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**THE HONG KONG CODE  
ON TAKEOVERS AND MERGERS**

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*This memorandum summarises in general terms some of the more important provisions of The Hong Kong Code on Takeovers and Mergers. It is not intended to be exhaustive or specific to any particular client or matter.*

## 1. INTRODUCTION

The Hong Kong Code on Takeovers and Mergers (**Takeovers Code**) was first introduced in 1975 and is a voluntary code which depends on the willingness of market participants to comply with it rather than the law to enforce it. It is administered by the Executive Director (**Executive**) of the Corporate Finance Division of the Securities and Futures Commission (**SFC**) 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, issuance of a public statement which involves criticism, disciplinary action or suspension. The Takeovers Panel can also require a person who has breached specific provisions<sup>1</sup> of the Takeovers Code to pay compensation to shareholders who suffered loss as a result of the breach.<sup>2</sup>

## 2. JURISDICTION

The Takeovers Code applies to takeovers and mergers affecting public companies in Hong Kong and companies with a primary listing of their equity securities in Hong Kong. In determining whether a company is a "public company" in Hong Kong, the 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.

## 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:

- (i) all shareholders are to be treated equally;
- (ii) if control of a company changes, a general offer to all other shareholders is normally required;
- (iii) 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 (except for some information furnished in confidence to the potential offeror or vice versa);
- (iv) an offer should only be made after careful and responsible consideration;
- (v) shareholders should be given sufficient information, advice and time to reach an informed decision;
- (vi) all persons concerned with offers should make full and prompt disclosure of all relevant information and take every precaution to avoid the creation or continuance of a false market and making statements which may mislead shareholders or the market;
- (vii) rights of control should be exercised in good faith and oppression of minority shareholders is unacceptable;
- (viii) directors should have regard to the interests of the shareholders as a whole;
- (ix) the board of the offeree should not take actions to frustrate a proposed bona fide offer or deny the shareholders the opportunity to decide on its merits; and

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<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.

- (x) all parties concerned with takeovers and mergers are required to co-operate to the fullest extent with the Executive, the Takeovers and Mergers Panel ('Panel') and the Takeovers Appeal Committee.

In addition to the above principles, the Takeovers Code contains 36 rules which apply the general principles.

## **4. VOLUNTARY AND MANDATORY OFFERS**

There are two types of offers covered in the Takeovers Code, namely voluntary offers and mandatory offers. Any person or company may make a voluntary offer provided the consequence of such an offer does not trigger a mandatory offer or the two per cent. "creeper rule" as discussed under paragraph 4.2 below. This would change the voluntary offer into a mandatory offer pursuant to Rule 26 of the Takeovers Code.

### **4.1 Voluntary Offer**

#### **4.1.1 Conditions for a voluntary offer**

A general offer is an offer by the offeror (**Offeror**) and persons acting in concert with him, open to all the shareholders of the offeree company (**Offeree**), to purchase shares from those shareholders. Unlike a mandatory offer under Rule 26 of the Takeovers Code, a voluntary offer may incorporate any conditions except conditions which depend on judgments by the Offeror or the Offeree or the fulfilment of which is in their respective control or discretion (Rule 30.1). Otherwise, the offer is merely a sham as the Offeror can withhold fulfilling the conditions in order to make the offer lapse.

The Offeror should not invoke any condition, other than the acceptance condition (as described below), that causes the offer to lapse unless the circumstances which give rise to the right to invoke the condition are of material significance to the Offeror in the context of the offer.

Except with the consent of the Executive, sought by filing an application (with application fee), all offers, except partial offers made under Rule 28, must be conditional upon the Offeror having received the acceptance of shareholders, whose shares, together with shares acquired or agreed to be acquired before or during the offer, will result in the Offeror and persons acting in concert with it holding more than 50 per cent. of the voting rights of the Offeree (Rule 30.2). This is commonly referred to as the "acceptance condition".

A voluntary offer may be made conditional upon an acceptance level of shares carrying a higher percentage of the voting rights (70 per cent. of the voting rights, for example) failing which the Offeror is entitled to withdraw the offer. However, when setting the acceptance level, the Offeror is reminded to observe the requirement of the Listing Rules that a specified percentage of a listed company's securities must be in public hands. For both Main Board and GEM listed companies, that percentage is 25% unless the Hong Kong Stock Exchange agreed to a lower percentage on initial listing.

#### **4.1.2 Consideration**

A voluntary offer may not normally be made at a price that is at a discount of more than 50% to the Offeree shares' market price (being the lesser of the closing price of the shares on the day before the announcement of a firm intention to make an offer under Rule 3.5 and the 5 day average closing price prior to such day). This provision was introduced to prevent so-called 'low-ball' or 'one cent' offers being used to frustrate the Offeree's business where there is no genuine intention to seek control.

If an Offeror, or any person acting in concert with it, has purchased shares in the Offeree (i) within 3 months before the offer period (or earlier in the case of purchases from directors or connected persons) or (ii) during the period between the start of the offer period and the announcement of a firm intention to make an offer under Rule 3.5, the offer must be on no less favourable terms than those applying to that purchase (Rule 24.1(a)). An offer period commences on the making of an announcement of a proposed or possible offer (see paragraph 9.4 below).

If, after an announcement of a firm intention to make an offer under Rule 3.5 and during the offer period, the Offeror (or any person acting in concert) purchases shares in the Offeree at above the offer price, the Offeror must increase the offer price to the highest price (excluding stamp duty and dealing costs) paid for such shares (Rule 24.1(b)). This will require the Offeror to make a revised offer which must be announced immediately after the purchase of shares at above the offer price (Rule 24.3). Persons who have accepted the original offer are entitled to receive the revised price (Rule 16.1).

The consideration for a voluntary general offer may be cash or securities. However, if the Offeror (and any person acting in concert) has acquired for cash shares in the Offeree carrying 10% or more of the voting rights during the offer period and 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). The Executive also has a discretion to require cash to be made available where less than 10% has been purchased in the 6 months before the offer period from directors or other persons closely connected with the Offeror or Offeree (Note 4 to Rule 23.1).

Conversely, if the Offeror (and any person acting in concert) has acquired shares in the Offeree carrying 10% or more of the voting rights in exchange for securities during the offer period and within 3 months before the start of the offer period, such securities are required to be offered to all other holders of shares of that class (Rule 23.2). Unless the vendor is required to hold the securities received until either the offer has lapsed or the offer consideration has been posted to accepting shareholders, the Offeror will also be required to make an offer in cash or to provide a cash alternative under Rule 23.1. In the case of a purchase from directors or persons closely connected with the Offeror or Offeree, the Executive may require a full share offer where less than 10% has been purchased or where the purchase was made more than 3 months before the offer period (Note 2 to Rule 23.2).

#### **4.1.3 Acceptance of voluntary offer**

An acceptance is counted towards fulfilling the acceptance condition when the Offeror's receiving agent, usually the Offeree's registrar, receives an acceptance on or before the deadline for acceptance set out in the Offeror's relevant documents or announcements and the receiving agent has recorded that the acceptance and any relevant materials required have been received. The acceptance form should be completed and accompanied by share certificates of the relevant shares from a registered holder or his personal representatives and certified by the Offeree's registrar or the Hong Kong Stock Exchange (Note 1 to Rule 30.2).

## **4.2 Mandatory Offer**

Under Rule 26 of the Takeovers Code, the SFC 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.

#### **4.2.1 Conditions of the Mandatory Offer**

Except with the consent of the Executive, a mandatory offer under Rule 26 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 (Rule 26.2). However, where the Offeror holds more than 50% of the voting rights before the offer is made, an offer made under this Rule must normally be unconditional (Note 1 to Rule 26.2). In particular, a mandatory offer may not be made conditional upon the passing of shareholders’ resolutions of the Offeror. Only in exceptional circumstances would the Executive allow other conditions, in addition to the acceptance condition, to be imposed on a mandatory offer.

Rule 26 can therefore have significant consequences for an unwary offeror. In addition to the obligation to make a mandatory offer for all the company’s shares, it will lose the right to include the other conditions on which the offer could have been made (see paragraph 11.3 below).

#### **4.2.2 Offeree Shareholders Entitled to Accept the Offer**

The mandatory offer required under Rule 26 is a general offer as it should be extended to:

- Holders of each class of equity share capital of the Offeree, whether the class carries voting rights or not; and
- Holders of any class of voting non-equity share capital in which the Offeror (or persons acting in concert) hold shares.

Offers for different classes of equity share capital must be comparable and the Executive should be consulted in advance in such cases (Rule 14).

#### **4.2.3 Waiver of Mandatory Offer**

The Takeovers Code empowers the Executive upon application, usually by the lawyer or the financial adviser on behalf of the Offeror, to waive the requirements of Rule 26 in special circumstances.

*Whitewash Procedure*

When the issue of new securities as consideration for an acquisition, or a cash subscription, or the taking of a scrip dividend, would otherwise result in an obligation to make a mandatory offer under Rule 26 of the Takeovers Code, the Executive will normally waive the obligation if the whitewash waiver and the underlying transaction(s) are separately approved by at least 75% (in case of the whitewash waiver) and more than 50% (in the case of the underlying transaction(s)) of the independent vote at a shareholders' meeting. Independent vote means a vote by shareholders who are not involved in, or interested in, the transaction in question. 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 shareholders approve the underlying transaction(s) but not the whitewash waiver, the underlying transaction(s) may still proceed coupled with a general offer provided the whitewash waiver condition is waivable.

However, the Executive will not normally grant a waiver if:

- (i) the person to whom the new securities are to be issued or any person acting in concert with him has acquired voting rights in the company (save for subscriptions for new shares which have been fully disclosed in the whitewash circular) in the 6 months prior to the announcement of the proposals but subsequent to negotiations or discussions with the directors of the company in relation to the proposed issue of new securities; or
- (ii) voting rights have been acquired or disposed of by such persons without the Executive's prior consent in the period between the announcement of the proposals and the completion of the subscription.

#### *Rescue Operations*

The Executive may also waive the requirement for a person to make a general offer where the company is in such a serious financial position that the only way it can be saved is by an urgent rescue operation which involves the issue of new securities without approval by a vote of independent shareholders or the acquisition of existing securities by the rescuer which would otherwise fall within Rule 26.

#### *Inadvertent Mistake*

The Executive will not normally require a person to make a general offer under Rule 26 if the obligation to do so results from an inadvertent mistake, provided that the person disposes of sufficient voting rights within a limited period to unconnected persons.

#### *Placing and Top-up Transactions*

A waiver will normally be granted where a shareholder, who together with persons acting in concert with him holds 50% or less of the voting rights of a company, places some of his shares with an independent person and then, as soon as practicable, subscribes for new shares up to the number of shares placed at a price substantially equivalent to the placing price less expenses.

### **4.2.4 Consideration**

Offers made under Rule 26 must be in cash or be 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 that class during the offer period and within 6 months before its commencement (Rule 26.3(a)). Only with the Executive's consent would the highest price not be taken as the offer price (Rule 26.3(b)). If the voting rights were acquired for a consideration other than cash, the offer price must be determined by independent valuation (Note 1 to Rule 26.3). As noted above, should the Offeror, or any person acting in concert with it, purchase securities in the Offeree above the offer price during the offer period, the Offeror must raise the offer price to not less than the highest price paid for the securities acquired.

## 5. CONCERT PARTIES AND INDEMNITIES

Many provisions of the Takeovers Code apply not only to the Offeror and the Offeree themselves, but also to those "acting in concert" with the Offeror, and to those who may have an indemnity or other arrangement with either party such as to induce them to deal or refrain from dealing. A person will be taken to be acting in concert with an offeror if, pursuant to an agreement or understanding, he is actively co-operating, through the acquisition of voting rights, to obtain or consolidate control of the Offeree. Certain categories of persons are presumed to be acting in concert with others in the same class, unless the contrary is established. These classes of persons include:

- a company, its parent, its subsidiaries, its fellow subsidiaries, associated companies of any of the foregoing, and companies of which such companies are associated companies;
- a company with any directors (together with their close relatives, related trusts and companies controlled by any of the directors, their close relatives or related trusts) of it or of its parent;
- a company with any of its pension funds, provident funds and employee share schemes;
- a fund manager (including an exempt fund manager) with any investment company, mutual fund, unit trust or other person, whose investments such fund manager manages on a discretionary basis, in respect of the relevant investment accounts;
- a financial or other professional adviser (including a stockbroker) with its client in respect of the shareholdings of the adviser and persons controlling, controlled by or under the same control as the adviser (except in the capacity of an exempt principal trader or exempt fund manager);
- directors of a company (together with their close relatives, related trusts and companies controlled by such directors, their close relatives and related trusts) which is subject to an offer or where the directors have reason to believe a bona fide offer for their company may be imminent;
- partners;
- an individual (including any person who is accustomed to act in accordance with the instructions of the individual) with his close relatives, related trusts and companies controlled by him, his close relatives or related trusts; and
- a person, other than an authorised institution within the meaning of the Banking Ordinance (Cap. 155) lending money in the ordinary course of business, providing finance or financial assistance (directly or indirectly) to any person (or a person acting in concert with such a person) in connection with an acquisition of voting rights (including any direct or indirect refinancing of the funding of the acquisition).

"Close relatives" are defined as:

- the person's spouse or de facto spouse, parents, children, grandparents and grandchildren;

- the person’s siblings, their spouse or de facto spouse and their children; and
- the parents and siblings of the person’s spouse or de facto spouse.

“Children” include natural, adopted and step-children.

The presumption that parties are acting in concert is a strong one and the Executive, who is responsible for the day-to-day management of the Takeovers Code and the conduct of investigations, will draw the inference unless provided with clear rebutting evidence. Practically, this is one of the most contentious issues of the Takeovers Code, particularly as the Executive is prepared to determine that a concert party exists where the evidence is primarily circumstantial.

Anyone dealing pursuant to an indemnity is likely to be regarded as acting in concert. For this reason, no arrangements of this nature should be entered into without full discussion with professional advisers, and will usually require to be disclosed.

Whether a person is acting in concert is of particular significance when determining whether the 30% threshold has been reached which will trigger a mandatory offer under Rule 26. It should be noted that where an Offeror acquires just under 30% of a company, it is the Offeror’s responsibility to ensure that there are no concert party holdings which will trigger the mandatory offer obligation (Note 7A to Rule 26).

## **6. ADVISERS**

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

### **6.1 Financial Advisers**

The principal role of the financial advisers to the Offeror will be to advise on the financial aspects of the offer. It is not only the Offeror which will require financial advisers; it is a requirement of the Takeovers Code that an independent committee of directors of the Offeree must obtain competent independent financial advice which must be made known to the Offeree shareholders by being included in the offeree board circular (Rule 2.1). The financial advisers will assist in negotiating the terms of the offer, and, if advising the Offeree, may be involved in negotiations with rival, possibly preferred, offerors. The board must announce the appointment of the independent financial adviser in the initial announcement of the offer or possible offer, or as soon thereafter as the appointment is made.

The board of the Offeror is also required to obtain competent independent advice as to whether an offer is in the interests of the Offeror’s shareholders where the offer being made is a reverse takeover or when the directors are faced with a conflict of interest (Rule 2.4). The substance of such advice must be made known to the Offeror’s shareholders. Situations which will involve a conflict of interest include where there are significant cross-shareholdings between the Offeror and Offeree, when a number of directors are common to both companies and when a person is a substantial shareholder in both companies.

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.

### **6.2 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.

### **6.3 Stockbrokers**

Where they are not appointed as the financial advisers, the Offeror or Offeree'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 Hong Kong Stock Exchange.

### **6.4 Auditors**

The Offeror or Offeree'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.

### **6.5 Press Consultants**

The Offeror or 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. THE NEGOTIATIONS**

### **7.1 Matters to be discussed**

Once an approach has been made, and negotiations for a possible recommended offer commenced, the Offeror and Offeree boards will attempt to finalise the terms of the offer. This will include agreeing on the price of the offer, and a timetable, and settling plans for the future of the Offeree, its management and employees.

### **7.2 Information**

The Offeror is likely to ask for financial information on the Offeree, much of which may be confidential. The Offeror may therefore be required to give a formal undertaking to keep the information confidential. However, under the Takeovers Code, any information given to an offeror must, on request, be given to any bona fide competing offeror (but usually on the same terms as to confidentiality) (Rule 6). This requirement may affect the extent to which the Offeree is prepared to release information, even to a friendly offeror.

### **7.3 Irrevocables**

In order to ensure the success of its offer, the Offeror may seek irrevocable commitments from certain shareholders to accept the offer once it is made. Commitments of this type are known as "irrevocables" or, where they effectively prevent a competing offer from succeeding, "shut-outs". The Offeror is allowed to approach a very restricted number (no more than six) shareholders in relation to irrevocables (Note 4 to Rules 3.1, 3.2 and 3.3 and Practice Note 12). The Offeror is not required to consult the Executive before approaching a shareholder with a material interest in the Offeree. A shareholder has a material interest if they and their concert parties have direct or indirect control of 5% or more of an offeree company's voting rights. However, the Executive must be consulted before approaching shareholders without a material interest in the Offeree. It will be a matter for negotiation as to whether these irrevocables commit the shareholders concerned to accept the offer in any event, or whether they are allowed to accept an alternative, higher offer from a competing offeror.

### **7.4 Special deals**

The Takeovers Code prohibits the Offeror and parties acting in concert with it from entering into arrangements with shareholders of the Offeree with favourable conditions which are not available to all shareholders, except where the Executive has consented to the arrangements (Rule 25).

## **8.     **SECRECY****

During the period of negotiations and throughout the offer when price sensitive matters are being discussed, the need for absolute secrecy is vital (Rule 1.4). Any “leak” may give rise to speculation or a rise in share price of the Offeree, which in turn may lead to the Executive requiring a clarifying announcement (which could prejudice the successful outcome of the negotiations) and possibly to allegations of insider dealing.

## **9.     **ANNOUNCEMENTS****

The Takeovers Code sets out specific situations in which announcements are required. Rule 12.2 stipulates that announcements in respect of listed companies must be published on the websites of the Hong Kong Stock Exchange and the listed company in accordance with the Listing Rules. Announcements are not required for unlisted offeree companies. However, all documents published in respect of unlisted offeree companies must be delivered to the Executive in electronic form for publication on the website of the SFC.

### **9.1     **Offeror Announcements****

Before the board of the Offeree is approached, the responsibility for making an announcement normally lies with the Offeror or potential Offeror. Rule 3.1 stipulates that an announcement must be made by the Offeror or potential Offeror in the following 3 situations:

- (A)    when, before an approach has been made, the Offeree is the subject of rumour or speculation about a possible offer or there is undue movement in its share price or in the volume of share turnover, and there are reasonable grounds for concluding that it is the actions of the potential Offeror or persons acting in concert with it (whether through inadequate security, purchasing of Offeree shares or otherwise) which have led to the situation;
- (B)    when negotiations or discussions are about to be extended to include more than a very restricted number of people (outside those who need to know in the companies concerned and their immediate advisers); and
- (C)    immediately when the Offeror triggers a mandatory offer obligation under Rule 26.

### **9.2     **Offeree Announcements****

Following an approach to the board of the Offeree, which may or may not lead to an offer, the primary responsibility for making an announcement will normally rest with the board of the Offeree, which accordingly must keep a close watch on its share price and volume. Rule 3.2 requires an announcement to be made by the board of the Offeree in 4 situations:

- (A)    when a firm intention to make an offer is notified to the board of the Offeree from a serious source, irrespective of the attitude of the board to the offer;
- (B)    when, following an approach to the Offeree, the Offeree is the subject of rumour or speculation about a possible offer or there is undue movement in its share price or in the volume of share turnover, whether or not there is a firm intention to make an offer;

- (C) when negotiations or discussions are about to be extended to include more than a very restricted number of people (outside those who need to know in the companies concerned and their immediate advisers); and
- (D) when the board of the Offeree is aware that there are negotiations or discussions between a potential Offeror and the controlling shareholder(s) (i.e. the holder or holders of shares carrying 30% or more of the voting rights of the company) or when the board of the Offeree is seeking potential Offerors, and
  - (i) the Offeree is the subject of rumour or speculation about a possible offer or there is undue movement in its share price or in the volume of share turnover; or
  - (ii) the number of potential purchasers or offerors approached is about to be increased to include more than a very restricted number of people.

### 9.3 Vendor Announcements

Rule 3.3 requires a potential vendor to make an announcement when there are negotiations or discussions between a potential Offeror and the controlling shareholder(s), and the Offeree is the subject of rumour or speculation about a possible offer or there is undue movement in its share price or in the volume of share turnover, and there are reasonable grounds for concluding that it is the potential vendor's actions (whether through inadequate security or otherwise) which have led to the situation.

### 9.4 Announcement of a Possible Offer (“talks announcement”)

Until a firm intention to make an offer has been notified, a brief announcement that talks are taking place or that a potential Offeror is considering making an offer will satisfy the obligation to make an announcement under Rules 3.1 and 3.2. After the announcement of a possible offer under Rule 3.7, announcements must be made monthly as to the progress of the talks or the consideration of a possible offer until an announcement of a firm intention to make an offer under Rule 3.5 or of a decision not to proceed with an offer is made. A potential offeror who makes a statement in relation to the terms of a possible offer prior to an announcement of a firm intention to make an offer will be bound by that statement if an offer for the offeree company is subsequently made, unless the right not to be bound was specifically reserved at the time the statement was made or there are wholly exceptional circumstances (Note 3 to Rule 3.7). A potential Offeror is not allowed to disclose an indicative offer price before publishing a Rule 3.5 firm intention announcement (e.g., in a Rule 3.7 announcement), except in exceptional circumstances (Note 4 to Rule 3.7).<sup>3</sup> If an indicative offer price is disclosed, this will be the floor price for any offer subsequently made: an Offeror cannot reserve a right to not be bound by a previously announced offer price (indicative or otherwise).<sup>4</sup>

If a potential Offeror announces that it has no present intention to make an offer, it will normally be prohibited from bidding for the Offeree for a period of 6 months (Rule 31.1(b)).

### 9.5 Announcement of a Firm Intention to Make an Offer

Once the formal terms of the offer have been agreed, any necessary irrevocables secured, and any required finance put in place, the Offeror will make an announcement of a firm intention to make

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<sup>3</sup> Examples of “exceptional circumstances” include the need to clarify an incorrect market rumour or incorrect statement in the media which may be creating a false market in the Offeree’s shares or where an Offeror or Offeree is required by overseas regulatory requirements to disclose an offer price before the announcement of a firm intention to make an offer (SFC “Consultation conclusions on proposed amendments to the Codes on Takeovers and Mergers and Share Buy-backs” (September 2023) (**2023 Consultation Conclusions**) at paragraph 69)).

<sup>4</sup> 2023 Consultation Conclusions at paragraph 68.

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.

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).

## **9.6 Announcement of Numbers 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). “Relevant securities”, for these purposes, include shares, convertible securities, warrants, options and derivatives in respect of such securities.

### Offeror announcement

Unless an offer will be solely in cash, 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 securities exchange offers 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. However, Class (6) associates (i.e. holders of 5% or more) of the Offeror are not required to disclose their dealings in relevant securities of the Offeree during a cash offer (Note 14 to Rule 22).

### 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). See further at paragraph 10.2 below.

## **9.7 Announcement of the Results of an Offer**

An Offeror is required to publish an announcement on the Hong Kong Stock Exchange’s website by 7.00 p.m. on a closing date stating whether the offer has been revised or extended, has expired or has become or been declared unconditional (and whether as to acceptances or in all respects) (Rule 19.1). A draft of the announcement must be submitted to the Executive and the Hong Kong Stock Exchange by 6.00 p.m. on the closing date for comment.

## **10. DEALINGS**

### **10.1 General**

Dealings in securities by parties 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.

## 10.2 Disclosure

### *Securities and Futures Ordinance*

Part XV of the Securities and Futures Ordinance (the **SFO**) requires an acquisition of an interest of 5% or more of 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. Directors and chief executives of Hong Kong-listed companies must disclose their acquisition of: (i) any interest or short position (however small) in *any* shares (not just voting shares) of the listed company; (ii) any interest or short position in the shares of an “associated corporation”<sup>5</sup> of the listed company; and (iii) interests in debentures of the listed company or its associated corporations.

### *The Takeovers Code*

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

- (i) relevant securities of the Offeree (except that class (6) associates (i.e. holders of 5% or more) of the Offeror are not required to disclose their dealings in relevant securities of the Offeree during a cash offer (Note 14 to Rule 22)); 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 and disclosures must 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.

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<sup>5</sup> As defined in section 308 of the SFO.

### Definition of “associates”

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

- (i) any person acting in concert with an Offeror, potential Offeror or Offeree;
- (ii) 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”;
- (iii) 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;
- (iv) the pension funds, provident funds and employee share schemes of the parent, subsidiaries and fellow subsidiaries of an Offeror, potential Offeror or Offeree;
- (v) 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, its parent, subsidiaries and fellow subsidiaries; and
- (vi) 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;
- (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 which 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, or any earlier date set by the Executive as the termination date for the relevant offer period. 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.

The term “associate” includes any person owning or controlling 5% or more of any class of relevant securities. A fund manager which holds 5% of a listed company’s securities will therefore be an “associate” and must disclose any dealings conducted on behalf of its investment clients during an offer period. Fund managers should refer to the SFC’s “[Guidelines to fund managers on dealing disclosure obligations under Rule 22 of the Takeovers Code](#)”.

The SFC publishes “Offer Period Tables” setting out details of current offer periods on its website at <https://www.sfc.hk/en/Regulatory-functions/Corporates/Takeovers-and-mergers/offer-periods>. These indicate, in the case of securities exchange offers, whether disclosure is required of dealings in the relevant securities of the Offeror or of the company whose securities are being offered as considered.

### **10.3 Takeovers Code consequences**

Some dealings by the Offeror or those acting in concert with it may affect the terms of the offer itself. As mentioned previously, if the Offeror or any person acting in concert acquires shares at above the price of the offer, the offer itself must be increased to that price (Rule 24.1). In addition, if the Offeror and any concert parties acquire in excess of 10% of the Offeree for cash during the offer period and within the 6 months before its commencement, it must increase the level of any cash alternative to meet the best price paid within that period, even if its share alternative is in fact worth more (Rule 23.1(a)). A full share offer will be required if the Offeror (and its concert parties) acquire Offeree shares carrying more than 10% of the voting right in exchange for securities during the offer period and within 3 months before the start of the offer period (Rule 23.2). If the Offeror acquires shares carrying 30% or more of the voting rights of the Offeree, it must make a mandatory offer to all other shareholders in cash or accompanied by a cash alternative at not less than the highest price paid within the preceding 6 months (Rule 26). Each of these Takeovers Code requirements reflects its general principle of equality of treatment for shareholders.

Rule 3.6 requires an immediate announcement if an Offeror or his concert parties makes an acquisition of shares which results in an obligation to make a cash offer or securities offer, to increase an offer or to make a mandatory offer.

### **10.4 Prohibited dealings**

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

The SFO renders an individual who is knowingly in possession of price-sensitive information liable to sanction if he deals, or procures someone else to deal, in the listed securities or the derivatives of a company he is connected with. Dealing in the listed securities or the derivatives of a company which is the subject of a takeover offer, or a contemplated takeover offer, may also constitute “insider dealing” where the person so dealing has access to price-sensitive information.

A person in possession of price-sensitive information in relation to such a company may also commit insider dealing if he discloses the information to another, knowing (or having reasonable cause to believe) that that person will use the information to deal, or procure someone else to deal, in the securities.

Insider dealing is a criminal offence under Part XIV of the SFO and subject to a maximum of 10 years’ imprisonment and fines of up to \$10 million. Alternatively, civil proceedings may be brought before the Market Misconduct Tribunal under Part XIII SFO and anyone identified as an insider

dealer may be disqualified as a director, prohibited from dealing in securities for up to 5 years or required to repay any profit made from the insider dealing.

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

There are also provisions in the Code which restrict dealings in an Offeree's securities before and during the period of a general offer and, where a general offer does not proceed, after the termination of discussions until an announcement of the position. In particular, Rule 21.1 provides that no dealings of any kind may take place in securities of the Offeree by any person (other than the Offeror) who is privy to confidential price-sensitive information concerning an actual or contemplated offer or revised offer before the announcement of the approach, the offer, the revised offer, or of the termination of the discussions. Such dealings in securities of the Offeror are also prohibited by Rule 21.1 unless the offer or proposed offer is not price-sensitive in relation to those securities.

Where the consideration for an offer includes securities of the Offeror or a person acting in concert with it, neither the Offeror nor the issuer of the securities may propose or conduct any off-market share buy-back or share buy-back by general offer from the date of the Rule 3.5 firm intention announcement until the end of the offer period (Rule 21.3). This prevents an Offeror from manipulating its share price during a securities exchange offer.

#### **10.5 Summary: seek advice before any dealing**

In view of these issues, 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.

## **11. THE OFFER DOCUMENT**

The offer document is usually posted as soon as practicable after the announcement of a firm intention to make an offer, 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) of the date of the announcement of the terms of the offer (Rule 8.2). The offer document is required to contain the information specified in Schedule I to the Takeovers Code, together with any other relevant information to enable the Offeree's shareholders to reach a properly informed decision. The offer document will normally include the following:

### **11.1 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 price, information on the business of the Offeror and of the Offeree, taxation advice and the procedure for acceptance.

### **11.2 A Letter from the Offeror**

There will be a letter from the board of directors of the Offeror explaining the reasons for the offer.

### **11.3 Terms and conditions**

The offer document will also set out the formal terms and conditions of the offer. In practice the most important of these are likely to relate to the level of acceptances required, consents and other authorisations and material changes.

(A) **Acceptances** – as mentioned in paragraph 4.1.1 above, 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. In a voluntary offer, a higher acceptance level may be specified. The Offeror may therefore include an acceptance condition of 95%, but with the ability to waive this if it wishes. This gives the Offeror the flexibility to decide precisely when acceptances have reached a workable minimum for its purposes.

When the original (or reduced) level is achieved the offer is said to be unconditional as to acceptances. In practice, once an offer is declared unconditional as to acceptances other shareholders will usually accept the offer fairly swiftly, to avoid being left as a minority in the Offeree. All other conditions must be satisfied (or waived) within 21 days of the first closing date or of the date the offer becomes or is declared unconditional as to acceptances, whichever is the later (Rule 15.7). The offer is then said to be unconditional in all respects or wholly unconditional.

- (B) **Consents** - The offer will usually be expressed to be conditional upon obtaining various consents. Some of these may be imposed by external requirements. The Offeror will usually have no choice but to secure such consents. In addition, however, 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 Offeree; again this condition is likely to be waivable by the Offeror.
- (D) **Other information** - Finally, the offer document will contain other detailed information and terms, mainly in compliance with the Takeovers Code. This further information will include information on the Offeror's intentions concerning the Offeree and its employees, financial information of 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 details of the company whose shares are being offered for exchange.

## 12. THE OFFEREE BOARD CIRCULAR

The Offeree is required to send a circular to its shareholders setting out the views of its board or independent committee on the offer and the written advice of the independent financial adviser. In an agreed offer, the Offeror and Offeree are encouraged to combine the offer document and offeree board circular in a composite document. If, however, the offer is contested (or there is a competing offer), then the offeree board circular will be sent separately and must be posted no later than 14 days after the date of the formal offer document (Rule 8.4). The offeree board circular should contain the information set out in Schedule II of the Takeovers Code together with any other information needed for shareholders to reach a properly informed decision about the offer. The Offeree board circular must set out (among others) the names of the Offeree's directors and of the directors comprising the independent committee of the board, the independent committee's recommendation as to whether the offer is fair and reasonable and as to acceptance and voting, or a statement that the independent committee is unable to make a recommendation giving reasons for the recommendation or for making no recommendation. It must also include the written advice of the independent financial adviser and a statement of their consent to the inclusion of the advice in the circular.

## 13. TIMETABLE

### 13.1 Offer Period

The offer must be open for a minimum of 21 days from the date of the offer document where the offer document and offeree board circular are posted on the same day or combined in a composite document. Where the offeree board circular is posted after the date of the offer document, the offer must remain open for a minimum of 28 days from the date of the offer document (Rule 15.1). 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 (whether as to acceptances or in all respects)(Rule 15.3). This is so that the Offeree shareholders who have not accepted the offer by such date have a second chance to accept the offer. Under Rule 15.5, the maximum period for which an offer may be open before it becomes or is declared unconditional as to acceptances is 60 days after the date of the offer document. Rule 15.5 sets out limited circumstances in which the Executive may consent to extending the last day for declaring an offer unconditional as to acceptances beyond day 60 to a date that is no more than four months after the date of the offer document. 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 stipulates the 39th day after the date of the initial offer document 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) (Rule 15.4). The Takeovers Code also stipulates the last time by which the Offeror can increase its offer (the 46th day). If a competing offer is announced then, in general, any Takeovers Code timing restrictions on the first Offeror are relaxed to correspond with those relating to the competing Offeror.

Consideration cheques must be posted to accepting shareholders no later than 7 business days after the later of the date on which the offer becomes, or is declared, unconditional and the date of receipt of a duly completed acceptance (Rule 20.1).

## **13.2 Timetable**

A typical outline timetable for a takeover offer is as follows:

Announcement	Offeror makes announcement of firm intention to make an offer under Rule 3.5
Day 0	Posting of offer document (Rule 8.2) <ul style="list-style-type: none"><li>• within 21 days of announcement (cash offer)</li><li>• within 35 days of announcement (securities offer)</li></ul>
Day 14	Last day for posting of offeree board circular (Rule 8.4)
Day 21	First permitted closing date (for composite document) (Rule 15.1)
Day 28	First permitted closing date (separate offeree board circular) (Rule 15.1)
Day 39	Last day for offeree company to announce material new information (Rule 15.4)
Day 46	Last day for revision of offer
Day 60	Last day for offer to become or be declared unconditional as to acceptances (Rule 15.5)

## **14. COMMUNICATION WITH SHAREHOLDERS, THE PRESS AND THE PUBLIC**

#### **14.1 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.

#### **14.2 Other statements**

Those involved in an offer must take care not to issue statements which might mislead shareholders or the market or create uncertainty. Statements of this sort might include the Offeror stating that it might increase or extend its offer (without actually committing itself to do so), or statements by the Offeree relating to a given level of support. The Executive is likely to require that such statements are clarified immediately.

#### **14.3 Meetings and telephone calls**

The Takeovers Code restricts the extent to which parties to an offer may contact the Offeree 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.

#### **14.4 Statements to the Press**

The directors of the Offeror or 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.

#### **14.5 Summary: seek advice**

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

### **15. DUTIES OF THE BOARD OF THE OFFEROR AND OFFEREE**

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. It is likely to be a term of the disposal that the existing directors of the Offeree resign on completion in which case the primary duty of the Offeree’s existing board is to ensure that there is a binding contractual commitment on the Offeror to comply with the provisions of the Takeovers Code after the completion of the disposal.

#### **15.1 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.

## 15.2 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 the 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 fulfills his obligations under the Takeovers Code. In particular, the board should ensure that:

- (A) it receives promptly:
  - (i) copies of all documents issued by the company in relation to the offer;
  - (ii) details of all dealings in relevant securities by the company or its associates; and
  - (iii) details of any agreements, understandings, guarantees, expenditure (including fees) or other obligations involving the company and the offer other than routine administrative matters;
- (B) the directors with day-to-day responsibility for the offer are in a position to justify their actions to the board; and
- (C) the advisers' opinions are available to the board.

In addition, board meetings should be held as and when necessary throughout the offer to ensure that all directors are kept up-to-date with events.

## 15.3 Preparation of documentation

Documents and advertisements issued in connection with an offer must be prepared with the highest standard of care and accuracy. It is a specific requirement of the Takeovers Code that the directors take responsibility for the accuracy of the information contained in all documents and that each document 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 has been delegated to a committee of the board of the Offeror or 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 have disclosed to the committee all relevant facts relating to himself (including his close relatives and related trusts) and all relevant facts known to him, and opinions known to him, which are unknown to the committee. 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 affairs. Further, the person concerned must be given access to any necessary documents, and the opportunity to discuss any points that arise with any of the company officers and advisers. Although the company's financial and legal advisers will co-ordinate the preparation of the offer documentation, it is important that the directors should be aware of their responsibility to satisfy themselves that the procedure for ensuring the accuracy of the contents is correct and followed.

With the exception of certain documents listed on the [Post-Vet List](#)<sup>6</sup>, all announcements and other documents issued or published by a party to a takeover offer must be filed with the Executive for comment prior to release or publication and must not be released or published until the Executive has confirmed that it has no further comments. A published version of any document on the Post-Vet List must be filed with the Executive immediately after publication.

#### **15.4 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.

#### **15.5 No Frustrating Action**

The Takeovers Code and the relevant laws and regulations impose many duties and obligations on the Offeree once it receives an offer or believes that an offer is imminent. Once the board of a company is notified of an offer or has reason to believe that an offer is imminent, no action may be taken by the board which could frustrate the offer or deny the shareholders the opportunity to decide on the merits of the offer without the approval of the shareholders at a general meeting (Rule 4). Rule 4 sets out a non-exhaustive list of actions that may constitute frustrating actions which includes:

- issuing shares;
- creating, issuing or granting, or permitting the creation, issue or grant of, any convertible securities, options or warrants in respect of shares of the company;
- selling, disposing of or acquiring assets of a material amount;
- entering into contracts, including service contracts, other than in the ordinary course of business; or
- causing the company or any subsidiary or associated company to buy back, purchase or redeem any shares in the company or provide financial assistance for any such buy-back, purchase or redemption.

Where the company is under a prior contractual obligation to take any such action, the requirements of Rule 4 do not normally apply. However, where there are special circumstances, the Executive must be consulted.<sup>7</sup> Under Note 1 to Rule 4, shareholders’ approval of a frustrating action is not required if the Offeror consents to it. The fact that the Offeror has consented to the frustrating action needs to be disclosed if any announcement published in relation to the frustrating action (e.g. if it is a notifiable transaction). If no announcement will be made, the Offeror’s consent must be lodged with the Executive. The Executive also has the power to waive the requirement to obtain shareholder approval in appropriate circumstances.

#### **15.6 The independent committee of the board**

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<sup>6</sup> The list of documents which do not require pre-vetting by the Executive is available in the “Takeovers & Mergers” section of the SFC website at [www.sfc.hk](http://www.sfc.hk).

<sup>7</sup> An example of a special circumstance could arise when obligations are established but are not enforceable or activated until a takeover offer is made, such as in the case of a poison pill provision.

A board which receives an offer, or is approached with a view to an offer being made, is required to 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 of the independent committee should comprise all non-executive directors of the company who have no interest in the offer other than as a shareholder of the company (Rule 2.8).

## **16. RESTRICTIONS FOLLOWING OFFERS AND POSSIBLE OFFERS**

### **16.1 Delay before subsequent offer**

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 (Rule 31.1(a)):

- 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.

The Executive will normally grant consent under Rule 31.1 when:

- i. the new offer is recommended by the board of the Offeree and the Offeror is not, or is not acting in concert with, a director or substantial shareholder of the Offeree. Consent is not normally granted within 3 months of the lapse of an earlier offer where the Offeror was prevented from revising the offer by a no increase or no extension statement;
- ii. the new offer follows the announcement by a third party of an offer for the Offeree; or
- iii. the new offer follows the announcement by the Offeree of a “whitewash” proposal or of a reverse takeover which has not failed or lapsed, or been withdrawn.

### **16.2 Six months delay before acquisition above offer price**

Rule 31.3 provides that, except with the consent of the Executive, a person holding at least 50% of a company’s voting rights and persons acting in concert with him are prohibited from making a second offer to acquire, or acquiring, shares from any shareholder in that company at above the offer price of a previous offer made by him to the shareholders of that company in the six months after the end of the offer period of the previous offer. For this purpose, the value of a securities exchange offer is calculated as at the later of the date of the offer document or the date the offer became, or was declared, unconditional.

## **17. ACQUISITION OF MINORITY SHARES AFTER SUCCESSFUL TAKEOVER OFFER**

### **17.1 Exercise of Compulsory Acquisition Rights**

Except with the Executive’s consent, an Offeror can only exercise compulsory acquisition rights granted by the laws of the Offeree’s jurisdiction of incorporation if it has received acceptances of the offer which, together with purchases (in each case of the Offeree’s disinterested shares) made by the Offeror and its concert parties from the date of the Rule 3.5 announcement until 4 months after the date of the initial offer document, amount to 90% of the Offeree’s disinterested shares (Rule 2.11). It must also comply with the requirements of the laws of the Offeree’s jurisdiction of incorporation.



## **17.2 Hong Kong-incorporated Companies: Compulsory Acquisition Rights**

In the case of Hong Kong-incorporated companies, the Offeror may rely on section 693 of the Companies Ordinance to compulsorily acquire the remaining shares. Section 693 enables an Offeror who has within 4 months of posting the initial offer document, by virtue of acceptances of the takeover offer, acquired or contracted unconditionally to acquire, at least 90% in number of the shares to which the offer relates, to give notice to the remaining shareholders that it desires to acquire their shares. 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 that 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.

## **17.3 Hong Kong-incorporated Companies: 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 exerciseable. 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.

## **17.4 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 the Offeree is incorporated in a jurisdiction that does not afford compulsory acquisition rights to the Offeror (such as the PRC), the Executive will require the Offeror to put in place arrangements to protect the 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 of the offer, which together with purchases (in each case of the disinterested shares) made by the Offeror and its concert parties from the date of the Rule 3.5 announcement until four months after the date of the offer document, amount to 90% of the disinterested shares.

## **DECEMBER 2023**

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