

Codes on Takeovers and Mergers and Share Repurchases (renamed Codes on Takeovers and Mergers and Share Buy-backs) amended to align with new Companies Ordinance

The Securities and Futures Commission (SFC) amended the Codes on Takeovers and Mergers and Share Repurchases (Codes) to bring them into line with the new Companies Ordinance (Cap. 622) which came into force on 3 March 2014. The revised Codes took effect on the same day.

The amendments change the terminology used in the Codes from share "repurchases" to share "buy-backs." As a result, the Codes have been renamed the Codes on Takeovers and Mergers and Share Buy-backs.

The Executive has also made the following housekeeping amendments to the Codes:

- changing references to the Telecommunications Authority to the Communications Authority in the Definitions section, Note 3 to Rule 15.5 and Note 4 to Rule 26.2 to reflect changes to the Telecommunications Ordinance (Cap. 106);
- reducing the number of copies of a document that must be filed with the Executive under Rule 12.1 of the Takeovers Code from six to two to promote environmentally friendly practices; and

Highlights

- Codes amended to reflect new Companies Ordinance
- Update on the post-vetting regime and addition to the Post-Vet List
- New Practice Note 20 – Guidance note on announcements and documents under the Codes
- Appointments and reappointments of members to the Takeovers and Mergers Panel and related committees
- Quarterly update on the activities of the Takeovers Team

- deleting Rule 26.6 and Note to Rule 26.6 of the Takeovers Code (the grandfathering provision when the trigger and creeper thresholds were reduced from 35% to 30% and from 5% to 2% respectively on 19 October 2001) as they are no longer applicable.

As the amendments result from changes to legislation or do not materially alter the effect of the provisions in question, they have been made without public consultation.

Consequential amendments were also made to Practice Notes 5, 11, 16 and 18 and revised versions of these practice notes can be found in the “Regulatory functions – Listing & takeovers – Takeovers & mergers - Practice Notes” section of the SFC website.

Update on the post-vetting regime and addition to the Post-Vet List

The Executive is pleased to note that since implementation, the post-vetting regime has worked well and overall market practitioners have complied with the requirements in Practice Note 5 without difficulty.

The Executive has now added final completion announcements for whitewash transactions to the Post-Vet List under the Note to Rule 12.1. The Post-Vet List sets out the types of documents that will not be subject to the Executive's prior comment under Rule 12.1. Practice Note 5 provides practical and prescriptive guidance to parties and their advisers in respect of documents that appear in the Post-Vet List.

Paragraph 6 of Schedule VI of the Takeovers Code sets out scenarios where announcements must be made following shareholders' approval of a proposed whitewash transaction. This includes the requirement to make an announcement where the final controlling holding of voting rights is dependent on the results of an underwriting.

In addition it is common practice for companies undertaking whitewash transactions which involve the subscription and issue of new securities but no underwriting arrangements to issue an announcement upon completion of the subscription¹ to confirm the resulting final shareholding position. Given their routine nature, the Executive considers final completion announcements for whitewash transactions including those which may fall within paragraphs 6(b) or 6(c) of Schedule VI to be appropriate for post-vetting.

The following standard disclosure should be made in a final completion announcement: (i) date of completion of the whitewash transaction; (ii) shareholding of the controlling shareholder and its concert parties immediately before completion of the issue of new securities; (iii) final shareholding of the controlling shareholder and its concert parties after completion of the issue of new securities; (iv) where convertible securities, options, warrants or other subscription rights are involved, the maximum potential shareholding of the controlling shareholder and its concert parties assuming immediate conversion in full.

The announcement would not be considered as falling within the Post-Vet List if it contains additional information relating to other material matters or Code provisions. In this case, the relevant announcement must be submitted to the Executive for comment under Rule 12.1 of the Takeovers Code before its publication.

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In all announcements that fall within the Post-Vet List, parties and their advisers must consult the Executive at the earliest opportunity if there is any doubt as to whether an announcement qualifies for post-vetting (see Note 2 to Rule 12 of the Takeovers Code).

The revised Post-Vet List will now contain the following types of announcements:

- Announcements of the appointment of independent financial advisers under Rule 2.1;
- Announcements of the despatch of circulars under Rule 8 or Rule 25;
- Announcements of delay in the despatch of circulars under Rule 8.2 or Rule 8.4;
- Announcements of the appointment and resignation of directors of the offeree company under Rule 26.4 and Rule 7;
- Announcements of placing and top-up transactions under Note 6 on dispensations from Rule 26;
- Announcements of number of relevant securities in issue under Rule 3.8; and
- Announcements of final completion of issue of new securities for whitewash transactions under paragraph 6 of Schedule VI.

The updated Post-Vet List can be found in the “Regulatory functions – Listing & takeovers – Takeovers & mergers – Post-Vet List” section of the SFC website. Corresponding changes and other changes to reflect the amendments to the Takeovers Code effected in March 2014 (see first article of this Bulletin) have been made to Practice Note 5 which can be found in the “Regulatory functions – Listing & takeovers – Takeovers & mergers - Practice Notes” section of the SFC website.

New Practice Note 20 - Guidance Note on announcements and documents under the Codes

As a matter of practice the Executive has sent a number of letters to parties and their advisers during the course of an offer or whitewash transaction. These letters – their and the SFC and their their and parties the SFD has transac Th

Practice Note 20 (PN20) – Guidance note on announcements and documents under the Codes on Takeovers and Mergers and Share Buy-backs (Codes)

Purpose

- (1) The purpose of this Guidance Note and Checklist (see Appendix 1) is to provide informal and non-exhaustive guidance to parties and their advisers. The Guidance Note consolidates a number of previous guidance letters and reminders issued by the Executive during the course of an offer or whitewash transaction and refers to Practice Notes² issued by the Executive from time to time. It remains the sole responsibility of the issuer of a document (and its directors and advisers) to ensure that the Codes and any other applicable laws and regulations are fully complied with. As always when there is any doubt as to whether a proposed course of conduct is in accordance with the Codes, parties or their advisers should consult the Executive in advance.
- (2) 'Document' is defined in the Codes to include "*any announcement, advertisement or document issued or published by any party to an offer or possible offer in connection with such offer or possible offer, other than documents*

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(6) Following

Blackout period

- (8) In the case of an offer by the directors of the offeree company, the directors are reminded that they should not make an offer or trigger a mandatory general offer obligation during a blackout period (see Rule A3(a) of the Model Code for Securities Transactions by Directors of Listed Issuers, Appendix 10 to the Listing Rules and Rule 5.56(a) of the GEM Listing Rules). It is solely the duty of the director concerned Issuers, Model Cod of of of of ofis w List duty

(a) the shareholder register;

(b) notifications received under

(19) The following should be noted:

- (i) **Latest Practicable Date (LPD)** – the LPD of the document should not be more than 3 days from the date of despatch of the relevant document. When the LPD falls on a day which is not a “business day” (defined under the Codes), the LPD can be set on the preceding business day. If the LPD is set on a date which is more than 3 days before despatch, the Executive should be consulted prior to release or publication of the document.
- (ii) **Property valuation report** – where a property valuation report is included in the document (under Rule 11.1(f) of the Takeovers Code or otherwise) the requirements in Rule 11 (including but not limited to Rules 11.2(d) and 11.3 and Rule 10 in the case of valuations involving DCF or projections of profits) must be complied with. The valuation should clearly state the relationship between the property owner and the offeree company.
- (iii) Prior to clearance of the document and as close to the LPD as possible, the Executive must be provided with the following:

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(20) Following despatch of the document, in addition to the items specified in paragraph 6(ii) to (iv) above, the Executive should be provided with the following as soon as practicable:

- (i) 2 copies of the published version of the document (both English and Chinese versions); and
- (ii) posting certificate for the document (see Note 4 to Rule 8).

Stage 3 – First closing date of general offer or general meeting for whitewash transactions

(21) **Close of offer announcements/announcements declaring offer unconditional as to acceptances** - the Executive should be provided with a copy of the receiving agent's certificate evidencing acceptance (see Note 2 to Rule 30.2).

(22) **Announcements of results of a general meeting for approving a whitewash transaction** - the Executive should be provided with a copy of the scrutineer's certificate.

Stage 4 – Restrictions following offers, possible offers and whitewash transactions

(23) Rule 31.3 of the Takeovers Code provides that, except with the Executive's consent, if the offeror and parties acting in concert with it hold more than 50% of the voting rights of the offeree company, then the offeror and any person acting in concert with it, may not within 6 months of the close of the offer:

- make a second offer to, or
- acquire any shares from

any shareholder in the offeree company at a price higher than the offer price. Practice Note 18 fu

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(27) **Final completion announcement for whitewash transaction** – Once the issue of the new securities has completed, an announcement relating to the completion should be issued. In a transaction which involves a subscription for new shares by a whitewash waiver applicant, completion will be taken as the time the new shares are issued to the whitewash waiver applicant. In a transaction which involves an issue of convertible securities to a whitewash waiver applicant, completion will be taken as the time the convertible securities are issued to the whitewash waiver applicant, and not when the conversion rights are exercised (see September 2010 Issue No. 14 of the Takeovers Bulletin).

Appendix 1 – Checklist of items for submission to the Executive

	Items required	Check/Date
I	Rule 3.7 announcements	
	(i) identity of potential offeror if not otherwise disclosed in the announcement, including its ultimate shareholders (ā) publication	

IV	Circulars – whitewash transactions	
	(i) 4 copies of advanced draft (ii) submission of soft copies of first draft (and each subsequent drafts) to “T&Mdocuments@sfc.hk” (iii) checklists of Schedules I, II and VI (iv) document fees and schedule of calculation (v) signed Rule 10.11 confirmation by directors of offeree company (vi) DoD disc and submission form (vii) DoD confirmation (viii) publication confirmation (ix) posting certificate (x) translation confirmation	
V	Closing announcements - offers	
	(i) receiving agent's certificate (if applicable) (ii) publication confirmation (iii) translation confirmation (iv) confirmation of compliance with Rules 31.3 and 25 six months after closing date	
VI	Announcements of results of general meetings – whitewash transactions and court meetings - privatisations by way of scheme of arrangement	
	(i) scrutineer's certificate (ii) publication confirmation (iii) translation confirmation	
VII	Announcements of final completion – whitewash transactions	
	(i) confirmation of compliance with Rule 25 after six months after general meeting (ii) final completion announcement publication confirmation (iii) final completion announcement translation confirmation	

Appendix 2 – Independence of IFA

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Appointments and reappointments of members to the Takeovers and Mergers Panel and related committees

We welcome the following new appointments and reappointments to the Takeovers and Mergers Panel (Panel), the Takeovers Appeal Committee (Appeal Committee), Disciplinary Chair Committee and the Nominations Committee with effect from 1 April 2014:

Panel and Appeal Committee

New appointments - Mr Conrad Chan, Mr Jon Perry and Mr James Soutar

Reappointments - Ms Teresa Ko, JP, Mr Liu Chee Ming and Mr John Maguire (Deputy Chairmen of the Panel and members of the Appeal Committee), Ms Julia Charlton, Mr Chester Kwok, Mrs Angelina Lee, SBS, JP, Mr Liu Che Ning, Mr Karl Lung, Mr David Norman, Mr Nicholas Norris, Mr Martin Sabine, Mr Mark Schwille, Mr Richard Winter and Ms Benita Yu.

Disciplinary Chair Committee

New appointments - Mr Jat Sew Tong, SC, JP and Mr Paul Shieh, SC

Reappointments - Mr Edward Chan, SC, Ms Gladys Li, SC and Mr Horace Wong, SC

Nominations Committee

Reappointment – Mr Carlson Tong

We wish to thank Mr Cheung Yuk Tong, Ms Kalpana Desai, Mr Michael Liu, Mr Gavin Nesbitt and Mr Andrew Tortoisshell who have stepped down from the Panel and the Appeal Committee for their valuable contributions over the years. We also wish to thank Mr Ambrose Ho, SC and Mr Peter Ng, SC for their valuable contribution to the Disciplinary Chair Committee.

Members are appointed for a term of two years and unless otherwise stated, their current term is until 31 March 2016. The membership lists for the Panel, the Appeal Committee, the Disciplinary Chair Committee and the Nominations Committee are set out below.

MEMBERSHIP LIST

The Panel hears disciplinary matters in the first instance, reviews rulings by the Executive Committee and the Appeal Committee below.

Members

All issues of the *Takeovers Bulletin* are available under 'Published resources – Industry-related publications – *Takeovers Bulletin*' on the SFC website at www.sfc.hk.

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Securities

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