



**SECURITIES AND FUTURES COMMISSION**  
證券及期貨事務監察委員會

## **Consultation Conclusions on proposed amendments to the Codes on Takeovers and Mergers and Share Buy-backs**

13 July 2018



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## Introduction

On 19 January 2018, the Securities and Futures Commission (**SFC**) issued a Consultation Paper and invited market participants and interested parties to submit comments on a number of proposed changes to the Codes on Takeovers and Mergers and Share Buy-backs (**Codes**). The proposals resulted from a review conducted by the Takeovers Executive (**Executive**) in consultation with the Takeovers and Mergers Panel (**Panel**).

The Consultation Paper was divided into six parts:

Part 1 proposed to introduce a number of provisions which clarify (i) the obligations of parties when dealing with the Executive, the Panel and the Takeovers Appeal Committee and (ii) the power of the Executive, the Panel and the Takeovers Appeal Committee to make compliance rulings. It also proposed to empower the Panel to require compensation to be paid to shareholders who have suffered as a result of a breach of certain provisions of the Codes.

Part 2 proposed to amend the definition of associate to eliminate overlap and potential inconsistencies that arise out of the similarities between the definition of associate and the definition of acting in concert.

Part 3 proposed to raise the voting approval threshold for whitewash waivers and the underlying transaction(s) from a simple majority of independent votes to 75% and to introduce an explicit requirement for separate resolutions to be put to independent shareholders for the underlying transaction(s) and the whitewash waiver.

Part 4 aimed to provide a level playing field for companies incorporated in jurisdictions which have no compulsory acquisition rights (such as the Mainland) that seek to delist in Hong Kong through a general offer. In such cases, it is proposed that appropriate measures should be put in place to protect minority shareholders.

Part 5 proposed to clarify the scope of disclosure of holdings and dealings in relevant securities, in particular where the offeror is offering securities of another company as consideration in an offer. It also proposed to relax some requirements including the timing of dealing disclosures.

Part 6 proposed various miscellaneous amendments to the Codes to codify existing practices and to effect a number of “*housekeeping*” amendments.

## Market consultation

The consultation period ended on 19 April 2018. The SFC received 26 responses. A list of respondents (other than those who requested anonymity) is set out in **Appendix 1**. The SFC welcomes these responses and is grateful to those who participated.

The proposals contained in the Consultation Paper and the responses received involve technical and complex issues. In arriving at the conclusions set out in this paper, the SFC has carefully considered respondents’ comments and further consulted the Panel. The SFC has adopted the majority of the proposed amendments discussed in the Consultation Paper with certain modifications as set out in this paper.

The marked-up text of the amendments to the Codes is set out in **Appendix 2**. All the amendments will become effective on 13 July 2018. Where this timing may produce major difficulties, for example, in the case of transactions in progress that have already been



announced, the Executive should be consulted and will endeavour to reach a solution which is fair to all parties.

A number of respondents raised comments that are beyond the scope of the consultation. The SFC will consider these in due course.

The Consultation Paper, the responses and this Conclusions Paper are available on the SFC website at [www.sfc.hk](http://www.sfc.hk).

The terms used in this Conclusions Paper have the same meaning as those in the Consultation Paper unless otherwise defined.

Securities and Futures Commission  
Hong Kong

13 July 2018



## PART 1: DEALINGS WITH AND POWERS OF THE EXECUTIVE, PANEL AND TAKEOVERS APPEAL COMMITTEE

1. Part 1 of the Consultation Paper proposed the introduction of a number of provisions which clarify (i) the obligations of parties when dealing with the Executive, the Panel and the Takeovers Appeal Committee and (ii) the power of the Executive, the Panel and the Takeovers Appeal Committee to make a compliance ruling as a pre-emptive measure to prevent breaches and to protect shareholders. It also proposed to empower the Panel to require compensation to be paid to shareholders who have suffered as a result of a breach of certain provisions of the Codes.

### Dealings with the Executive, Panel and Takeovers Appeal Committee

2. Part 1 of the Consultation Paper proposed to add new sections 5.2, 11.18 and 14.9 to the Introduction to the Codes and to amend section 7.2 of the Introduction to clarify that the parties must provide the Executive, the Panel and the Takeovers Appeal Committee with all relevant information which they are aware of, and correct or update the information if it changes to facilitate informed decision-making.

**Question 1: Do you agree with the proposals regarding parties' dealings with the Executive, Panel and Takeovers Appeal Committee? If not, please give reasons.**

#### *Public comments*

3. The majority of respondents welcomed the proposal. It was noted that open communication with the Executive is essential for fair, efficient and timely decision-making under the Codes. A number of respondents expressed concerns that the obligation as proposed was unqualified and suggested that the new section 5.2 should follow the wording of section 9(a) of the London Code, namely, "*must take reasonable care not to provide incorrect, incomplete or misleading information*". One of these respondents proposed that a higher and more onerous standard of ensuring truthfulness, accuracy and completeness of information supplied to the Executive should apply only in the case of applications for rulings with the Executive. This respondent also requested clarification of the meaning of "*dealings with the Executive*" and asked for a confirmation that only those parties who have commenced or engaged in a dialogue with the Executive would be subject to the obligations in section 5.2.
4. Some respondents suggested that the proposed new section 5.2 should explicitly carve out information that is subject to legal professional privilege.

#### *SFC's response*

5. After considering the respondents' comments, the SFC has decided that the obligation to provide true, accurate and complete information should be subject to a reasonable care test and will make specific reference to this in section 5.2 so that this is clear.
6. The SFC believes that parties should be open and co-operative in all dealings with the Executive as this helps to ensure the smooth administration of the Codes. The positive obligation to provide true, accurate and complete information has been incorporated into section 5.2 to reflect this. It is also consistent with the standard set



out in section 8.3 of the Introduction to the Codes regarding applications for rulings. Given this, the SFC does not agree that it is appropriate to adopt the wording from the London Code. As to whom section 5.2 might apply, it is intended that the obligations in section 5.2 will apply to any person in dialogue with the Executive as well as to those to whom enquiries and other requests are directed. In other words, if a person were to fail to respond to the Executive's enquiries or other requests, there might be implications under section 5.2. As with many provisions of the Codes, this would depend on the particular facts and circumstances of a case.

7. Finally, as legal professional privilege is an overriding right under the law, the SFC does not believe it is necessary to expressly refer to this in the new section 5.2.
8. The SFC will therefore introduce new sections 5.2, 11.18 and 14.9 to the Introduction to the Codes and amend section 7.1 of the Introduction as set out below.

"Dealings with the Executive

5.2 Any person dealing with the Executive must do so in an open and co-operative way. Prompt co-operation and assistance are expected from persons dealing with the Executive and those to whom enquiries and other requests are directed. In such dealings, a person must disclose any information known to him and relevant to the matter being considered (and correct or update that information if it changes). A person dealing with the Executive or to whom enquiries or requests are directed must take all reasonable care to provide true, accurate and complete information.

Where a matter has been determined by the Executive and a person becomes aware that information supplied to the Executive was not true, accurate or complete, that person must promptly contact the Executive to correct the position. In addition, where a determination of the Executive has continuing effect (such as the grant of exempt status or a concert party ruling), the party or parties to that determination must promptly notify the Executive of any new information relevant to that determination.

For the avoidance of doubt, nothing in this section limits the general application of General Principle 10."

"7.1 While the Executive may sometimes see fit to make a ruling under the Codes of its own volition, a ruling is more often requested by an interested party. A ruling by the Executive normally involves a consideration of all relevant information in relation to the application and a more thorough analysis than that permissible under a consultation. In some cases the Executive may find it necessary to convene an informal meeting or hear the views of other interested parties before making a ruling. The Executive requires prompt co-operation from those to whom enquiries are directed so that decisions may be both properly informed and given as speedily as possible. Rulings may initially be conveyed to parties orally but will always be confirmed in writing in time. Particular attention should be paid to the obligations under section 5.2 of this Introduction."



*“Dealings with the Panel*

11.18 *The obligations set out in section 5.2 of this Introduction apply equally to a person dealing with the Panel.*”

“14.9 *The obligations set out in section 5.2 of this Introduction apply equally to a person dealing with the Takeovers Appeal Committee.*”

## Compliance rulings

9. Part 1 of the Consultation Paper also proposed to add new sections 7.2 and 13.12 to the Introduction to the Codes and to amend section 13.10 of the Introduction to the Codes to clarify the Executive’s and the Panel’s existing power to make compliance rulings as a pre-emptive measure to prevent breaches and to protect shareholders and the market.

**Question 2: Do you agree with the proposal to add new sections 7.2 and 13.12 to the Introduction to the Codes and to amend section 13.10 to the Introduction to the Codes? If not, please give reasons.**

*Public comments*

10. Respondents broadly supported this proposal. A small number of respondents expressed concerns about what might constitute “reasonable likelihood” of a contravention and asked for guidance. Some respondents were concerned that the rule was drafted in subjective terms (“*If the Executive is satisfied that ...*”). A question was raised about the application of the new section 7.2 if there was a genuine disagreement between the parties and the Executive about how the Codes should apply. This respondent suggested that in such circumstances it might result in the Executive issuing a compliance ruling that obliged a party to take certain action, failing which the party would be regarded to be in breach of section 7.2. This respondent also suggested that the Executive introduce a distinction between “conditional” and “unconditional” rulings so that the Executive could provide a “conditional” ruling if it had not been able to hear the views of other parties to the matter.
11. Concerns were also expressed by one respondent as to whether the Chairman of the Panel’s personal subjective judgment would compromise the fairness of the hearing.

*SFC’s response*

12. As explained in the Consultation Paper, the proposed new section 7.2 clarifies the Executive’s and the Panel’s existing power to issue compliance rulings (under section 7 of the Introduction to the Codes). In line with the SFC’s front-loaded approach the SFC believes that it is preferable for the Executive or the Panel to issue a direction to prevent a breach from occurring. For example, if an offeree board were to refuse to issue a response document to shareholders in a hostile offer, there would be a reasonable likelihood that if the offeree company did not issue the response document it would be in breach of the Codes. In this case, a direction could be issued requiring the offeree board to issue a response document to shareholders. Another example might be in the event that the completion of an acquisition would result in the trigger of a mandatory general offer and the acquirer indicated that it





was not prepared to make the offer, a direction could be issued to restrain the person from completing the acquisition.

13. The SFC considers “*reasonable likelihood that a person will contravene a requirement imposed by or under the Codes*” to mean that it is more likely than not that a breach of the Codes will occur if a particular action is taken. As in all decisions reached by the Executive, it is inevitable that those decisions will involve an element of subjectivity. It should be noted that as a matter of law, any decision taken by a statutory body such as the SFC must be reasonable and take into account all relevant matters. Given that each case would depend on a careful examination of the particular facts and circumstances as well as relevant parties’ submissions, the SFC does not consider that useful guidance can be given as to the factors that may or may not be relevant in assessing whether or not there is a reasonable likelihood of a breach of the Codes. The SFC also does not believe conditional rulings should be introduced as this might create uncertainty and confusion.
14. The SFC would like to clarify that as a matter of practice in cases where there is a genuine disagreement about how the Codes apply, the Executive would normally either issue a ruling to the parties which sets out the basis of its decision or refer the matter to the Panel for its decision if there is a particularly novel, important or difficult point at issue (under section 10.1 of the Introduction to the Codes). In the first instance, if a party wishes to contest the ruling, it may ask for the matter to be reviewed by the Panel under section 9.1 of the Introduction to the Codes. Any ruling under the new section 7.2 would similarly be subject to review by the Panel on the application of a party to the matter.
15. As for concerns expressed about the fairness of the hearing, it should be noted that Panel hearings are held in accordance with section 13 of the Introduction and the Rules of Procedure for hearings (disciplinary and non-disciplinary). The Rules of Procedure together with section 13 and the Guidelines on Conflict of Interest of Members of the Takeovers and Mergers Panel and the Takeovers Appeal Committee are designed to ensure the smooth conduct of the proceedings and thereby facilitate fair, efficient and timely proceedings. With this aim, the Chairman of the hearing already has the explicit power to “*give any preliminary or procedural direction as he considers appropriate for the determination of a matter without the need for a hearing.*” The proposed amendment merely clarifies that the Chairman of the hearing may issue a compliance ruling if it relates to a preliminary or procedural direction. The SFC does not therefore share the concern that the amendment to section 13.10 might compromise the fairness of the hearing.
16. In light of the above, new sections 7.2 and 13.12 will be adopted and section 13.10 of the Introduction will be amended as proposed:

“Compliance rulings

7.2 If the Executive is satisfied that:

- (a) there is a reasonable likelihood that a person will contravene a requirement imposed by or under the Codes; or
- (b) a person has contravened a requirement imposed by or under the Codes.



the Executive may give any direction that appears to it to be necessary in order to:

- (i) restrain a person from acting (or continuing to act) in breach of a relevant requirement under the Codes; or
- (ii) restrain a person from doing (or continuing to do) a particular thing, pending determination of whether that or any other conduct of his is or would be a breach of a relevant requirement under the Codes; or
- (iii) otherwise secure compliance with a relevant requirement under the Codes.”

“13.10 The Chairman of the hearing may give any preliminary or procedural direction (including a compliance ruling of the nature described in section 7.2 of this Introduction) as he considers appropriate for the determination of a matter without the need for a hearing. Any ruling made by the Chairman is a ruling of the Panel.”

“13.12 The Panel may also give directions of the nature described in section 7.2 of this Introduction.”

## Compensation rulings

17. In Part 1 of the Consultation Paper the SFC recommended that the Panel is provided with the explicit power to require a person found to be in breach of certain provisions of the Codes to pay compensation to shareholders. The purpose of a compensation ruling would be to provide financial redress to shareholders or former shareholders who have suffered as a result of a breach of the Codes. For example, in a case where an offeror has failed to make a mandatory offer as required by Rule 26.1 of the Takeovers Code, rather than requiring a general offer to be made forthwith, the Panel might consider it more appropriate to require the person(s) found to be in breach to pay compensation to shareholders who should have received an offer at the time the obligation was triggered.

**Question 3: Do you agree with the new proposal regarding compensation rulings? If not, please give reasons.**

### *Public comments*

18. A number of respondents generally agreed with this proposal but raised a number of concerns. One respondent requested the SFC to provide justification for the proposal to empower the Panel to issue compensation rulings. Some respondents questioned whether the power to determine compensation should rest with the courts after examining detailed evidence including from expert witnesses. One respondent asked whether the SFC is satisfied that this proposal is consistent with Article 80 of the Basic Law and requested guidance on how and when a compensation order would be imposed, and how the Panel would calculate the amount to be paid.
19. Most of the respondents who commented on this point accepted that compensation should be payable where an offeror has invoked a condition and lapsed an offer in breach of Note 2 to Rule 30.1. In these circumstances shareholders would have



been deprived of an offer and should be entitled to financial redress. However, concerns were raised about the breadth of the Panel's power to require compensation to be paid and in particular whether extending the power to all breaches of Rule 30 (which relates to conditions to an offer) was too wide. Concerns included whether it would be appropriate to provide financial redress to shareholders if an offer was made subject to conditions which depend on the offeror's judgment. One respondent suggested that the reference to Rule 16 (revised and alternative offers) in draft section 13.13 of the Introduction should be limited to Rule 16.1 which relates to the obligation to offer the same revised terms to all target shareholders. This respondent also suggested that the reference to Rule 28 (partial offers) should be limited to Rule 28.9 which relates to the obligation to make a comparable offer for other classes of shares. This would be in line with the Singapore Code.

20. Finally, one respondent suggested that compensation orders should be limited to offerors and potential offerors as they are the only persons who could breach the specific rules. One respondent submitted that the power to issue compensation orders should be limited to monetary obligations which are reasonably capable of objective calculation. Two respondents asked for guidelines or practice notes to be issued by the Executive to set out the detailed parameters that should be used by the Panel in determining the amount of compensation to be paid.

*SFC's response*

21. The Codes are non-statutory in nature and do not have the force of law. However, currently the Codes do not provide the Panel with the explicit power to require a person found to be in breach of certain provisions of the Codes to pay compensation to shareholders who have suffered as a result. The new section 13.13 is intended to address possible legal arguments that the Panel does not have the power to issue a compensation order and is hence acting ultra vires. The SFC is satisfied that the exercise of the power to issue a compensation order by the Panel is consistent with Article 80 of the Basic Law.
22. Panel members are drawn from the financial and investment community and represent a wealth of expertise from the securities markets. The Panel is therefore clearly well-qualified to make determinations under the Codes including those relating to the payment of compensation. The Panel would only reach a determination after it had carefully considered evidence before it including the parties' written and oral representations and evidence given by any witnesses to the proceedings. In Panel hearings all parties are provided with a right to be heard.
23. It is also clear that the Panel (or the Chairman of the hearing) may obtain advice from an independent professional adviser or an expert in any relevant area of practice (see paragraph 10.5 of the Non-Disciplinary Rules of Procedure and paragraph 13.5 of the Disciplinary Rules of Procedure). The substance of the advice will be disclosed to the parties in order that they may comment upon it prior to a decision being made. The Panel has in the past engaged relevant experts on a number of occasions.
24. As the Consultation Paper states, the purpose of a compensation ruling would be to provide financial redress to shareholders or former shareholders who have suffered as a result of a breach of the Codes. In the past, there have been cases where the Panel imposed a cold shoulder order that was to be uplifted if the parties



compensated shareholders who did not receive the opportunity to participate in a general offer to which they were entitled. See Shun Ho Resources Holdings Limited (29 November 1995) and Kong Tai International Holdings Limited (24 June 1999). The proposed amendments are consistent with these decisions and are intended to address the argument that the Panel is not entitled to make such orders as it is not explicitly empowered to do so.

25. The SFC does not think it is desirable to provide guidance on how, when or on whom a compensation order should be imposed by the Panel and how the compensation should be calculated. The SFC believes that the guiding principle should be that the Panel should carefully examine all the circumstances of the matter (as discussed above) in order to reach a decision which is just and reasonable in all those circumstances. The SFC would therefore prefer to leave this to the discretion of the Panel and does not propose to be over-prescriptive in this regard.
26. The SFC has considered the various comments relating to the breadth of the proposed new section 13.13 and accepts that a relevant breach relating to Rule 30 would most likely relate to an offeror who lapses an offer by invoking a condition in breach of Note 2 to Rule 30.1. In these circumstances shareholders would have been deprived of an offer and should be entitled to financial redress. Whilst the SFC acknowledges that the circumstances by which shareholders might suffer a financial loss as a result of a breach of other provisions of Rule 30 would be much rarer, the SFC continues to consider that section 13.13 should make broad reference to Rule 30 in order not to limit the Panel from making a compensation order if the circumstances merit it. The same logic applies to the application of Rules 16 and 28. As already mentioned, this would only arise after a hearing of the Panel (that would be held in accordance with the Introduction to the Codes and the Rules of Procedure) where the Panel had determined that shareholders had suffered a financial loss as a result of the relevant breach.
27. The SFC therefore will add the following new section 13.13 to the Introduction to the Codes as proposed:

“13.13 Where any person has breached the requirements of Rules 13, 14, 16, 23, 24, 25, 26, 28, 30 or 31.3 of the Takeovers Code, the Panel may make a ruling requiring the person to pay, within such period as is specified, to the holders, or former holders, of securities of the offeree company such amount as the Panel thinks just and reasonable so as to ensure that such holders receive what they would have been entitled to receive if the relevant Rule had been complied with. In addition, the Panel may make a ruling requiring simple or compound interest to be paid at a rate and for a period (including in respect of any period prior to the date of the ruling and until payment) to be determined. The Panel’s power to make a ruling under this section may be exercised irrespective of whether any sanction referred to in section 12.2 of this Introduction is imposed.”

## **Disciplinary proceedings and remedial / compliance rulings**

28. Finally, Part 1 of the Consultation Paper proposed to amend section 12.2 of the Introduction to the Codes to enable the Panel to impose remedial measures as well as sanctions in disciplinary matters. There is a concern that the current drafting of



section 12.2 of the Introduction might preclude the Panel in disciplinary matters from issuing remedial rulings.

**Question 4: Do you agree with the proposed amendments to section 12.2 to the Introduction to the Codes? If not, please give reasons.**

*Public comments*

29. The majority of respondents agreed with this proposal. Two respondents suggested the change was unnecessary with one of these respondents noting that the Panel already has the power to issue remedial rulings under section 12.2(e) of the Introduction which currently states that the Panel may require “*further action to be taken as the Panel thinks fit*” and that this should be wide enough to cover remedial and compliance rulings.

*SFC’s response*

30. The SFC continues to believe that the current wording of section 12.2 of the Introduction, in particular “*Disciplinary action is to be distinguished from requiring compliance with, or requiring that action be taken to remedy a breach of, the Codes or of a ruling of the Executive or the Panel*”, gives rise to arguments that the Panel is precluded from making remedial rulings in disciplinary cases. In the circumstances and in the interests of facilitating remedial rulings in disciplinary cases, the SFC will amend section 12.2 of the Introduction to the Codes as proposed:

~~“12.2 A disciplinary case is one the sole or main purpose of which is to propose that disciplinary action should be taken. Disciplinary action is to be distinguished from requiring compliance with, or requiring that action be taken to remedy a breach of, the Codes or of a ruling of the Executive or the Panel. In any such case, the Executive invites the person concerned to appear before the Panel. If the Panel finds there has been a breach of either of the Codes or of a ruling, it may impose any of the following sanctions:-~~

- ~~(a) issuance of a public statement which involves criticism;~~
- ~~(b) public censure;~~
- ~~(c) requiring licensed corporations, licensed representatives, registered institutions, or relevant individuals, for a stated period, not to act or continue to act in any or a stated capacity for any person who has failed to comply, or has indicated that he does not intend to comply, with either of the Codes or a ruling;~~
- ~~(d) banning advisers from appearing before the Executive or the Panel for a stated period; and/or~~
- ~~(e) requiring further action to be taken as the Panel thinks fit.~~

*The Executive or the Panel may report a person to other regulatory authorities or professional bodies even though there has been no finding of a breach if the person so reported is governed by rules, regulations or standards of professional conduct of the relevant*



*regulatory authority or professional body and the Executive or the Panel has reasonable grounds for believing that the conduct of such person may have contravened such rules, regulations or standards of professional conduct.”*



## PART 2: DEFINITION AND USE OF THE TERM “ASSOCIATE”

31. In Part 2 of the Consultation Paper, the SFC proposed to amend the definition of associate to eliminate overlap and potential inconsistencies that arise from the similarities between the definition of associate and the definition of acting in concert.

**Question 5: Do you agree with the proposal to amend the definition of associate and the consequential amendments? If not, please give reasons.**

**Question 6: In respect of the proposed amendments to class (3) of associate, do you agree with Option 1 or Option 2? Please give reasons.**

### *Public comments*

32. All respondents supported the proposal to narrow the scope of the definition of associate. They agreed that the current definition is unnecessarily wide. Some respondents suggested that the definition of associate should be deleted entirely, save for those who hold a material shareholding (ie, current class (6) associates), and noted that this would be consistent with the London regime. One respondent further suggested the definition should be narrowed to an exhaustive list, and to reflect this, the words “normally includes” should be replaced with “means the following”.
33. Two respondents suggested it should be clarified that only financial advisers who are engaged in connection with an offer should be included in the definition of associate and therefore be subject to the dealing disclosure requirements under Rule 22. These respondents suggested that all other advisers should be excluded as the position they are in is no different from that of a current class (7) associate (a company with a material trading contract) which the Executive proposes to remove.
34. One respondent asked for clarification of the meaning of “connected with the first person” in the proposed new class (5) (which applies to exempt fund managers and exempt principal traders). Another respondent suggested that the reference to bank should be deleted from the definition of connected fund manager and connected principal trader to ensure consistency.

### *SFC response*

35. As explained in the Consultation Paper, the SFC believes that it is appropriate to amend the definition of associate to remove any unnecessary overlap with the definition of acting in concert. However, given the market conditions and size of Hong Kong, the SFC does not consider it to be appropriate to delete the definition of associate in its entirety. The SFC proposed to retain the revised classes of associate as we consider disclosure of dealings by those persons to be relevant information in the context of an offer due to their close connection with the offeror or offeree company. The SFC believes that it is important to retain the words “normally include” in the definition of associate to provide the Executive with the flexibility of requiring or not requiring certain parties to make a dealing disclosure should the situation warrant it.
36. The proposal to amend class (2) of the definition of associate aims to narrow its application significantly so that class (2) will no longer apply to associated companies



within an offeror or offeree company's group. However, given the possible closeness of an adviser-client relationship (which we consider to be distinguishable from material trading arrangements under the current class (7) of associate), the SFC believes that class (2) should continue to capture advisers of other group companies (parent, subsidiaries and fellow subsidiaries, regardless of whether such advisers are advising on the offer, and also entities that are in the same group as the relevant adviser, including exempt principal traders (**EPTs**) and exempt fund managers (**EFMs**). This provides market transparency of dealings by parties who may have an interest in the outcome of the offer (in addition to their normal interests as shareholders) due to the close connection.

37. In practice, the Executive recognises that in some cases the relationship between an adviser, who is not advising on the offer, and its client may not be sufficiently close that the adviser and its group entities (including EPTs and EFMs) should be considered as associates. In determining this particular issue, the Executive has regard to all the relevant circumstances as well as the factors set out in the London Takeover Panel's statement in relation to Canary Wharf Group plc (2004/12) which include:
- (a) the extent to which the adviser has carried out work for the client on the transaction for which it has not received any remuneration;
  - (b) the closeness and length of the advisory or broking relationship;
  - (c) the formality of the relationship (including whether the adviser is named in the company's annual report and accounts);
  - (d) whether the company has any other nominated advisers;
  - (e) whether the adviser acts as both corporate finance adviser and broker or just in one such capacity;
  - (f) the nature of the services provided by the adviser to the client;
  - (g) the remuneration which the adviser derives from its role in terms of advisory and other fees and, in the case of a broker, commission income;
  - (h) the importance of the client to the adviser, including the size and prestige of the client; and
  - (i) where an adviser has stood down or has offered to stand down, the reasons for so doing.
38. Any adviser to an offeror, the offeree company or other group companies who is not advising on the offer should therefore consult the Executive at the earliest opportunity to clarify the application of class (2) to it and its group entities (including EPTs and EFMs).
39. The SFC agrees with the suggestion that the reference to bank should be deleted from the definition of connected fund manager and connected principal trader to ensure consistency.





40. As to the scope of class (5), the SFC proposed to make amendments to clarify that “*connected with the first person*” is intended to follow the definition of connected fund manager and connected principal trader in the Codes. In view of this clarification, and in order to ensure the new class (5) is self-contained and does not overlap with class (2) of associates, the SFC will amend class (2) and class (5) as set out below.

“(2) ~~any bank and financial and other professional adviser (including a stockbroker)\* to an offeror, the offeree company or any company in class (1) of the parent, subsidiaries and fellow subsidiaries of the first person, including persons controlling<sup>#</sup>, controlled by or under the same control as such banks, financial and other professional advisers (other than exempt fund managers and exempt principal traders covered in class (5) below);~~

...

(5) ~~any investment company, unit trust or other person whose investments an associate manages on a discretionary basis, in respect of the relevant investment accounts; any exempt principal trader or exempt fund manager which is controlling<sup>#</sup>, controlled by or under the same control as the financial and other professional adviser (including a stockbroker)\* of the first person, its parent, subsidiaries and fellow subsidiaries; and...~~”

**Question 6: In respect of the proposed amendments to class (3) of associate, do you agree with Option 1 or Option 2? Please give reasons.**

41. Part 2 of the Consultation Paper also proposed to amend class (3) of associate to remove the reference to directors of associated companies on the basis that this might be unnecessarily wide. If class (3) were to be amended to narrow its scope, views were invited on whether to draw the line at the subsidiary level (Option 1) or include directors of companies which are controlled by the offeror or offeree company or their parents (within the meaning of the Takeovers Code) (Option 2).

#### *Public comments*

42. The vast majority of respondents supported Option 1 noting that requiring dealing disclosure by directors of associated companies (which may be controlled by independent third parties not connected or involved in the Code transaction) would be too far-reaching and onerous and would not provide meaningful disclosure. Some respondents noted that should a director of an associated company deal in relevant securities with the purpose of assisting the offeror or the offeree company, he would in any event be considered as a de facto concert party and therefore subject to the dealing disclosure requirements in Rule 22.

43. Those respondents who supported Option 2 commented that the more information that is provided to the market the better.

#### *SFC’s response*

44. The SFC agrees that Option 1 is preferable to Option 2 which may be unduly onerous and not provide meaningful disclosure.
45. In view of the above, the SFC will amend the definition of associate and related



provisions as set out in **Appendix 2**. The prescribed public disclosure and private disclosure forms will also be amended to reflect the changes.



## PART 3: VOTING THRESHOLD FOR WHITEWASH WAIVERS

46. Part 3 of the Consultation Paper proposed to raise the voting approval threshold for whitewash waivers and underlying transactions from a simple majority of independent votes to 75% and to introduce an explicit requirement to require separate resolutions to be put to independent shareholders for underlying transactions and whitewash waivers.

**Question 7: Do you agree that the voting threshold for whitewash waivers should be increased from 50% to 75%? If not, please give reasons.**

**Question 8: Do you agree that separate resolutions should be required for each of the underlying whitewash transaction(s) and the whitewash waiver? If not, please give reasons.**

**Question 9: Do you agree that the 75% voting threshold should apply to each resolution for the underlying whitewash transaction(s) and the whitewash waiver? If not, please give reasons.**

**Question 10: Do you agree with the proposed amendment to Note 1 on dispensations from Rule 26 to include the word “normally”? If not, please give reasons.**

### *Public comments*

47. A number of respondents agreed with the proposals. Comments in support included that the proposal could help mitigate abuse and accord more protection to minority shareholders. One respondent noted that the proposals could deter people with ulterior motives from abusing the whitewash waiver mechanism in order to obtain control more easily of a listed company while circumventing their obligation to make a general offer which is contrary to the key principle of fair treatment for all shareholders.
48. One respondent, who did not object to the proposal, asked the SFC to consider excluding the 75% voting requirement for financially distressed listed issuers in restructuring cases to increase the chance of a successful rescue.
49. A larger number of respondents opposed the proposal to increase the voting threshold for whitewash waivers and the underlying transactions to 75%. Comments included that the increase is not warranted as the simple majority principle is in line with corporate law and the Listing Rules (as well as London and Singapore) and there is no reason to deviate from this long-established practice. Some respondents noted that the Executive already has the discretion to withhold the grant of a whitewash waiver and suggested that this already provides shareholders with sufficient protection.
50. It was also suggested that there are sufficient existing safeguards under the Listing Rules to tackle potential abuses relating to fund raising or asset injections particularly upon the implementation of the amendments to the Listing Rules proposed by the Stock Exchange in its Consultation Paper on Capital Raisings by Listed Issuers (issued in September 2017) (**Consultation Paper on Capital Raisings**).



51. A number of respondents argued that the proposal would give minority shareholders a disproportionate power to influence the outcome of a transaction and frustrate genuine beneficial commercial matters. In this regard, one respondent invited the SFC to consider providing further guidance on the meaning of “*independent vote*” and situations where a controlling shareholder would be considered as involved in or interested in the transaction in question.
52. One respondent remarked that sufficient protection is already provided to minority shareholders as they are advised by the independent board committee and the independent financial adviser appointed by the offeree company.

#### *Single or separate resolutions*

53. Most respondents supported the proposal that separate resolutions should be put to shareholders for approval in respect of the underlying whitewash transaction and the whitewash waiver. One respondent, whilst supporting the proposal to increase the whitewash voting threshold to 75%, suggested that the threshold for the underlying transaction should remain a simple majority.

#### *SFC’s response*

##### *Raising the voting threshold*

54. Part 3 of the Consultation Paper explained that the mandatory offer obligation under Rule 26.1 of the Takeovers Code is one of the central tenets of the Codes. The Executive may grant a whitewash waiver to waive an obligation to make a general offer in a comparatively narrow set of circumstances. A whitewash waiver should only be granted under stringent conditions because it results in a person obtaining or consolidating control without making a general offer and is therefore a derogation from General Principle 2. Once a person has obtained control of a company, shareholders have normally surrendered the choice of any future change of control of that company to that new controlling shareholder. The SFC would like to reiterate that the protection that should be afforded to shareholders in the context of a whitewash transaction must not be underestimated.
55. The proposal to increase the voting threshold from 50% to 75% has been put forward as a measure to enhance protection of minority shareholders and to address a number of concerns. Currently obtaining whitewash waiver approval from independent shareholders is a virtual certainty. This suggests that the independent shareholders voting requirement in whitewash transactions is not acting as an effective “*gatekeeper*”. This appears to be the case despite a number of existing protective measures in the Codes such as the requirement for the formation of an independent board committee and the appointment of an independent financial adviser to advise minority shareholders on the merits of the whitewash transaction.
56. These concerns are exacerbated by the warehousing of shares by friendly non-independent shareholders who vote in favour of the relevant transaction. The SFC has recently found compelling evidence in a number of investigations of clear incidents of organised systemic warehousing of shares. The Stock Exchange has also recognised the problem of warehousing shares in its Consultation Paper on Capital Raisings where it noted that “[m]arket commentators have questioned, in specific cases, whether such new share issuances were conducted to “warehouse” shares for various ulterior purposes or to facilitate insiders in making gains. These



*transactions raised concerns whether the operation of the market is fair and orderly. Allowing these corporate actions to prevail may undermine investors' confidence and the reputation of our market."*

57. One respondent noted that whilst the Stock Exchange proposed various measures in its Consultation Paper on Capital Raisings, it did not suggest raising the voting threshold for shareholder approval of relevant transactions. In this regard it should be noted that the Stock Exchange explained in the Consultation Paper on Capital Raisings that it had considered, and decided not to propose, increasing the minority shareholders' approval threshold from 50%. The Stock Exchange noted in this regard that in a vast majority of cases, the highly dilutive pre-emptive offers discussed in the paper were approved by over 75% of the shareholders that attended the general meetings, but the shareholders' turnout rates were low.
58. In the Conclusions Paper on Capital Raisings by Listed Issuers (issued in May 2018) the Stock Exchange reiterated the concern that *"whilst the existing [Listing] Rules already require minority shareholders' approval for large scale offers, there is a concern whether this is sufficient to guard against abusive cases due to the low shareholders' turnout rates at general meetings and other problems such as vote rigging through warehousing of shares"*.
59. The operation of the Codes requires close integration with the Listing Rules and regular collaboration between the SFC and the Stock Exchange. The SFC appreciates the measures put in place by the Exchange to address potential abuses related to deeply discounted capital raising activities and share issuances. However, these measures do not directly address issues relating to a change of control of an issuer and approval of whitewash waivers. These matters clearly fall within the ambit of the Takeovers Code which amongst other things is designed to ensure fair treatment of shareholders who are affected by takeovers. Indeed, this is why the Exchange raised concerns with the SFC about capital raisings which involve a change of control and asked the Executive to look into the matter as mentioned in the Consultation Paper.
60. The SFC believes that the nature of a whitewash waiver and its impact on shareholders are distinguishable from the underlying transaction. In addition to the effect of the underlying transaction on the issuer and its shareholders, by its nature a whitewash waiver will have an additional and critical impact on shareholders as firstly, there will be a change or consolidation of control of the company they have invested in; and secondly, their shareholding interest in the company will be diluted in consequence of the issue of new shares to the whitewash applicant. Finally and fundamentally, in a whitewash waiver transaction shareholders are not given an opportunity to exit from their investment in the offeree company. In such circumstances, a higher approval threshold is merited in order to enhance protection of minority shareholders.
61. The Executive clearly has the discretion to withhold the grant of a whitewash waiver in appropriate circumstances and will continue to scrutinise whitewash transactions. The Executive will not hesitate to refuse to grant a whitewash waiver when the facts and circumstances warrant such a course of action. This is also consistent with the SFC's front-loaded approach to listed company regulation. However, this should not preclude the adoption of additional measures if appropriate.



62. The SFC does not accept the suggestion that the proposal to increase the voting threshold to 75% will introduce an “*unacceptable*” increase in the level of deal risk. In this respect the SFC agrees with one respondent’s observations that the bigger risk of abuse is not minorities frustrating the will of majorities who wish to push through whitewashes, but rather whitewashes being pushed through by shareholder groups that actually represent a relatively small proportion of the entire shareholder base.
63. The SFC does not agree with the suggestion that if the proposal goes ahead minority shareholders will have a disproportionate power to influence the outcome of a transaction and frustrate genuine beneficial commercial matters. As a general rule, if a whitewash proposal is genuinely beneficial to the offeree company and its shareholders, it would be more likely that minority shareholders would vote in favour of the proposal.
64. As for the request for further guidance on the meaning of “*independent vote*”, the SFC considers this to be sufficiently clear as it is defined in Note 1 on dispensations from Rule 26 to mean “*a vote by shareholders who are not involved in, or interested in, the transaction in question*”. The guiding principle is whether the shareholder concerned is involved in or interested in the transaction other than merely as a shareholder. The SFC believes this is well understood by the market.
65. Whilst the SFC appreciates the role played by the independent board committee and the independent financial adviser, we do not consider it to be a substitute for the proposal to increase the voting threshold to 75%.
66. The SFC believes that the 75% voting threshold should apply equally to a restructuring of a distressed company as the rights of shareholders in such a situation should not differ from those of shareholders in other whitewash transactions.
67. The SFC does not accept that the 75% voting threshold should not be adopted as other overseas jurisdictions retain a simple majority voting threshold for whitewash waivers. Whilst useful guidance can be drawn from overseas jurisdictions, the SFC believes that the characteristics of the local market should be taken into account in the formulation of any new rules and Hong Kong should not hesitate to take the lead in adopting ground-breaking rules if the circumstances warrant it.

#### *Voting on single or separate resolutions*

68. Most respondents agreed with the proposal to have separate resolutions for the whitewash waiver and the underlying transactions consistent with paragraph 2(e) of Schedule VI. A small number of respondents disagreed, arguing mainly that separate resolutions do not serve any useful purpose unless the whitewash waiver condition is a waivable condition. Given the SFC’s decision in relation to Question 9 below concerning the voting threshold for the underlying transaction, this issue is no longer relevant.

#### *Separate voting thresholds*

69. As already explained, as shareholders are deprived of the opportunity to receive a general offer to buy their shares following a change of control of the offeree company, the SFC continues to believe that the dispensation from the obligation to make a general offer should be subject to a more stringent approval requirement. The SFC therefore proposes to adopt a higher voting threshold of 75% of the independent vote



for whitewash waivers. Nevertheless, the SFC recognises that if the 75% threshold is also applied to the underlying transaction, this might give rise to a possible anomaly between the voting requirements in the Listing Rules (simple majority) and the Takeovers Code.

70. The SFC has therefore decided that the underlying transaction should remain subject to a simple majority vote. Where minority shareholders consider the underlying transaction to be beneficial to the offeree company and approve the necessary resolution but disapprove the corresponding whitewash waiver resolution, so long as the whitewash waiver condition is waivable the underlying transaction would still be able to proceed coupled with a general offer.

*Additional amendments*

71. The SFC proposed to amend Note 1 on dispensations from Rule 26 by including the word “normally” to remove any uncertainty as to whether a whitewash waiver would normally be granted.
72. All respondents supported the proposal and the amendments to Note 1 on dispensations from Rule 26 will therefore be adopted.
73. In view of the above, Note 1 on dispensations from Rule 26 will be amended with consequential amendments to paragraphs 2(e) and 4(e) of Schedule VI as follows:

- “1. *Vote of independent shareholders on the issue of new securities (“Whitewash”)*

*(See Schedule VI – Whitewash Guidance Note for the detailed requirements of the Takeovers Code under this Note.)*

*When the issue of new securities as consideration for an acquisition, or a cash subscription, or the taking of a scrip dividend, would otherwise result in an obligation to make a mandatory offer under this Rule 26, the Executive will normally waive the obligation if ~~there is an~~ the whitewash waiver and the underlying transaction(s) are separately approved by at least 75% and more than 50% respectively of the independent vote that are cast either in person or by proxy at a shareholders’ meeting. For this purpose “independent vote” means a vote by shareholders who are not involved in, or interested in, the transaction in question. The requirement for a mandatory offer will also normally be waived, provided there has been an independent vote of shareholders, in cases involving the underwriting of an issue of shares. If an underwriter incurs an obligation under this Rule 26 unexpectedly, for example as a result of failure by a sub-underwriter in respect of all or part of his liability, the Executive should be consulted.*

...”

- “2. *Specific grant of waiver required*

...

- (e) *approval of the proposals by an independent vote at a meeting of the holders of any relevant class of securities in accordance with*



*Note 1 on dispensations from Rule 26 of the Takeovers Code, whether or not any such meeting needs to be convened to approve the issue of the securities in question; and...*

“4. *Circular to shareholders*

...

- (e) *a statement that the Executive has agreed, subject to approval by independent shareholders in accordance with Note 1 on dispensations from Rule 26 of the Takeovers Code, to waive any obligations to make a general offer which might result from the transaction;...*”





## PART 4: APPROVAL OF DELISTINGS BY INDEPENDENT SHAREHOLDERS

74. Rule 2.2 of the Takeovers Code provides that if an offeror intends to delist the offeree company following a general offer, the resolution to approve the delisting must be subject to (i) at least 75% approval, (ii) not more than 10% disapproval (by disinterested shareholders) and (iii) the offeror being entitled to exercise, and exercising, its rights of compulsory acquisition. As there are no equivalent compulsory acquisition rights under the laws of certain jurisdictions such as the Mainland, in recent years the Executive has granted a number of waivers from compliance with Rule 2.2(c) (the third limb) on the basis that it was technically impossible to comply under Mainland law.
75. Part 4 of the Consultation Paper proposed to provide a level playing field for relevant companies by introducing appropriate measures that should be in place to protect minority shareholders before a waiver from Rule 2.2(c) might be granted. The measures include (i) the offer remaining open for acceptance for a longer period after it becomes unconditional in all respects, (ii) non-accepting shareholders being notified in writing of the extended closing date and the implications if they choose not to accept the offer and (iii) the offer being subject to a 90% acceptance condition.

**Question 11: Do you agree with the proposal to add a Note to Rule 2.2 to clarify the matters above? If not, please give reasons.**

### *Public comments*

76. The majority of respondents welcomed the proposal. One respondent, who agreed with the proposal, suggested that the 90% acceptance condition should be a requirement in all delisting cases rather than merely a factor to be taken into account by the Executive in considering whether or not to grant a waiver from Rule 2.2(c).
77. Some respondents did not agree with the proposal. Concerns were expressed that the introduction of a minimum 90% acceptance condition for companies incorporated in jurisdictions without compulsory acquisition rights (including Mainland companies) may render privatisations by these companies practicably impossible. One respondent suggested this might deter relevant companies from listing in Hong Kong. It was also noted that the Listing Rules (consistent with the listing rules of the London Stock Exchange and the Singapore Exchange) do not impose a 90% acceptance condition and that the proposal represented a significant shift in the Executive's current practice.
78. Another respondent commented that the only purpose of Rule 2.2(c) was to set the timing of when a delisting resolution could take effect (ie, a delisting resolution should only become effective when the offeror becomes entitled to exercise its right of compulsory acquisition). As such, since there was no right of compulsory acquisition available to offerors making offers for Mainland companies, the issue of when a delisting resolution should become effective did not arise and so Rule 2.2(c) should not apply to those companies.



*SFC's response*

79. The SFC considers that the main purpose of Rule 2.2(c) is to ensure that a delisting cannot become effective until an offeror is able to exercise, and exercises its right of compulsory acquisition (which arises in respect of Hong Kong incorporated companies when the offeror receives acceptances amounting to 90% of the disinterested shares). This in turn ensures that passive minority shareholders will not find themselves holding illiquid shares in an unlisted and potentially non-public company that is not protected by the Takeovers Code.
80. As explained in the Consultation Paper, the rationale for the three limbs to Rule 2.2 is to provide the same level of protection to minority shareholders as afforded by Rule 2.10 (which applies to privatisations by scheme of arrangement) in respect of delisting applications and to alleviate concerns about use of the threat of delisting as part of the tactics of privatisation by general offer. The combined effect of the three limbs is to make it more difficult for an offeror to use the threat of delisting to exert pressure on minority shareholders to accept a general offer. This is in line with General Principle 7 which states that “*the oppression of minority or non-controlling shareholders is always unacceptable*”. The introduction of a 90% acceptance condition as proposed is entirely consistent with the rationale for Rule 2.2.
81. There is a concern that if waivers from Rule 2.2(c) are granted without imposing a minimum 90% acceptance condition, an uneven playing field will be created that will effectively make it easier for companies incorporated in jurisdictions without compulsory acquisition rights (such as the Mainland) to delist through a general offer as they will be able to do so with less than 90% acceptances. The SFC therefore believes that the 90% acceptance condition should normally apply to all such cases as well. Although this proposal represents a shift in the Executive's current practice regarding the grant of waivers to relevant companies, it aims to enhance shareholder protection and to align the treatment of all companies that are subject to the Codes.
82. In light of the above, the SFC maintains its view and will therefore introduce the proposed new Note to Rule 2.2 as follows:

“Note to Rule 2.2:

In cases where the offeree company is incorporated in a jurisdiction that does not afford compulsory acquisition rights to an offeror, the Executive may be prepared to waive the requirement of Rule 2.2(c). In considering whether to grant such a waiver, the Executive will normally require, among other things, the offeror to put in place arrangements such that:-

- (i) where the offer becomes or is declared unconditional in all respects, the offer will remain open for acceptance for a longer period than normally required by Rule 15.3;
- (ii) shareholders who have not yet accepted the offer will be notified in writing of the extended closing date and the implications if they choose not to accept the offer; and
- (iii) the resolution to approve the delisting is subject to the offeror having received valid acceptances amounting to 90% of the disinterested shares.”



83. As regards the application of the new Note to Rule 2.2 to real estate investment trusts (**REITs**), the SFC would like to remind all REITs which are subject to the Codes that pursuant to paragraph 1(a) of the REIT Guidance Note the requirements under the new Note to Rule 2.2 would apply to REITs.



## **PART 5: DISCLOSURE OF NUMBER OF, HOLDINGS OF AND DEALINGS IN, RELEVANT SECURITIES**

84. Part 5 of the Consultation Paper proposed to clarify the scope of disclosure of holdings and dealings in relevant securities, in particular where the offeror is offering securities of another company as consideration in an offer (**Third Party Securities**). It also proposed to relax some requirements including the timing of dealing disclosures.

### **Rule 3.8 – Announcement of number of relevant securities in issue**

85. The SFC proposed to amend Rules 3.8 and 22 to require disclosure of details and dealings in Third Party Securities.

**Question 12: Do you agree with the proposed amendments to Rules 3.8 and 22 and the consequential changes to Note 1 to paragraph 4 of Schedule I and paragraph 12 of Schedule I? If not, please give reasons.**

#### *Public comments*

86. All of the respondents supported the proposal. Two respondents requested clarification of whether holders of 5% or more of any class of Third Party Securities would be subject to the dealing disclosure requirements even if they hold less than 5% of the relevant securities of the offeror or the offeree company. These respondents also suggested that the Offer Period Tables should be expanded to include details of any Third Party Securities (other than the Offeror) in a securities exchange offer, so that the market is clear that dealings in such securities by relevant persons during an offer period would also require disclosure under the Codes.

#### *SFC's response*

87. The main purpose of dealing disclosure during an offer period is to ensure that dealing activities of parties that are sufficiently interested in the outcome of the offer are publicly disclosed. This helps to provide market transparency about dealings by parties who have a significant interest in relevant securities and enables the market and shareholders to assess the possible impact of those dealings on both the market price of the securities and the outcome of the offer. It also increases transparency about possible concert party dealings and the location of control.
88. Currently the Codes do not require holders of 5% or more of Third Party Securities to make dealing disclosures as they are neither considered associates of the offeror nor associates of the offeree company. The proposal does not change this position. The SFC believes that dealing disclosure by such persons who are otherwise not connected, involved or interested in the offer would be unlikely to be meaningful in the context of the offer. In any event, if a person deals with the purpose of assisting an offer, such person would be treated as a concert party and be subject to the usual dealing disclosure requirements. Such person would also be required to make dealing disclosures under Part XV of the Securities and Futures Ordinance as along as the securities concerned are listed.



89. As part of this review exercise, the SFC has identified the need to make an additional amendment to Rule 3.8 as explained below.
90. Rule 22.1 of the Takeovers Code requires dealings in relevant securities by an offeror or the offeree company, and by any associates, for their own account during an offer period to be disclosed.
91. Rule 3.8 aims, amongst other things, to provide shareholders of the offeree company and the offeror with details of relevant securities to help them ascertain whether they are class (6) associates and therefore subject to the dealing disclosure requirements in Rule 22. Rule 3.8 currently provides that an offeree company must announce details of its relevant securities as soon as possible when an offer period begins. However, Rule 3.8 currently only requires an offeror to announce details of its relevant securities in a securities exchange offer. No such details are required to be disclosed in cash offers.
92. Under Rule 22.1 an offeror's associates (most notably under class (6) of the definition of associates) are required to disclose their dealings in offeree securities in all offers (ie, cash offers and securities exchange offers). There is a concern that the current drafting of Rule 3.8, in particular the fact that it does not require an offeror to disclose details of its securities in a cash offer, might make it more difficult for offeror shareholders to determine whether they hold a 5% interest within the meaning of class (6) and thereby cause confusion about their obligations under Rule 22.1 in cash offers. This was not intended and therefore the SFC proposes to amend Rule 3.8 to clarify that in going forward an offeror must announce details of its relevant securities in all offers by removing the words "unless it has stated that its offer is likely to be solely in cash".
93. The SFC will therefore amend Rule 3.8 as follows:

*"3.8 Announcement of numbers of relevant securities in issue*

*When an offer period begins, the offeree company must announce, as soon as possible, details of all classes of relevant securities issued by the offeree company, together with the numbers of such securities in issue. An offeror or potential named offeror must also announce the same details relating to its relevant securities (and if relevant, the relevant securities of the company the securities of which are to be offered as consideration for the offer) following any announcement identifying it as an offeror or potential offeror, ~~unless it has stated that its offer is likely to be solely in cash.~~*

*In the announcement, the offeree company, the offeror or potential named offeror should remind their respective associates to disclose their dealings in any relevant securities of the offeree company, or in the case of . In a securities exchange offer, any securities in the same class as the securities that are offered as consideration under an offer the offeree company, the offeror or potential named offeror should also remind their respective associates to disclose their dealings in any relevant securities of the offeror or potential named offeror (or of the company the securities of which are to be offered as consideration for the offer, as the case may be).*

*The text of Note 11 to Rule 22 should also be included in any announcement commencing an offer period.*



*If the information included in an announcement made under this Rule 3.8 changes during the offer period, a revised announcement must be made as soon as possible.*

*Note to Rule 3.8:*

*Relevant securities*

*See Note 4 to Rule 22.”*

94. The consequential changes to Note 4 to Rule 22, Note 1 to paragraph 4 of Schedule I and a new Note 4 to paragraph 12 of Schedule I will also be adopted as proposed:

*“4. Relevant Securities*

*Relevant securities for the purpose of this Rule 22 include:-*

- (a) securities of the offeree company which are being offered for or which carry voting rights;*
- (b) equity share capital of the offeree company and, in a securities exchange offer only, of an offeror or of a company the securities of which are to be offered as consideration for the offer (as the case may be);*
- (c) securities of an offeror or of a company the securities of which are to be offered as consideration for the offer (as the case may be) which carry the same or substantially the same rights as any to be issued as consideration for the offer;*
- (d) securities carrying conversion or subscription rights into any of the foregoing; and*
- (e) options and derivatives in respect of any of the foregoing.*

*The taking, granting, exercising, lapsing or closing out of an option (including a traded option contract) in respect of any of the foregoing or the exercise or conversion of any security under (d) above whether in respect of new or existing securities and the acquisition of, entering into, closing out, exercise (by either party) of any rights under, or issue or variation of, a derivative will be regarded as a dealing in relevant securities (see also Notes 7 and 9 to this Rule 22).”*

Note 1 to paragraph 4 of Schedule I:

*“1. Relevant shareholdings*

*References in this paragraph 4 to shareholdings should be taken to mean:-*

- (a) in the case of shareholdings in the offeree company, holdings of:-*
  - (i) securities which are being offered for or which carry voting rights;*



- (ii) convertible securities, warrants, options and derivatives in respect of (i); ~~and~~
- (b) in the case of shareholdings in the offeror company, holdings of:–
  - (i) equity share capital;
  - (ii) securities which carry substantially the same rights as any to be issued as consideration for the offer; and
  - (iii) convertible securities, warrants, options and derivatives in respect of (i) or (ii); and
- (c) in the case of a securities exchange offer involving the offer as consideration of securities in a company other than the offeror, references to shareholdings in the offeror in this paragraph 4 should be taken to mean shareholdings in the company whose securities are being offered as consideration and (b) above should be construed accordingly.”

New Note 4 to paragraph 12 of Schedule I:

“4. Where securities in a company other than the offeror are being offered as consideration

In the case of a securities exchange offer involving the offer as consideration of securities in a company other than the offeror, references to the offeror in this paragraph 12(a) of Schedule I should be taken to mean the company whose securities are being offered as consideration. In these cases the Executive should be consulted.”

95. The SFC agrees with the suggestion to expand the Offer Period Tables. In a securities exchange offer, the Offer Period Tables will state whether disclosure of dealings in the relevant securities of the offeror or of the Third Party Securities is required.

### **Schedule IX (REIT Guidance Note) – Disclosure of shareholdings and dealings in the offeree board circular**

96. Part 5 proposed to require the two classes of associate (a REIT’s trustee and a REIT’s management company) to disclose shareholdings of and dealings by them in the offeree board circular under paragraph 2 of Schedule II by making an explicit requirement in paragraph 3(p) of Schedule IX.

**Question 13: Do you agree with the proposed new paragraph 3(p) in Schedule IX? If not, please give reasons.**

*Public comments and SFC’s response*

97. All respondents agreed to the proposal. The new paragraph 3(p) to Schedule IX will be introduced as proposed.



**“(p) Shareholdings and dealings (paragraph 2 of Schedule II to the Codes)”**

*In cases where the offeree company is a REIT, the disclosure obligations under paragraph 2 of Schedule II and Note 2 to such paragraph should also apply to any person who is an associate of the offeree company by virtue of classes (7) and (8) of the definition of associate.”*

**Note 5 to Rule 22 – Timing of submission of dealing disclosures**

98. The SFC proposed to amend Note 5 to Rule 22 to extend the deadline for filing of dealing disclosures from 10.00 a.m. to 12.00 noon on the business day following the date of the transaction, and in the case of a dealing that takes place in US time zones, the second business day following the date of the transaction.

**Question 14: Do you agree with the proposal to amend Note 5 to Rule 22? If not, please give reasons.**

*Public comments*

99. All respondents welcomed the proposal. Various requests were made to extend the deadline further for dealings that took place in Europe and for private disclosures.
100. One respondent suggested that the deadline for dealing disclosure by connected exempt principal traders under Rule 22.4 (currently 10.00 a.m. on the business day following the date of the dealings) should also be amended to align it with the proposal.

*SFC’s response*

101. The SFC does not consider it necessary to extend the disclosure deadline for dealings that take place in Europe or for private disclosures. In general, market practitioners have complied with the current requirement without difficulty. In cases where market practitioners have approached the Executive for a time extension, typically only a short extension has been sought. The Executive is also mindful of the publication windows set by the Stock Exchange (on a normal business day, being 6.30 a.m. to 8.30 a.m., 12.00 noon to 12.30 p.m. and 4.30 p.m. to 11.00 p.m.). Any further extension to 11.30 p.m. or to the next day would delay the publication of disclosures by another business day which would contradict the purpose of timely disclosure in the context of offers. As such, the SFC believes an extension of two hours is sufficient. The SFC agrees with the suggestion that the deadline for dealing disclosure by connected exempt principal traders under Rule 22.4 should also be amended to align it with the proposal.
102. In light of the above, Note 5 to Rule 22 will be amended as proposed with corresponding changes to Rule 22.4 and Practice Note 9:

*“5. Timing of disclosure*

*Disclosure must be made no later than ~~10.00 a.m.~~ 12.00 noon on the business day following the date of the transaction. ~~Where or, where~~ dealings have taken place on stock exchanges in the time zones of the United States and there may be difficulty in disclosing dealings by 10.00*





~~a.m., the no later than 12.00 noon on the second business day following the date of the transaction. The Executive should be consulted at the earliest opportunity if there is difficulty in meeting the deadlines set.~~

“22.4 Connected exempt principal traders

*Dealings in relevant securities by an exempt principal trader connected with an offeror or the offeree company should be aggregated and disclosed, in accordance with Note 6(a) to this Rule 22, not later than ~~10.00 a.m.~~12.00 noon on the business day following the date of the transactions.....”*

## Note 6 to Rule 22 – Method of dealing disclosure

103. Part 5 also proposed to simplify the method of disclosure under Note 6(a) to Rule 22 of the Takeovers Code by removing the requirement to make separate disclosures to the offeror, offeree company or their financial advisers.

**Question 15: Do you agree with the proposal to amend Note 6 to Rule 22? If not, please give reasons.**

104. All respondents supported the proposal and accordingly the amendments will be adopted.

“(a) Public disclosure

*Dealings should be disclosed in writing to ~~all offerors and the offeree company or their respective financial advisers. At the same time all such dealings should be disclosed in writing to the~~ Executive using the prescribed forms available on the SFC’s website. The Executive will arrange for the posting of the disclosure on the SFC’s website and on the Stock Exchange’s website.*

*Persons proposing to engage in dealings should also acquaint themselves with the disclosure requirements of Part XV of the Securities and Futures Ordinance (Cap. 571).*

*If ~~parties to an offer and their associates~~ any person chooses to make an announcements regarding dealings in addition to making formal disclosures, ~~they~~ that person must ensure that no confusion results.*

*Public disclosure may be made by the ~~party~~person concerned or by an agent acting on its behalf. Where there is more than one agent (e.g. a merchant bank and a stockbroker), particular care should be taken to ensure that the responsibility for disclosure is agreed between the parties and that it is neither overlooked nor duplicated.”*



## PART 6: MISCELLANEOUS AMENDMENTS

105. Part 6 of the Consultation Paper proposed various miscellaneous amendments to the Codes to codify existing practice and to effect a number of “housekeeping” amendments.

### Class (5) of the presumption of acting in concert

106. Part 6 proposed to clarify that class (5) of the presumption of acting in concert should exclude exempt fund managers, as is the case with exempt principal traders, as they would not be presumed to be acting in concert with the client of the financial adviser group’s corporate finance department once exempt status is obtained.

**Question 16: Do you agree with the amendment to class (5) of the presumption of acting in concert? If not, please give reasons.**

107. All respondents supported the proposal and accordingly the presumption will be amended as proposed:

“(5) *a financial or other professional adviser (including a stockbroker)\* with its client in respect of the shareholdings of the adviser and persons controlling<sup>#</sup>, controlled by or under the same control as the adviser (except in the capacity of an exempt principal trader or exempt fund manager);”*

### Section 8.3 of the Introduction to the Codes – Certificates of truth, accuracy and completeness

108. The SFC proposed to amend section 8.3 of the Introduction to the Codes to require the submission of the duly completed prescribed filing form together with any application made under the Codes.

**Question 17: Do you agree with the proposal to amend section 8.3 of the Introduction to the Codes? If not, please give reasons.**

109. All respondents supported the proposal and section 8.3 will be amended as proposed:

“8.3 *Each submission application should be signed by the applicant and should close with accompanied by a duly completed and signed prescribed filing form available on the SFC’s website. Such filing form contains a statement by the applicant certifying the truth, accuracy and completeness of statements contained in the submission application. When the application is filed by an adviser, the filing form also contains a statement should confirm that the applicant has authorised the filing of the application by the adviser. Such statement does not relieve the adviser of its obligation to use all reasonable efforts to ensure that its client understands, and abides by, the relevant requirements of the Codes, and that the submission of its client is true, accurate and complete. Any subsequent submissions in respect of an application should also contain a statement by the applicant certifying the truth, accuracy and completeness of statements contained in the submission.*”



## Notes 2 and 3 to Rule 8.1 – Meetings and materials used in meetings

110. The SFC proposed certain amendments to Notes 2 and 3 to Rule 8.1 to the Takeovers Code regarding dissemination of information about companies involved in an offer.

**Question 18: Do you agree with the proposed amendments to Notes 2 and 3 to Rule 8.1? If not, please give reasons.**

### *Public comments*

111. Respondents generally supported the proposals. Some respondents requested clarification of the meaning of “*other person interested in any relevant securities*”. Two respondents suggested that the financial adviser’s confirmation under Note 3 to Rule 8.1 (that no material new information or significant new opinion was provided) should be limited to information and opinions “*relating to the offer*”. A number of respondents disagreed with the proposal to require financial advisers to confirm that the materials distributed at meetings were “*fairly*” presented as it is subjective and goes beyond the scope of Note 3 to Rule 8.1.

### *SFC’s response*

112. The main purpose of Note 3 to Rule 8.1 is to prevent material new information being disclosed selectively to shareholders, analysts, brokers or other persons who might be interested in the offer. It follows that the safeguards under Notes 2 and 3 to Rule 8.1 should apply both to meetings with current shareholders and also to meetings with holders of other classes of relevant securities of the offeror or the offeree company. The reason for this is that Rules 13 and 14 of the Takeovers Code require an offeror to extend the offer to all holders of other classes of relevant securities. In order to clarify the scope of Note 3 to Rule 8.1, the SFC will replace “*other person interested in any relevant securities*” with “*holder of other relevant securities (as defined in Note 4 to Rule 22)*”.
113. The SFC does not believe that the application of Note 3 to Rule 8.1 should be confined to meetings “*relating to the offer*” as this would exclude meetings that might be relevant to the offer. For example, a meeting convened during an offer period where the financial results of the offeree company are announced or discussed might not be a meeting relating to an offer, but nonetheless might well be significant in the context of an offer. It is therefore important that no material new information or significant new opinion is provided at these meetings as well.

### *Material distributed at meetings or to the media*

114. The SFC continues to consider it to be important that material that is distributed at meetings with shareholders, analysts, brokers or other persons interested in the offer, or to the media, is fairly presented. However, the SFC accepts the concerns about subjectivity raised by a number of respondents. As such the SFC will not adopt the proposed requirement for financial advisers to confirm that the relevant materials were fairly presented.



115. Notes 2 and 3 to Rule 8.1 will therefore be amended as follows:

“2. *Press, television and radio interviews*

*Parties involved in an offer must take particular care not to release new material in interviews or discussions with the media. The requirements regarding meetings and presentations or other documents set out in Note 3 below will also apply to any interviews and discussions and any written communication relating to an offer which is provided to the media.”*

“3. *Meetings*

*Subject always to Rule 34, meetings of representatives of the offeror or the offeree company or their respective advisers with any shareholders in, or holder of other relevant securities (as defined in Note 4 to Rule 22) of, either the an offeror or the offeree company, investment analysts, stockbrokers or others engaged in investment management or advice may take place during the offer period, provided that so long as no material new information is forthcoming provided, and no significant new opinions are expressed, by the relevant representative or adviser and the following provisions are observed. Except with the consent of the Executive, an appropriate representative of the financial adviser to the offeror or the offeree company must be present. That representative will be responsible for confirming in writing to the Executive, not later than 12.00 noon on the business day following the date of the meeting, that no material new information was forthcoming provided, and no significant new opinions were expressed, by the relevant representative or adviser at the meeting.*

*Materials such as press releases or printouts of slides which highlight the salient facts of the offer may be distributed at the meeting and should be fairly presented. Whilst the Executive would not normally regard these printed materials as documents for the purpose of Rule 12.1 and they need not be submitted to the Executive for comment prior to distribution, an appropriate representative of the financial adviser must confirm to the Executive in the manner set out above that these printed materials do not contain any material new information or significant new opinion.*

*~~Should there be any dispute as to whether the provisions of this Note have been complied with, the~~ The relevant financial adviser will be expected to satisfy the Executive that they have been the provisions of this Note have been complied with in case of doubt. Financial advisers may, therefore, find it useful to record the proceedings of meetings, although this is not a requirement. The offeror or the offeree company and their respective financial advisers must ensure that no meetings are arranged without the relevant financial adviser’s knowledge.*

*The above provisions apply to all such meetings held during an offer period wherever they take place, whether they are held in person or by telephone or other electronic means and even if with only one person or firm. Meetings with employees in their capacity as such (rather than in their capacity as shareholders) are not normally covered by this Note, although the Executive should be consulted if any employees hold a significant number of shares.”*



## Rule 12 – Confirmation as to publication, no material change and translation

116. Part 6 of the Consultation Paper proposed to amend Rule 8.6 to codify the practice of requiring submission of confirmations of publication and translation following the publication of a Code document.

**Question 19: Do you agree with the proposed new Notes 4 and 5 to Rule 12 and the consequential changes relating to the new Note to Rule 8.6 and the new Note 6 to Rules 9.3 and 9.4? If not, please give reasons.**

### *Public comments*

117. Almost all respondents supported the proposal. One respondent remarked that some company directors and even an entire board of directors may not be in a position to provide a confirmation of the accuracy of the English translation or vice versa due to language limitations. It was therefore suggested that the Executive should accept instead a confirmation from a professional translator noting that the directors of the issuer of the document will ultimately be responsible for all information contained in the Code document.

### *SFC's response*

118. The SFC considers the starting point to be that the responsibility for ensuring the accuracy of the information contained in a document rests with all the directors of the issuer of the document (see Rule 9.3). The proposed new Note 5 to Rule 12 provides that the confirmation should be signed by a director (on behalf of the board of directors) of the issuer of the document. The SFC would expect the relevant director to make proper arrangements to ensure the relevant translation is true and accurate. This would be likely to include using the services of an experienced and competent translator. This is consistent with Note 1 to Rules 9.3 and 9.4, which recognises that in certain circumstances the board may delegate certain responsibilities in an offer.
119. The SFC will therefore add new Notes 4 and 5 to Rule 12, and adopt the consequential changes by adding a new Note to Rule 8.6 and a new Note 6 to Rules 9.3 and 9.4 as proposed:

#### "4. Confirmation of publication and no material change

As soon as practicable following the publication of any document, the issuer of that document or its advisers must confirm in writing to the Executive that (a) the document has been published and the time and date of publication and (b) save for where the document is one of the documents included in the list published under the Note to Rule 12.1, there has been no material change to the version of the document in respect of which the Executive has confirmed that it has no further comment. Such confirmation should be accompanied by a copy of the published version of the document (both English and Chinese versions) and a marked-up version of the document showing any changes (including deletions) made subsequent to the Executive's confirmation.



## 5. Confirmation of translation

Following the publication of any document, the directors of the issuer of that document must confirm that the Chinese version of the document is a true and accurate translation of the English version and that it is consistent with the English version (or vice versa). Such confirmation should be in the form prescribed by the Executive from time to time and should be provided to the Executive as soon as possible and in any event no later than 5:00 p.m. on the business day after the publication of the document. The confirmation should be signed by a director (on behalf of the board of directors) of the issuer of the document. If the document is jointly issued, a confirmation should be provided by each of the parties issuing that document.

Under Rules 8.6 and 9.3, the responsibility to ensure that the Chinese version of the document is a true and accurate translation of the English version (or vice versa) lies with the directors of the issuing party. The provision of the confirmation of translation to the Executive does not absolve the responsibility of the directors of the issuing party in this regard.”

New Note to Rule 8.6 and new Note 6 to Rules 9.3 and 9.4:

### “Confirmation of translation

See Note 5 to Rule 12 regarding the confirmation of translation to be given to the Executive following the publication of any document.”

## **Note 3 to Rule 15.5 and Note 4 to Rule 26.2 – References to the Telecommunications Ordinance**

120. The SFC proposed to delete the definition of CA (ie, Communications Authority) and replace references to CA consents to regulatory approvals generally.

**Question 20: Do you agree with the proposed deletion of the definition of “CA” and the proposed amendments to Note 3 to Rule 15.5 and Note 4 to Rule 26.2? If not, please give reasons.**

### *Public comments*

121. All respondents supported the proposal. One respondent asked the SFC to clarify whether there would be a breach of the Codes if a mandatory offer was triggered unintentionally and it was later discovered that relevant regulatory approvals should have been sought beforehand.

### *SFC’s response*

122. It is a long-established rule that mandatory offers must not be subject to any condition except for the 50% acceptance condition. This ensures certainty in a mandatory offer. Note 4 to Rule 26.2 provides that an offeror will be in breach of the Takeovers Code if he triggers a mandatory offer without obtaining the CA’s prior consent and be subject to possible disciplinary action. The same principle would apply to other types of regulatory approvals. Effectively this means that issues relating to regulatory clearance must be resolved before a mandatory offer is



triggered and appropriate safeguards should be put in place to ensure compliance with the relevant rules.

123. Note 3 to Rule 15.5 and Note 4 to Rule 26.2 will therefore be amended as proposed.

*“Notes to Rule 15.5:*

*...*

*3. ~~CA decisions~~ Regulatory approvals*

*If an offer requires approval from a regulatory body (in relation to merger control or otherwise) the expected timetable for the relevant regulatory approval process should be set out in the offer document. Where there is a delay in a decision of the CA under section 7P of the Telecommunications Ordinance (Cap. 106) in the relevant approval process after posting publication of the offer document, the Executive will normally should be consulted at the earliest opportunity. In appropriate cases, the Executive may extend “Day 39” (see Rule 15.4) to the second day following the announcement of such decision approval with consequent changes to “Day 46” (see Rule 16.1) and “Day 60”. If there is a significant delay or there is an appeal against the CA’s decision whereby the extended “Day 39” under this Note 3 is likely to be more than 3 months from the posting of the offer document, the Executive should be consulted to determine whether the offer should lapse and to what extent the relevant provisions of the Takeovers Code will continue to apply after lapsing of the offer.*

*“Notes to Rule 26.2:*

*...*

*4. ~~CA consent~~ Regulatory approvals*

*No acquisition of voting rights which would give rise to a requirement for an offer under this Rule 26 may be made if such acquisition or offer may result in a “change” in relation to a carrier licence within the meaning of section 7P(16) of the Telecommunications Ordinance (Cap. 106) require prior approval from a regulatory body (in relation to merger control or otherwise). The restrictions in Rule 26.2 mean that the offeror cannot make ~~the an~~ offer conditional upon any ~~CA decision~~ such regulatory approval. A potential offeror under this Rule 26 must seek consent of the CA under section 7P(6) of the Telecommunications Ordinance the relevant regulatory approval before he triggers an obligation to make a general offer under Rule 26.1.*

*If an offeror triggers a mandatory offer without obtaining the ~~CA’s consent~~ relevant regulatory approval he will be in breach of this Note 4 and subject to possible disciplinary action.”*



## Rule 18 – Setting aside “no extension” and “no increase” statements

### *Competitive situations (Note 2 to Rule 18)*

124. Part 6 proposed to clarify that an offeror will be free to increase its offer if a competitive situation arises.

**Question 21: Do you agree with the proposed clarification to Note 2 to Rule 18? If not, please give reasons.**

125. All respondents supported the proposal and therefore it will be adopted.

#### *“2. Competitive situations*

*Subject to Note 4 to this Rule 18 below, if a competitive situation arises after a no extension or no increase statement has been made, the offeror can choose not to be bound by it and to be free to extend or increase its offer provided that:– ...”*

### *Circumstances in which statements may be set aside (Note 4 to Rule 18)*

126. The SFC proposed to extend an offeror’s right to set aside a no-increase or no-extension statement in situations which cannot be determined or controlled by the offeror so long as the reservation of the right to set aside is promptly made and prominently displayed in the document containing the statement.

**Question 22: Do you agree with the proposal to amend Note 4 to Rule 18? If not, please give reasons.**

### *Public comments*

127. All respondents who expressed a view supported the proposal. One respondent suggested that the Executive should require an offeror to specify the circumstances in which it may set aside a no-increase or no-extension statement, similar to the London Code. Another respondent commented that an issue might arise if an offeror were to set out an exhaustive list of reservations being exercised, particularly when the list is long.

### *SFC’s response*

128. The SFC notes that Note 4 to Rule 18 clearly provides that an offeror is required to specify the circumstances in which it may set aside a no-increase or no-extension statement. Precise details must also be included in the document. The SFC agrees that it may create uncertainty if an offeror were to set out a long list of possible scenarios in which it may set aside a no-increase or no-extension statement. In such circumstances, the Executive would be likely to raise concerns during the vetting process.

129. As such, the proposal will be adopted as proposed:

#### *“4. Reservation of right to set statements aside*





*A no extension or no increase statement may be set aside in the circumstances set out in Notes 2 and 3 to this Rule 18 above only if the offeror has specifically reserved the right to do so in such circumstances at the time the statement was made; this applies whether or not the offer was recommended at the outset. The first offer document sent to shareholders in which mention is made of the statement must contain prominent reference to this reservation (precise details of which must also be included in the document). Any subsequent mention by the offeror of the statement must be accompanied by a reference to the reservation or, at the least, to the relevant sections in the document containing the details. Notes 2 and 3 to this Rule 18 describe examples of specific types of reservation to set aside a no extension or no increase statement. However, other types of reservation may also be made, provided that the reservation does not depend solely on subjective judgements by the offeror or its directors or the fulfilment of which is in their hands. If the right to set aside the statement has not been specifically reserved as set out above, only in wholly exceptional circumstances will the offeror be allowed to extend or increase its offer, as the case may be (except for a 14 day extension pursuant to Rule 15.3), even if a recommendation from the board of the offeree company is forthcoming or if the offer is unconditional in all respects.*

#### **Rule 19.1 – Results announcements**

130. Part 6 of the Consultation Paper proposed to amend Rule 2.9 and add a new Note to Rule 19.1 to require disclosure of the number of shareholders voting for and against a resolution in a scheme of arrangement to privatise a company that is incorporated in a jurisdiction that applies the Headcount Test (namely, a scheme that is subject to approval by “a majority in number” representing 75% in value of the shareholders present and voting).

**Question 23: Do you agree with the proposed amendments to Rule 2.9 and the proposed new Note to Rule 19.1? If not, please give reasons.**

##### *Public comments*

131. Almost all respondents agreed with the proposal. One respondent commented that the proposal does not properly address the “majority in number” issue, and the Executive should go one step further to require the CCASS Participant to disclose the number of beneficial shareholders that it represents.

##### *SFC’s response*

132. As explained in the Consultation Paper, the proposal is intended to provide greater transparency and to reflect the number of shares held within CCASS in schemes of arrangement which are subject to the Headcount Test. In this regard, in relevant cases announcements of the results of any court or shareholders meeting to approve a scheme should disclose, in addition to the details required under Rule 2.9, the number of CCASS Participants instructing HKSCC Nominees Limited to vote for and against the resolution and the number of shares voted by such CCASS Participants.
133. Given the tight deadline for issuing a results announcement under Rule 19.1 (7.00 p.m. on the closing date) the Executive does not consider it to be practical to require



the CCASS Participant to disclose the number of beneficial shareholders that it represents. Further, the additional information might not be relevant in the context of the Headcount Test as those beneficial shareholders would not be counted towards it.

134. In light of the above, Rule 2.9 will be amended and the new Note to Rule 19.1 will be introduced as proposed:

**“2.9 Shareholder votes to be conducted by way of poll**

*Whenever the Codes require a matter to be approved by shareholders or any class or group thereof in general meeting the vote must be conducted by way of a poll. The company convening such meeting must appoint its auditors, share registrar or external accountants who are qualified to serve as auditors for such company, as scrutineer for the vote-taking.*

*The identity of the scrutineer and the results of the poll, (including:-*

*(a) the number of shares of each class voted for and against the resolution and the percentage of the relevant class of share capital which those numbers represent; and*

*(b) in the case of a scheme of arrangement which is subject to an approval by “a majority in number” requirement, the number of shareholders voting for and against the resolution and the percentage of the shareholders voting which that number represents and, among them, the number of CCASS Participants (as defined under the General Rules of the Central Clearing and Settlement System established and operated by Hong Kong Securities Clearing Company Limited) instructing HKSCC Nominees Limited to vote for and against the resolution and the number of shares voted by such CCASS Participants.)*

*must be announced.”*

“Note to Rule 19.1:

Schemes of arrangement

*In the case of a scheme of arrangement, an announcement must be published in accordance with the requirements of Rule 19.1 on the date on which any shareholder meeting to approve the scheme of arrangement is held. See Rule 2.9 for the disclosure requirements applicable to such announcements.”*

**Rule 30.1 – Conditions should not be subjective**

135. The SFC proposed to amend the heading of Rule 30.1 to remove the reference to “subjective” and to amend the rule to make it clear that an offer must not normally be made subject to conditions which depend on judgements of the offeree company.

**Question 24: Do you agree with the proposed amendments to Rule 30.1? If not, please give reasons.**



### *Public comments*

136. The majority of respondents welcomed the proposal. One respondent who agreed with the underlying principles giving rise to the proposal asked for clarification of how the restriction on conditions which are dependent on the offeree company's judgement would interact with conditions such as "*material adverse change*" clauses (**MAC Clauses**) which may potentially be dependent on the offeree company's action. Another respondent asked for clarification of the impact of the proposal on the application of Note 6 to Rule 3.5 in relation to pre-conditions.
137. One respondent who supported the proposal suggested that Rule 30.1 should adopt the second part of the corresponding rule in the London Code (ie, Rule 13.1 of the London Code) which provides guidance about when the London Panel may be prepared to accept an element of subjectivity in conditions especially in cases involving official authorisations or regulatory clearances.
138. Another respondent asked for clarification of what would constitute a condition the fulfilment of which is in the hands of the offeree company or its directors.
139. Some respondents did not agree with the proposal. Two of them suggested that conditions requiring the offeree company to maintain a certain cash balance should be allowed as the financing of offers may be subject to the fulfilment of these conditions. One of these respondents commented that not only should such conditions be allowed but offerors should be able to invoke such conditions to lapse offers. The same two respondents observed that under Rule 4 of the Takeovers Code an offeree company is already restricted from undertaking frustrating action. As such, a condition requiring the offeree company to maintain a certain cash balance is consistent with the requirements of Rule 4.
140. Whilst not directly related to the proposal, one respondent suggested that Mainland offerors should be permitted to announce a firm intention to make an offer subject to a financing condition as they often face difficulties in obtaining the necessary Mainland regulatory approvals to transfer money out of the Mainland.

### *SFC's response*

141. The SFC reiterates its view as referred to in the Consultation Paper that conditions regarding the offeree company maintaining a certain cash balance are not acceptable as they are subjective in that their fulfilment rests with the offeree company. This is consistent with the Codes' approach towards conditions which depend on judgements by the offeror or the fulfilment of which is in its hands and helps to ensure certainty.
142. In this regard it should be noted that Rule 4 of the Takeovers Code already provides a strong form of protection to offerors by restricting an offeree company from engaging in frustrating action during the course of an offer. This includes action which may have the effect of dispersing the offeree company's funds (such as acquiring assets of a material amount, entering into contracts otherwise than in the ordinary course of business and conducting, or providing financial assistance for, share buy-backs). In addition, from a corporate governance perspective, the SFC is concerned that a condition which has the effect of locking up a listed company's funds to assist an offer may not be in the interests of independent shareholders especially as it may affect the day-to-day operations of the company.



143. The SFC would like to emphasise that any financing of an offer which is subject to the offeree company maintaining a certain cash balance would be considered as conditional financing and is therefore not acceptable. This is consistent with the Executive's response to various past consultations in relation to the same or similar issues and with Practice Note 15 which states that it would not be acceptable for an offer to be subject to a financing condition. The SFC believes that this approach should be applied consistently to all companies that are subject to the Codes (including Mainland companies) in the interests of providing an even playing field in Code matters.
144. As regards the interaction between the proposal and MAC Clauses, the SFC accepts that many conditions if scrutinised closely may contain a possible element of subjectivity but MAC Clauses have generally been accepted as being sufficiently objective in nature as they tend to relate to the effect of the occurrence of events which are beyond the control of the offeree company.
145. The SFC does not consider it necessary to adopt the second part of Rule 13.1 of the London Code as Note 1 to Rule 30.1 already provides the following similar guidance:
- "The Executive may be prepared to accept an element of subjectivity in certain special circumstances where it is not practicable to specify all the factors on which satisfaction of a particular condition may depend, especially in cases involving official authorisations, the granting of which may be subject to additional material obligations for the offeror. It would also normally be acceptable in an announcement for an offer to be expressed as being conditional on statements or estimates being appropriately verified."*
146. As for the impact of the proposals on the application of Note 6 to Rule 3.5, the SFC would like to emphasise that as a starting point, conditions to offers should not be subjective in nature. However, the Codes do recognise that there could be an element of subjectivity as provided under Note 1 to Rule 30.1 and, in relation to pre-conditions, Note 6 to Rule 3.5. This will remain the case and parties and their advisers should consult the Executive at the earliest opportunity in line with Note 4 to Rule 3.5.
147. In light of the above, the SFC maintains its view that the proposed amendments to Rule 30.1 should be introduced. The SFC will therefore amend Rule 30.1 as proposed:
- "30.1 ~~Subjective conditions~~ Conditions to an offer
- An offer must not normally be made subject to conditions which depend on judgements by the offeror or the offeree company or the fulfilment of which is in its their respective hands."*

### **Rule 31.3 – Six months delay before acquisition above offer price**

148. The SFC proposed to amend Rule 31.3 to clarify that it also applies to mandatory offers that are unconditional at the outset.

**Question 25: Do you agree with the proposed amendments to Rule 31.3? If not, please give reasons.**



149. All respondents supported the proposal and the amendments to Rule 31.3 will be made as proposed:

*“31.3 6 months delay before acquisition above offer price*

*Except with the consent of the Executive, if a person, together with any person acting in concert with him, holds more than 50% of the voting rights of a company, neither that person nor any person acting in concert with him may, within 6 months after the end of the offer period of any previous offer made by him to the shareholders of that company which was unconditional at the time of publication of the offer document or became or was declared unconditional after the publication of the offer document, make a second offer to, or acquire any shares from, any shareholder in that company at a higher price than that made available under the previous offer. For this purpose the value of a securities exchange offer shall be calculated as at the day later of the date of the offer document or the date the offer became, or was declared, unconditional.”*

### **Paragraph 1 of Schedule II – Views of offeree board**

150. The SFC proposed to clarify that both the independent board committee’s advice and the independent financial adviser’s advice must be included in the offeree board circular.

**Question 26: Do you agree with the proposal to amend paragraph 1 of Schedule II and the related Note 4? If not, please give reasons.**

151. All respondents supported the proposal and the amendments to paragraph 1 of Schedule II and the related Note 4 will be adopted as proposed:

*“1. ~~The names of the directors of the offeree company and whether they recommend that the shareholders should accept or reject the offer of the directors comprising the independent committee of the board of the offeree company established in accordance with Rules 2.1 and 2.8, and the recommendation of the independent committee of the board given in accordance with Rule 2.1, or a statement that the directors are independent committee of the board is unable to make a recommendation (with reasons for the recommendation or for making no recommendation). A copy of the written advice of the offeree company’s independent financial advisers appointed in accordance with Rule 2.1 must also be given.~~*

*Notes:*

*...*

*4. ~~Financial~~ Independent financial adviser’s consent*

*The circular must, ~~unless issued by the financial adviser in question,~~ include a statement that the independent financial adviser has given and not withdrawn his consent to the issue of the circular with the inclusion of his recommendation or opinion in the form and context in which it is included.”*



## Paragraph 12(a) of Schedule I, Paragraph 6(a) of Schedule II and Paragraph 16(a) of Schedule III – Financial information

### *Historical Financial information*

152. The SFC proposed to allow Historical Financial Information in the relevant Code document be incorporated into it by referring to published accounts or accountants' reports that have been published in accordance with the Listing Rules.

**Question 27: Do you agree with the proposal to add a new Note 5 to paragraph 12 of Schedule I and a new note to paragraph 16 of Schedule III? If not, please give reasons.**

153. All respondents supported the proposal and the relevant amendments to Schedules I, II and III will be adopted as proposed:

New Note 5 to paragraph 12 of Schedule I:

"5. Where the offeror is a company listed on the Stock Exchange

For the purpose of paragraphs 12(a)(ii), (iii), (iv), (vi) and (vii) of this Schedule I, if the offeror is listed on the Stock Exchange, the information may be incorporated in the offer document by reference to the offeror's other documents published in accordance with the Listing Rules."

New Note to paragraph 6 of Schedule II:

"Note:

For the purpose of paragraphs 6(a)(ii), (iii), (iv), (vi) and (vii) of this Schedule II, if the offeree company is listed on the Stock Exchange, the information may be incorporated in the offeree board circular by reference to the offeree company's other documents published in accordance with the Listing Rules."

New Note to paragraph 16 of Schedule III

"Note:

For the purpose of paragraphs 16(a)(ii), (iii), (iv), (vi) and (vii) of this Schedule III, if the offeror is listed on the Stock Exchange, the information may be incorporated in the offer document by reference to the offeror's other documents published in accordance with the Listing Rules."

*Alignment with the latest terminology commonly used in accounting standards and certain provisions of the Listing Rules*

154. The SFC proposed to bring the relevant accounting terminology used in the Schedules to the Codes in line with the latest accounting standards and to conform to certain amended requirements of the Listing Rules.

**Question 28: Do you agree with the proposal amendments as set out in Appendix 3? If not, please give reasons.**



155. All respondents supported the proposal and the relevant amendments to Schedules I, II and III as set out in Appendix III of the Consultation Paper will be adopted as proposed.



## APPENDIX 1: LIST OF RESPONDENTS

(in alphabetical order)

### **Respondents whose comments are published on the SFC's website in full**

1. Association of Chartered Certified Accountants
2. Anglo Chinese Corporate Finance, Limited
3. Asia Securities Industry & Financial Markets Association
4. Black Crane Capital
5. BlackRock Asset Management North Asia Limited and BlackRock Inc.
6. Cathay Pacific Airways Limited
7. Hon Christopher Cheung Wah-fung, SBS, JP
8. FIL Investment Management (Singapore) Limited
9. HeungKong Financial Group
10. Hong Kong Aircraft Engineering Company Limited
11. Hong Kong General Chamber of Commerce
12. Hong Kong Investment Funds Association
13. Jeffrey Mak Law Firm
14. Latham & Watkins
15. Norton Rose Fulbright
16. Slaughter and May
17. Swire Pacific Limited
18. Swire Properties Limited
19. The Chamber of Hong Kong Listed Companies
20. The Hong Kong Institute of Chartered Secretaries
21. The Law Society of Hong Kong





**Respondents who requested their comments to be published on the SFC’s website on a “no name” basis**

Four submissions

**Respondents who requested their name and comments to be withheld**

One submission



## APPENDIX 2: CONSOLIDATED AMENDMENTS

### New section 5.2 to the Introduction to the Codes

#### Dealings with the Executive

5.2 Any person dealing with the Executive must do so in an open and co-operative way. Prompt co-operation and assistance are expected from persons dealing with the Executive and those to whom enquiries and other requests are directed. In such dealings, a person must disclose any information known to him and relevant to the matter being considered (and correct or update that information if it changes). A person dealing with the Executive or to whom enquiries or requests are directed must take all reasonable care to provide true, accurate and complete information.

Where a matter has been determined by the Executive and a person becomes aware that information supplied to the Executive was not true, accurate or complete, that person must promptly contact the Executive to correct the position. In addition, where a determination of the Executive has continuing effect (such as the grant of exempt status or a concert party ruling), the party or parties to that determination must promptly notify the Executive of any new information relevant to that determination.

For the avoidance of doubt, nothing in this section limits the general application of General Principle 10.

### Section 7 to the Introduction to the Codes

7.1 While the Executive may sometimes see fit to make a ruling under the Codes of its own volition, a ruling is more often requested by an interested party. A ruling by the Executive normally involves a consideration of all relevant information in relation to the application and a more thorough analysis than that permissible under a consultation. In some cases the Executive may find it necessary to convene an informal meeting or hear the views of other interested parties before making a ruling. The Executive requires prompt co-operation from those to whom enquiries are directed so that decisions may be both properly informed and given as speedily as possible. Rulings may initially be conveyed to parties orally but will always be confirmed in writing in time. Particular attention should be paid to the obligations under section 5.2 of this Introduction.

#### Compliance rulings

7.2 If the Executive is satisfied that:

- (a) there is a reasonable likelihood that a person will contravene a requirement imposed by or under the Codes; or
- (b) a person has contravened a requirement imposed by or under the Codes, the Executive may give any direction that appears to it to be necessary in order to:
  - (i) restrain a person from acting (or continuing to act) in breach of a relevant requirement under the Codes; or



- (ii) restrain a person from doing (or continuing to do) a particular thing, pending determination of whether that or any other conduct of his is or would be a breach of a relevant requirement under the Codes; or
- (iii) otherwise secure compliance with a relevant requirement under the Codes.

### **Section 8.3 of the Introduction to the Codes**

8.3 Each ~~submission application~~ should be signed by the applicant and should close with accompanied by a duly completed and signed prescribed filing form available on the SFC's website. Such filing form contains a statement by the applicant certifying the truth, accuracy and completeness of statements contained in the submission application. When the application is filed by an adviser, the filing form also contains a statement should confirm that the applicant has authorised the filing of the application by the adviser. Such statement does not relieve the adviser of its obligation to use all reasonable efforts to ensure that its client understands, and abides by, the relevant requirements of the Codes, and that the submission of its client is true, accurate and complete. Any subsequent submissions in respect of an application should also contain a statement by the applicant certifying the truth, accuracy and completeness of statements contained in the submission.

### **Section 11 of the Introduction to the Codes**

#### *Dealings with the Panel*

11.18 The obligations set out in section 5.2 of this Introduction apply equally to a person dealing with the Panel.

### **Section 12 of the Introduction to the Codes**

12.2 ~~A disciplinary case is one the sole or main purpose of which is to propose that disciplinary action should be taken. Disciplinary action is to be distinguished from requiring compliance with, or requiring that action be taken to remedy a breach of, the Codes or of a ruling of the Executive or the Panel. In any such case, the Executive invites the person concerned to appear before the Panel. If the Panel finds there has been a breach of either of the Codes or of a ruling, it may impose any of the following sanctions:-~~

- (a) issuance of a public statement which involves criticism;
- (b) public censure;
- (c) requiring licensed corporations, licensed representatives, registered institutions, or relevant individuals, for a stated period, not to act or continue to act in any or a stated capacity for any person who has failed to comply, or has indicated that he does not intend to comply, with either of the Codes or a ruling;
- (d) banning advisers from appearing before the Executive or the Panel for a stated period; and/or
- (e) requiring further action to be taken as the Panel thinks fit.



The Executive or the Panel may report a person to other regulatory authorities or professional bodies even though there has been no finding of a breach if the person so reported is governed by rules, regulations or standards of professional conduct of the relevant regulatory authority or professional body and the Executive or the Panel has reasonable grounds for believing that the conduct of such person may have contravened such rules, regulations or standards of professional conduct.

### **Section 13 of the Introduction to the Codes**

...

13.10 The Chairman of the hearing may give any preliminary or procedural direction (including a compliance ruling of the nature described in section 7.2 of this Introduction) as he considers appropriate for the determination of a matter without the need for a hearing. Any ruling made by the Chairman is a ruling of the Panel.

...

13.12 The Panel may also give directions of the nature described in section 7.2 of this Introduction.

13.13 Where any person has breached the requirements of Rules 13, 14, 16, 23, 24, 25, 26, 28, 30 or 31.3 of the Takeovers Code, the Panel may make a ruling requiring the person to pay, within such period as is specified, to the holders, or former holders, of securities of the offeree company such amount as the Panel thinks just and reasonable so as to ensure that such holders receive what they would have been entitled to receive if the relevant Rule had been complied with. In addition, the Panel may make a ruling requiring simple or compound interest to be paid at a rate and for a period (including in respect of any period prior to the date of the ruling and until payment) to be determined. The Panel's power to make a ruling under this section may be exercised irrespective of whether any sanction referred to in section 12.2 of this Introduction is imposed.

### **New section 14.9 of the Introduction to the Codes**

14.9 The obligations set out in section 5.2 of this Introduction apply equally to a person dealing with the Takeovers Appeal Committee.

### **Definition of Acting in concert**

**Acting in concert:** Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), actively cooperate to obtain or consolidate "control" (as defined below) of a company through the acquisition by any of them of voting rights of the company.

Without prejudice to the general application of this definition, persons falling within each of the following classes will be presumed to be acting in concert with others in the same class unless the contrary is established:–

...

(5) a financial or other professional adviser (including a stockbroker)\* with its client in respect of the shareholdings of the adviser and persons controlling<sup>#</sup>, controlled by or



under the same control as the adviser (except in the capacity of an exempt principal trader or exempt fund manager);

...

## Definition of Associate

**Associate:** ~~It is not practicable to define associate in terms which would cover all the different relationships which may exist in an offer. The term associate will cover all persons acting in concert with an offeror. It is also intended to apply to a wider range of persons (who may not be acting in concert) and will cover all persons who directly or indirectly own or deal in the relevant securities of an offeror or the offeree company in an offer and who have (in addition to their normal interests as shareholders) an interest or potential interest, whether commercial, financial or personal, in the outcome of the offer.~~

~~Without prejudice to the generality of the foregoing~~ With respect to an offeror or potential offeror or the offeree company (the "first person"), the term associate normally includes the following:–

- (1) ~~an offeror's or the offeree company's parent, subsidiaries and fellow subsidiaries, and their associated companies, and companies of which such companies are associated companies;~~ any person acting in concert with the first person;
- (2) ~~any bank and financial and other professional adviser (including a stockbroker)\* to an offeror, the offeree company or any company in class (1) of the parent, subsidiaries and fellow subsidiaries of the first person, including persons controlling<sup>#</sup>, controlled by or under the same control as such banks, financial and other professional advisers~~ (other than exempt fund managers and exempt principal traders covered in class (5) below);
- (3) ~~the directors (together with their close relatives\*\*, related trusts and companies controlled<sup>#</sup> by any of the directors, their close relatives or related trusts) of an offeror, the offeree company or any company in class (1)~~ any subsidiary or fellow subsidiary of the first person;
- (4) ~~the pension funds, provident funds and employee share schemes of an offeror, the offeree company or any company in class (1)~~ the parent, subsidiaries and fellow subsidiaries of the first person;
- (5) ~~any investment company, unit trust or other person whose investments an associate manages on a discretionary basis, in respect of the relevant investment accounts;~~ any exempt principal trader or exempt fund manager which is controlling<sup>#</sup>, controlled by or under the same control as the financial and other professional adviser (including a stockbroker)\* of the first person, its parent, subsidiaries and fellow subsidiaries; and
- (6) a person who owns or controls 5% or more of any class of relevant securities (as defined in paragraphs (a) to (d) in Note 4 to Rule 22) issued by ~~an offeror or the offeree company~~ the first person, including a person who as a result of any transaction owns or controls 5% or more. When two or more persons act pursuant to an agreement or understanding (formal or informal) to acquire or control such securities, they will be deemed to be a single person for the purpose of this paragraph. Such securities managed on a discretionary basis by an investment management group will, unless otherwise agreed by the Executive, also be deemed to be those of a single person (see Rule 22.3).~~;~~ and



~~(7) a company having a material trading arrangement with an offeror or the offeree company.~~

~~# See Note 1 at the end of the definitions.~~

~~\* See Note 2 at the end of the definitions.~~

~~\*\* See Note 8 to the definition of acting in concert.~~

## **Definition of CA**

~~**CA:** means the Communications Authority established under section 3 of the Communications Authority Ordinance (Cap. 616).~~

## **Definition of Connected fund manager and connected principal trader**

**Connected fund manager and connected principal trader:** A fund manager or principal trader will be connected with an offeror or the offeree company, as the case may be, if the fund manager or principal trader controls<sup>#</sup>, is controlled by or is under the same control as:–

- (1) an offeror;
- (2) the offeree company;
- (3) any ~~bank or~~ financial or other professional adviser (including a stockbroker)\* to an offeror or the offeree company; or
- (4) an investor in a consortium formed for the purpose of making an offer (e.g. through a special purpose company).

~~# See Note 1 at the end of the definitions.~~

~~\* See Note 2 at the end of the definitions.~~

## **New Note to Rule 2.2 of the Takeovers Code**

2.2 If after a proposed offer the shares of an offeree company are to be delisted from the Stock Exchange, neither the offeror nor any persons acting in concert with the offeror may vote at the meeting, if any, of the offeree company's shareholders convened in accordance with the Listing Rules. The resolution to approve the delisting must be subject to:–

- (a) approval by at least 75% of the votes attaching to the disinterested shares that are cast either in person or by proxy at a duly convened meeting of the holders of the disinterested shares;
- (b) the number of votes cast against the resolution being not more than 10% of the votes attaching to all disinterested shares; and
- (c) the offeror being entitled to exercise, and exercising, its rights of compulsory acquisition.



Note to Rule 2.2:

In cases where the offeree company is incorporated in a jurisdiction that does not afford compulsory acquisition rights to an offeror, the Executive may be prepared to waive the requirement of Rule 2.2(c). In considering whether to grant such a waiver, the Executive will normally require, among other things, the offeror to put in place arrangements such that:-

- (i) where the offer becomes or is declared unconditional in all respects, the offer will remain open for acceptance for a longer period than normally required by Rule 15.3;
- (ii) shareholders who have not yet accepted the offer will be notified in writing of the extended closing date and the implications if they choose not to accept the offer; and
- (iii) the resolution to approve the delisting is subject to the offeror having received valid acceptances amounting to 90% of the disinterested shares.

## **Rule 2.9 of the Takeovers Code**

### **2.9 Shareholder votes to be conducted by way of poll**

Whenever the Codes require a matter to be approved by shareholders or any class or group thereof in general meeting the vote must be conducted by way of a poll. The company convening such meeting must appoint its auditors, share registrar or external accountants who are qualified to serve as auditors for such company, as scrutineer for the vote-taking.

The identity of the scrutineer and the results of the poll, (including:-

- (a) the number of shares of each class voted for and against the resolution and the percentage of the relevant class of share capital which those numbers represent; and
- (b) in the case of a scheme of arrangement which is subject to an approval by “a majority in number” requirement, the number of shareholders voting for and against the resolution and the percentage of the shareholders voting which that number represents and, among them, the number of CCASS Participants (as defined under the General Rules of the Central Clearing and Settlement System established and operated by Hong Kong Securities Clearing Company Limited) instructing HKSCC Nominees Limited to vote for and against the resolution and the number of shares voted by such CCASS Participants,)

must be announced.

## **Rule 3.8 of the Takeovers Code**

### **3.8 Announcement of numbers of relevant securities in issue**

When an offer period begins, the offeree company must announce, as soon as possible, details of all classes of relevant securities issued by the offeree company, together with the numbers of such securities in issue. An offeror or potential named offeror must also



announce the same details relating to its relevant securities (and if relevant, the relevant securities of the company the securities of which are to be offered as consideration for the offer) following any announcement identifying it as an offeror or potential offeror, ~~unless it has stated that its offer is likely to be solely in cash.~~

In the announcement, the offeree company, the offeror or potential named offeror should remind their respective associates to disclose their dealings in any relevant securities of the offeree company, or in the case of, In a securities exchange offer, any securities in the same class as the securities that are offered as consideration under an offer the offeree company, the offeror or potential named offeror should also remind their respective associates to disclose their dealings in any relevant securities of the offeror or potential named offeror (or of the company the securities of which are to be offered as consideration for the offer, as the case may be).

The text of Note 11 to Rule 22 should also be included in any announcement commencing an offer period.

If the information included in an announcement made under this Rule 3.8 changes during the offer period, a revised announcement must be made as soon as possible.

*Note to Rule 3.8:*

*Relevant securities*

*See Note 4 to Rule 22.*

## **Notes to Rule 8.1 of the Takeovers Code**

...

### **2. *Press, television and radio interviews***

*Parties involved in an offer must take particular care not to release new material in interviews or discussions with the media. The requirements regarding meetings and presentations or other documents set out in Note 3 below will also apply to any interviews and discussions and any written communication relating to an offer which is provided to the media.*

### **3. *Meetings***

*Subject always to Rule 34, meetings of representatives of the offeror or the offeree company or their respective advisers with any shareholders in, or holders of other relevant securities (as defined in Note 4 to Rule 22) of, either the an offeror or the offeree company, investment analysts, stockbrokers or others engaged in investment management or advice may take place during the offer period, provided that so long as no material new information is forthcoming provided, and no significant new opinions are expressed, by the relevant representative or adviser and the following provisions are observed. Except with the consent of the Executive, an appropriate representative of the financial adviser to the offeror or the offeree company must be present. That representative will be responsible for confirming in writing to the Executive, not later than 12.00 noon on the business day following the date of the meeting, that no material new information was forthcoming provided, and no significant*





*new opinions were expressed, by the relevant representative or adviser at the meeting.*

*Materials such as press releases or printouts of slides which highlight the salient facts of the offer may be distributed at the meeting and should be fairly presented. Whilst the Executive would not normally regard these printed materials as documents for the purpose of Rule 12.1 and they need not be submitted to the Executive for comment prior to distribution, an appropriate representative of the financial adviser must confirm to the Executive in the manner set out above that these printed materials do not contain any material new information or significant new opinion.*

*~~Should there be any dispute as to whether the provisions of this Note have been complied with, the~~ The relevant financial adviser will be expected to satisfy the Executive that they have been the provisions of this Note have been complied with in case of doubt. Financial advisers may, therefore, find it useful to record the proceedings of meetings, although this is not a requirement. The offeror or the offeree company and their respective financial advisers must ensure that no meetings are arranged without the relevant financial adviser's knowledge.*

*The above provisions apply to all such meetings held during an offer period wherever they take place, whether they are held in person or by telephone or other electronic means and even if with only one person or firm. Meetings with employees in their capacity as such (rather than in their capacity as shareholders) are not normally covered by this Note, although the Executive should be consulted if any employees hold a significant number of shares.*

4. *Information issued by associates (e.g. financial advisers or stockbrokers)*

*Rule 8.1 does not prevent the issue of circulars during the offer period to their own investment clients by brokers or advisers to any party to the transaction provided such issue has previously been approved by the Executive.*

*In giving to their own clients material on the companies involved in an offer, associates of an offeror or the offeree company must bear in mind the essential point that new information must not be restricted to a small group. Accordingly, such material must not include any statements of fact or opinion derived from information not generally available.*

*The associate's status must be clearly disclosed.*

*Attention is drawn to class (5) of the definition of acting in concert and class (2) of the definition of associate, as a result of which, for example, this Note will be relevant to stockbrokers who, although not directly involved with the offer, are associates of an offeror or the offeree company because the stockbroker is in the same group as the financial adviser to an offeror or the offeree company.*

*In this connection, all entities within the same group as any financial advisers to an offeror or the offeree company should, after the commencement of an offer period, stop issuing research reports on the offeree company and, in the case of a securities exchange offer, the offeror company, except with the Executive's prior consent. The concern is that these reports may contain profit*



forecast statements which require full compliance with Rule 10. The financial adviser is not required to retrieve (or procure its group entities to retrieve) research reports already distributed prior to the offer period but all entities within the financial adviser's group should stop distributing these old reports and they should be removed from the websites. The Executive should be consulted and it would normally regard any research reports issued within 6 months prior to the offer period as being "live".

### **New Note to Rule 8.6 of the Takeovers Code**

8.6 Each document is to be written in English or Chinese and shall include or be accompanied by a translation, as the case requires, in Chinese or English, unless the Executive has previously agreed to waive this requirement.

Note to Rule 8.6:

Confirmation of translation

See Note 5 to Rule 12 regarding the confirmation of translation to be given to the Executive following the publication of any document.

### **New Note 6 to Rule 9.3 and 9.4 of the Takeovers Code**

6. Confirmation of translation

See Note 5 to Rule 12 regarding the confirmation of translation to be given to the Executive following the publication of any document.

### **New Notes 4 and 5 to Rule 12 of the Takeovers Code**

...

4. Confirmation of publication and no material change

As soon as practicable following the publication of any document, the issuer of that document or its advisers must confirm in writing to the Executive that (a) the document has been published and the time and date of publication and (b) save for where the document is one of the documents included in the list published under the Note to Rule 12.1, there has been no material change to the version of the document in respect of which the Executive has confirmed that it has no further comment. Such confirmation should be accompanied by a copy of the published version of the document (both English and Chinese versions) and a marked-up version of the document showing any changes (including deletions) made subsequent to the Executive's confirmation.

5. Confirmation of translation

Following the publication of any document, the directors of the issuer of that document must confirm that the Chinese version of the document is a true and accurate translation of the English version and that it is consistent with the English version (or vice versa). Such confirmation should be in the form prescribed by the Executive from time to time and should be provided to the Executive as soon as possible and in any event no later than 5:00 p.m. on the



business day after the publication of the document. The confirmation should be signed by a director (on behalf of the board of directors) of the issuer of the document. If the document is jointly issued, a confirmation should be provided by each of the parties issuing that document.

Under Rules 8.6 and 9.3, the responsibility to ensure that the Chinese version of the document is a true and accurate translation of the English version (or vice versa) lies with the directors of the issuing party. The provision of the confirmation of translation to the Executive does not absolve the responsibility of the directors of the issuing party in this regard.

### **Note 3 to Rule 15.5 of the Takeovers Code**

#### **3. CA decisions-Regulatory approvals**

If an offer requires approval from a regulatory body (in relation to merger control or otherwise) the expected timetable for the relevant regulatory approval process should be set out in the offer document. Where there is a delay in a decision of the CA under section 7P of the Telecommunications Ordinance (Cap. 106) in the relevant approval process after posting publication of the offer document, the Executive will normally should be consulted at the earliest opportunity. In appropriate cases, the Executive may extend "Day 39" (see Rule 15.4) to the second day following the announcement of such decision approval with consequent changes to "Day 46" (see Rule 16.1) and "Day 60". If there is a significant delay or there is an appeal against the CA's decision whereby the extended "Day 39" under this Note 3 is likely to be more than 3 months from the posting of the offer document, the Executive should be consulted to determine whether the offer should lapse and to what extent the relevant provisions of the Takeovers Code will continue to apply after lapsing of the offer.

### **Notes to Rule 18 of the Takeovers Code**

...

#### **2. Competitive situations**

Subject to Note 4 to this Rule 18 below, if a competitive situation arises after a no extension or no increase statement has been made, the offeror can choose not to be bound by it and to be free to extend or increase its offer provided that:-

- (a) an announcement to this effect is given as soon as possible (and in any event within 4 business days after the day of the announcement of the competing offer) and a circular is sent to shareholders at the earliest opportunity; and
- (b) any shareholders of the offeree company who accepted the offer after 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.



...

#### 4. *Reservation of right to set statements aside*

*A no extension or no increase statement may be set aside in—~~the circumstances set out in Notes 2 and 3 to this Rule 18 above~~ only if the offeror has specifically reserved the right to do so in ~~such circumstances~~ at the time the statement was made; this applies whether or not the offer was recommended at the outset. The first offer document sent to shareholders in which mention is made of the statement must contain prominent reference to this reservation (precise details of which must also be included in the document). Any subsequent mention by the offeror of the statement must be accompanied by a reference to the reservation or, at the least, to the relevant sections in the document containing the details. Notes 2 and 3 to this Rule 18 describe examples of specific types of reservation to set aside a no extension or no increase statement. However, other types of reservation may also be made, provided that the reservation does not depend solely on subjective judgements by the offeror or its directors or the fulfilment of which is in their hands. If the right to set aside the statement has not been specifically reserved as set out above, only in wholly exceptional circumstances will the offeror be allowed to extend or increase its offer, as the case may be (except for a 14 day extension pursuant to Rule 15.3), even if a recommendation from the board of the offeree company is forthcoming or if the offer is unconditional in all respects.*

### **New Note to Rule 19.1 of the Takeovers Code**

Note to Rule 19.1:

#### Schemes of arrangement

In the case of a scheme of arrangement, an announcement must be published in accordance with the requirements of Rule 19.1 on the date on which any shareholder meeting to approve the scheme of arrangement is held. See Rule 2.9 for the disclosure requirements applicable to such announcements.

### **Rule 21.7 of the Takeovers Code**

21.7 Restriction on securities borrowing and lending transactions by offerors, the offeree company and certain other parties

During the offer period, none of the following persons may, except with the consent of the Executive, enter into or take action to unwind a securities borrowing or lending transaction in respect of relevant securities of the offeree company and, in the case of securities exchange offers, the offeror:

- (a) the offeror;
- (b) the offeree company;
- (c) ~~a company which is an associate of the offeror or the offeree company by virtue of paragraph (1) of the definition of associate;~~



- (~~ec~~) a financial or professional adviser ~~to the offeror or the offeree company, to a company which is an associate of the offeror or offeree company by virtue of paragraph (1) of the definition of associate or to a person acting in concert with an offeror or with the directors of the offeree company, and persons controlling<sup>#</sup>, controlled by or under the same control as any such adviser (except for an exempt principal trader or an exempt fund manager); and~~
- (~~ed~~) any other person acting in concert with the offeror or the offeree company.

<sup>#</sup> See Note 1 at the end of the definitions.

## Rule 22.1 of the Takeovers Code

### 22.1 Dealings by parties and by associates for themselves or for discretionary clients

- (a) Own account

Dealings in relevant securities by an offeror or the offeree company, and by any associates of either of them, for their own account during an offer period must be publicly disclosed in accordance with Notes 5, 6 and 7 to this Rule 22.

- (b) For discretionary clients

- (i) Dealings in relevant securities by an offeror or the offeree company, and by any associates of either of them, for the account of discretionary investment clients during an offer period must be publicly disclosed in accordance with Notes 5, 6 and 7 to this Rule 22.

If, however, the associate is an exempt fund manager connected with an offeror or the offeree company, paragraph (ii) below will apply.

- (ii) Except with the consent of the Executive, dealings in relevant securities during an offer period for the account of discretionary investment clients by an associate of an offeror or the offeree company which is an exempt fund manager connected with an offeror or the offeree company (as the case may be) must be privately disclosed in accordance with Notes 5, 6 and 7 to this Rule 22.

If, however, the exempt fund manager is an associate of an offeror or the offeree company by virtue of class (6) of the definition of associate, the exempt fund manager must disclose publicly under Rule 22.1.

## Rule 22.2 of the Takeovers Code

### 22.2 Dealings by parties and by associates for non-discretionary clients

Except with the consent of the Executive, dealings in relevant securities during an offer period by an offeror, ~~or the offeree company, and by any associates of either of them,~~ for the account of non-discretionary investment clients (other than an offeror, the offeree company ~~and, or any associates of either of them~~) must be privately disclosed in accordance with Notes 5, 6 and 7 to this Rule 22.



## Rule 22.4 of the Takeovers Code

### 22.4 Connected exempt principal traders

Dealings in relevant securities by an exempt principal trader connected with an offeror or the offeree company should be aggregated and disclosed, in accordance with Note 6(a) to this Rule 22, not later than ~~10.00 a.m.~~ 12.00 noon on the business day following the date of the transactions, stating the following details:-

- (i) total purchases and sales;
- (ii) the highest and lowest prices paid and received; and
- (iii) whether the connection is with an offeror or the offeree company.

In the case of dealings in options or derivatives, full details should be given so that the nature of the dealings can be fully understood (see Note 7 to this Rule 22).

## Notes to Rule 22 of the Takeovers Code

...

### 3. Offer period

*This Rule 22 applies only during an offer period. Dealings by any associates of an offeror or the offeree company (other than persons acting in concert with any offeror) need not be disclosed during the period between the date when the offer becomes or is declared unconditional in all respects and the end of the offer period.*

### 4. Relevant Securities

*Relevant securities for the purpose of this Rule 22 include:-*

- (a) *securities of the offeree company which are being offered for or which carry voting rights;*
- (b) *equity share capital of the offeree company and in a securities exchange offer only, of an offeror or of a company the securities of which are to be offered as consideration for the offer (as the case may be);*
- (c) *securities of an offeror or of a company the securities of which are to be offered as consideration for the offer (as the case may be) which carry the same or substantially the same rights as any to be issued as consideration for the offer;*
- (d) *securities carrying conversion or subscription rights into any of the foregoing; and*
- (e) *options and derivatives in respect of any of the foregoing.*



*The taking, granting, exercising, lapsing or closing out of an option (including a traded option contract) in respect of any of the foregoing or the exercise or conversion of any security under (d) above whether in respect of new or existing securities and the acquisition of, entering into, closing out, exercise (by either party) of any rights under, or issue or variation of, a derivative will be regarded as a dealing in relevant securities (see also Notes 7 and 9 to this Rule 22).*

5. *Timing of disclosure*

*Disclosure must be made no later than ~~10.00 a.m.~~ 12.00 noon on the business day following the date of the transaction. ~~Where or, where~~ dealings have taken place on stock exchanges in the time zones of the United States and there may be difficulty in disclosing dealings by 10.00 a.m., the no later than 12.00 noon on the second business day following the date of the transaction. The Executive should be consulted at the earliest opportunity if there is difficulty in meeting the deadlines set.*

6. *Method of disclosure*

(a) *Public disclosure*

*Dealings should be disclosed in writing to ~~all offerors and the offeree company or their respective financial advisers.~~ At the same time all such dealings should be disclosed in writing to the Executive using the prescribed forms available on the SFC's website. The Executive will arrange for the posting of the disclosure on the SFC's website and on the Stock Exchange's website.*

*Persons proposing to engage in dealings should also acquaint themselves with the disclosure requirements of Part XV of the Securities and Futures Ordinance (Cap. 571).*

*~~If parties to an offer and their associates~~ any person chooses to make an announcements regarding dealings in addition to making formal disclosures, they that person must ensure that no confusion results.*

*Public disclosure may be made by the ~~party~~ person concerned or by an agent acting on its behalf. Where there is more than one agent (e.g. a merchant bank and a stockbroker), particular care should be taken to ensure that the responsibility for disclosure is agreed between the parties and that it is neither overlooked nor duplicated.*

7. *Details to be included in disclosures*

(a) *Public disclosure (Rules 21.7, 22.1(a) and 22.1(b))*

*A specimen disclosure form may be obtained from the Executive or the SFC's website. Disclosures should follow that format.*

*A disclosure of dealings must include the following information:–*

(i) *the total of the relevant securities in question purchased or*



- sold, or redeemed or bought back by the company itself;*
- (ii) the prices paid or received (in the case of an average price bargain, each underlying trade should be disclosed);*
  - (iii) the identity of the ~~associate or other~~ person dealing and, if different, the owner or controller;*
  - (iv) if the dealing is by an associate of an offeror or the offeree company, an explanation of how that status arises;*
  - (v) if the disclosure is made by a 5% shareholder or group of shareholders, a statement to that effect;*
  - (vi) the resultant total amount of relevant securities owned or controlled by the ~~associate or other person in question~~ dealing (including those of any person with whom there is an agreement or understanding) and the percentage which it represents; and*
  - (vii) if relevant, details of any arrangements required by Note 8 to this Rule 22.*

*For the purpose of disclosing identity, the ultimate beneficial owner or controller must be specified, in addition to the person dealing. The naming of nominees or vehicle companies is insufficient. The Executive may require additional information to be disclosed when it appears to be appropriate, for example to identify other persons who have an interest in the securities in question. Subject to Note 10 to this Rule 22, in the case of disclosure of dealings by fund managers on behalf of discretionary clients, the clients need not be named.*

*In the case of option business or dealings in options or derivatives full details should be given so that the nature of the dealings can be fully understood. For options this should include the number of securities under option, the exercise period (or in the case of exercise, the exercise date), the exercise price and any option money paid or received. For derivatives this should include, at least, the number of reference securities to which they relate (when relevant), the maturity date (or if applicable the closing out date) and the reference price.*

*If an associate is an associate for more than one reason (for example because he falls within classes (65) and (76) of the definition of associate), all the reasons must be specified.*

*Where a disclosure of a securities borrowing and lending transaction (including the unwinding of such a transaction) is made pursuant to Notes 2 and 3 to Rule 21.7, all relevant details should be given as specified in the specimen disclosure form.*

*Where a person to whom Rule 21.7 applies discloses a dealing in relevant securities and has previously borrowed relevant securities from, or lent such securities to, another person, the disclosure must*





be made in a form agreed by the Executive.

(b) *Private disclosure (Rules 22.1(b)(ii) and 22.2)*

*Private disclosure under Rule 22.1(b)(ii) by exempt fund managers connected with an offeror or the offeree company must be in the form required by the Executive. A specimen disclosure form may be obtained from the Executive or the SFC website.*

*A private disclosure under Rule 22.2 must include the identity of the associate person dealing, the total number of relevant securities purchased or sold and the prices paid or received (in the case of an average price bargain, each underlying trade should be disclosed). ~~A specimen disclosure form may be obtained from the Executive.~~ Rule 22.2 disclosures should follow that format. In the case of dealings in options or derivatives the same information as specified in Note 7(a) to this Rule 22 is required.*

...

11. *Responsibilities of stockbrokers, banks and other intermediaries*

*Stockbrokers, banks and others who deal in relevant securities on behalf of clients have a general duty to ensure, so far as they are able, that those clients are aware of the disclosure obligations attaching to associates of an offeror or the offeree company and other persons under Rule 22 and that those clients are willing to comply with them. Principal traders and dealers who deal directly with investors should, in appropriate cases, likewise draw attention to the relevant Rules. However, this does not apply when the total value of dealings (excluding stamp duty and commission) in any relevant security undertaken for a client during any 7 day period is less than \$1 million.*

*This dispensation does not alter the obligation of principals, associates and other persons themselves to initiate disclosure of their own dealings, whatever total value is involved.*

*Intermediaries are expected to co-operate with the Executive in its dealings enquiries. Therefore, those who deal in relevant securities should appreciate that stockbrokers and other intermediaries will supply the Executive with relevant information as to those dealings, including identities of clients, as part of that co-operation.*

...

**Note 4 to Rule 26.2 of the Takeovers Code**

4. ~~CA consent~~ Regulatory approvals

*No acquisition of voting rights which would give rise to a requirement for an offer under this Rule 26 may be made if such acquisition or offer may ~~result in a “change” in relation to a carrier licence within the meaning of section 7P(16) of the Telecommunications Ordinance (Cap. 106)~~ require prior approval from a regulatory body (in relation to merger control or otherwise). The restrictions in*



*Rule 26.2 mean that the offeror cannot make ~~the an~~ offer conditional upon any ~~CA decision such regulatory approval~~. A potential offeror under this Rule 26 must seek ~~consent of the CA under section 7P(6) of the Telecommunications Ordinance the relevant regulatory approval~~ before he triggers an obligation to make a general offer under Rule 26.1.*

*If an offeror triggers a mandatory offer without obtaining the ~~CA's consent relevant regulatory approval~~ he will be in breach of this Note 4 and subject to possible disciplinary action.*

## **Note 1 on dispensations from Rule 26 of the Takeovers Code**

1. *Vote of independent shareholders on the issue of new securities ("Whitewash")*

*(See Schedule VI – Whitewash Guidance Note for the detailed requirements of the Takeovers Code under this Note.)*

*When the issue of new securities as consideration for an acquisition, or a cash subscription, or the taking of a scrip dividend, would otherwise result in an obligation to make a mandatory offer under this Rule 26, the Executive will normally waive the obligation if there is an the whitewash waiver and the underlying transaction(s) are separately approved by at least 75% and more than 50% respectively of the independent vote that are cast either in person or by proxy at a shareholders' meeting. For this purpose "independent vote" means a vote by shareholders who are not involved in, or interested in, the transaction in question. The requirement for a mandatory offer will also normally be waived, provided there has been an independent vote of shareholders, in cases involving the underwriting of an issue of shares. If an underwriter incurs an obligation under this Rule 26 unexpectedly, for example as a result of failure by a sub-underwriter in respect of all or part of his liability, the Executive should be consulted.*

...

## **Rule 30.1 of the Takeovers Code**

- 30.1 ~~Subjective conditions~~ Conditions to an offer

An offer must not normally be made subject to conditions which depend on judgements by the offeror or the offeree company or the fulfilment of which is in ~~its~~ their respective hands.

## **Rule 31.3 of the Takeovers Code**

- 31.3 6 months delay before acquisition above offer price

Except with the consent of the Executive, if a person, together with any person acting in concert with him, holds more than 50% of the voting rights of a company, neither that person nor any person acting in concert with him may, within 6 months after the end of the offer period of any previous offer made by him to the shareholders of that company which was unconditional at the time of publication of the offer document or became or was declared unconditional after the publication of the offer document, make a second



offer to, or acquire any shares from, any shareholder in that company at a higher price than that made available under the previous offer. For this purpose the value of a securities exchange offer shall be calculated as at the day later of the date of the offer document or the date the offer became, or was declared, unconditional.

#### **Note 1 to paragraph 4 of Schedule I to the Codes**

1. *Relevant shareholdings*

*References in this paragraph 4 to shareholdings should be taken to mean:–*

(a) *in the case of shareholdings in the offeree company, holdings of:–*

- (i) *securities which are being offered for or which carry voting rights;*
- (ii) *convertible securities, warrants, options and derivatives in respect of (i); ~~and~~*

(b) *in the case of shareholdings in the offeror company, holdings of:–*

- (i) *equity share capital;*
- (ii) *securities which carry substantially the same rights as any to be issued as consideration for the offer; ~~and~~*
- (iii) *convertible securities, warrants, options and derivatives in respect of (i) or (ii); and*

(c) in the case of a securities exchange offer involving the offer as consideration of securities in a company other than the offeror, references to shareholdings in the offeror in this paragraph 4 should be taken to mean shareholdings in the company whose securities are being offered as consideration and (b) above should be construed accordingly.

#### **Paragraph 12 of Schedule I to the Codes**

12 (a) In the case of a securities exchange offer the following information about the offeror:–

- (i) for the last 3 financial years for which the information has been published, ~~turnover-revenue, net-profit or loss before taxation, net profit or loss attributable to shareholders-owners of the company, net profit or loss attributable to minority interests-non-controlling interests, comprehensive income attributable to owners of the company, comprehensive income attributable to non-controlling interests, the charge for tax expense, items which are exceptional because of size, nature or incidence-any income or expense which are material, the amount absorbed by~~ of dividends distributed to owners, and earnings and dividends per share;



- (ii) a statement of ~~the assets and liabilities~~ financial position as shown in the last published audited accounts;
  - (iii) a ~~cash flow~~ statement of cash flows if provided in the last published audited accounts;
  - (iv) any other primary statement shown in the last published audited accounts;
  - (v) all material changes in the financial or trading position or outlook of the offeror subsequent to the last published audited accounts or a statement that there are no known material changes;
  - (vi) details relating to the items referred to in paragraph 12(a)(i) of this Schedule I above in respect of any interim statement or preliminary announcement made since the last published audited accounts;
  - (vii) significant accounting policies together with any points from the notes to the relevant published accounts which are of major relevance to an appreciation of the information contained in paragraphs 12(a)(i) to (vi) of this Schedule I above;
  - (viii) details of any ~~qualification~~ modified opinion, emphasis of matter or material uncertainty related to going concern contained in the auditors' report in respect of each of the last 3 financial years or ~~a~~ an appropriate negative statement ~~that there is no such qualification~~; and
  - (ix) where, because of a change in accounting policy, figures are not comparable to a material extent, this should be disclosed and the approximate amount of the resultant variation should be stated.
- (b) Except for cash offers seeking to privatise the offeree company, and without any waiver of the acceptance condition, all offer documents must contain a description of how the offer is to be financed and the source of the finance. The principal lenders or arrangers of such finance must be named. Where the offeror intends that the payment of interest on, repayment of or security for any liability (contingent or otherwise) will depend to any significant extent on the business of the offeree company, a description of the arrangements contemplated will be required. Where this is not the case, a negative statement to this effect must be made.

*Notes:*

1. *Where the offeror is a subsidiary company*

*The Executive will normally look through unlisted subsidiaries in interpreting this paragraph 12 of Schedule I unless, with the approval of the Executive, the subsidiary in question is regarded as being of sufficient substance in relation to the group and the offer. Accordingly if the offeror is part of a group, information will normally be required on the ultimate holding company in the form of group accounts.*



2. *Further information requirements*

*If the offeror is not listed on the Stock Exchange, in addition to the above requirements, the Executive would normally expect it to include a general description of the business interests of the offeror and/or other person(s) concerned and details of those assets which the Executive considers may be relevant to the business of the offeree company.*

3. *Partial offers*

*Where the offer is a partial offer, the offer document must contain the information required under paragraph 12(a) of this Schedule I, whether the consideration is securities or cash.*

4. *Where securities in a company other than the offeror are being offered as consideration*

*In the case of a securities exchange offer involving the offer as consideration of securities in a company other than the offeror, references to the offeror in this paragraph 12(a) of Schedule I should be taken to mean the company whose securities are being offered as consideration. In these cases the Executive should be consulted.*

5. *Where the offeror is a company listed on the Stock Exchange*

*For the purpose of paragraphs 12(a)(ii), (iii), (iv), (vi) and (vii) of this Schedule I, if the offeror is listed on the Stock Exchange, the information may be incorporated in the offer document by reference to the offeror's other documents published in accordance with the Listing Rules.*

## **Paragraph 1 of Schedule II to the Codes**

1. The names of the directors of the offeree company and ~~whether they recommend that the shareholders should accept or reject the offer~~ of the directors comprising the independent committee of the board of the offeree company established in accordance with Rules 2.1 and 2.8, and the recommendation of the independent committee of the board given in accordance with Rule 2.1, or a statement that the directors are independent committee of the board is unable to make a recommendation (with reasons for the recommendation or for making no recommendation). A copy of the written advice of the offeree company's independent financial advisers appointed in accordance with Rule 2.1 must also be given.

Notes:

...

4. ~~Financial-Independent financial~~ adviser's consent

~~The circular must, unless issued by the financial adviser in question, include a statement that the independent financial adviser has given and not withdrawn~~



*his consent to the issue of the circular with the inclusion of his recommendation or opinion in the form and context in which it is included.*

## **Paragraph 2 of Schedule II to the Codes**

2. (i) The shareholdings of the offeree company in the offeror;
- (ii) the shareholdings in the offeree company and in the offeror in which directors of the offeree company are interested;
- (iii) the shareholdings in the offeree company and (in the case of a securities exchange offer only) in the offeror owned or controlled by a subsidiary of the offeree company, by a pension fund of the offeree company or of a subsidiary of the offeree company, or by ~~an adviser to a person who is presumed to be acting in concert with~~ the offeree company ~~as specified in by virtue of class (5) of the definition of acting in concert or who is an associate of the offeree company by virtue of class (2) of the definition of associate~~ but excluding exempt principal traders and exempt fund managers;
- (iv) the shareholdings in the offeree company and (in the case of a securities exchange offer only) in the offeror owned or controlled by a person who has an arrangement of the kind referred to in Note 8 to Rule 22 of the Takeovers Code with the offeree company or with any person who is ~~an associate of presumed to be acting in concert with~~ the offeree company by virtue of classes (1), (2), (3) and (4~~5~~) of the definition of acting in concert or who is an associate of the offeree company by virtue of classes (2), (3) and (4) of the definition of associate;
- (v) except with the consent of the Executive, the shareholdings in the offeree company and (in the case of a securities exchange offer only) in the offeror which are managed on a discretionary basis by fund managers (other than exempt fund managers) connected with the offeree company (the beneficial owner need not be named);
- (vi) whether the directors of the offeree company intend, in respect of their own beneficial shareholdings, to accept or reject the offer; and
- (vii) the shareholdings in the offeree company and (in the case of a securities exchange offer only) the offeror which the offeree company or any directors of the offeree company has borrowed or lent, save for any borrowed shares which have been either on-lent or sold.

If in any of the above categories, other than category (v), there are no shareholdings, then this fact should be stated. This will not apply to category (iv) above if there are no such arrangements.

If any person whose shareholdings are required by categories (i) or (ii) above to be disclosed (whether there is an existing holding or not) has dealt for value in the shares in question during the period beginning 6 months prior to the offer period and ending with the latest practicable date prior to the posting of the offeree board circular, the details, including dates and prices, must be stated.



If any person whose shareholdings are required by categories (iii), (iv) or (v) above to be disclosed (whether there is an existing holding or not) has dealt for value in the shares in question during the offer period and ending with the latest practicable date prior to the posting of the offeree board circular, the details, including dates and prices, must be stated.

In all cases, if no such dealings have taken place this fact should be stated.

*Notes:*

1. *When directors resign*

*When, as part of the transaction leading to an offer being made, some or all of the directors of the offeree company resign, the foregoing requirements of this paragraph 2 of Schedule II apply to them and their shareholdings and dealings must be disclosed in the offeree board circular in the usual way.*

2. *Arrangements in relation to dealings*

*The circular from the offeree board advising shareholders on an offer, whether recommending acceptance or rejection of the offer, must disclose any arrangements of the kind referred to in the third paragraph of Note 8 to Rule 22 of the Takeovers Code which exist between the offeree company, or any person who is an associate of presumed to be acting in concert with the offeree company by virtue of classes (1), (2), (3) or (45) of the definition of acting in concert or who is an associate of the offeree company by virtue of classes (2), (3) and (4) of the definition of associate, and any other person; if there are no such arrangements, this should be stated. If the directors or their financial advisers are aware of any such arrangements between any other associate of the offeree company and any other person, such arrangements must also be disclosed.*

3. *Notes to paragraph 4 of Schedule I*

*The Notes to paragraph 4 of Schedule I apply equally to this paragraph 2 of Schedule II.*

## **Paragraph 6 of Schedule II to the Codes**

6. (a) The following information about the offeree company:–

- (i) for the last 3 financial years for which the information has been published, turnover revenue, net profit or loss before taxation, net profit or loss attributable to shareholders owners of the company, net profit or loss attributable to minority interests non-controlling interests, comprehensive income attributable to owners of the company, comprehensive income attributable to non-controlling interests, the charge for tax expense, items which are exceptional because of size, nature or incidence any income or expense which are material, the amount absorbed by of dividends distributed to owners, and earnings and dividends per share;



- (ii) a statement of ~~the assets and liabilities~~ financial position as shown in the last published audited accounts;
  - (iii) a ~~cash flow~~ statement of cash flows if provided in the last published audited accounts;
  - (iv) any other primary statement shown in the last published audited accounts;
  - (v) all material changes in the financial or trading position or outlook of the offeree company subsequent to the last published audited accounts or a statement that there are no known material changes;
  - (vi) details relating to items referred to in paragraph 6(a)(i) of this Schedule II above in respect of any interim statement or preliminary announcement made since the last published audited accounts;
  - (vii) significant accounting policies together with any points from the notes to the relevant published accounts which are of major relevance to an appreciation of the information contained in paragraphs 6(a)(i) to (vi) of this Schedule II above; and
  - (viii) details of any ~~qualification~~ modified opinion, emphasis of matter or material uncertainty related to going concern contained in the auditors' report in respect of each of the last 3 financial years or ~~a~~ an appropriate negative statement that there is no such qualification.
- (b) Where, because of a change in accounting policy, figures are not comparable to a material extent, this should be disclosed and the approximate amount of the resultant variation should be stated.

Note:

For the purpose of paragraphs 6(a)(ii), (iii), (iv), (vi) and (vii) of this Schedule II, if the offeree company is listed on the Stock Exchange, the information may be incorporated in the offeree board circular by reference to the offeree company's other documents published in accordance with the Listing Rules.

### **Paragraph 16 of Schedule III to the Codes**

16. (a) The following information about the offeror:—
- (i) for the last 3 financial years for which the information has been published, ~~turnover~~ revenue, ~~net~~ profit or loss before taxation, ~~net~~ profit or loss attributable to ~~shareholders~~ owners of the company, ~~net~~ profit or loss attributable to ~~minority interests~~ non-controlling interests, comprehensive income attributable to owners of the company, comprehensive income attributable to non-controlling interests, ~~the charge for tax~~ expense, ~~items which are exceptional because of size, nature or incidence~~ any income or expense which are material, the amount ~~absorbed by~~ of ~~dividends~~ distributed to owners, and earnings and dividends per share;





- (ii) a statement of ~~the assets and liabilities~~ financial position as shown in the last published audited accounts;
  - (iii) a ~~cash flow~~ statement of cash flows if provided in the last published audited accounts;
  - (iv) any other primary statement shown in the last published audited accounts;
  - (v) all material changes in the financial or trading position or outlook of the offeror subsequent to the last published audited accounts or a statement that there are no known material changes;
  - (vi) details relating to the items referred to in (i) of this paragraph 16(a) in respect of any interim statement or preliminary announcement made since the last published audited accounts;
  - (vii) significant accounting policies together with any points from the notes to the relevant published accounts which are of major relevance to an appreciation of the information contained in (i) to (vi) of this paragraph 16(a); and
  - (viii) details of any ~~qualification~~ modified opinion, emphasis of matter or material uncertainty related to going concern contained in the auditors' report in respect of each of the last 3 financial years or ~~a~~ an appropriate negative statement that there is no such qualification.
- (b) Where, because of a change in accounting policy, figures are not comparable to a material extent, this should be disclosed and the approximate amount of the resultant variation should be stated.

Note:

For the purpose of paragraphs 16(a)(ii), (iii), (iv), (vi) and (vii) of this Schedule III, if the offeror is listed on the Stock Exchange, the information may be incorporated in the offer document by reference to the offeror's other documents published in accordance with the Listing Rules.

## Paragraph 2 of Schedule VI to the Codes

2. Specific grant of waiver required

...

- (e) approval of the proposals by an independent vote at a meeting of the holders of any relevant class of securities in accordance with Note 1 on dispensations from Rule 26 of the Takeovers Code, whether or not any such meeting needs to be convened to approve the issue of the securities in question; and...



## Paragraph 4 of Schedule VI to the Codes

4. Circular to shareholders

...

- (e) a statement that the Executive has agreed, subject to approval by independent shareholders in accordance with Note 1 on dispensations from Rule 26 of the Takeovers Code, to waive any obligations to make a general offer which might result from the transaction;

...

## Paragraph 2 of Schedule IX to the Codes

**“Associate”**: In addition to the persons listed under the definition of “associate” in the Definitions section of the Codes, with respect to an offeror or potential offeror or the offeree company (the “first person”), the term “associate” normally includes the following:–

- (87) any trustee (in its capacity as trustee of a REIT) of an offeror, the offeree REIT or any company in class (1) of the definition of acting in concert; and
- (98) any management company (together with persons controlling<sup>#</sup>, controlled by or under the same control as the management company) of an offeror, the offeree REIT or any company in class (1) of the definition of acting in concert.

## Paragraph 3 of Schedule IX to the Codes

...

- (f) Availability of information – information issued by associates (Note 4 to Rule 8.1 of the Takeovers Code)**

With respect to Note 4 to Rule 8.1 of the Takeovers Code, attention should also be drawn to classes (87) and (98) of the definition of “associates” under this Guidance Note.

...

- (p) Shareholdings and dealings (paragraph 2 of Schedule II to the Codes)**

In cases where the offeree company is a REIT, the disclosure obligations under paragraph 2 of Schedule II and Note 2 to such paragraph should also apply to any person who is an associate of the offeree company by virtue of classes (7) and (8) of the definition of associate.