

---

**Obligations of Directors of the Offeror**  
**under the Hong Kong Code on Takeovers and**  
**Mergers**

---

**CHARLTONS**  
**易周律師行**  
Solicitors

**Hong Kong**

**Shanghai**

**Beijing**

**Yangon**

[www.charltonslaw.com](http://www.charltonslaw.com)





## CONTENTS

<b>1.</b>	<b>Background</b>	<b>1</b>
<b>2.</b>	<b>The Takeovers Code</b>	<b>1</b>
<b>3.</b>	<b>General Principles</b>	<b>1</b>
<b>4.</b>	<b>Mandatory Offer under Rule 26</b>	<b>2</b>
<b>5.</b>	<b>Voluntary Offers</b>	<b>3</b>
<b>6.</b>	<b>The Offer</b>	<b>4</b>
<b>7.</b>	<b>Advisers</b>	<b>4</b>
<b>7.1</b>	<b>Financial Advisers</b>	<b>4</b>
<b>7.2</b>	<b>Legal Advisers</b>	<b>5</b>
<b>7.3</b>	<b>Stockbrokers</b>	<b>5</b>
<b>7.4</b>	<b>Auditors</b>	<b>5</b>
<b>7.5</b>	<b>Press Consultants</b>	<b>5</b>
<b>7.6</b>	<b>Seek advice before any dealing</b>	<b>5</b>
<b>8.</b>	<b>Offeror Announcements</b>	<b>5</b>
<b>8.1</b>	<b>Announcement of a Firm Intention to make an Offer (Rule 3.5)</b>	<b>5</b>
<b>9.</b>	<b>The Offer Document</b>	<b>6</b>
<b>9.1</b>	<b>The Formal Offer</b>	<b>6</b>
<b>9.2</b>	<b>A Letter from the Offeror</b>	<b>7</b>
<b>9.3</b>	<b>Terms and conditions</b>	<b>7</b>
<b>10.</b>	<b>The Offeree Board Circular</b>	<b>8</b>
<b>11.</b>	<b>Offer Period</b>	<b>8</b>
<b>12.</b>	<b>Communication with shareholders, the press and the public</b>	<b>8</b>
<b>12.1</b>	<b>Profit forecasts</b>	<b>8</b>
<b>12.2</b>	<b>Other statements</b>	<b>9</b>

<b>12.3</b>	<b>Meetings and telephone calls</b>	<b>9</b>
<b>12.4</b>	<b>Statements to the Press</b>	<b>9</b>
<b>12.5</b>	<b>Summary: seek advice</b>	<b>9</b>
<b>13.1</b>	<b>Legal responsibilities</b>	<b>9</b>
<b>13.2</b>	<b>General Takeovers Code responsibilities</b>	<b>10</b>
<b>13.3</b>	<b>Preparation of documentation</b>	<b>10</b>
<b>13.4</b>	<b>Responsibility statements</b>	<b>10</b>
<b>13.5</b>	<b>Independent committee of the board</b>	<b>11</b>
<b>14.</b>	<b>DEALINGS</b>	<b>11</b>
<b>14.1</b>	<b>General</b>	<b>11</b>
<b>14.2</b>	<b>Restrictions on dealings during the offer</b>	<b>11</b>
<b>14.3</b>	<b>Restrictions on dealings during securities exchange offers</b>	<b>11</b>
<b>14.4</b>	<b>Dealings after termination of discussions</b>	<b>12</b>
<b>14.5</b>	<b>Disclosure of dealings</b>	<b>12</b>
<b>14.</b>	<b>Restrictions Following Offers</b>	<b>15</b>
<b>15.</b>	<b>Compulsory Purchase Requirements under the Companies Ordinance</b>	<b>15</b>
<b>15.1</b>	<b>Purchase of the Minority's Shareholding</b>	<b>15</b>
<b>15.2</b>	<b>The Minority's Right to be Bought Out</b>	<b>16</b>
<b>16.</b>	<b>Delisting following a general offer</b>	<b>16</b>
<b>17.</b>	<b>Conclusion</b>	<b>17</b>

## 1. **Background**

This note is prepared for the directors of the Offeror in connection with the possible acquisition of a controlling interest of at least 30% of the issued shares (“Shares”) of a company (the “Offeree”) by the Offeror from the shareholders of the Company. The purpose of this memorandum is to give a general outline of the practical and legal issues which may arise in connection with the proposed acquisition by the Offeror under the Hong Kong Code on Takeovers and Mergers (“the Takeovers Code”) where the Offeree is primary listed on the Stock Exchange of Hong Kong Limited or is regarded by the Securities and Futures Commission (“SFC”) as a ‘public company’ for the purpose of the Takeovers Code.

## 2. **The Takeovers Code**

The Takeovers Code applies to takeovers and mergers affecting companies with a primary listing of their equity securities in Hong Kong and public companies in Hong Kong. In determining whether an Offeree is a “public company” in Hong Kong, the Executive Director of the Corporate Finance Division of the SFC (“Executive”) applies an economic or commercial test, taking into account, primarily, the number of Hong Kong shareholders and the extent of share trading in Hong Kong. Other factors which the Executive will consider are the location of the head office and place of central management, the location of the business and assets, and the existence or absence of protection for Hong Kong shareholders under any statute or code regulating takeovers and mergers outside Hong Kong.

The Takeovers Code is a voluntary Code which depends on the willingness of market participants to comply with it. It is administered by the Executive and operates principally to ensure fair and equal treatment of all shareholders in relation to takeovers. Anyone in breach of the Takeovers Code may be subject to the SFC’s private reprimand, public censure, and/or issuance of a public statement which involves criticism, disciplinary action or suspension. A person who has breached specific provisions<sup>1</sup> of the Takeovers Code may also be ordered to pay compensation to shareholders who suffered loss as a result of the breach.<sup>2</sup>

## 3. **General Principles**

The Takeovers Code sets out 10 general principles which provide the acceptable standards of commercial conduct in relation to takeovers and mergers in Hong Kong including the following:-

- all shareholders are to be treated equally;
- if control of an Offeree changes, a general offer to all other shareholders is normally required;

---

<sup>1</sup> The right to compensation applies to breaches of Rules 13, 14, 16, 23, 24, 25, 26, 28, 30 and 31.3.

<sup>2</sup> Section 13.13 of the Introduction to the Takeovers Codes.

- during the course of an offer or when an offer is in contemplation, information made available to some shareholders must be made available to all shareholders;
- an offer should only be made after careful and responsible consideration;
- shareholders should be given sufficient information, advice and time regarding the offer;
- all persons concerned with takeovers and mergers should make full and prompt disclosure of all relevant information and take every precaution to avoid the creation of a false market and making statements which may mislead shareholders or the market;
- rights of control should be exercised in good faith and the oppression of minority shareholders is unacceptable;
- directors should have regard to the interests of the shareholders as a whole;
- the board of the Offeree must not take actions to frustrate a proposed bona fide offer or deny the shareholders the opportunity to decide on its merits; and
- all parties concerned with takeovers and mergers should co-operate to the fullest extent with the Executive, the Takeovers and Mergers Panel ("Panel") and the Takeovers Appeal Committee.

#### 4. **Mandatory Offer under Rule 26**

In addition to the above principles, the Takeovers Code contains 36 rules which implement the general principles. The most important rule is contained in Rule 26 relating to the making of a **mandatory offer**.

Rule 26 of the Takeovers Code requires a mandatory offer to be made to all the shareholders of the Offeree by the Offeror in the following circumstances, unless a waiver is granted by the Executive:

- i. when any person (or two or more persons **acting in concert**) acquires, whether by a series of transactions over a period of time or not, **30% or more of the voting rights** of a company; and
- ii. when any person (or two or more persons acting in concert) holding **not less than 30% and not more than 50% of the voting rights** of a company, acquires additional voting rights that increase his or their holding of voting rights by more than 2% from the lowest percentage holding by that person (or the concert group) in the preceding 12 month period. This is commonly referred to as the 'creeper' provision.

**Conditions of the Mandatory Offer:** except with the consent of the Executive, a mandatory offer made under Rule 26 is subject to the following:

- it must be made conditional only upon the Offeror having received acceptances in respect of voting rights which, together with voting rights acquired or agreed to be acquired before or during the offer, will result in the Offeror and any person acting in concert with it holding more than **50%** of the voting rights. However, where the Offeror holds more than 50% of the voting rights before the offer is made, an offer made under this rule should normally be unconditional;
- no acquisition of voting rights which would trigger the obligation to make a mandatory offer under Rule 26 must be made if the making or implementation of the mandatory offer would be subject to the passing of any resolution by shareholders of the Offeror, or any other conditions, consents, arrangements or regulatory approvals. Any regulatory approval required for a mandatory offer must be obtained before the general offer obligation is triggered.<sup>3</sup>

Thus, if the Offeror acquires 30% or more of the voting shares of the Offeree, it must make an offer to all other shareholders for the remaining interest in cash or accompanied by a cash alternative at **not less than** the highest price paid by the Offeror, or any person acting in concert with it, for shares of the same class in the Offeree during the offer period and within 6 months prior to its commencement (Rule 26.3).

An “offer period” commences when an announcement is made of a proposed offer under Rule 3.5 (Announcement of a firm intention to make an offer) or a possible offer under Rule 3.7 and extends until the later of: (i) the date when the offer closes for acceptances; (ii) the date the offer lapses; (iii) an announcement that a possible offer will not proceed; (iv) the date of an announcement of the withdrawal of a proposed offer; and (v) where the offer contains a possibility to elect for alternative forms of consideration, the latest date for making such election.

The Offeror will have to prepare a formal offer document and conduct the offer in accordance with the requirements of the Takeovers Code as discussed below.

## 5. Voluntary Offers

Unlike a mandatory offer, a voluntary offer may be made subject to conditions other than the acceptance condition except conditions which depend on judgments by the Offeror or the Offeree or the fulfilment of which is in their respective control (Rule 30.1). A voluntary offer may also be made conditional on an acceptance level higher than 50%. Typically, the offer document sets a minimum acceptance condition of either 50% of the issued shares or 90% of the shares not already held by the Offeror and its concert parties.

A voluntary offer may be in cash or securities, although there are prescribed situations where a cash offer or a securities offer must be made to all shareholders. If the Offeror or any concert party has acquired for cash shares in the Offeree carrying 10% or more of the voting rights during

---

<sup>3</sup> Note 4 to Rule 26.

the offer period or within 6 months before the start of the offer period, the general offer must be in cash, or accompanied by a cash alternative, at not less than the highest price paid for such shares (Rule 23.1(a)). Conversely, a full share offer must be made if the Offeror or any concert party has acquired shares in the Offeree carrying 10% or more of the voting rights in exchange for securities during the offer period or within 3 months before the start of the offer period (Rule 23.2).

Rule 24.1(a) further provides that if the Offeror or any person acting in concert with it has acquired shares in the Offeree in the 3 months before the start of the offer period, the voluntary offer must offer no less than the highest price paid during that period.

If the Offeror or any person acting in concert with it acquires shares in the Offeree at above the offer price during the offer period, the Offeror must increase the offer to not less than the highest price paid for the shares acquired (Rule 24.1(b)).

## **6. The Offer**

The offer will be effected by the Offeror posting a formal offer document to the shareholders of the Company. The formal offer document will be accompanied by a form of acceptance, which shareholders who wish to accept the offer should sign and return to the Offeror. The offer document will set out the conditions of the offer. The offer will be made to acquire all the issued shares of the Offeree other than those currently owned by the Offeror and persons acting in concert with it.

## **7. Advisers**

The board of a company involved in a takeover offer will need to seek the advice of the following:-

### **7.1 Financial Advisers**

The principal role of the financial advisers to the Offeror will be to advise on the financial aspects of the offer and whether or not it is fair and reasonable. It is not only the Offeror which will require financial advisers; it is a requirement of the Takeovers Code that an independent committee of board of directors of the Offeree must obtain competent independent financial advice and make the substance of it known to its shareholders. The financial advisers will also assist in negotiating the terms of the offer.

In addition to advising on financial matters, the financial advisers may be responsible for the general conduct of the offer, the timetable, documentation and liaison with the Executive and the Panel, although these additional roles may also be performed, in whole or in part, by the legal advisers.

## **7.2 Legal Advisers**

The legal advisers for both the Offeror and the Offeree will be primarily responsible for advising upon the legal aspects of the offer. In conjunction with the financial advisers, they will also be involved in negotiations, and be responsible for settling documentation and liaison with the Executive and the Panel.

## **7.3 Stockbrokers**

Where they are not appointed as the financial advisers, the Offeror or the Company's stockbrokers will need to be consulted. They will be responsible for advising upon such matters as the market perception of the offer, and liaison with major shareholders and The Stock Exchange of Hong Kong Limited (the "Stock Exchange").

## **7.4 Auditors**

The Offeror or the Company's auditors will be involved in the preparation of financial and other information required to be disclosed in the documentation issued during the course of the offer.

## **7.5 Press Consultants**

The Offeror or the Offeree may also wish to employ a specialist firm of press or financial public relations consultants to assist in such matters as the drafting and distribution of press releases, liaison with the press and major shareholders.

## **7.6 Seek advice before any dealing**

As a general rule, those involved in an offer (including the directors of the Offeror and the Offeree should not deal in the securities of the Offeree or of the Offeror (including options etc.) except after taking professional advice on the specific deal in question.

# **8. Offeror Announcements**

## **8.1 Announcement of a Firm Intention to make an Offer (Rule 3.5)**

Once the formal terms of the offer have been agreed and any required finance put in place, the Offeror will make an announcement of a firm intention to make an offer under Rule 3.5. This announcement does not constitute the offer itself, but, under the Takeovers Code, must contain all of its terms. The announcement must also include confirmation by the financial adviser or another appropriate third party that the Offeror has sufficient resources to satisfy the offer in full. The financial adviser's confirmation of sufficiency of financial resources must be

submitted to the Executive at the same time as the first draft of the announcement of a firm intention to make an offer.<sup>4</sup>

Once an announcement of a firm intention to make an offer has been made, the Offeror must, except with the consent of the Executive, proceed with the offer unless the offer is subject to the fulfilment of a specific condition which has not been satisfied (Rule 5).

## **8.2 Announcement of Number of Relevant Securities in Issue**

An Offeror or potential Offeror must announce details of all classes of relevant securities of the Offeror (and, if relevant, the relevant securities of the company whose securities will be offered as consideration for the offer) following any announcement identifying it as an Offeror or potential Offeror (Rule 3.8). The announcement is required for both cash offers and securities exchange offers as its purpose is to allow shareholders of the Offeror to determine whether they are “associates” of the Offeror by virtue of holding 5% or more of its relevant securities and thus subject to Rule 22 dealing disclosure requirements.

## **8.3 Announcement of Certain Purchases**

An announcement must be made immediately after any acquisition of voting rights in the Offeree by the Offeror or any person acting in concert with it which gives rise to an obligation to:

- i. Make a cash offer or securities offer under Rule 23;
- ii. Increase a cash offer under Rule 24; or
- iii. Make a mandatory offer under Rule 26.

The announcement must state the number of voting rights acquired and the price paid and the information required by Rule 3.5 if it has not previously been announced.

## **9. The Offer Document**

The offer document is usually posted as soon as practicable after the formal announcement has been made and, in any event, is required by the Takeovers Code to be posted within 21 days or 35 days in the case of a securities exchange offer. The offer document will normally include the following:-

### **9.1 The Formal Offer**

This will be set out in the form of a letter, usually from the Offeror’s stockbroker or merchant bank. It will include the offer

---

<sup>4</sup> Practice Note 20 – Guidance note on announcements and documents under the Codes on Takeovers, Mergers and Share Buy-backs at paragraph 18.

price, information on the business of the Offeror and of the Company, taxation advice and the procedure for acceptance.

## 9.2 A Letter from the Offeror

There will be a letter from the Board of Directors of the Offeror explaining the reasons for the offer.

## 9.3 Terms and conditions

The offer document will also set out the formal terms and conditions of the offer. As noted above, a mandatory offer under Rule 26 may only be made conditional upon the offeror obtaining shares carrying 50% or more of the voting rights in the target company. If the offeror and persons acting in concert with it hold more than 50% of the voting rights before the offer is made, an offer made under Rule 26 should normally be unconditional.

A voluntary offer may however be made subject to other conditions and may specify an acceptance level higher than 50%. In practice, in the case of a voluntary offer, the most important conditions are likely to relate to the level of acceptances required, consents and other authorisations and material changes.

- (A) **Acceptances** - Under the Takeovers Code, an offer must usually be made conditional upon the offeror receiving acceptances which, together with those shares already held or agreed to be acquired by it, represent 50% of the voting rights in the offeree company. In a voluntary offer, a higher acceptance level may be specified but with the ability for the Offeror to waive this if it wishes.
- (B) **Consents** - The offer will usually be expressed to be conditional upon obtaining various consents. Some of these may be imposed by external requirements. In addition, the conditions may refer to a number of other general regulatory requirements which the Offeror may wish to be satisfied, but will usually reserve the right to waive.
- (C) **Other conditions** - the Offeror will usually wish to be able to withdraw its offer if there has been a material adverse change in the Company; again this condition is likely to be waivable by the Offeror.

The Takeovers Code prevents the Offeror from framing conditions subjectively or from invoking a condition (other than the acceptance condition) that causes the offer to lapse unless the issue is material.

- (D) **Other information** - Finally, the offer document will contain other detailed information and terms, mainly in compliance with the Takeovers Code, but also, where the Offeror or the Offeree is listed in Hong Kong, as required by the Rules Governing the Listing of Securities on the

Hong Kong Stock Exchange. This further information will include information on the Offeror's intentions concerning the Offeree and its employees, financial information on the Offeree, including information on how the offer is to be financed, details of shareholders and dealings by the parties and their associates, verification of profit forecasts, etc. In the case of a securities exchange offer, the offer document will need to contain additional information in relation to the securities offered for exchange and the nature and details of the company whose shares are being offered for exchange.

## **10. The Offeree Board Circular**

The Offeree is required to send a circular to its shareholders setting out the views of its board or of the independent committee of the board on the offer and the written advice of its independent financial adviser as to whether the offer is fair and reasonable. In an agreed offer, the Offeror and the Offeree are encouraged to combine the offer document and the offeree board circular in a composite document. If the offeree board circular is sent separately, it must be sent within 14 days of the formal offer document.

## **11. Offer Period**

The offer must be open for a minimum period of 21 days. In addition, unless it is wholly unconditional from the outset, it must be open for a further 14 days after the first closing date on which it becomes or is declared unconditional as to acceptances. This is so that the Offeree's shareholders who have not accepted the offer by such date have a second chance to accept the offer. The maximum period for which an offer may be open before it becomes or is declared unconditional as to acceptances is 60 days. In practice, a recommended offer is usually declared unconditional well within this timetable, although a hostile one may well be drawn out to the very end. To ensure that shareholders are given enough time to consider the merits of an offer before it finally closes, the Takeovers Code also stipulates the 39<sup>th</sup> day as the last time by which the Offeree can announce material new information (including trading results, profit or dividend forecasts, asset valuations or proposals for dividend payments or for any material acquisition or disposal or major transactions). The Takeovers Code also stipulates the last time by which the Offeror can increase its offer (the 46<sup>th</sup> day).

## **12. Communication with shareholders, the press and the public**

### **12.1 Profit forecasts**

The Takeovers Code sets out detailed requirements to ensure that profit forecasts and valuations made by either side during an offer are properly verified. These rules apply not only to the more usual form of forecasts and valuations set out in a document, but may also apply to any informal or unguarded statement, for

example “profits have grown this year”. Where such statements cannot be properly verified, the Executive will usually insist that they are withdrawn. For this reason great care should be taken not to make a statement which may, unintentionally, be treated as a profit forecast or valuation.

#### **12.2 Other statements**

Those involved in an offer must take care not to issue statements which might mislead shareholders or the market or create uncertainty.

#### **12.3 Meetings and telephone calls**

The Takeovers Code restricts the extent to which parties to an offer may contact the Offeree’s shareholders to induce them to accept or reject the offer. Proposed meetings or telephone calls should therefore be carefully discussed in advance with professional advisers.

#### **12.4 Statements to the Press**

The directors of the Offeror and the Offeree should exercise great care when having any conversations with journalists. There is always the risk that remarks may be misunderstood or misattributed, which may lead to a requirement to clarify or withdraw by the Executive. In particular, discussions relating to sensitive subjects, such as future profits, prospects, and asset values should be avoided.

#### **12.5 Summary: seek advice**

Given the importance of the above issues, it is vital that the directors of the Offeror or the Offeree consult their advisers before speaking to shareholders or to the press.

### **13. Duties of the Board**

The directors of the Offeror and the Offeree will, under Hong Kong company law, owe various duties to the relevant company and to its shareholders. In addition, the directors will have specific responsibilities under the Takeovers Code.

#### **13.1 Legal responsibilities**

The duties owed by directors of the Offeror or the Offeree in law can be summarised as: to act bona fide in the interests of the company (the interests of the company being a question on which the directors are generally free to decide); to act for proper, and not “collateral” purposes; to avoid conflicts of interest with the company, not to make secret profits and to exercise skill and care in performance of their duties. In addition to their duties to the company, the directors have a duty to be honest and not to mislead the shareholders of the company when giving advice.

## **13.2 General Takeovers Code responsibilities**

In addition to these legal responsibilities, the Takeovers Code requires each director of a company involved in an offer to ensure, so far as he is reasonably able, that the Takeovers Code is complied with during the conduct of an offer. The Takeovers Code recognises that a board of directors may delegate the day to day conduct of an offer to individual directors or to a committee of directors. However, the board as a whole must ensure that proper arrangements are in place to enable it to monitor the conduct of an offer so that each director fulfils his obligations under the Takeovers Code.

## **13.3 Preparation of documentation**

Documents and advertisements issued in connection with an offer must be prepared with the highest standards of care and accuracy. It is a specific requirement of the Takeovers Code that the directors take responsibility for each document and that the document itself contains a statement to that effect (Rule 9.3). Directors cannot, of course, be expected to know personally that all the detailed information contained in the offer documentation is accurate in all material respects. In relation to much of the detail, it may be sufficient for directors to avoid any liability, both under the law and under the Takeovers Code, if they ensure that an appropriate procedure has been established and followed for checking the accuracy of the information concerned. When detailed supervision of any document or advertisement has been delegated to a committee of the board of the Offeror or the Offeree, each of the remaining directors must reasonably believe that the persons to whom supervision has been delegated are competent to carry it out. Moreover, the directors should be satisfied that, where any employee or adviser has been instructed to check the accuracy of any part of the offer documentation, it is reasonable for that person to be given the task having regard to the nature of information concerned and to the extent to which it may require special knowledge of the company's affairs. Further, the person concerned must be given access to any necessary documents, and the opportunity to discuss any points arising with any of the company's officers and advisers. Although the company's financial and legal advisers will co-ordinate the preparation of the offer documentation generally, it is important that the directors should appreciate their own responsibility to satisfy themselves that the procedure for ensuring the accuracy of the contents is in order.

## **13.4 Responsibility statements**

Each director will be asked to sign a form of responsibility statement addressed to the Offeror or the Offeree, as appropriate, and its financial advisers. Under this responsibility statement, the director will take responsibility, as required by the Takeovers Code, for an "approved document" that is, a document or announcement which has been approved by the board or a

committee of the board and of which he has not expressed disapproval.

### **13.5 Independent committee of the board**

The board of an Offeror must obtain independent advice on an offer being made which is a reverse takeover or when the directors face a conflict of interest (Rule 2.4). The advice should be as to whether or not the offer is in the interests of the Offeror's shareholders and must be obtained before the offer is announced. The advice is required to be sent to the Offeror's shareholders as soon as practicable, and if a general meeting of the Offeror is to be held to approve the offer, at least 14 days before the date of the meeting.

A conflict of interest may exist where there are significant cross-shareholdings between the Offeror and Offeree, when the companies have a number of directors in common or a common substantial shareholder. The Executive will normally waive the requirement for independent advice where a substantial shareholder is not acting in concert with the Offeror or the directors of the Offeree.

## **14. DEALINGS**

### **14.1 General**

Dealings in securities by parties to an offer and their associates during the course of an offer, or even when one is in contemplation, may have a number of consequences. Some may simply require disclosure; others may have important consequences for the offer itself; some may be prohibited and amount to a breach of the Takeovers Code by the parties and their advisers and any persons acting in concert with any of them.

### **14.2 Restrictions on dealings during the offer**

During an offer period, the Offeror and persons acting in concert with it must not sell any securities of the Offeree except with the prior consent of the Executive and following the giving of 24 hours public notice that such sales may be made. The Executive will not normally grant consent for sales particularly where a mandatory offer is being made under Rule 26. Sales below the value of the offer are not permitted. The Offeror and persons acting in concert with it will not be able to make further purchases after an announcement that sales may be made.

### **14.3 Restrictions on dealings during securities exchange offers**

Where the consideration under an offer includes securities of the Offeror or a person acting in concert with it, neither the Offeror nor any person acting in concert may deal in such securities or conduct an on-market buy-back of such securities during the offer period.

#### **14.4 Dealings after termination of discussions**

If discussions are terminated or the Offeror decides not to proceed with an offer after an announcement has been made that offer discussions are taking place, or that an offer or approach is contemplated, no dealings in securities (including convertible securities, warrants, options and derivatives of such securities) of the Offeree may be made by the Offeror or persons acting in concert with it before an announcement of the termination of discussions or the Offeror's decision not to proceed (Rule 21.4).

#### **14.5 Disclosure of dealings**

##### ***Securities and Futures Ordinance***

Part XV of the Securities and Futures Ordinance (the **SFO**) requires an acquisition of an interest of 5% or more in the voting shares of a Hong Kong listed company to be disclosed to the Hong Kong Stock Exchange and the company within 3 business days. An "interest" in shares includes an interest in the underlying shares of equity derivatives. Disclosure is also required if a notifiable interest increases or decreases across a percentage level (e.g. from 6.9% to 7.1%). Once the 5% threshold is reached, the acquisition or disposal of a short position of 1% or more in the voting shares of a listed company and a change in the percentage level of a short position must also be disclosed.

##### ***The Takeovers Code***

Once an announcement has been made of a proposed or possible offer, disclosure must be made of all dealings during the offer period by parties to an offer and their associates for their own account or for their investment clients in:

- i. relevant securities of the Offeree: and
- ii. in the case of a securities exchange offer only, relevant securities of the Offeror or of another company whose securities will be offered as consideration for the offer.

If a potential Offeror has been the subject of an announcement that talks are taking place (irrespective of whether or not the potential Offeror has been named) or has announced that it is considering making an offer, the potential Offeror and persons acting in concert with it must disclose dealings under Rule 22 which include the identity of the potential Offeror. (Note 13 to Rule 22).

Dealings by the Offeror, the Offeree and their respective associates for their own account or on behalf of their investment clients must be disclosed to the Executive by 12.00 noon on the business day following the date of the transaction (Rule 22). If

dealings have taken place in the time zones of the United States, the deadline for disclosure is 12.00 noon on the second business day following the transaction. Disclosure must be made to the Executive in electronic form using the prescribed forms available on the SFC's website.

Dealings by the Offeree, the Offeror, and their respective associates for their own account and for their discretionary investment clients are published by the Executive on the websites of the SFC and the Hong Kong Stock Exchange. Dealings on behalf of non-discretionary investment clients (other than the Offeree, the Offeror, and their respective associates) must also be disclosed to the Executive but the disclosure is private – it is not made publicly available.

Dealings by associates do not however need to 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.

#### Definition of “associates”

The associates of an Offeror, a potential Offeror and an Offeree normally include:

- 1) any person acting in concert with an Offeror, potential Offeror or Offeree;
- 2) any financial and other professional adviser (including a stockbroker) of the parent, subsidiaries and fellow subsidiaries of an Offeror, potential Offeror or Offeree, including persons controlling, controlled by or under the same control as such financial and other professional advisers (other than exempt fund managers and exempt principal traders covered in class (5) below). A holding of 30% or more of the voting rights of a company is the normal test of “control”;
- 3) the directors (together with their close relatives, related trusts and companies controlled by any of the directors, their close relatives and related trusts) of any subsidiary or fellow subsidiary of an Offeror, potential Offeror or Offeree;
- 4) the pension funds, provident funds and employee share schemes of the parent, subsidiaries and fellow subsidiaries of an Offeror, potential Offeror or Offeree;
- 5) any exempt principal trader or exempt fund manager which is controlling, controlled by or under the same control as the financial and other professional adviser (including a stockbroker) of an Offeror, potential Offeror or Offeree ; and

- 6) a person who, or who as a result of a transaction, owns or controls 5% or more of any class of the relevant securities of an Offeror, potential Offeror or Offeree.

Definition of “relevant securities”

Relevant securities for the purposes of Rule 22 are:

- i. the Offeree’s securities which are the subject of the offer or which carry voting rights;
- ii. equity shares of the Offeree;
- iii. in a securities exchange offer, equity shares of the Offeror or of another company whose securities are to be offered as consideration;
- iv. securities of the Offeror or of a company whose securities are to be offered as consideration having substantially the same rights as any securities to be issued as consideration for the offer; and
- v. securities carrying conversion or subscription rights into any of the foregoing; and
- vi. options and derivatives in respect of any of the foregoing.

The disclosure obligation relates to all dealings during the offer period.

Announcement of Number of Relevant Securities in Issue

*Offeree announcement*

Once an announcement of a proposed or possible offer has been made, the Offeree must publish an announcement giving details of all classes of its “relevant securities” and the number of such securities in issue (Rule 3.8).

*Offeror announcement*

An Offeror or potential Offeror must also announce the same details of the relevant securities of the Offeror (and, if relevant, the relevant securities of the company whose securities will be offered as consideration for the offer) following any announcement identifying it as an Offeror or potential Offeror. The announcement of details of the relevant securities of the Offeror is required for both cash offers and securities exchange offers: its purpose is to allow shareholders of the Offeror to determine whether they are “associates” of the Offeror by virtue of holding 5% or more of its relevant securities and thus subject to Rule 22 dealing disclosure requirements.

### Announcement contents

An announcement by an Offeree, Offeror or potential Offeror under Rule 3.8 must include a reminder of the requirement for associates to disclose their dealings in any securities of the Offeree. In a securities exchange offer, the Offeree, Offeror or potential Offeror must also remind their associates to disclose their dealings in any relevant securities of the Offeror or potential Offeror (or of the company whose securities will be offered as consideration for the offer).

#### **14. Restrictions Following Offers**

Where an offer has been withdrawn or has lapsed, neither the Offeror nor any person who acted in concert with the Offeror nor any person who subsequently acts in concert with any of them, may within 12 months from the date of withdrawal or lapse of such offer do either of the following, without the consent of the Executive:

- make an offer for the Offeree; or
- acquire any shares of the Offeree resulting in an obligation to make a mandatory offer under Rule 26.

#### **15. Compulsory Purchase Requirements under the Companies Ordinance**

##### **15.1 Purchase of the Minority's Shareholding**

Section 693 of the Companies Ordinance (Cap. 622) allows an Offeror to compulsorily acquire the remaining shares following a takeover offer made for all the shares of the Offeree (or all the shares of a particular class) not already held by the Offeror.

Section 693 enables an Offeror who has acquired (or contracted unconditionally to acquire) at least 90% in number of the shares to which the offer relates within 4 months of posting the initial offer document, to give notice to the remaining shareholders that it desires to acquire their shares ("squeeze out notice"). The Offeror must give this notice before the earlier of: (i) three months after the end of the offer period of the takeover offer; and (ii) 6 months from the date of the takeover offer (section 694(1) Companies Ordinance).

Within 2 months of receiving such notice, a shareholder can apply to court for an order that the Offeror is not entitled to acquire the shares or for an order varying the terms of the acquisition. If there is no such application, the Offeror is bound to acquire the shares on the terms of the takeover offer and must, within two months from the date of compulsory acquisition notice, send a copy of the compulsory acquisition notice to the Offeree together with the necessary instruments of transfer and the consideration;

the Offeree must then register the Offeror as holder of those shares.

Where an Offeror is unable to achieve the 90% threshold for giving squeeze-out notices due to it being unable to trace one or more shareholders related to the offer, it can apply to court for authorisation to give squeeze out notices (section 693(4) and (5)). The court will need to be satisfied that the Offeror made reasonable enquiries in its efforts to trace relevant shareholders and that the consideration offered was fair and reasonable. The court will grant authorisation only if it considers it just and equitable to do so, having regard, in particular, to the number of shareholders who have been traced but not accepted the takeover offer.

## **15.2 The Minority's Right to be Bought Out**

Alternatively, the holder of any shares to which the offer relates may require the Offeror to acquire their shares. Section 700 of the Companies Ordinance provides that where the Offeror has by virtue of acceptances of the takeover offer, acquired or contractually agreed to acquire at least 90% in number of the shares in the Offeree before the end of the offer period, a holder of shares who has not accepted the offer may by letter addressed to the Offeror require it to acquire his shares.

Where shareholders are entitled to require the Offeror to acquire their shares under section 700, the Offeror must give notice to relevant shareholders of their rights under that section and of the period during which those rights are exercisable, unless it has given notice that it wishes to acquire the shares under section 693 (section 701 Companies Ordinance). That notice must be given within one month of the section 700 rights arising. A shareholder must exercise his right to require the Offeror to purchase his shares within 3 months after the later of: (i) the end of the offer period; and (ii) the date of the Offeror's notice.

Where the shareholder exercises his right to be bought out, the Offeror is entitled and bound to acquire the shares on the terms of the offer or on such terms as it may agree with the shareholder.

## **16. Delisting following a general offer**

Where it is proposed that an Offeree will be delisted following a general offer, the resolution to approve the delisting must be approved by 75% of the votes of disinterested shareholders and the number of shares voted against the resolution must not exceed 10% of the votes of all disinterested shareholders. A further condition to a delisting from the Hong Kong Stock Exchange is that the Offeror must be entitled to exercise, and must exercise, its rights of compulsory acquisition. (Rule 2.2) The purpose of the latter condition is to ensure that passive minority shareholders are not left holding illiquid shares in an unlisted company.

Where companies incorporated in jurisdictions that do not afford compulsory acquisition rights to an Offeror (such as the PRC) seek delisting following a general offer, the Executive will require them to put in place arrangements to protect minority shareholders in order to obtain a waiver from the compulsory acquisition rights condition. The arrangements required to be put in place are intended to provide shareholders with the greatest opportunity to exit their investment and require that:

- i. when the offer becomes or is declared unconditional in all respects, the offer must remain open for a longer period than normally required by Rule 15.3;
- ii. shareholders who have not yet accepted the offer must 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 must be subject to the Offeror receiving valid acceptances amounting to 90% of the disinterested shares.

## **17. Conclusion**

Any offer will involve the full participation of the boards of the Offeror and the Offeree and their advisers. It is important that, during the offer, the board of each Offeree should be fully aware of the progress of matters and of their responsibilities under the Takeovers Code and under the general law. They should also ensure that their advisers are consulted at all stages, and in particular before entering into any dealings or similar transactions. In addition, full advice should be sought before any statements are made to the public, shareholders or the press.

**February 2019**

*This note is provided for information purposes only and does not constitute legal advice. Specific advice should be sought in relation to any particular situation. This note has been prepared based on the laws and regulations in force at the date of this note which may be subsequently amended, modified, re-enacted, restated or replaced.*

31880(9)