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[online version](http://www.charltonslaw.com/sfc-emphasises-trigger-and-creeper-provisions-will-not-be-relaxed-and-introduces-new-takeovers-code-practice-note-on-confirmation-of-financial-resources/)

# SFC Emphasises Trigger And Creeper Provisions Will Not Be Relaxed And Introduces New Takeovers Code Practice Note On Confirmation Of Financial Resources

## Introduction

The Securities and Futures Commission has published its December 2008 Takeovers Bulletin which:

* reiterates the Takeovers Panel's October 2008 recommendation not to relax the trigger and creeper provisions in the Takeovers Code;
* includes a new Practice Note 15 on Confirmation of Financial Resources in Cash Offers; and
* details the revisions made to Practice Note 1 on Partial Offers and Practice Note 14 on the Meaning of "reporting in accordance with Rule 10 of the Takeovers Code".

The purpose of this note is to provide a summary of the issues raised in the Takeovers Bulletin, a copy of which can be viewed on the [SFC's website](http://www.sfc.hk/sfc/doc/EN/cfd/mergers/takeovers_bulletin/08/dec_08.pdf) ([see archive](bulletin.pdf)).

## Takeovers Panel's Recommendation Not To Relax The General Offer Trigger Point And Creeper Under The Takeovers Code

The Takeovers Bulletin sets out the SFC's statement of 29 October 2008 regarding the recommendation of the Takeovers Panel that there should be no relaxation of the 30% general offer trigger point and the 2% creeper under the Takeovers Code. The Takeovers Panel had met at the request of the SFC to consider whether, in the light of prevailing market conditions, these provisions should be relaxed temporarily to allow a company's major shareholders to show confidence in the company without incurring a mandatory takeover obligation.

For a summary of the SFC's statement, please see our November 2008 newsletter which can be viewed by clicking [*here*](/newsletters/hklaw/en/2008/62/nl-hklaw-20081110-62.html).

## New Practice Note 15 (PN15) - Confirmation Of Financial Resources In Cash Offers

Rule 3.5 of the Takeovers Code requires that the announcement of an offer must include confirmation by the financial adviser or by another appropriate third party that the offeror has sufficient resources to satisfy full acceptance of the offer. Note 3 to that rule provides that the Executive may require evidence to support a confirmation of sufficiency of financial resources. Note 3 also requires a financial adviser confirming the adequacy of financial resources to observe the "highest standard of care to satisfy itself of the adequacy of resources, including performance of due diligence".

In the light of recent market conditions, the SFC sought the views of the Takeovers Panel on possible additional safeguards which might be implemented regarding a financial adviser's confirmation of sufficiency of financial resources. The Takeovers Panel's recommendations were as follows:

1. The Executive should make rigorous enquiries to satisfy itself that the financial adviser has performed the necessary due diligence in providing the financial resources' confirmation.
2. Market practitioners should be mindful of the requirement in paragraph 11 of Schedule 1 to the Takeovers Code that the financial adviser should confirm in the offer document that there have been no material changes to the availability of financial resources since the date the confirmation was first given.
3. No subjective conditions should be attached to any financing in the context of the financial adviser's confirmation of financial resources in a Rule 3.5 announcement.

PN15 also states that in the case of all cash offers (irrespective of whether they are accompanied by an alternative form of consideration), the SFC will expect to be provided with documents confirming that the offeror has sufficient cash available. Such documents could include a financial adviser’s letter of confirmation of sufficiency of financial resources, which should be based on evidence of funds such as bank facilities letters relating to the cash required. Such facilities must not be subject to any subjective condition.

The SFC reminds market practitioners that financial advisers are solely responsible for ensuring that sufficient financial resources are available to satisfy an offeror's obligations and that they must observe the highest standards of care in satisfying themselves of the sufficiency of financial resources.

## Revised Practice Note 1 - Partial Offers

PN1 has been revised to clarify that the SFC will, as a matter of practice, normally grant consent under Rule 28.1 to partial offers which could result in an offeror holding 30% or more of the voting rights attaching to the shares in a company provided that the partial offer is conditional on approval of independent (i.e. not the offeror or its concert parties) shareholders holding over 50% of the voting rights and subject to compliance with the other relevant provisions of the Codes. The approval process is signified by means of a separate tick box on the acceptance form which states the number of shares in respect of which the offer is approved.

## Revised Practice Note 14 - Meaning Of "Reporting On In Accordance With Rule 10 Of The Takeovers Code"

Where a document to shareholders includes information that constitutes a profit forecast under Rule 10.06, that information must be "reported on" in accordance with Rule 10 of the Takeovers Code. PN14 gives guidance on the meaning of "reported on" in Rule 10.

PN14 has been revised to clarify that financial advisers are not normally required to provide a written confirmation to the SFC confirming that the profit forecast has been made with due care and consideration. Similarly, auditors and accountants are not normally required to confirm to the SFC in writing that the forecast has been properly compiled on the basis of the assumptions made. In both cases, it is normally sufficient for the relevant confirmations, which form part of the report referred to in Rule 10.4 of the Takeovers Code, to be published in the document addressed to shareholders containing the profit forecast.

## Importance Of Highlighting Issues To The SFC

The SFC reminds market practitioners of the importance of bringing all relevant facts and issues to the attention of the Executive at the earliest opportunity. This applies in all cases including applications for the Executive's ruling, preparation of documents in Code-related transactions and consultation with the Executive on Code-related matters.

*This note constitutes a summary only of the SFC's Takeovers Bulletin Issue No. 7. Specific advice should be sought in relation to any particular situation.*

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