

WEBINAR: RESPONSIBILITIES OF HKEX LISTCO DIRECTORS

Part V: Corporate Governance Code and the Takeovers Code

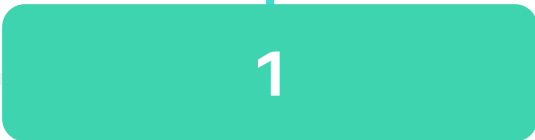
31 AUGUST 2020

CHARLTONS
易周律师行

INEDS

holds more than a 1%
shareholding interest or received
any as a gift or by means of other
financial assistance

○



○

is or was a director, partner or
principal of a professional
adviser to specified parties

has or had a material interest in any
principal business activity or involved
in any material business dealings

○



is or was in two preceding years an
executive or director of listco, holding
co, subsidiaries or core connected
persons

○



is financially dependent on
the group or any core
connected persons

○



AUDIT COMMITTEE

AUDIT COMMITTEE MUST:

- (1) have at least 3 members (1 of which is an INED)
- (2) have a majority of INEDs
- (3) be chaired by an INED

TERMS OF REFERENCE MUST INCLUDE:

- ((1) monitoring relationship with auditors
- (2) monitoring integrity of financial statements
- (3) overseeing financial reporting system and internal control procedures

CORPORATE GOVERNANCE REQUIREMENTS

1

directors' service contracts (MBLR 13.68)

2

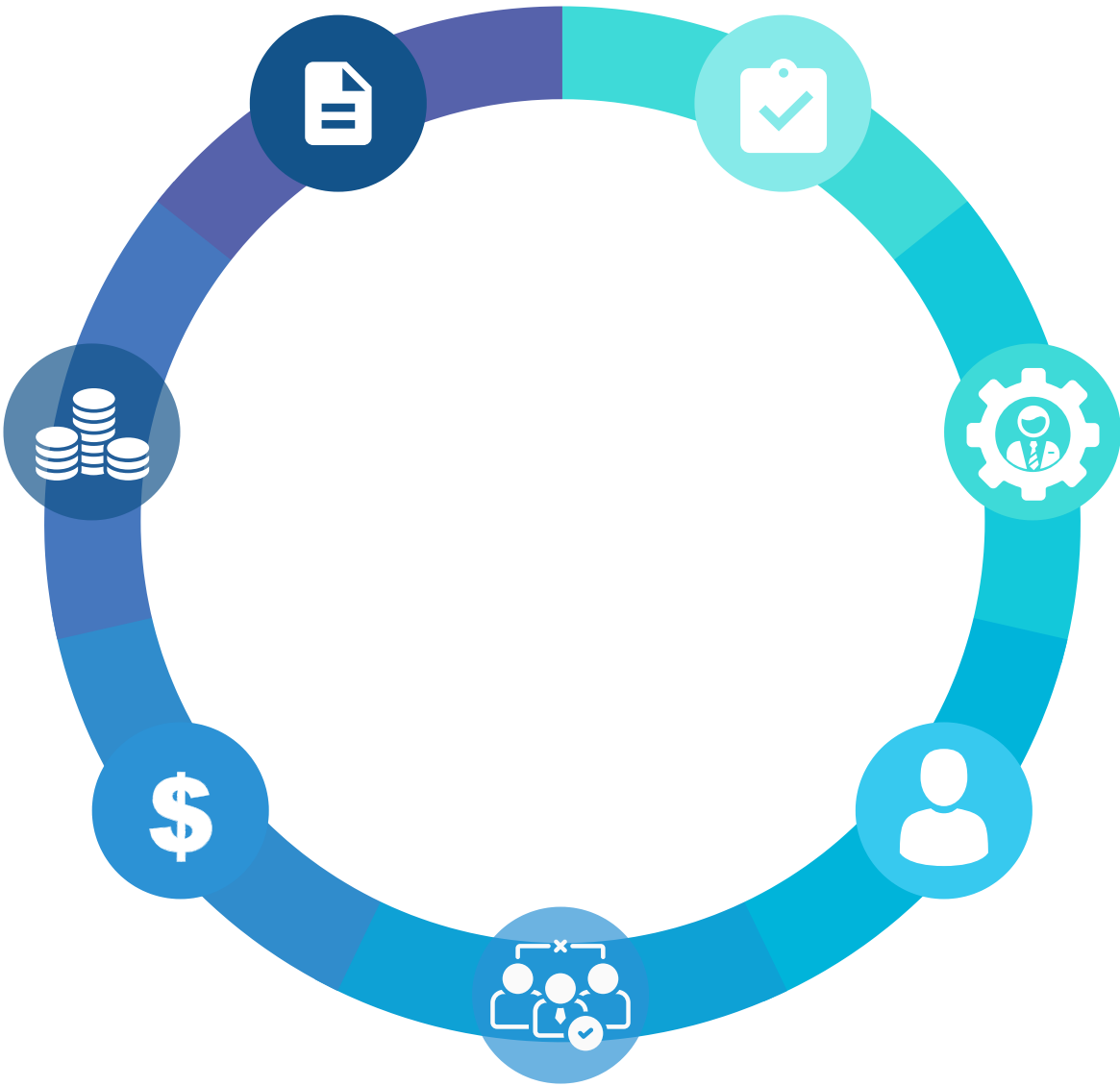
directors' remuneration (Appendix 16 MBLR)

3

remuneration committee (MBLR 3.25-3.27)

4

nomination committee (Code Provision A.5.1)



compliance adviser (MBLR 3A.23)

5

authorised representatives (MBLR 3.05 and 3.06)

6

company secretary (MBLR 3.28)

7

An aerial photograph of a dense urban skyline, likely New York City, with numerous skyscrapers and buildings. A semi-transparent teal rectangular box is centered over the image, containing white text. The text is in a serif font and is centered within the box.

BOARD DIVERSITY (MBLR 13.92)

"Board diversity will differ according to the circumstances of each issuer. Diversity of board members can be achieved through consideration of a number of factors, including but not limited to gender, age, cultural and educational background, or professional experience. Each issuer should take into account its own business model and specific needs, and disclose the rationale for the factors it uses for this purpose."

WEBSITE PUBLICATION OF CERTAIN DOCUMENTS

LISTING RULES



(1) up to date consolidated version of constitutional docs on co. website and Exchange website (MBLR 13.90)

(2) procedures for shareholders to propose a person for election as a director published on co. website (MBLR 13.51D)

*CORPORATE
GOVERNANCE CODE*



(1) up to date list of directors identifying their role and function and whether they are INEDs (Code Provision A.3.2)

(2) terms of reference of co.'s nomination, remuneration and audit committees explaining roles and authority delegated by board (Code Provisions A.5.3, B.1.3 and C.3.4)

THE CORPORATE GOVERNANCE CODE (APPENDIX 14 MBLR)

directors

1

remuneration of directors
and senior management

2

accountability and audit

3

delegation by the Board

4

communication with
shareholders

5

CODE PROVISIONS


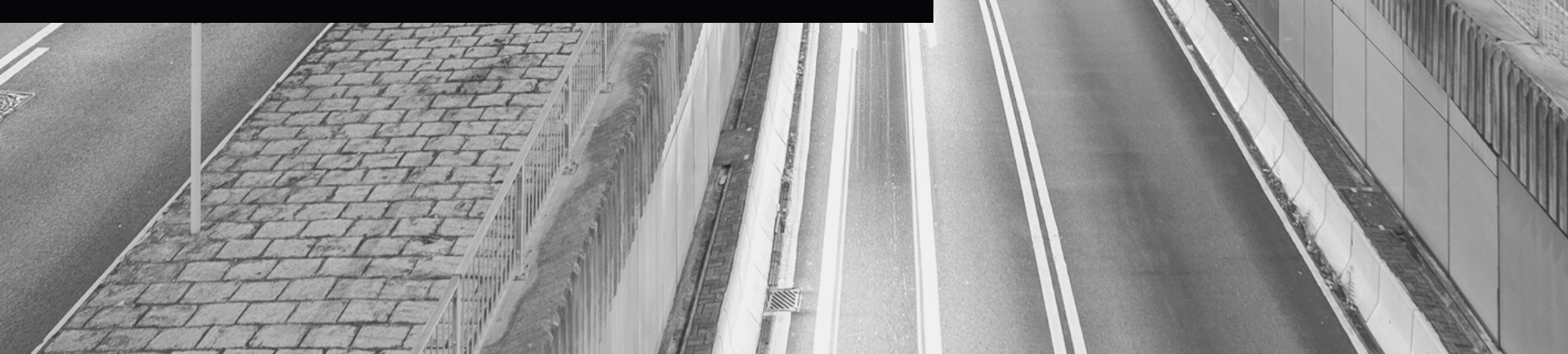
01	full board meeting at least 4 times a year at quarterly intervals
02	different people perform roles of chairman and chief executive
03	all directors subject to retirement by rotation once every 3 years
04	directors should conduct annual review of internal controls
05	directors should provide records of training they received to the company
06	companies should arrange appropriate insurance cover for directors

CODE PROVISIONS

07	<i>specifics to be included in circular to shareholders and/or explanatory statement accompanying notice of the relevant general meeting, where board proposes nominating an individual for election as an INED at the general meeting</i>
08	<i>audit committee should meet external auditor at least twice yearly and audit committee terms of reference should include arrangements for employees to raise concerns about financial reporting improprieties</i>
09	<i>non-executive directors should attend board, committee and general meetings and contribute to company strategy and policies</i>
10	<i>chairman should at least annually hold meetings with the INEDs without presence of other directors</i>
11	<i>management should provide monthly updates of company's performance, position and prospects to board members sufficiently to enable them to discharge duties</i>



CORPORATE GOVERNANCE REPORT

- listcos must include a Corporate Governance Report prepared by the Board in annual reports and any summary financial report
 - must include certain mandatory disclosures (paras. G-Q Appendix 14 MBLRs)
- 
- 

THE MODEL CODE FOR SECURITIES TRANSACTIONS BY DIRECTORS OF LISTED COMPANIES

ABSOLUTE PROHIBITIONS

- at any time when in possession of inside information in relation to those securities, or if no clearance (MCR A.1)
- on the publication date of the company's financial results
- during period of 60 days preceding publication date of annual results or, if shorter, period from end of the relevant financial year up to the publication date of the results
- during period of 30 days preceding the publication date of the quarterly results (if any) or half-year results or, if shorter, the period from the end of the relevant quarterly or half-year period up to the publication date of the results

DUTY OF NOTIFICATION

- establish written notification procedure
- response to request for clearance to deal must be given within 5 business days
- clearance to deal must be valid for no more than 5 business days
- company must maintain written record of notifications given, acknowledgements and written responses

INSIDER DEALING (SS.270 AND 291 SFO)

1

a person who is (1) connected with a listco and has info he knows is inside info or (2) contemplates making takeover offer for listco and knows it is inside info:

- deals, counsels or procures another to deal in company's listed securities or derivatives or in those of related corp; or
- discloses the info knowing or having reasonable cause to believe recipient will use info to deal, counsel or procure another to deal in the company's listed securities or derivatives or those of related company



INSIDER DEALING (SS.270 AND 291 SFO)

2

person who has received inside information from a connected person or a person who is contemplating or has contemplated making a takeover offer for a listed company either deals, or counsels or procures another person to deal, in the company's listed securities or their derivatives or those of a related corporation



INSIDER DEALING (SS.270 AND 291 SFO)

3

person who has information which he knows is inside information in relation to a listed company in any of the circumstances mentioned:

(a) counsels or procures another person to deal, knowing or having reasonable cause to believe that the person will deal in the company's listed securities or their derivatives or in those of a related corporation outside Hong Kong on an overseas stock market

(b) discloses the information knowing or having reasonable cause to believe that the recipient will use the information to deal, or to counsel or procure another person to deal, in the company's listed securities or their derivatives or in those of a related corporation outside Hong Kong on an overseas stock market



KEY DEFINITIONS

1

SECURITIES

includes shares, stocks, debentures, loan stocks, bonds and notes as well as any rights, options or interests in respect of any of the foregoing

2

PERSONS CONNECTED WITH A CORPORATION

directors, employees and substantial shareholders of the listed company and its related corporations

3

RELATED CORPORATIONS

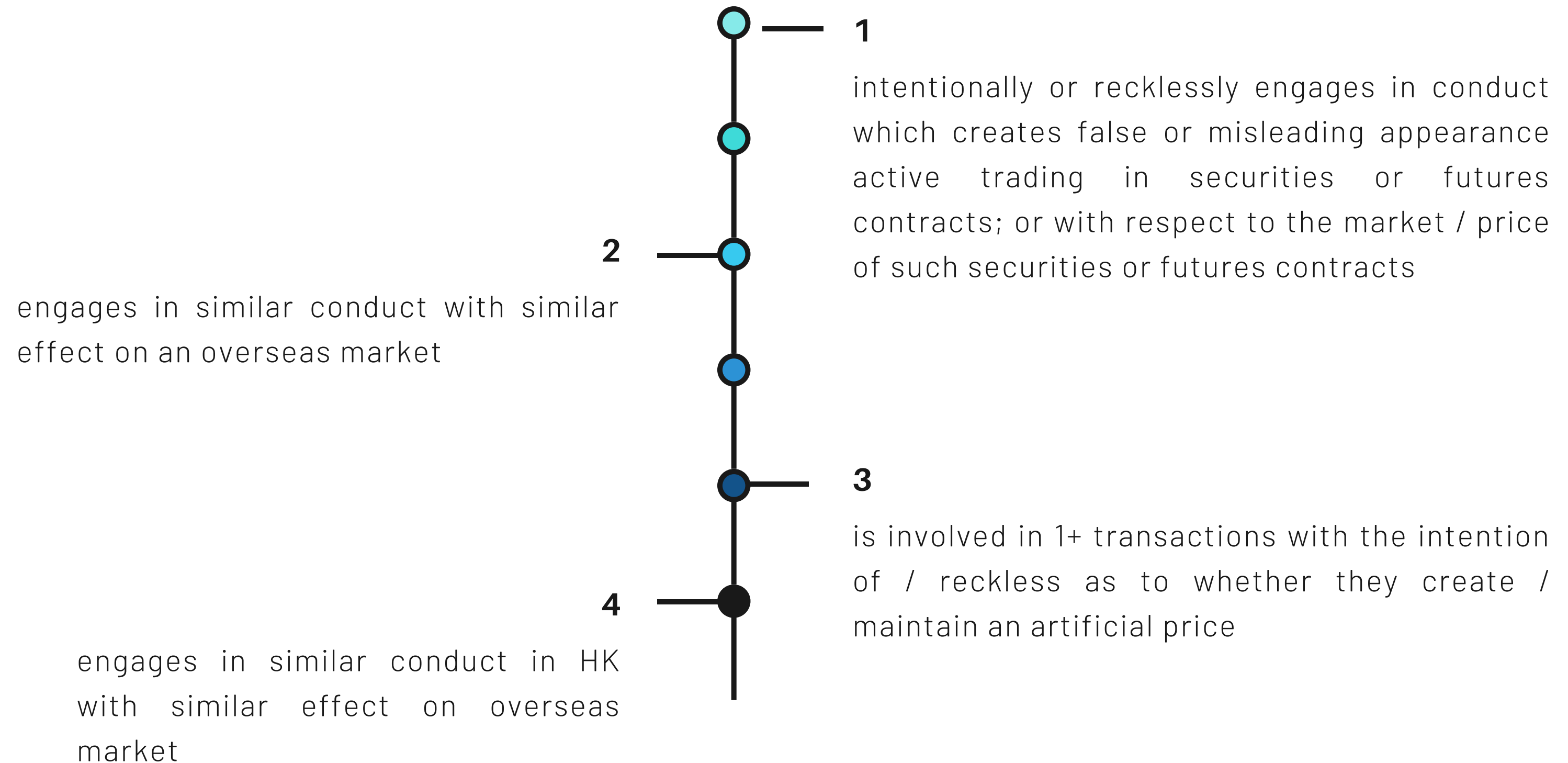
subsidiaries and holding companies and other subsidiaries of any holding company of the listed company

4

INSIDE INFORMATION

specific information about the company, a shareholder or officer of the company, or the listed securities of the company or their derivatives, which is not generally known to the persons who are accustomed or likely to deal in the listed securities of the company but which would, if it were generally known to them, be likely to materially affect the price of the listed securities

FALSE TRADING



PRICE RIGGING (SS. 275 AND 296 SFO)

1

— a wash sale of securities which maintains, increases, reduces, stabilises or causes fluctuations in, the price of securities traded on an exchange or through an ATS in Hong Kong; or

2

— any fictitious or artificial transaction or device with the intention that, or being reckless as to whether, it maintains, increases, reduces, stabilises or causes fluctuations in, the price of securities or futures contracts traded on an exchange or through an ATS in Hong Kong

MARKET MISCONDUCT (CONT.)

STOCK MARKET MANIPULATION (SS.278 & 299 SFO)

occurs when a person engages directly or indirectly in 2+ transactions in the securities of a company that by themselves or in conjunction with any other transaction increase, reduce, maintain or stabilise the price of any securities traded on an exchange or through an ATS in Hong Kong, or are likely to do so, with the intention of inducing another person to buy or subscribe for, or to refrain from selling, securities issued by that corporation or a related corporation

DISCLOSURE OF INFO ABOUT PROHIBITED TRANSACTIONS (SS.276 & 297 SFO)

when a person discloses or disseminates, or authorises or is concerned in the disclosure or dissemination of, information about the effect of a prohibited transaction on the price of securities or the price for dealings in future contracts traded on a Hong Kong market, if the person or an associate of his:

- participates in the prohibited transaction;
- or benefits or expects to benefit, directly or indirectly, from the disclosure, circulation or dissemination of the information



DISCLOSURE OF FALSE OR MISLEADING INFO INDUCING TRANSACTIONS (SS.277 & 298 SFO)

- information likely to induce others to enter into transactions or to affect the price of securities or futures contracts, that is false or misleading in a material fact or through the omission of a material fact; and
- he knows or is reckless or (for civil market misconduct only) negligent as to whether, the information is false or misleading in a material fact or through the omission of a material fact

CIVIL AND CRIMINAL LIABILITY



CRIMINAL OFFENCE (PART XIV
SFO)



CIVIL PROCEEDINGS (BEFORE
THE MMT)

PROCEEDINGS:

- (1) has perpetrated any market misconduct
- (2) market misconduct was perpetrated by a corporation of which he is an officer with his consent or connivance
- (3) another person engaged in market misconduct and he assisted or connived with that person in the perpetration of the market misconduct, knowing that such conduct constitutes or might constitute market misconduct

ORDERS:

the MMT may impose the following sanctions:

- (1) disqualification order
- (2) cold shoulder order
- (3) cease and desist order
- (4) disgorgement order
- (5) government costs order
- (6) SFC costs order
- (7) disciplinary referral order



CIVIL LIABILITY - PRIVATE RIGHT OF ACTION

a person will be taken to have committed market misconduct if:

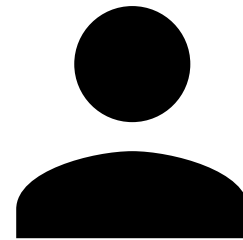
- (1) he has perpetrated any market misconduct
- (2) market misconduct was perpetrated by a corporation of which he is an officer with his consent or connivance
- (3) any other person committed market misconduct and he assisted or connived with that person in the perpetration of the market misconduct, knowing that such conduct constitutes or might constitute market misconduct

LIABILITY OF OFFICERS



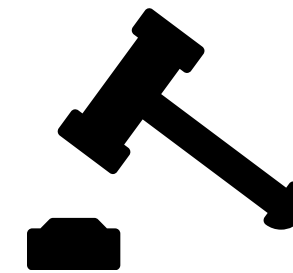
S.279 SFO

duty to take reasonable measures to ensure that proper safeguards exist to prevent the corporation from acting in a way which would result in the corporation perpetrating any market misconduct



DEFINITION OF "OFFICER"

includes a director, manager or secretary of, or any other person involved in the management of, the corporation

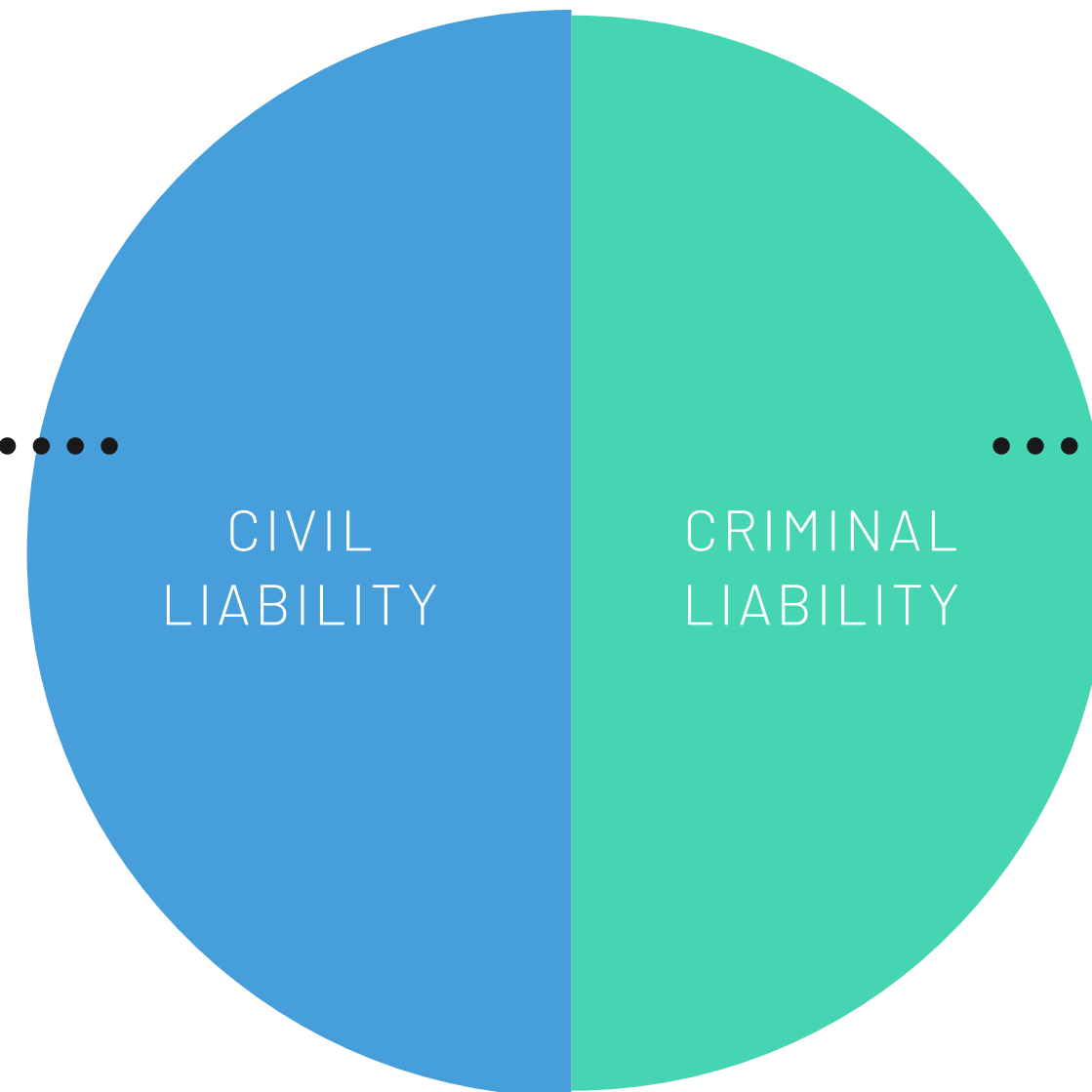


S. 258 SFO

MMT may make one or more order in respect of that person even if that person has not been identified as having engaged in market misconduct himself

LIABILITY OF OFFICERS (CONT.)

SFO - anyone who suffers financial loss as a result of market misconduct or a Part XIV offence has a right of civil action to seek compensation



s.390 SFO - where proved that an offence committed under Part XIV was aided, abetted, counselled, procured or induced by, or committed with the consent or connivance of, or attributable to the recklessness of, any officer of the corporation, or any person purporting to act in any such capacity, that person, as well as the corporation, is guilty of the offence

THE TAKEOVERS CODE

CONCERNED WITH -

(1) offers for, and takeovers and mergers of, all relevant companies;

(2) partial offers, offers by a parent company for shares in its subsidiary and certain other transactions where control is to be obtained or consolidated

MANDATORY OFFER REQUIREMENT (RULE 26)

(1) acquires 30% or more of the voting shares of a company

(2) already holds between 30 - 50% of voting shares and increases that holding by more than 2% in any period of 12 months

1

3

2

4

"PERSONS ACTING IN CONCERT"

(1) company, parent, subsidiaries, associated companies, companies of which such companies are associated

(2) company with any directors of it or its parent company

REQUIREMENTS OF THE TAKEOVERS CODE

(1) target must announce an offer disclosing bidder's identity as soon as bidder informs intention to make offer

(2) bidder will send formal doc setting out offer

(3) target co. will send offeree circular to shareholders

DUTIES OF THE BOARD OF THE OFFEROR AND OFFEREE

LEGAL RESPONSIBILITIES

- to act bona fide in the interests of the company
- to act for proper and not "collateral" purposes
- to avoid conflicts of interest with the company
- duty to be honest and not mislead shareholders when giving advice

1

receives promptly:

- copies of all docs issued by the company in relation to the offer
- details of all dealings in relevant securities by the company / associates
- details of any agreements, understandings, guarantees, expenditure or other obligations involving the company and the offer other than routine administrative matters

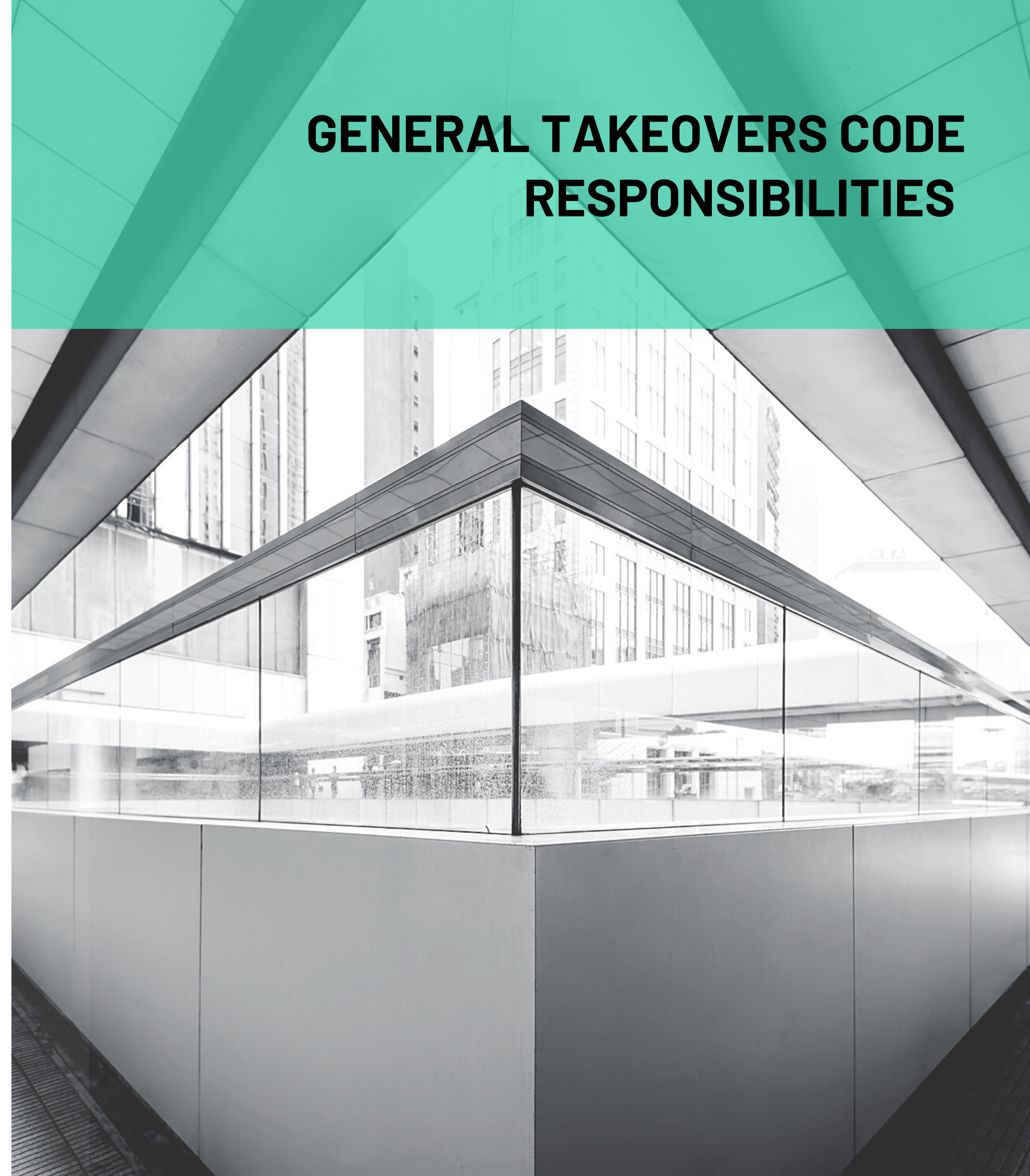
2

directors with day-to-day responsibility for the offer are in a position to justify their actions to the board

3

advisers' opinions are available to the board

GENERAL TAKEOVERS CODE RESPONSIBILITIES



PREPARATION OF DOCUMENTS

- directors take responsibility for the accuracy of the information contained in all documents and each document contains a statement to that effect (Rule 9.3)
- where supervision of any document has been delegated to a committee of the board of the Offeror / Offeree, each remaining director must reasonably believe that the persons to whom a supervisory role has been delegated are competent to carry it out and must disclose to the committee all relevant facts relating to himself and all relevant facts / opinions known to him, which are unknown to the committee
- 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
- all announcements and other documents issued or published by a party to a takeover offer must be filed with the SFC's executive for comment prior to release / publication

RESPONSIBILITY STATEMENT



director will take responsibility for an approved document (i.e. a document / announcement which has been approved by the board / committee of the board and which he has not expressed disapproval)

NO FRUSTRATING ACTION

0
1

issue any shares

0
2

create, issue or grant, or permit the creation of any convertible securities, options or warrants in respect of shares of the company

0
3

sell, dispose of or acquire assets of a material amount

0
4

enter into contracts, including service contracts, other than in the ordinary course of business

0
5

cause the company or any subsidiary / associated co. to purchase or redeem any shares in the co. or provide financial assistance for any such purchase

INDEPENDENT COMMITTEE OF THE BOARD

- must appoint an independent committee of the board to make a recommendation as to whether the offer is fair and reasonable and as to acceptance and voting (Rule 2.1)
- members should comprise all non-executive directors who have no interest in the offer other than as a shareholder (Rule 2.8)



CASE STUDY: BREACH OF RULE 22 OF THE TAKEOVERS CODE



CODE ON SHARE BUY-BACKS

ON-MARKET

EXEMPT

OFF-MARKET

BY GENERAL OFFER

ON-MARKET SHARE BUY-BACKS

- (1) shares are fully paid-up
- (2) Explanatory Statement is issued to the shareholders
- (3) shareholders have given specific approval or a general mandate to make the buy-back(s) by way of an ordinary resolution passed at a general meeting





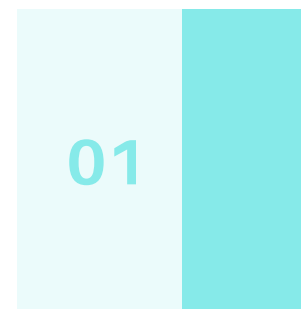
ON MARKET SHARE BUY-BACKS (CONT.)

EXPLANATORY STATEMENTS

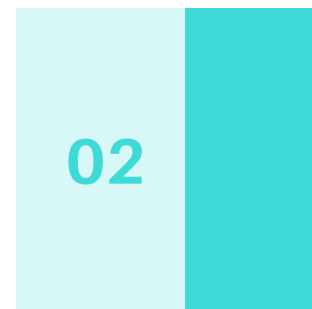
1. total no. and description of shares to be repurchased and reasons for buy-back
2. proposed source of funds
3. any directors or any associates of the directors who have an intention to sell shares to the company
4. consequences arising under the Takeovers Code
5. details of any purchases by the company of shares made in the previous 6 months
6. intention of connected persons to sell shares to company
7. highest and lowest prices at which shares traded on the Exchange during each of the previous 12 months

ON MARKET SHARE BUY-BACKS (CONT.)

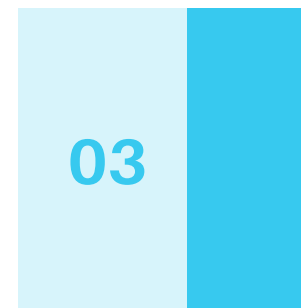
DEALING RESTRICTIONS



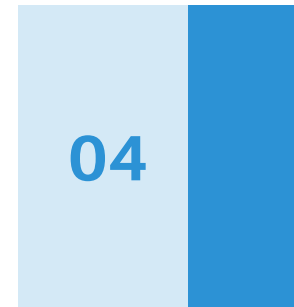
no shares may be repurchased if the purchase price is higher by 5% or more than the average closing market price for the 5 preceding trading days



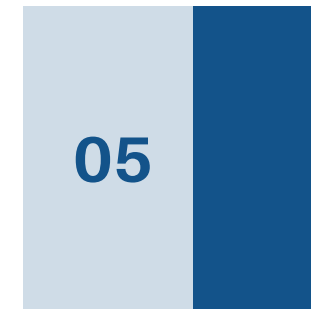
shares cannot be repurchased for non-cash consideration



company must not knowingly purchase its shares from a core connected person



must not repurchase its shares on the Exchange at any time after inside information has come to its knowledge until the information is made public



no shares may be repurchased if that purchase will result in the number of listed shares held by the public falling below the prescribed minimum percentage

OFF-MARKET SHARE BUY-BACKS

- (1) approval being given by at least 75% of votes cast on a poll by disinterested shareholders in attendance in person or by proxy at a general meeting
- (2) notice of the shareholders' meeting being accompanied by a circular containing:
 - details of proposed offeree(s)
 - terms and conditions
 - advice of independent financial adviser
- (3) certified copy of the shareholders' resolution being filed with SFC
- (4) copy of the agreement(s) for the off-market share buy-back being available for inspection by the shareholders





BUY-BACK BY GENERAL OFFER

(1) must be approved by a majority of the votes cast by independent shareholders in attendance in person or by proxy at general meeting

(2) if will result in the delisting and privatisation of the company

- directors of the offeror and any persons acting in concert will not be considered to be independent and therefore may not vote at the general meeting
- must be approved by at least 75% of votes attaching to the shares owned by independent shareholders cast in person or by proxy

SHARE BUY-BACKS (CONT.)

REPORTING REQUIREMENTS

must submit for publication to the Exchange through HKEx-EPS a next day disclosure return no later than 30 minutes before the commencement of the morning trading session (or any earlier pre-opening session) on the business day following the repurchase

STATUS OF REPURCHASED SHARES

listing of the repurchased shares will be automatically cancelled upon purchase and the company must apply for listing of any further issues of that type of shares

RESTRICTION ON NEW ISSUE OF SHARES

cannot issue, or announce a proposed new issue of shares, in the 30 days after its repurchase of shares (whether on the Exchange or otherwise), without the Exchange's prior approval



TAKEOVERS IMPLICATIONS OF SHARE REPURCHASES (RULE 32 OF TAKEOVERS CODE)

- a share buy-back is considered to be an acquisition by shareholders whose shares are not repurchased
- Executive will normally grant a whitewash waiver in the case of general offer obligations triggered by off-market share buy-backs or share buy-backs by general offer