

Introduction

This is the second issue of the Takeovers Bulletin. We are encouraged that the first issue has generated a high download rate on our website.

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In addition to the two Practice Notes in the first issue, this issue contains three more Practice Notes to clarify the application of certain rules of the Codes and the role of the Takeovers Executive in the commenting process.

We would also like to draw your attention to our proposed amendments to the Codes, a summary of which can be found in this issue.

Practice Note 3 (PN3) – Implementation of Phase 1 of the Electronic Disclosure Project and the application of Rule 19.1 of the Takeovers Code

On 25 June 2007 the Hong Kong Stock Exchange launched a new regime for electronic dissemination of regulatory information (the Electronic Disclosure

Note 2 provides that in the event of a competitive situation arising the offeror may choose not to be bound by its no increase statement only if:

- (i) it has specifically reserved the right to set the no increase statement aside in such circumstances; and
- (ii) an announcement is issued providing details of the revisions as soon as possible and in any event within 4 business days after the announcement of the competing offer and a circular is sent to shareholders at the earliest opportunity; and
- (iii) any shareholders of the offeree company who accepted the offer **af e** the date of the no extension or no increase statement are given a right of withdrawal for a period of 8 days following the date on which the circular is sent.

Note 3 clarifies that, again only in the event that the offeror has reserved the right to do so, the offeror may choose not to be bound by a no increase statement which would otherwise prevent the posting of an increased or improved offer recommended for acceptance by the board of the offeree company.

As already mentioned Rule 18.3 permits revision of a no increase statement in “ **holl e cep ional ci^l m ance** ” even if the right to set the no increase statement aside has not been specifically reserved. The question of what might amount to “ **holl e cep ional ci^l m ance** ” would depend on a detailed analysis of the circumstances of the particular case. If in doubt the Executive should be consulted at the earliest opportunity.

Takeovers Panel decisions in relation to Pacific Challenge Holdings Limited and Sanmenxia Tianyuan Aluminum Company Limited

The Panel has had a busy summer. In a substantive hearing consisting of a series of meetings held between 3 and 12 July 2007 the Panel met to consider disciplinary proceedings brought by the Takeovers Executive in respect of whether certain parties were acting in concert in relation to certain transactions in shares of Pacific Challenge Holdings Limited under the Takeovers Code. The disciplinary proceedings were dismissed by the Takeovers Panel on the basis that there was insufficient evidence to conclude that the alleged concert party relationship existed. The Panel's substantive decision and a series of related decisions were published by the SFC on 16 July 2007.

On 6 August 2007, the SFC published the Panel's decision that the comparable offer price for the "H" shares of Sanmenxia Tianyuan Aluminum Company Limited as required by Rule 14 of the Takeovers Code should be at the same price paid for its Domestic Shares, being the Hong Kong dollar equivalent of RMB0.1577 per share calculated by reference to the exchange rate prevailing on the date the mandatory offer was triggered. The Executive referred the matter to the Panel as the matter related to a particularly novel, important or difficult point at issue. The Panel met on 1 August 2007 to consider this matter.

Section 16.3 of the Introduction to the Codes provides that, subject to confidentiality considerations, it is the policy of the Panel to publish its decisions and the reasons for those decisions, so that its activities may be understood by the public.

If you would like to know more about the Panel's decisions, please follow this [link](#).

Consultation Paper on proposed amendments to the Codes

On 19 September 2007 the SFC issued a Consultation Paper on proposed amendments to the Codes. The proposed amendments, formulated in close consultation with the Panel, aim to address issues that have arisen since the last amendments in 2005.

It is proposed to amend the Takeovers Code to address a potential loophole which arises if a company disposes of substantially all of its assets and withdraws its listing from the Stock Exchange under the Listing Rules. In this situation, once a company has disposed of substantially all of its assets (which only requires approval by a simple majority (i.e. 50%) of the independent votes under the Listing Rules), shareholders are left with little choice other than to approve any related delisting proposal. The only alternative for shareholders is to be left with a cash company which may not be regarded as suitable for continued listing and hence would be suspended for an indefinite period or become delisted. It is arguable that a transaction structured in this way enables a company to effectively privatise and delist in a manner which circumvents the voting thresholds and other provisions of the Takeovers Code. In order to address this loophole it is proposed that the Codes be amended to clarify that transactions involving asset disposals coupled with possible delistings may fall within the jurisdiction of the Codes. This should prevent shareholders from being coerced into approving a proposal they might otherwise wish to disapprove.

Various amendments are also proposed relating to securities borrowing and lending activity by persons connected to an offer. The proposals recognise that in securities borrowing and lending transactions the voting rights pass to the borrower along with the borrowed shares. This gives rise to concerns of potential abuse as the underlying purpose of the transaction may be to secure a tactical advantage or to manipulate the price or location of relevant securities. For example, a person connected to an offer may "lend" his shares to another person so that those shares may be voted in accordance with the lender's wish on a resolution which the lender was prohibited from voting on.

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Feedback and comments are welcome and can be sent to takeoversbulletin@sfc.hk

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