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# SFC Consultation Paper On (1) Proposal To Stop Commenting On Routine Announcements Under The Codes On Takeovers And Mergers And Share Repurchases And (2) Proposed Miscellaneous Amendments To The Codes

The Securities and Futures Commission ("SFC") issued a consultation paper on 21 April, 2010 setting out proposed amendments to the Codes on Takeovers and Mergers and Share Repurchases (the "**Codes**") ("**Consultation Paper**"). The Consultation Paper is set out in two parts:

**Part 1** sets out the proposals to amend Rule 12.1 of the Takeovers Code (Filing of documents for comments) so that certain routine announcements will no longer need to be submitted to the Executive for comment before publication.

**Part 2** sets out proposals for various miscellaneous amendments including a proposal to amend section 16.1 of the Introduction to the Codes relating to the publication of rulings of the Panel and the Takeovers Appeal Committee in matters which are price sensitive or otherwise subject to confidentiality considerations of a commercial nature. Other minor "housekeeping" amendments are also proposed.

The Consultation Paper is available on [the SFC website](http://www.sfc.hk/sfcConsultation/EN/sfcConsultFileServlet?name=amendtomergercode&type=1&docno=1). Interested parties should submit their comments to the SFC no later than **19 May 2010**.

## Part 1 - Proposal to stop commenting on routine announcements under the Codes on Takeovers and Mergers and Share Repurchases

The current Rule 12.1 of the Takeovers Code provides that:

*12.1 Filing of documents for comments*

All documents must be filed with the Executive for comment prior to release or publication and must not be released or published until the Executive has confirmed that it has no further comments thereon. 6 final copies of the document must be filed with each of the Executive and the Stock Exchange.

Under the Takeovers Code, "document" is defined as:

*"...any announcement, advertisement or document issued or published by any party to an offer or possible offer in connection with such offer or possible offer, other than documents which are required to be put on display for inspection under Notes 1 and 2 to Rule 8 of the Takeovers Code..."*

These include:

* Announcements issued under Rules 2, 3, 7, 8, 19, 25 and 26
* Whitewash circulars
* Offer documents
* Offeree circulars
* Circulars relating to schemes of arrangement, special deals and share repurchases

Pursuant to Rule 12.1, all "documents" (i.e. announcements and circulars) issued under the Codes must be submitted to the Executive for comment before release or publication. The Consultation Paper proposes to remove this requirement for routine announcements that do not require substantive comments from the Executive. The Executive conducted a review in late 2009 on the commenting process for certain routine announcements and noted that it does not normally have substantive Code comments on the following types of announcement:

1. appointment of independent financial advisers under Rule 2.1;
2. despatch of circulars under Rule 8 or Rule 25;
3. delay in dispatch of circulars under Rule 8.2 or Rule 8.4;
4. appointment and resignation of directors of the offeree company under Rule 26.4 and Rule 7; and
5. placing and top-up transactions under Note 6 on dispensations from Rule 26.

The Executive therefore proposes to remove the requirement for the categories of announcement referred to above. The proposal aims to reduce the cost and burden of compliance for those issuing announcements. It also aims to promote self-discipline among financial advisers and parties to ensure compliance with the Codes.

Should the proposals come into effect, the Executive will issue a Practice Note to clarify the following (see Appendix 2 of the Consultation Paper):

1. a list of announcements which do not require submission to the Executive for comment prior to publication (the "Post-Vet List") will be available on the SFC website. Normally, the Executive will not comment on announcements in the List but parties and their advisers must consult the Executive in advance if there is any doubt as to whether an announcement qualifies for post-vetting. A draft of the List is in Appendix 3 of the Consultation Paper.
2. To qualify for post-vetting, the contents of the announcement should be strictly limited to matters relating to the relevant rule. If the announcement contains additional information which requires the Executive's comments, the announcement must be submitted under Rule 12.1 of the Takeovers Code before it can be issued. Appendix 2 contains further guidance.
3. "Documents" that do not fall within the Post-Vet List will be required to be submitted to the Executive for comment before publication in accordance with Rule 12.1. The Executive considers that the application of Rule 12.1 should not be relaxed for circulars and some other types of announcements, particularly announcements issued under Rule 3, as the commenting process provides a platform for consultation between advisers and the Executive during which substantive Code issues can be raised and dealt with before publication.
4. Practical and prescriptive guidance will be given for announcements in the Post-Vet List including clarification of instances when the Executive should be consulted in advance of publication - particularly where the Executive's ruling or consent is required for a specific announcement.
5. The published version of the announcement must be filed with the Executive immediately after it is published. The announcement will be reviewed and the Executive will take appropriate action for non-compliance which may include follow up enquiries, issuing a letter to the parties and their advisers or request for an immediate supplementary disclosure or a clarification announcement to be made. The Executive proposes to adopt a pragmatic approach when determining the appropriate recourse for non-compliance and mitigating factors will be taken into consideration.
6. In cases of difficulty, it is proposed that the Executive will reserve an overriding power to require parties and/or their advisers to submit drafts of the announcement for review prior to publication where the Executive considers it necessary or appropriate. It is believed that the proposed overriding power coupled with the possibility of appropriate action for non-compliance with the Codes, will discourage the abuse of the proposed relaxation of Rule 12.1.

## Part 2 - Proposed miscellaneous amendments to the Codes

The proposals for miscellaneous amendments to the Codes are set out below.

* **Section 16.1 of the Introduction (publication of rulings)**

In the interests of transparency, the Executive proposes that the decisions of the Panel and the Takeovers Appeal Committee should be published as promptly as possible. The current section 16.1 allows the deferral of the publication of decisions under section 16.1 due to confidentiality considerations of a commercial nature or a ruling being price sensitive. The proposal will ensure that decisions are made equally available to all market participants.

* **Rule 3.5 - requirement of negative statements in announcements**

Rule 3.5 provides a list of specific disclosures to be made in an announcement of a firm intention to make an offer. It is proposed that if Rule 3.5(c) to (h) does not apply, a negative statement must be included in the announcement.

* **Notes 1 and 2 to Rule 8 (documents to be on display and display of documents on websites)**

The Executive proposes to delete the last paragraph of these sections regarding the transitional arrangements for the implementation of changes as they are now obsolete.

* **Rule 10.2, Rule 10.4 and Note 6(a) to Rule 22 (profit forecasts, publication of reports and consent letters and disclosure of dealings)**

The removal of the references to "press" in Rule 10.2, 10.4 and Note 6(a) to Rule 22 because announcements are no longer required to be made in the press.

* **Rule 10.7, paragraph 12(a)(i) of Schedule I, paragraph 6(a) (i) of Schedule II and paragraph 16(a)(i) of Schedule III (financial information - extraordinary items, exceptional items and minority interests)**

The proposed changes seek to bring the relevant sections in line with the disclosure requirements for financial statements under the Hong Kong Financial Reporting Standards and the International Financial Reporting Standards. These changes will also reflect the requirements of the Companies Ordinance.

* **Rule 19.1 (nature of announcement)**

To reflect the practice of the Hong Kong Stock Exchange's new vetting regime and the new regime for electronic dissemination of regulatory information, the Executive proposes to amend Rule 19.1.

* **Rule 22.1(b)(ii) (dealings by parties and by associates for themselves or for discretionary clients)**

The proposal aims to remove the additional private disclosure which is considered to be excessive and is currently required to be made by an associate who is an exempt fund manager connected with an offeror or the offeree company when dealing in relevant securities during an offer period for the account of discretionary investment clients.

* **Note 6 to Rule 22 (method of disclosure)**

The proposals to amend Note 6 to Rule 22 is in line with the current practice that Rule 22 disclosures (both public and private) should be made using the prescribed forms provided on the SFC's website. It is further proposed that the requirement to disclose such dealings to the Stock Exchange should also be removed as the Stock Exchange no longer requires such information to be provided to it.

* **Note 5 to Rule 23.1 (acquisitions for securities)**

For the sake of consistency with Rule 23.1(a) of the Takeovers Code, the Executive proposes to amend the prescribed time period in Note 5 to Rule 23.1 from the current 12 months to 6 months.

* **Rule 26.7 (method of disclosure)**

The Executive proposes to remove the transitional provisions for the creeper for the 12 months following the reduction of the trigger threshold from 35% to 30% on 19 October 2001 under Rule 26.7 of the Takeovers Code as the transition period is no longer applicable.

*The purpose of this newsletter is to provide a summary only of information included in the SFCs "Consultation Paper on the (1) proposal to stop commenting on routine announcements under The Codes on Takeovers and Mergers and Share Repurchases and (2) proposed miscellaneous amendments to the Codes" (21 April 2010). Its contents do not constitute legal advice and specific advice should be sought in relation to any particular situation.*

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