SFC 證監會

TAKEOVERS BULLETIN

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Takeovers Panel sanctions Chow Yei Ching, Oscar Chow Vee Tsung and Joseph Leung Wing Kong for breach of Takeovers Code

On 2 July 2015, the Takeovers and Mergers Panel (Takeovers Panel) imposed cold shoulder orders against Chow Yei Ching, Oscar Chow Vee Tsung and Joseph Leung Wing Kong and publicly censured them for breach of the Takeovers Code.

The cold shoulder order against Chow Yei Ching denies him direct or indirect access to the securities markets in Hong Kong for 10 years from 2 July 2015 to 1 July 2025. Oscar Chow and Joseph Leung are denied direct or indirect access to the securities markets in Hong Kong for two years from 2 July 2015 to 1 July 2017.

We commenced disciplinary proceedings on 20 November 2013 against Chow Yei Ching, Oscar Chow and Joseph Leung before the Takeovers Panel. On 16 April 2015, the Takeovers Panel published its written decision setting out the reasons for finding them in breach of the mandatory offer requirement under the Takeovers Code when they acted in concert with the late Nina Kung to obtain and consolidate control of ENM Holdings Limited through the acquisition of voting rights and failed to make a general offer as required.

The Takeovers Panel's decision on sanctions and the cold shoulder orders can be found in the "Regulatory functions – Listings & takeovers – Takeovers & Mergers – Decisions & statements – Takeovers and Mergers Panel and Takeovers Appeal Committee decisions and statements" and the "Regulatory functions – Listings & takeovers – Takeovers & Mergers – Decisions & statements – Current cold shoulder orders" sections of the SFC website.

Highlights

- Takeovers Panel imposes sanctions for breach of mandatory offer requirement
- Independent vote required for underlying transactions in whitewash cases
- Update on post-publication review of Schedule compliance
- Reminder to submit advanced drafts of documents for vetting
- Early consultation on employee benefit trusts
- Quarterly update on the activities of the Takeovers Team

Independent vote required to approve not just whitewash waivers but also underlying transactions

Note 1 on dispensations from Rule 26 of the Takeovers Code states that "*[w]hen the issue of new securities as consideration for an acquisition, or a cash subscription, or the taking of a script dividend, would otherwise result in an obligation to make a mandatory offer under Rule 26, the Executive will normally waive the obligation if there is an independent vote at a shareholders' meeting... The requirement for a mandatory offer will also be waived, provided there has been an independent vote of shareholders, in cases involving the underwriting of an issue of shares.*"

Paragraph 2(e) of Schedule VI states that the grant of a whitewash waiver will be subject to "*approval of the proposals by an independent vote at a meeting of the holders of any relevant class of securities…*". This means that in addition to requiring the whitewash waiver to be approved by an independent vote, the underlying transactions that will trigger the general offer obligation under Rule 26.1 must also be approved by an independent vote. These requirements apply irrespective of whether the whitewash waiver condition is waivable, or the underlying transaction requires shareholders' approval under the Listing Rules or other applicable rules and regulations.

Update on post-publication review of the Schedule disclosure requirement regime

In Issue No. 29 (June 2014) of the *Takeovers Bulletin* we announced a change to the commenting process with regards to the Codes' Schedule disclosure requirements for documents that are despatched to shareholders pursuant to Rule 8 of the Takeovers Code (shareholder's documents). Since 1 July 2014 we no longer raise comments about compliance with the Schedule disclosure requirements during the commenting process unless they also relate to substantive Code issues. Instead we review the relevant document for Schedule compliance after publication and make appropriate enquiries where necessary.

We are pleased to note that since the implementation of the new regime, issuers and their advisers have generally complied with the Schedule disclosure requirements without difficulty. We will continue to adopt this post-publication review regime until further notice.

In a small number of cases, follow-up action was required after the despatch of the shareholder's document as a result of incomplete disclosure. This included requiring the issuer of the document to publish a clarification announcement. In order to assist future compliance, we have highlighted below a few common areas where incomplete disclosure required follow-up action:

- Shareholdings and dealings under paragraph 4 of Schedule I and paragraph 2 of Schedule II — the disclosures should cover **all** persons listed in each sub-paragraph. Where no disclosure is required because no such irrevocable commitment or arrangement set out in the sub-paragraphs exists, this fact should be clearly highlighted to us in the checklists of compliance with the relevant Schedule disclosure requirements.

- Financial information under paragraph 6(a) of Schedule II — this should include disclosures of net profit or loss attributable to minority interests, exceptional items because of size, nature or incidence, amount absorbed by dividends as well as earnings and dividends per share. The latest published interim or quarterly financial reports should also be included as a Document on Display.

- Directors' intentions as regards acceptance or rejection of the offer (or voting intentions on the whitewash transaction) under paragraph 2(vi) of Schedule II — this statement must be included in the shareholder's document.

- Directors' service agreements under paragraph 13 of Schedule II — these include service contracts with the offeree company's associated companies.

To facilitate a more efficient post-publication review process, the relevant checklists must clearly mark the page number of the published version of the shareholder's document (or an appropriate negative statement if the requirement is not applicable because no such matter or arrangement exists) against the relevant Schedule requirement.

Reminder to submit advanced drafts of documents for vetting

Note 1 to Rule 12 of the Takeovers Code states that "*[t]he Executive should be given a reasonable time for consideration of a document when it is submitted for comment. The first draft of the document submitted to the Executive should be* ***in advanced form*** *and* ***points of difficulty should be drawn to the attention of the Executive as early as possible****. If a draft document is not submitted in a substantially final form before 5.00 p.m. on a business day, the Executive would expect difficulties in commenting on the document on the same day, particularly if there are outstanding points or issues of difficulty.*" [emphasis added]

In a number of recent cases issuers or their advisers have submitted poor quality drafts of documents and checklists. In some cases, key information including reports required to be included in a shareholder's document remained outstanding until shortly before the despatch deadline. Some proofs failed to highlight all of the changes made and therefore required more time for us to review, resulting in an unnecessarily long commenting process. This is plainly undesirable. Issuers and their advisers are reminded that a draft document should not be submitted to us for comment unless it is in an advanced form and every effort has been made to comply with the Codes. We should be given a reasonable time to review the document and points of difficulty or unusual aspects should be drawn to our attention as early as possible. Please also refer to Practice Note 20 which contains useful guidance on announcements and documents under the Codes.

Parties who issue Code-related announcements and documents are also reminded that they are ultimately responsible for the information disclosed as well as for compliance with the Codes and any other applicable laws and regulations. The "no-comment" fax should not be taken as a confirmation from us that the announcement or document is fully compliant. They should also be aware of the possible criminal liability arising under Section 384 of the Securities and Futures Ordinance for any false or misleading information contained in such announcements and documents.

Reminder to consult the Executive in relation to employee benefit trusts (EBT)

An EBT is a trust established by a company for the purpose of acquiring and holding shares in that company, in order to satisfy awards of shares or options granted to employees under one or more share schemes operated by that company. Note 20 to Rule 26.1 addresses the question of whether the trustees of an EBT are acting in concert with the board of directors or the controlling shareholder of the company.

Note 20 to Rule 26.1 of the Takeovers Code provides that the Executive must be consulted in advance (i) when there is a proposed acquisition of new or existing shares that will lead to the aggregate shareholdings of the directors, or any shareholders acting, or presumed to be acting, in concert with any of the directors and the trustees of an EBT to equal or exceed 30% of the voting rights, or if already exceeding 30% will increase further; and (ii) a shareholder (or a concert group) holds between 30% and 50% of the voting rights and an EBT proposes to acquire shares. The mere establishment and operation of an EBT will not by itself

give rise to a presumption that the trustees are acting in concert with the directors or the controlling shareholder(s). We will consider all relevant factors in considering whether the trustees of the EBT are independent of the directors or controlling shareholder(s), including:

- the identities of the trustees;
- the composition of any remuneration committee;
- the nature of the funding arrangements;
- the percentage of the issued share capital held by the EBT;
- the number of shares held to satisfy awards made to directors;
- the number of shares held in excess of those required to satisfy existing awards;
- the prices at which, method by which and persons from whom existing shares have been or are to be acquired;
- the established policy or practice of the trustees as regards decisions to acquire shares or to exercise votes in respect of shares held by the EBT;
- whether or not the directors themselves are presumed to be acting in concert; and
- the nature of any relationship existing between a controlling shareholder (or a group of shareholders acting, or presumed to be acting, in concert) and both the directors and the trustees.

We wish to remind issuers, EBT trustees and advisers that the Executive must be consulted **in advance** if an EBT proposes to acquire shares that may have implications under Rule 26.1. As the review of these cases is typically time-intensive, early consultation is strongly encouraged.

Quarterly update on the activities of the Takeovers Team

In the three months ended 30 June 2015, we received 13 takeovers-related cases (including privatisations, voluntary and mandatory general offers and off-market and general-offer share buy-backs), 18 whitewashes and 82 ruling applications.

Useful links

- The Codes on Takeovers and Mergers and Share Buy-backs
- Practice notes
- Decisions and statements
- Previous *Takeovers Bulletins*

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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