

Press Release

LCQ12: Regulation of issuance of announcements of possible offer by listed companies

Wednesday, January 11, 2017

Following is a question by the Hon Christopher Cheung and a written reply by the Secretary for Financial Services and the Treasury, Professor K C Chan, in the Legislative Council today (January 11):

Question:

Rule 3.7 (Announcement of a Possible Offer) of the Takeovers Code issued by the Securities and Futures Commission (SFC) stipulates that, "until a firm intention to make an offer has been notified a brief announcement by a potential offeror or the offeree company that talks are taking place or that a potential offeror is considering making an offer will normally satisfy the obligations under this Rule 3...". In its Takeovers Bulletin published in June last year, SFC pointed out that the Executive had noticed a growing trend of "talks" announcements being issued by listed companies under Rule 3.7. Although "talks" announcements indicate that the relevant offer is a possibility only and that it may or may not materialise, the publication of such announcements nevertheless may have an impact on the share prices of the subject offeree companies. In this connection, will the Government inform this Council if it knows:

(1) in each of the past five years, the respective numbers of companies whose equity securities were primary listed in Hong Kong (including those on the Main Board and on the Growth Enterprise Market) which (i) issued an announcement of "talks" under Rule 3.7, and the total number of such announcements, and (ii) issued a subsequent announcement that the talks had been terminated or the potential offeror(s) had decided not to proceed with such an offer, and the total number of such announcements;

(2) in the past five years, (i) how SFC followed up with the growing trend of listed companies issuing "talks" announcements, and (ii) in the course of its follow-up, whether SFC found any regulatory breaches by listed companies (such as issuing "talks" announcements with an intent to affect share prices); if SFC did, whether SFC took law enforcement actions against such regulatory

breaches; if SFC did, of a breakdown by the type of law enforcement actions taken (e.g. initiating investigations, imposing sanctions such as reprimands or fines on the persons concerned); and

(3) whether SFC will consider amending Rule 3.7 to stipulate that "talks" announcements may be issued only when specified conditions have been met, in order to guard against abuse of the Rule; if SFC will, of the details; if not, the reasons for that?

Reply:

President,

Our response to the three parts of the question is as follows:

(1) Past five-year statistics on the announcements on "talks" made under Rule 3.7 of the Takeovers Code, as well as those where talks were terminated, as provided by the Securities and Futures Commission (SFC), are set out in the Annex.

(2) Following the marked increase of new Rule 3.7 announcements issued in 2015, the Takeovers Executive of the SFC took proactive action in 2016 to remind parties, in the course of reviewing documents when being approached, to consider whether the issuing of a Rule 3.7 announcement was necessary. The Takeovers Executive of the SFC also published an article in the June 2016 issue of the Takeovers Bulletin to remind practitioners that it is not necessary to issue a "talks" announcement under Rule 3.7 so long as confidentiality is maintained when the parties are in negotiation but have not yet reached a firm intention to make an offer. Parties may be required to issue an announcement in order to comply with other rules and regulations (both local and overseas) including Part XIVA of the Securities and Futures Ordinance (Cap. 571) (SFO). However, it should be noted that Part XIVA provides an effectively similar safe harbour from the obligation to disclose inside information where the information concerns an incomplete proposal or negotiation and confidentiality has been maintained.

The SFC is closely monitoring this growing trend of "talks" announcements. Although no formal action has yet been taken against this type

of announcements specifically, the SFC will investigate and take enforcement action if it is revealed that any of such announcements are false or misleading, or that any persons take improper advantages of such announcements by inside dealing or manipulating the relevant stocks.

(3) Rules 3.1, 3.2 and 3.3 of the Takeovers Code set out specific situations where a "talks" announcement under Rule 3.7 should be issued. As mentioned in the June 2016 issue of the Takeovers Bulletin, a "talks" announcement under Rule 3.7 is not required to be issued under the Takeovers Code when parties are in negotiation if confidentiality is maintained. Rule 3.7 does not and cannot prevent a company from issuing a voluntary announcement, or an announcement made in order to comply with other rules and regulations (both local and overseas). In the majority of cases in 2016 and 2015 (33 of 48 in 2016 and 59 of 75 in 2015), trading in the shares of the corresponding offeree (target) company had been suspended pending an announcement of what was described by the company as inside information (under Part XIVA of the SFO and/or the relevant Listing Rules) related to a takeovers' matter under Rule 3.7. Once trading is suspended, the Stock Exchange of Hong Kong requires the relevant company to issue an announcement of the relevant information before trading can be resumed. Ultimately, the decision of whether to request suspension and/or issue an announcement is a matter for the directors of a company who are most familiar with the affairs of the company and subject to their fiduciary duties taking into account, among other things, the applicable rules and regulations. In all the circumstances, the Takeovers Executive of the SFC does not consider it appropriate to stipulate specific conditions to fulfil before a Rule 3.7 announcement can be issued as this could interfere with the legitimate exercise of the directors' powers and the performance of their duties.

It is worth noting that Rule 3.7 is consistent with similar provisions in other leading overseas takeovers regimes such as the United Kingdom, Australia, Singapore and Malaysia.

Ends