Charltons - Hong Kong Law Newsletter - 10 November 2008

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# Hong Kong Law Issue 62

## 1. No Change To General Offer Trigger Point And Creeper Under Takeovers Code

The following is a summary of an announcement by the Securities and Futures Commission on 29 October 2008.

### Background

The Takeovers Panel met recently to consider suggestions received by the Securities and Futures Commission (**SFC**) that, in light of current market conditions, the 30% general offer trigger point and the 2% creeper under the Takeovers Code should be relaxed temporarily. The rationale is that this would allow a company's major shareholders to show confidence in the company without incurring a mandatory takeover obligation.

Rule 26.1 of the Takeovers Code requires a person and his concert parties to make a general offer to all shareholders if they acquire voting rights that will increase their holdings of a company to 30% or more. A person and his concert parties who hold voting rights between 30% and 50% will have to make a general offer if they acquire more than 2% within 12 months.

The underlying principle is that all shareholders should be treated fairly. Accordingly, if control of a company changes, a general offer to all other shareholders is normally required.

The general offer trigger and creeper thresholds were reduced from 35% and 5% to 30% and 2%, respectively in October 2001. The reductions were driven by market expectations that Hong Kong regulations should align with those of other leading markets such as the United Kingdom. The United Kingdom regulations are in fact stricter as they do not have a creeper provision.

### View of the Takeovers Panel

A substantial majority of the Takeovers Panel opposed the relaxation of the relevant rules. The reasons given were as follows:

1. the proposals ran counter to General Principle 1 of the Takeovers Code which requires equality of treatment for all shareholders and was considered to be an absolutely fundamental principle underpinning the regulation of takeovers and mergers in Hong Kong;
2. no jurisdiction that had a similar regulatory framework to Hong Kong had proposed temporary waivers of important provisions of their takeover regulations in response to recent market conditions;
3. if implemented, the proposals would reflect poorly on Hong Kong as an international financial centre. It was noted that the temporary waiver of the 35% trigger and 5% creeper in 1987 had been criticised;
4. while the stock market had experienced substantial declines in prices, there was no suggestion that it was not functioning properly;
5. the proposals appeared to be motivated more by the interests of major or controlling shareholders than the market as a whole;
6. the proposals would be seen as favouring big business interests at the expense of other stock market participants and, in fact, may be detrimental to their interests;
7. there was no evidence that support for the proposals was widespread or that the proposals would boost confidence in the market for the shares of particular companies or the market as a whole.

The Takeovers Panel also noted that off-market company share repurchases, share repurchases by general offer and partial offers that are conducted in compliance with the Takeovers and Share Repurchase Codes, could be employed to increase a major or controlling shareholder's interest without triggering a mandatory takeover offer. In addition, there is a mechanism in the Takeovers Code for shareholders' approval of any partial offers, which could result in the offeror holding 30% or more of the voting rights in the company. It was noted that these mechanisms could be used to increase a controlling or major shareholder's interest without there being a need for a temporary waiver of Rule 26.1.

## 2. Guidelines For The Exemption Of Listed Corporations From Part XV Of The SFO Amended To Facilitate Exchange-Traded Funds

### Background

The Securities and Futures Commission (**SFC**) has amended the Guidelines for the Exemption of Listed Corporations from Part XV of the Securities and Futures Ordinance (the **Guidelines**) so that an exemption from the disclosure requirements of Part XV of that Ordinance (**Part XV**) may be granted to open-ended collective investment schemes (**CIS**) which are listed or seeking a listing on the Stock Exchange of Hong Kong Limited (**SEHK**). The amendments came into effect on 31 October 2008.

Part XV requires the disclosure by corporate insiders (i.e., substantial shareholders, directors, shadow directors and chief executives of a listed corporation) of their interests in the securities of listed corporations. A corporate-form CIS which is listed on SEHK (such as an exchange-traded fund (**ETF**) in corporate form) is technically within the definition of "listed corporation" under Part XV. Its corporate insiders are therefore required to comply with the disclosure obligations under Part XV.

One of the reasons behind the amendment is that for open-ended corporate form CIS, the manager can generally issue and redeem units without holders' approval. As the total number of outstanding shares will change constantly due to the frequent subscription and redemption of shares by investors, it was considered that it is extremely difficult for investors to comply with the disclosure of interests provisions.

It was also noted that most ETFs listed in Hong Kong are either in unit trust or contractual form and so are not subject to the disclosure requirements under Part XV. Allowing an exemption to be granted from the Part XV disclosure requirements therefore allows corporate form ETFs to enjoy the same disclosure treatment as trust form ETFs.

### The Amendments

The Guidelines have been amended to add as a third category of corporations which may be exempted from the disclosure requirements of Part XV, open-ended CIS which are listed or seeking a listing on the SEHK.

As with the existing categories, the SFC may only exempt a corporation from all or any of the provisions of Part XV upon the application of the corporation under Section 309(2) of the Securities and Futures Ordinance. An application for the exemption of an open-ended CIS must be sent to the Investment Products Department of the SFC.

A new paragraph has been added to the Guidelines (paragraph 4.3) to provide for the matters that the SFC will take into account in deciding whether to grant an exemption to a corporate form CIS listed or seeking a listing on SEHK. The following will be considered:

1. the extent to which shares of such CIS can be issued/created without reference or consent from existing holders and, repurchased/redeemed, directly or indirectly, at the request of the holder of such shares (which may be subject to conditions or limitations as customarily or commonly found in open-ended CIS or otherwise acceptable to the SFC), taking into account factors including the dealing frequency, the period required for subscription or repurchase or redemption proceeds to be paid and whether shareholders' approval is required for such issue/creation and/or repurchase/redemption. The SFC will make reference to the Code on Unit Trusts and Mutual Funds, which is in force from time to time, in considering whether the above factors are fulfilled; and
2. whether such CIS is authorised by the SFC under Section 104 of the SFO.

This note is intended as a summary only of the SFC's announcement entitled " General offer trigger point and creeper under Takeovers Code upheld" and of the amendments made to the SFC's Guidelines for the Exemption of Listed Corporations from Part XV of the Securities and Futures Ordinance. Specific advice should be sought in relation to any particular situation.

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