CHARLTONS
SOLICITORS

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Hong Kong Takeovers Code Amendments effective 13 July 2018

Introduction

Amendments to Hong Kong's Codes on Takeovers and Mergers and Share Buy-backs (**Codes**) took effect on 13 July 2018 with the publication by the Securities and Futures Commission (**SFC**) of its Consultation Conclusions on proposed amendments to the Codes on Takeovers and Mergers and Share Buy-backs[1] (**Consultation Conclusions**). This follows a 3-month public consultation on proposals set out in a Consultation Paper[2] released in January 2018. For more information on the Consultation Paper, please see Charltons' February 2018 newsletter.[3] The 26 responses received were, in general, supportive of the proposals.

The amendments which took effect on 13 July include:

- increasing the threshold for independent shareholder approval of a whitewash waiver to 75% (from a simple majority);
- an explicit requirement for separate resolutions to be put to independent shareholders for the underlying transaction(s) and the whitewash waiver. The voting approval threshold for underlying transactions is a simple majority;
- the Takeovers and Mergers Panel (**Panel**) is given power to require a person in breach of specific provisions of the Codes to compensate current and former shareholders;
- the definition of "associate" has been amended to remove unnecessary overlap and potential inconsistences arising from similarities with the definition of acting in concert;
- companies incorporated in jurisdictions without compulsory acquisition rights (e.g. the PRC) that seek delisting through a general offer are now required to put in place arrangements to protect minority shareholders in order to obtain a waiver from the compulsory acquisition rights' condition;
- the scope of disclosure of holdings and dealings in relevant securities has been clarified, in particular where the offeror is offering securities of another company as consideration in an offer. Other requirements have been relaxed, including the timing of dealing disclosures; and
- various miscellaneous amendments to the Codes to codify existing practices and to effect a number of "housekeeping" amendments.

1. Voting Threshold for Whitewash Waivers

1.1 Raising the voting threshold

1 https://www.sfc.hk/edistributionWeb/gateway/EN/consultation/listing-and-takeovers/conclusion?refNo=18CP1
2 https://www.sfc.hk/edistributionWeb/gateway/EN/consultation/takeovers-and-mergers/openFile?refNo=18CP1
3 https://www.charltonslaw.com/sfc-consults-on-takeovers-code-changes/

The voting approval threshold for a whitewash waiver from the obligation to make a mandatory offer on a change or consolidation of control under Rule 26 has been increased from a simple majority of independent votes to 75% of independent votes. Independent votes are those of shareholders who are not involved in, or interested in, the transaction in question.

This higher approval threshold is intended to enhance investor protection and address the SFC's concerns that whitewash waiver approval from independent shareholders had become a "virtual certainty" and regarding cases of organised systemic warehousing of shares by friendly non-independent shareholders voting in favour of transactions.

Whitewash waivers significantly impact shareholders since they involve a change or consolidation of control of the company, a dilution of shareholders' interests in the company and do not afford shareholders the opportunity to exit from their investment in the offeree company.

The SFC in the Consultation Conclusions notes the Executive's discretion to withhold a grant of a whitewash waiver in appropriate circumstances, and that the Executive may refuse to grant a whitewash waiver where the circumstances justify such action.

1.2 Voting on single or separate resolutions

The whitewash waiver and the underlying transaction(s) are now required to be subject to separate shareholder votes. Previously, market practice varied as to whether the whitewash waiver and the underlying transaction(s) were voted on through separate resolutions or a combined resolution.

1.3 Separate voting thresholds

Whitewash waivers are now subject to a higher 75% voting threshold, whilst underlying transaction(s) continue to be subject to a simple majority vote. The original proposal to also increase the voting threshold for underlying transactions to 75% was dropped because this may have resulted in an anomaly between the simple majority requirement under the Listing Rules and the threshold under the Takeovers Code. Thus, where transactions are coupled with a whitewash waiver application, the whitewash waiver applicant can only proceed to completion if both the underlying transaction and the whitewash waiver of the mandatory offer obligation are approved. Where minority shareholders approve the underlying transaction(s) but disapprove the whitewash waiver, provided that the whitewash waiver condition is waivable, the underlying transaction would be able to proceed, coupled with a general offer.

1.4 Changes to Note 1 on Dispensations from Rule 26

The wording of Note 1 on dispensations from Rule 26 has been amended to provide that in cases involving the underwriting of an issue of shares, the requirement for a mandatory offer will normally be waived, provided there has been an independent vote of shareholders. The addition of the word "normally" is intended to ensure that it is understood that a whitewash waiver will not be granted automatically even if all relevant Takeovers Code requirements have been met. The Takeovers Bulletin, Issue No. 37 (June 2016) provided that the Executive may not grant a whitewash waiver if the transaction does not comply with all other applicable rules and regulations (including the Listing Rules) nothwithstanding that all Takeovers Code requirements have been met.

2. Approval of Delistings by Independent Shareholders

Pursuant to Rule 2.2 of the Takeovers Code, the resolution to approve a delisting from the Stock Exchange following a general offer must be subject to certain conditions, including the offeror being entitled to exercise, and exercising, its rights of compulsory acquisition under Rule 2.2(c).

The purpose of Rule 2.2(c) is to ensure that a delisting can only become effective after a general offer when an offeror is able to exercise and exercises its right of compulsory acquisition. This ensures that passive minority shareholders are not left holding illiquid shares in an unlisted company which may be a non-public company which is not protected by the Takeovers Code. The three conditions to Rule 2.2, together, have the effect of making it more difficult for an offeror to use a delisting resolution to pressurise minority shareholders to accept a general offer. For Hong Kong incorporated companies, the right of compulsory acquisition arises when the offeror receives acceptances amounting to 90% of the disinterested shares.

2.1 Offeree companies incorporated in jurisdictions with no compulsory acquisition rights

The laws of certain jurisdictions (such as Mainland China) do not provide compulsory acquisition rights to an offeror. The Executive has thus granted a number of waivers from

compliance with Rule 2.2(c) for privatisations of Mainland companies as compliance is technically impossible given the lack of compulsory acquisition rights in the PRC.

2.2 Amendment to protect minority shareholders of offeree companies

Rule 2.2 has been amended to include a Note which provides that 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 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.

The amendments strengthen minority shareholder protection by ensuring that where an offeror makes a general offer for the shares of a company incorporated in a jurisdiction that does not provide compulsory acquisition rights with a view to privatising it, shareholders are given the greatest opportunity to exit if they wish to do so.

The minimum 90% acceptance condition provided for in the amendments means delisting through a general offer is not easier for companies incorporated in jurisdictions without compulsory acquisition rights.

The requirements under the new note to Rule 2.2 also apply to all real estate investment trusts (**REITs**) subject to the Codes.

3. Dealings with and Powers of the Executive, Panel and Takeovers Appeal Committee

3.1 Dealings with the Executive, Panel and Takeovers Appeal Committee

Sections 5.2, 11.18 and 14.9 to the Introduction to the Codes have been added and section 7.2 of the Introduction has been amended in order to make it clear that parties are required to disclose to the Executive, the Panel and the Takeovers Appeal Committee all relevant information of which they are aware, and to correct or update the information if it changes. There is a positive obligation on parties to provide true, accurate and complete information, which is subject to a reasonable care test.

According to Section 5.2, persons 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 as well as from those to whom enquiries and other requests are directed. In such dealings, a person is required to disclose any information known to him/her and relevant to the matter, as well as 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 the information provided to the Executive was not true, accurate or complete, that person must promptly contact the Executive to correct the position. Further, 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 applicable to that determination.

Sections 11.18 and 14.9 provide that the obligations set out in section 5.2 of the Introduction apply equally to a person dealing with the Panel and the Takeovers Appeal Committee, respectively. Section 7.1 on rulings by the Executive has been amended to provide that particular attention should be paid to the obligations under section 5.2 of the Introduction. The SFC stated in the Consultation Conclusions that it considers that it is not necessary to expressly refer to professional privilege in section 5.2, as it is an overriding right under the law.

3.2 Compliance rulings

Sections 7.2 and 13.12 to the Introduction to the Codes have been adopted to clarify the Executive's and the Panel's existing power to make compliance rulings as a pre-emptive measure so as to prevent breaches and to enhance protection of shareholders and the market generally. In particular, section 7.2 provides that where 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/her 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.

Pursuant to section 13.12, the Panel may also give directions of the nature described in section 7.2.

According to the Consultation Conclusions, the phrase "a reasonable likelihood that a person will contravene a requirement" means more likely than not that there will be a breach if a particular action is taken. The SFC does not consider that it could issue useful guidance as different factors may or may not be relevant to different cases, or introduce conditional rulings as they may cause uncertainty and confusion. However, the SFC provides an example in the Consultation Conclusions that where an offeree board refuses to issue a response document to shareholders in a hostile offer, there would be a reasonable likelihood that if the offeree company did not produce the response document, it would be in breach of the Codes. Here, the Executive/Panel could give a direction compelling the offeree board to issue a response document to shareholders.

In addition, an amendment to section 13.10 of the Introduction clarifies that the Chairman of a hearing is empowered to issue a compliance ruling of the nature described in section 7.2 if it relates to a preliminary or procedural direction.

3.3 Compensation rulings

The Codes have been amended so that the Panel is empowered to require a person who is in breach of specific provisions of the Codes to pay compensation to current and former shareholders. Compensation rulings will be issued to provide financial redress to shareholders who have suffered as a result of a breach. For example, where an offeror fails to make a mandatory offer as required by Rule 26.1 of the Takeovers Code, rather than requiring the making of a general offer, the Panel could require the person(s) in breach of Rule 26.1 to pay compensation to shareholders who should have received an offer at the time the Rule 26.1 obligation was triggered.

New section 13.13 to the Introduction provides that where any person has breached the requirements of certain Rules, the Panel may make a ruling requiring the person to pay, within a specific period, to the holders, or former holders, of securities of the offeree company such amount as the Panel thinks just and reasonable in order to ensure that such holders receive what they would have been entitled to receive if the relevant Rule had been complied with. Further, the Panel may make a ruling requiring simple or compound interest to be paid at a rate and for a period (including for any period before the date of the ruling and until payment) to be determined. The Panel's power to make a ruling under section 13.13 may be exercised irrespective of whether any sanction under section 12.2 is imposed.

The right to compensation will apply to breaches of the following Rules:

- Rules 13 and 14 – the appropriate offers and comparable offers requirement which requires offers to be made for other classes of relevant securities;

- Rule 16 – the entitlement to revised consideration. Rule 16.1 requires that when an offer is revised, all shareholders are entitled to receive the revised offer irrespective of whether they accepted the original offer;

- Rule 23 – the nature of consideration and the situations in which a cash offer or securities offer is required;

- Rule 24 – purchases resulting in an obligation to offer a minimum level of consideration. Shareholders of the same class are entitled to no less favourable terms if a certain level of acquisition has been made during specified offer periods;

- Rule 25 – special deals. Rule 25 prohibits transactions between an offeror, or potential offeror, or parties acting in concert with it and a shareholder of the offeree company which are on favourable terms that are not extended to other shareholders;

- Rule 26 – the mandatory offer obligation which requires a general offer to be made to all shareholders if certain ownership levels are exceeded;

- Rule 28 – partial offer requirements;

- Rule 30 – offer conditions – offers must not normally be made conditional on matters that depend on judgements of the offeror or the fulfilment of which is in its hands; and

- Rule 31.3 – prohibits the offeror and its concert parties purchasing further securities at above the offer price in the 6 months after the close of the offer.

The SFC will not issue guidance on how, when or on whom a compensation order should be issued and the calculation of compensation. The guiding principle should be that a careful examination of all the circumstances of the matter should be carried out so as to arrive at a decision that is just and reasonable in all the circumstances. The SFC does not intend to be over-prescriptive, but rather the Panel should have discretion on such matters. In relation to public comments that applying section 13.13 to all breaches of Rule 30 may be too wide, the SFC stated that section 13.13 should include a broad reference to Rule 30 as the Panel would not be limited from imposing a compensation order if the circumstances justify one.

In response to various queries raised during the consultation, the SFC stated in the Consultation Conclusions that it is satisfied that the new section is consistent with Article 80 of the Basic Law, and that the Panel is well-qualified to make determinations in relation to compensation payments. Further, the Panel may seek advice from an independent professional adviser or an expert in any relevant area.

3.4 Disciplinary proceedings and remedial/compliance rulings

Section 12.2 of the Introduction to the Codes has been amended as there were concerns that the Panel may not have been able to issue remedial rulings in disciplinary matters under the previous drafting. The Panel is now empowered to impose both remedial measures and sanctions in disciplinary measures under revised section 12.2, which provides that where the Panel finds that 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 specific period, not to act or continue to act in any or a specific capacity for any person who has failed to comply, or has indicated that he/she 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 specific period; and/or

e) requiring further action to be taken as the Panel thinks fit.

Further, the Executive or the Panel may report a person to other regulatory authorities or professional bodies (even where there is no finding of a breach), where (i) the person is governed by rules, regulations or standards of professional conduct of the relevant regulatory authority or professional body, and (ii) the Executive or the Panel has reasonable grounds for believing that such person may have contravened such rules, regulations or standards of professional conduct.

4. Definition and Use of the Term "Associate"

The term "associate" is principally relevant to the disclosure of dealings under Rule 22 of the Takeovers Code. The definition has been amended to remove any unnecessary overlap and potential inconsistencies with the definition of acting in concert. The definition of "associate" now provides that with respect to an offeror or potential offeror or the offeree company (the **first person**), the term associate normally includes the following:

(1) any person acting in concert with the first person;

- The position remains that all persons acting in concert with an offeror or offeree are regarded as their associates. The previous class of group companies has been deleted since these companies are already included in class (1) of the definition of "acting in concert". The revised

introduction to the definition has removed the statement that the term associate will cover all persons acting in concert with an offeror.

(2) any financial and other professional adviser (including a stockbroker) of the parent, subsidiaries and fellow subsidiaries of the first person, including persons controlling, controlled by or under the same control as such financial and other professional advisers (other than exempt fund managers (**EFMs**) and exempt principal traders (**EPTs**) covered in class (5) below);

- Class 2 has been narrowed to cover only financial and other professional advisers of companies in the same group as the offeror or offeree company (i.e. their parent, subsidiary and fellow subsidiary companies). Advisers to associated companies are no longer included.

- In light of the possible closeness of an adviser-client relationship, class (2) continues to cover advisers of other group companies, irrespective of whether they are advising on the offer, as well as entities that are in the same group as the adviser. However, an adviser who is not advising on an offer may not be sufficiently close with the client to be considered an associate, and in order to determine this, the Executive may take into account all relevant circumstances and the factors specified in the London Takeover Panel's statement in relation to Canary Wharf Group plc (2004/12). An adviser who is not advising on the offer should, at the earliest opportunity, consult with the Executive to clarify the application of class (2) to its situation.

- The reference to "banks" has been been deleted as it was considered to be too wide given that class (5) of the presumption of "acting in concert" already covers any bank which acts as a financial or professional adviser and class (9) of that presumption already covers any person, other than an authorised institution, lending money in the ordinary course of business, providing finance or financial assistance (directly or indirectly) to any person (or any person acting in concert with such person) in connection with an acquisition of voting rights.

(3) the directors (together with their close relatives, related trusts and companies controlled by any of the directors, their close relatives or related trusts) of any subsidiary or fellow subsidiary of the first person;

- Class 3 has been amended to remove the reference to directors of associated companies.

(4) the pension funds, provident funds and employee share schemes of the parent, subsidiaries and fellow subsidiaries of the first person;

- The scope has been narrowed to cover pension funds, provident funds and employee share schemes of parents, subsidiaries and fellow subsidiaries of offeror and offeree companies but not those of their associated companies.

(5) any EPT or EFM which is controlling, 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

- Class (5) is a new class covering EPTs and EFMs in the same group as the financial or other professional adviser of an offeror or offeree company and its parents, subsidiaries and fellow subsidiaries. The original class 5 referred to any investment company, unit trust or other person whose investments an associate manages on a discretionary basis, in respect of the relevant investment accounts. This has been deleted since the presumption of acting in concert includes a virtually identical class at class (4).

(6) a person who owns or controls 5% or more of any class of relevant securities issued by 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.

- Class (6) has been retained.

The former Class (7) covering companies with a material trading arrangement with an offeror or offeree company has been removed.

5. Disclosure of Number of, Holdings of and Dealings in, Relevant Securities

5.1 Rule 3.8 – Announcement of number of relevant securities in issue

Rules 3.8 and 22 have been amended to require disclosure of details and dealings in securities, where the offeror is offering securities of another company as consideration in an offer (**Third Party Securities**). Accordingly, revised Rule 3.8 requires that on a securities exchange offer involving Third Party Securities, the offeror must announce details of all relevant securities of the company the securities of which are to be offered as consideration for the offer and the number of such securities in issue. The offeror would still need to announce these details in respect of the relevant securities of the offeror to enable a shareholder of the offeror to ascertain whether he is an associate of the offeror by virtue of holding 5% or more of its relevant securities.

The definition of "relevant securities" in Note 4 to Rule 22 has been amended to include the securities of the company whose securities are to be offered as consideration for the offer. Where securities other than those of the offeror will be offered as consideration, the SFC considers that for the purposes of Rule 22, disclosure should only be required of dealings in the relevant securities of the company whose securities are to be offered as consideration for the offer (i.e it would not be necessary to disclose dealings in the relevant securities of the offeror since this information would not be meaningful). Similar disclosures would be required for the purpose of shareholding and dealing disclosures under Schedules I and II and consequential changes to Note 1 to paragraph 4 of Schedule I and a new Note 4 to paragraph 12 of Schedule have been added.

A further amendment introduced by the Consultation Conclusions is a requirement under Rule 3.8 for an offeror to announce details of its relevant securities not only for securities exchange offers (as previously) but also for cash offers.

Rule 22.1 requires disclosure of 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. One purpose of Rule 3.8 is to provide shareholders of the offeree company and the offeror with details of relevant securities to allow them to determine whether they are class (6) associates (a person who owns or controls 5% or more of any class of relevant securities of the offeror or offeree company), and thus subject to Rule 22 dealing disclosure requirements.

Rule 3.8 provides that 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. However, for an offeror, Rule 3.8 previously only applied to announcements of details of its securities in a securities exchange offer, and there were no disclosure requirements in relation to cash offers. This may give rise to difficulties for the offeror shareholders to determine whether they hold a 5% interest under class (6) associates, and thus uncertainty as to their obligations under Rule 22.1 cash offers. Rule 3.8 has been amended so that an offeror is required to announce details of its relevant securities in all offers, the phrase "unless it has stated that its offer is likely to be solely in cash" being removed.

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

Requirements of disclosure of shareholdings and dealings in the offeree board circular have been extended to include disclosure by two classes of associate, a REIT's trustee (class 7) and a REIT's management company (class 8), under Schedule IX. New paragraph 3(p) of Schedule IX provides that in cases where the offeree company is a REIT, the disclosure obligations for offeree board circulars for takeovers and mergers 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.

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

Note 5 to Rule 22 has been amended so that the deadline for filing of dealing disclosures is extended from 10.00 a.m. to 12.00 noon on the business day following the date of the transaction, or in the case of dealings that have taken place in the time zones of the United States, the second business day following the date of the transaction.

In response to various requests, the SFC stated in the Consultation Conclusions that it does not consider it necessary to extend the disclosure deadline for dealings in Europe or private disclosures.

5.4 Note 6 to Rule 22 – Method of dealing disclosure

The method of disclosure under Note 6(a) to Rule 22 of the Takeovers Code has been amended with the removal of the requirement to make separate disclosures to the offeror,

offeree company and their financial advisers. Disclosure of dealings thus only needs to be made to the SFC using the prescribed forms available on the SFC's website. The SFC then posts the disclosure on the websites of the SFC and the Stock Exchange.

6. Miscellaneous Amendments

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

Class (5) of the presumption of acting in concert (which covers financial and other professional advisers and other entities within their groups) has been amended to exclude group entities which are EFMs.

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

Section 8.3 of the Introduction to the Codes has been amended to require the submission of a duly completed and signed prescribed filing form together with any application made under the Codes. The filing form includes a statement by the applicant certifying the truth, accuracy and completeness of statements contained in the submission application. The filing form refers to the form required to be submitted for all applications made under Rule 8 of the Introduction to the Codes which was introduced in September 2016 and is available on the SFC website (https://www.sfc.hk/web/EN/regulatory-functions/listings-and-takeovers/takeovers-and-mergers/forms.html).

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

The SFC has amended Notes 2 and 3 to Rule 8.1 on the dissemination of information about companies involved in an offer.

First, the safeguards under Notes 2 and 3 are now stated to apply to meetings with "holders of other relevant securities (as defined in Note 4 to Rule 22)" of the offeror or offeree company as well as meetings with the current shareholders of the offeror and offeree. The reason is that under Rules 13 and 14, an offeror must extend the offer to all holders of other classes of relevant securities.

Note 3 has also been amended to make it clear that its requirements (such as the requirement that a representative of the financial adviser present at the meeting must confirm to the Executive that no material new information was provided etc.) apply to all meetings held during an offer period whether held in person or by telephone or other electronic means.

Note 3 has been modified to provide that materials such as press releases or printouts of slides which highlight the salient facts of an offer may be distributed at the meeting and should be fairly presented. These printed materials would not normally be regarded as documents for the purpose of Rule 12.1 and do not need to be submitted to the Executive for comment prior to distribution. However, an appropriate representative of the financial adviser is required to confirm to the Executive that these printed materials do not include any material new information or significant new opinion.

In response to concerns relating to subjectivity, the proposed requirement for financial advisers to confirm that the information in the printed materials is fairly presented has not been adopted.

According to amended Note 2 to Rule 8.1, the requirements concerning meetings and presentations or other documents set out in Note 3 also apply to any interviews and discussions and any written communication relating to an offer which is provided to the media.

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

The practice of requiring submission of confirmations of publication and translation after the publication of a Code document has been codified.

New Note 4 to Rule 12 provides that as soon as practicable following the publication of any document, the issuer 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) there has been no material change to the version of the document in relation to which the Executive has confirmed that it has no further comment (except where the document is one of the documents included in the list published under the Note to Rule 12.1). Such confirmation should be accompanied by a copy of the published English and Chinese versions of the document, as well as a marked-up version showing any changes (including deletions) made after the Executive's confirmation.

New Note 5 to Rule 12 states that following the publication of any document, the directors must confirm that the Chinese version is a true and accurate translation of, and is consistent

with, the English version (or vice versa). Such confirmation should be in the form prescribed by the Executive and should be provided to the Executive as soon as possible and 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. For documents that are jointly issued, confirmations should be provided by each of the parties issuing the document. Further, 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 requirement of the confirmation of translation does not absolve the responsibility of the directors of the issuing party.

Consequential changes were made by adding a new Note to Rule 8.6 (English/Chinese language) and a new Note 6 to Rules 9.3 (Directors' joint and several responsibility) and 9.4 (Executive's consent for exclusion of directors) to refer to Note 5 to Rule 12 regarding the confirmation of translation to be given to the Executive following the publication of any document.

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

The definition of CA (i.e. Communications Authority under section 3 of the Communications Authority Ordinance (Cap. 616)) has been deleted. wReferences to the Communications Authority decisions/consent in Note 3 to Rule 15.5 (Final day rule) and Note 4 to Rule 26.2 (Conditions) have been replaced by a general reference to regulatory approvals from a regulatory body. This is because regulatory approvals (under merger law and otherwise) are increasingly required for a broad range of companies and transactions under the Codes.

The SFC noted in the Consultation Paper that the timetable for different regulatory approval processes differs significantly depending on the nature of the approval with some processes taking many months to complete. In the interests of certainty of an offer (in line with General Principle 4 of the Codes), the SFC considers it is best practice for an offeror to structure a voluntary offer which is subject to regulatory approval(s) as a pre-conditional offer. In these circumstances, the precondition (i.e. the obtaining of the regulatory approval(s)) must be satisfied before the formal offer is made (by the issuance of an offer document to shareholders). In some cases however (this is fairly uncommon in Hong Kong) the offeror might announce a firm intention to make an offer that is conditional on regulatory approval(s). In this case, the offeror will be obliged to proceed with the offer and issue an offer document to shareholders. Once the offer document has been published the timetable requirements 35 set out in the Codes will apply. This includes various important deadlines such as Day 39 (Rule 15.4 - latest date for announcement of new information), Day 46 (Rule 16.1 – latest day for revisions to an offer) and Day 60 (Rule 15.5 – latest day for an offer to be declared or become unconditional as to acceptances). As a matter of practice the Executive's consent is normally sought for an extension of Day 39, Day 46 and/or Day 60 if an offeror encounters delay in obtaining relevant regulatory consents. As regards mandatory offers, the only condition allowed to be included is the 50% acceptance condition (Rule 26.2). As such, an offeror must seek the relevant regulatory approval before a mandatory offer obligation is triggered under Rule 26.1. Failure to do so will mean that the offeror is in breach if it fails to do so.

6.6 Rule 18 – Setting aside "no extension" and "no increase" statements

Competitive situations (Note 2 to Rule 18)

Note 2 to Rule 18 has been modified to clarify that an offeror is free to increase its offer if a competitive situation arises after a no increase statement. This is in line with an offeror's ability to extend its offer in a competitive situation which was already provided for in the previous version of the Codes.

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

Note 4 to Rule 18 has been amended to extend an offeror's right to set aside a no extension or no increase statement to situations which cannot be determined or controlled by the offeror where the offeror has specifically reserved the right to do so at the time the statement was made and the first document in which mention is made of the statement contains prominent reference to this reservation. The amended Note states that Notes 2 and 3 to 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.

6.7 Rule 19.1 – Results announcements

Rule 2.9 has been amended so that for matters required to be approved by shareholder vote under the Rules, the issuer must disclose by way of announcement 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. Additionally, in the case of a scheme of arrangement which is subject to approval by "a majority in number" requirement (i.e. the headcount test), the company must now announce 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 instructing HKSCC Nominees Limited to vote for and against the resolution, and the number of shares voted by such CCASS Participants.

Further, a Note to Rule 19.1 on the nature of the announcement of the results of an offer has been added so that in the case of a scheme of arrangement, an announcement is required to be published in accordance with Rule 19.1 requirements on the date of the shareholder meeting approving the scheme of arrangement, and to refer to Rule 2.9 for the disclosure requirements applicable to such announcements.

6.8 Rule 30.1 – Conditions should not be subjective

The heading of Rule 30.1 has been changed from "Subjective conditions" to "Conditions to an offer". The Rule has been extended to include judgments by the offeree company, and now states that an offer must not normally be made subject to conditions which depend on judgments by the offeror or the offeree company or the fulfilment of which is in their respective hands.

A specific concern of the SFC is that it considers as unacceptable conditions that the offeree company is required to maintain a certain cash balance, as such conditions are subjective with compliance resting with the offeree company. The SFC considers that such conditions should be treated in the same way as conditions which depend on the offeror's judgements or the fulfilment of which is in its hands.

6.9 Rule 31.3 – Six months delay before acquisition above offer price

Rule 31.3 which provides that persons holding at least 50% of the voting rights are subject to a six-month delay from the end of an offer period before being able to make an offer or acquisition above the offer price, has been modified to apply to both offers that were unconditional at the time of publication of the offer document and offers that became or were declared unconditional after the publication of the offer document. Further, for this purpose, the value of a securities exchange offer is now calculated as at the later of the date of the offer document or the date the offer became, or was declared, unconditional.

6.10 Paragraph 1 of Schedule II – Views of offeree board

Amendments to the Code have clarified that both the independent board committee's advice and the independent financial adviser's advice must be included in the offeree board circular.

Paragraph 1 of Schedule II now provides that an offeree board circular should include: (i) the names of the directors of the offeree company and of the directors comprising the independent committee of its board, (ii) the recommendation of the independent committee, or a statement that the independent committee is unable to make a recommendation (with reasons for the recommendation or for making no recommendation), and (iii) a copy of the written advice of the independent financial adviser. Note 4 to Paragraph 1 has also been amended so that the circular must include the independent financial adviser's statement of consent.

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

Historical Financial information

New Note 5 to paragraph 12 of Schedule I, a new Note to paragraph 6 of Schedule II and a new Note to paragraph 16 of Schedule III provide that historical financial information may be incorporated into the relevant code document (offer document, offeree board circular and offer document, respectively) by reference to a listed company's other documents published in accordance with the Listing Rules (i.e. published accounts or accountants' reports).

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

Accounting terminology in the Schedules to the Codes has been amended so as to bring it in line with the latest accounting standards and to conform to certain amended Listing Rules' requirements.

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