

2. Independent advice, independent committees and shareholder approval

2.1 Board of offeree company

A board which receives an offer, or is approached with a view to an offer being made, should, in the interests of shareholders, retain a competent independent financial adviser to advise the board as to whether the offer is, or is not, fair and reasonable. Such advice, including reasons, should be obtained in writing and such written advice should be made known to shareholders by including it in the offeree board circular along with the recommendation of the offeree company's board regarding acceptance of the offer. If any of the directors of an offeree company is faced with a conflict of interest, the offeree company's board should, if possible, establish an independent committee of the board to discharge the board's responsibilities in relation to the offer.

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.

2.2 Approval of delistings by independent shareholders

If after a proposed offer the shares of an offeree company are to be delisted from the Stock Exchange, neither the offeror nor any persons acting in concert with the offeror may vote at the meeting, if any, of the offeree company's shareholders convened in accordance with the Listing Rules. The resolution to approve the delisting must be subject to:-

(a) approval by at least 75% of the votes attaching to the disinterested shares that are cast either in person or by proxy at a duly convened meeting of the holders of the disinterested shares;

(b) the number of votes cast against the resolution being not more than 10% of the votes attaching to all disinterested shares; and

(c) the offeror being entitled to exercise, and exercising, its rights of compulsory acquisition.

2.3 Costs of scheme of arrangement

Where ~~an offer is made by way of any person seeks to use a scheme of arrangement involving an offeree company to privatise a company~~ and the ~~offer proposal~~ is either not recommended by the independent committee of the offeree company's board or is not recommended as fair and reasonable by the financial adviser to the independent committee, all expenses incurred by the offeree company in connection with the ~~offer proposal~~ shall be borne by the ~~shareholder person~~ seeking to privatise the offeree company by way of the scheme of arrangement if the scheme of arrangement is not approved.

2.4 Board of offeror company

~~If any director of~~ Where an offeror ~~which~~ is a public company in Hong Kong, and the offer being made is a reverse takeover or when the directors of the offeror are faced with a ~~material~~ conflict of interest ~~as the result of a proposed offer, the offeror's board should, if possible, establish an independent committee to assess the proposed offer. If the conflict is a material one the Executive should be consulted to establish, having regard to, among other things, the materiality of the offer to the offeror, whether the offeror's board should retain an independent financial adviser to advise the shareholders, or independent shareholders, of the offeror, as the case may be, and whether the offer should be made conditional upon approval of the offer by a majority of the votes cast by such shareholders in attendance either in person or by proxy at a duly convened general meeting of the offeror's shareholders.~~ the board of the offeror must obtain competent independent advice as to whether the making of the offer is in the interests of the offeror's shareholders. Such advice must be obtained before announcing an offer or revised offer. Such offer or revised offer must also be made subject to the approval of the shareholders of the offeror in general meeting. The advice must be in writing and sent to the shareholders with the notice of the meeting. If an offeror considers that these requirements should not apply, where for example the offer is not material to the offeror, it may apply to the Executive for a waiver of these requirements. A potential offeror under Rule 26 should have regard to this Rule 2.4 in the context of Rule 26.2(b).

Notes to Rule 2.4:

Timing of advice

~~When the board of an offeror is required to obtain competent independent advice, it should do so before announcing an offer or any revised offer: such advice should be as to whether or not the making of the offer is in the interests of the company's shareholders. Shareholders must have sufficient time to consider advice given to them prior to any general meeting held to implement the proposed offer.~~

1. General

Any documents or advertisements issued by the board of the offeror in such cases must include a responsibility statement by the directors as set out in Rule 9.3.

2. Reverse takeovers

A transaction will be a reverse takeover if an offeror may as a result increase its existing issued voting share capital by more than 100%.

3. Offers by controlling shareholders

This Rule 2.4 will not normally apply to offers by controlling shareholders where the only conflict, or potential conflict, of interest arises as a result of a number of directors of the offeror being also directors of the offeree company.

2.5 Offers for companies that control the offeror

~~If~~Where an offeror is a public company in Hong Kong (the “offeror”), and it or a subsidiary thereof, proposes to make an offer for another company that, together with any persons acting in concert with the offeree company, controls, directly or indirectly, the offeror, the offeror’s board should, ~~if possible,~~ establish an independent committee to assess the proposed offer and the Executive should be consulted for the purpose described in Rule 2.4 above.

2.6 Persons not suited to give independent advice

~~A person who has, or had, a connection, financial or otherwise, with the offeror or offeree company of a kind likely to create a conflict of interest will not be regarded as a suitable person to give independent advice.~~

The Executive will not regard as appropriate to give independent advice a person who is in the same group as the financial or other professional adviser (including a stockbroker) to an offeror or the offeree company or who has, or had, a significant connection, financial or otherwise, with either an offeror or the offeree company, or the controlling shareholder(s) of either of them, of a kind reasonably likely to create, or to create the perception of, a conflict of interest or reasonably likely to affect the objectivity of his advice (see also Schedule VII).

Note to Rule 2.6:

Significant connection within 2 years

The Executive would normally regard any significant connection within the 2 years prior to the commencement of an offer period as reasonably likely to create such a conflict of interest or reasonably likely to affect the objectivity of an adviser’s advice.

2.7 ~~Independent financial advisers and~~ Advice to independent shareholders

~~A financial adviser will not normally be considered to be independent if he is considered to have a relationship with the offeror, the offeree company, or the controlling shareholder(s) of either of them, which is reasonably likely to affect the objectivity of his advice.~~ If there are shareholders who are not independent because they have an interest in the proposed transaction other than their interest as a shareholder of the offeror or the offeree company, as

the case may be, the independent adviser should endeavour to represent the best interests of the offeror or the offeree company, respectively, by concerning itself only with the interests of the independent shareholders, ~~i.e. those shareholders of the company who have no interest in the proposed transaction other than their interest as a shareholder of the company.~~

2.8 Independent committees

Members of an independent committee of a company's board of directors should consist of directors of the company who have no direct or indirect interest in ~~the any~~ offer or possible offer for consideration by the independent committee other than, in the case of a director of the offeree company, as a shareholder of the offeree company. For this purpose, it is presumed that employees of an offeree company that is an associated company of the offeror have an indirect interest in ~~the an~~ offer and are therefore not independent. The same presumption is applicable to employees, directors, agents, partners, close relatives and affiliates of any person that exercises control or direction over the business and operations of ~~the any~~ offeror or ~~the~~ offeree company respectively if such person has a direct or indirect interest in the offer. For such purpose an affiliate is a person which controls, is controlled by, or is under common control with, the person in question. In case of doubt the Executive should be consulted. ~~If a committee of a board of directors is not truly independent it should not be characterized as such.~~ If it is not possible to form an independent committee, responsibility for representing the interests of any independent shareholders shall reside primarily with the independent financial adviser.

2.9 Shareholder votes to be conducted by way of a poll

~~If management is appointed as proxy by one or more shareholders for the purpose of a vote to be held to approve any matter in connection with an offer, the vote shall~~ Whenever the Codes require a matter to be approved by shareholders or any class or group thereof in general meeting the vote must be conducted by way of a poll if management proxies which represent votes opposed to the approval sought constitute 5% or more of the votes that are poll. The results of the poll (including the number of shareholders voting at the meeting in person or by proxy and the number of the shares voted for and against the relevant resolution) must be announced.

~~2.10~~ Privatisation by scheme of arrangement

~~Where a shareholder which has control of a company as defined under the Code or a person or persons acting in concert with such a person seeks or seek to use a scheme of arrangement to privatise the company:~~

- ~~(a) — in addition to satisfying any voting requirements imposed by law, the scheme of arrangement must be either:~~

- ~~(i) — approved by a majority in number representing 90% in value of those shares that are voted either in person or by proxy at a duly convened general meeting by shareholders other than the person seeking to privatise the company and persons acting in concert with him, or~~
- ~~(ii) — if not so approved by the requisite majority, not disapproved by shareholders voting in person or by proxy at such general meeting holding more than 2.5% of the total number of shares in issue; and~~
- ~~(b) — the scheme must be conducted in accordance with applicable laws and regulatory requirements.~~

2.10 Takeover and privatisation by scheme of arrangement or capital reorganisation

Except with the consent of the Executive, where any person seeks to use a scheme of arrangement or capital reorganisation to acquire or privatise a company, the scheme or capital reorganisation may only be implemented if, in addition to satisfying any voting requirements imposed by law:-

- (a) the scheme or the capital reorganisation is approved by at least 75% of the votes attaching to the disinterested shares that are cast either in person or by proxy at a duly convened meeting of the holders of the disinterested shares; and
- (b) the number of votes cast against the resolution to approve the scheme or the capital reorganisation at such meeting is not more than 10% of the votes attaching to all disinterested shares.

The Executive will normally only waive the requirements of this Rule 2.10 in the case of schemes or capital reorganisations under which the economic interests of all shareholders are not affected, such as a scheme to redomicile a company.

2.11 Exercise of rights of compulsory acquisition

Except with the consent of the Executive, where any person seeks to acquire or privatise a company by means of an offer and the use of compulsory acquisition rights, such rights may only be exercised if, in addition to satisfying any requirements imposed by law, acceptances of the offer and purchases (in each case of the disinterested shares) made by the offeror and persons acting in concert with it during the period of 4 months after posting the initial offer document total 90% of the disinterested shares.

Notes to Rule 2:

1. Conflicts of interest

A conflict of interest exists, for instance, when there are significant cross-shareholdings between an offeror and the offeree company, when a number of directors are common to both companies or when a person is a substantial shareholder in both companies. See also Schedule VII.

2. Offer Management buy-outs and offers made by or with the co-operation of controlling shareholders

~~The requirement for competent independent advice for shareholders is of particularly importance important in respect of offers cases where the offer is a management buy-out or similar transaction or is made by or with the co-operation of the existing controlling shareholder or group of shareholders. controlling shareholders. An independent adviser for the independent shareholders is essential and its responsibility is considerable. Because of this, it is all the more important that its competence and independence from the parties involved should be beyond question. In such cases, the reasons for advice are of particular importance.~~

~~The Executive will normally require the formation of an independent committee of the offeree's board of directors in these cases if it is possible for an independent committee to be formed. The responsibilities of the committee would include instructing and dealing with the independent adviser, and generally protecting the interests of the independent shareholders. In such cases, it is particularly important that the reasons for the advice are clearly stated. Furthermore the responsibility borne by the adviser is considerable and for this reason the board of the offeree company or potential offeree company should appoint an independent adviser as soon as possible after it becomes aware of the possibility that an offer may be made.~~

3. When there is uncertainty about financial information

When there is a significant area of uncertainty in the most recently published accounts or interim figures of the offeree company (e.g. a qualified audit report, a material provision or contingent liability or doubt over the real value of a substantial asset, including a subsidiary company), the board and the independent advisers should highlight these areas and their implications on the offer and the offeree company. the factors which they consider important.

4. When no recommendation is given or there is a divergence of views

When the board of an offeror or the offeree company, as the case may be, is unable to express a view on the merits of an offer or to give a firm recommendation or when there is a divergence of views amongst board members or between the board and the independent adviser as to either the merits of an offer or the recommendation ~~being made~~, this

must be drawn to shareholders' attention and an explanation given, including the arguments for acceptance or rejection, emphasising the important factors. The Executive should be consulted in advance about the explanation which is to be given.

When a financial adviser is unable to advise whether an offer is, or is not, fair and reasonable the Executive should be consulted.

5. *Success fees*

Certain fee arrangements between an adviser and the offeree company may create a conflict of interest which would disqualify the adviser as an independent adviser to the offeree company. For example, a fee which becomes payable to an offeree company adviser only in the event of failure of an offer will normally create such a conflict of interest. In cases of doubt the Executive should be consulted.

6. *Particular provisions for Rules 2.2, 2.10 and 2.11*

For the purpose of Rules 2.2, 2.10 and 2.11, "disinterested shares" means shares in the company other than those which are owned by the offeror or persons acting in concert with it.

Where an offeree company has more than one class of share capital, the requirements in Rules 2.2, 2.10 and 2.11 will normally apply separately in respect of each class.