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Consultation Conclusions on a Review of the Codes on Takeovers and Mergers and Share Repurchases

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Introduction

On 30 November 2004 the SFC issued a Consultation Paper inviting public comment on a number of proposed changes to the Hong Kong Codes on Takeovers and Mergers and Share Repurchases (**Codes**). The consultation period was originally scheduled to end on 14 January 2005. In response to public requests it was extended to 14 February 2005.

The SFC received 13 responses in total from a wide range of respondents including one respondent who represented 10 financial institutions. A list of respondents who agreed for their responses to be published on the SFC's website is set out in **Appendix 1**. The Takeovers Panel and the SFC welcome these responses and are grateful to those who have participated. Many comments have been accepted as described in this paper.

The Codes represent a consensus of opinion of those who participate in Hong Kong's financial markets and the SFC regarding standards of commercial conduct and behaviour that are considered acceptable for takeovers, mergers and share repurchases. The Codes are not statutes and are framed as far as possible in non-technical language. It is not always possible to draft rules to cover every possible scenario and it is often necessary to observe the spirit of a rule as well as the letter. This ensures that matters may be dealt with speedily in a flexible and yet certain manner. The SFC keeps the Codes under regular review with the aim of ensuring that they are kept up to date with changes in the market and with developments in international practice. Accordingly, in this review, account has been taken of the changes in the Hong Kong market as well as drawing on experience from London.

The text of the Codes as at April 2005 marked up with all the amendments arising from the consultation is set out in **Appendix 2**. All these amendments will become effective on 1 October 2005. Where this timing may produce major difficulties, for example, in the case of transactions in progress, the Executive should be consulted and will endeavour to reach a solution which is fair to all parties.

The Consultation Paper and responses are available on the SFC's website at www.sfc.hk.

SPECIFIC CONSULTATION AREAS

Class 2 of the definition of “acting in concert”

Question 1 Do you think that the class (2) presumption should remain unchanged or should it be amended, as set out in Appendix 1 to [the Consultation Paper], to apply only to a company and its directors and the directors of its parent company or parent companies?

1. Each respondent who responded to this question supported amending the definition as recommended. The class (2) presumption has been amended so that it will no longer apply to directors of subsidiaries or fellow subsidiaries. The presumption will continue to apply to directors of a company’s parent. The Executive expects that this amendment will eliminate in most instances the need to apply for waivers from the class (2) presumption.

Stock borrowing and lending (“SBL”)

Question 2 Does the reference to a standard form agreement that is recognised by the International Securities Lending Association [in paragraph 11 of the Consultation Paper] encompass the standard agreement(s) used by stock borrowers and lenders in the normal course of business in Hong Kong?

2. Paragraph 11 of the Consultation Paper proposed adding a new note to the definition of acting in concert to clarify that an SBL transaction carried out in the ordinary course of the lender’s business would not normally result in the lender being regarded as acting in concert with the borrower. A number of respondents raised comments in relation to this proposal ranging from requests for clarification of certain terms, such as “stock lending institution” and “ordinary course of business”, to more complex issues concerning under what circumstances, if any, the Codes should recognise the transfer of legal title in SBL transactions.
3. Although an SBL transaction involves the absolute transfer of legal title and therefore voting rights from the lender of the shares to the borrower, the Executive normally treats the “lent” stock as continuing to be controlled by the lender. As a matter of practice each matter is dealt with on a case-by-case basis in accordance with all the relevant circumstances. The Executive has adopted this practice in recognition of the fact that the “borrower” normally uses the stock to cover short positions (or to on-lend) and is under a contractual duty to return the shares to the lender in due course. The Executive also understands that “normal” SBL activity is not generally connected to matters governed by the Takeovers Code.
4. However, upon further reflection in light of the various issues raised and the London Panel’s recent observations in its consultation paper on market issues (PCP 2004/3) and the response paper (RS 2004/3) the Executive

believes that this complex area merits a more in-depth review and further market consultation before implementing any changes to the Codes. In the meantime the Executive will continue its practice described in paragraph 3 above.

General Principle 9, Rule 4 (no frustrating action) and definition of “offer”

Question 3 Do you agree that a new note to the definition of “offer” should be added to the Codes as proposed?

Question 4 Do you think the new Note should contain specific guidance as to the meaning of “substantially below the market price of the offeree company shares” and if so, what is the appropriate threshold to impose (e.g. below 50% of the lesser of the closing price of the relevant shares on the day before the Rule 3.5 announcement and the 5 day average closing price)?

5. Paragraphs 18 and 19 of the Consultation Paper proposed adding a new note to the definition of “offer” to address concerns about “low-ball” offers which might be used as a tactic to frustrate the offeree company’s business where there is no genuine intention to takeover the offeree company.
6. Most respondents broadly supported the proposal to add a new note to the definition of “offer”. Some believed that there should be specific guidance as to the meaning of “*substantially below the market price of the shares*” whilst others preferred the more flexible approach of leaving this question to the Executive’s discretion. There were a number of requests for guidance on how the Executive will determine objectively whether there is a “*reasonable prospect of an offer succeeding*”.
7. Given that most “low ball” offers are hostile in nature and trigger the disciplines imposed by the Codes on offeree companies, the Executive supports the introduction of a clear and objective test to determine whether or not a voluntary offer is made at a price “*substantially below the market price of the shares*”. This should assist in resolving disputes in this respect and allay concerns about unnecessary trading suspensions and the creation of misinformed markets. As to the appropriate threshold, there was no consensus amongst respondents with suggestions ranging from discounts of 25% to 70% to the market price. On balance the Executive believes that 50% is an appropriate level. The Executive would like to clarify that it will only grant a waiver from the application of this Note in exceptional circumstances such as in cases where trading in the offeree company’s shares has been suspended for a long period.
8. Accordingly the Executive has adopted the following note to the definition of “offer”:

“A voluntary offer may not normally be made at a price that for the purpose of this Note is substantially below the market price of the shares in the

offeree company. A voluntary offer at more than a 50% discount to the lesser of the closing price of the relevant shares of the offeree company on the day before the Rule 3.5 announcement and the 5 day average closing price prior to such day will normally be considered as being “substantially below the market price of the shares in the offeree company”. The Executive will only grant a waiver from the application of this Note in exceptional circumstances. In all cases which fall within this Note, the Executive should be consulted.”

9. Finally in this regard, one respondent suggested that it was more important for the Codes to adopt the “*put up and shut up*” provisions in Rule 2.4(b) of the London Takeover Code which impose a deadline by which the potential offeror must announce either a firm intention to make an offer (i.e. “*put up*”) or that it has no intention to bid for the offeree company (i.e. “*shut up*”). In principle the Executive agrees with the “*put up and shut up*” provisions in the London Takeover Code and as a matter of practice will apply those principles to appropriate live transactions. The Executive will consult the market about codifying this practice in the next Code review.

Rule 7 (resignation of directors of offeree company)

Question 5 Do you agree that Rule 7 should not apply to directors of subsidiaries of the offeree company?

10. Respondents generally supported the proposed amendment. One respondent suggested that if the proposed changes were adopted, directors of the offeree company who are not independent non-executive directors should also be able to resign prior to the first closing date, as they will not need to remain in place to advise shareholders. The respondent that disagreed with the proposal suggested that executive directors who are engaged in the day-to-day management of the offeree company, whether at subsidiary or holding company level, should remain in place to advise shareholders. This respondent suggested that the same restriction need not apply to non-executive directors.
11. The restrictions in Rule 7 help to provide stability, in terms of the management of the offeree company, as well as ensuring that offeree directors remain in place to advise shareholders during the earlier stages of an offer. They also ensure that directors carry out the various duties imposed upon them under the Codes (such as under Rule 9) in compliance with General Principles 3, 5, 6 and 8. Given this the Executive is not inclined to relax the restrictions in Rule 7 in respect of directors of the offeree company be they executive or non-executive directors. However the Executive continues to believe that the restrictions in Rule 7 should not apply to directors of subsidiaries of the offeree company as these directors do not owe any direct fiduciary duties to the shareholders of the offeree company.

Note 1 to Rule 8 (documents on display)

Question 6 Do you agree that documents on display should be made available for inspection on the website of the issuer of the document or its financial adviser?

Question 7 Do you think that documents on display should be made available on the SFC or Stock Exchange's website rather than or in addition to the website of the issuer of the relevant document?

12. Some respondents agreed that documents on display should be made available for inspection on an appropriate website. One respondent suggested that the Codes should expressly allow for deal specific websites. Most respondents who expressed a preference supported the display of documents on the SFC's or the Stock Exchange's websites commenting that this would provide consistency in the place of display and would promote public awareness. The respondents that disagreed with the proposal raised concerns about the time and cost involved in preparing documents for display. One respondent expressed concerns that publication on the website gives unfettered access to the public to documents which may be confidential, commercially sensitive or protected by copyright.
13. The Executive has carefully considered respondents' comments. On balance the Executive believes that a move towards greater transparency and ease of access to information that is relevant to an offer is in the overall interests of shareholders. As to the question of where such documents should be posted, in addition to posting them on the issuer's website, issuers will be required to provide a copy of each document to be displayed under Note 1 in an electronic form acceptable to the Executive for display on the SFC's website. The Executive is currently making the necessary arrangements to facilitate the posting of documents. As the system enhancements will take some time to implement the Executive will postpone the effective date of the changes to Notes 1 and 2 to Rule 8 to 1 January 2006.
14. The Executive is not in a position to express an opinion on whether there may be legal implications in respect of publication of specific documents on the website as this would depend on the particular circumstances. In cases of difficulty, for instance where there may be a legal impediment preventing the display of a particular document on the website, the Executive should be consulted. Finally, a majority of the respondents disagreed that documents on display should be posted on a financial adviser's website. They raised a number of concerns about whether a financial adviser's website is an appropriate place for the posting of such documents. The Executive acknowledges a number of these concerns and will not proceed with this part of the proposal.

Rule 10.6 (statements which will be treated as profit forecasts)

Question 8 Do you agree with the proposed clarifications regarding working capital statements in proposed new paragraph (f) to Rule 10.6?

Question 9 Do you agree with the proposed obligations of financial advisers in respect of working capital statements?

15. Most respondents who expressed a view supported the proposed amendment. One of the respondents who disagreed with the proposal suggested that the Codes should not impose additional compliance requirements regarding the content and preparation of working capital statements. It should be sufficient that the compilation and contents of working capital statements are in compliance with the requirements under the Stock Exchange Listing Rules.
16. The Executive acknowledges a number of these concerns and agrees that the Codes should not impose additional requirements in respect of a working capital statement that is not deemed as a profit forecast for Code purposes as Rule 10 does not apply to them. The Executive will not proceed with the proposed change.

Rule 11.1 (disclosure of valuations) and 11.5 (d) (valuation certificate to be on display)

Question 10 Do you think that the full valuation report, rather than just a summary, should be put into the relevant document given that a full valuation report is a document on display under Rule 8?

17. Most respondents disagreed with the suggestion that the full valuation report should be included in the offer document, offeree board circular or other document rather than just a summary. Some respondents supported the introduction of such a change but with qualifications.
18. Rule 11 of the Takeovers Code already provides that a summary of the valuation must be included in the relevant document. Rule 11.5 provides that the full valuation report must also be made available for inspection as a document on display which going forward will include it being posted on a relevant website (see paragraph 13 of this paper). Given this the Executive does not believe it is necessary to require additional disclosure of the full valuation report in the relevant document.
19. The Executive has amended Rule 11 to the Takeovers Code to reflect the requirements under the "The HKIS Valuation Standards on Properties" issued by The Hong Kong Institute of Surveyors in early 2005 as set out in **Appendix 2**.

Rule 15.5 (final day rule)

Question 11 Do you agree with the amendment of the latest time for declaring an offer unconditional as to acceptances from “midnight on the 60th day” to “7.00 p.m. on the 60th day”? Do you think such changes will pose any practical difficulties for the offeror?

20. Most respondents supported the proposed change and did not think it would pose any practical difficulties. One respondent disagreed stating that it did not see any compelling reason for change.
21. This change was proposed to bring the deadline in Rule 15.5 for declaring an offer unconditional as to acceptances (currently “midnight on the 60th day”) into line with the deadline in Rule 19.1 for announcing, amongst other things, whether the offer has become unconditional as to acceptances or expired. In view of respondents’ comments the change has been adopted as proposed.

Note 1 to Rule 16.1 (announcements which may increase the value of an offer) and Rule 21.3 (restrictions on share dealings and transactions by offeror during securities exchange offers)

22. Paragraphs 69 to 78 of the Consultation Paper proposed to extend the restrictions in Note 1 to Rule 16.1 and Rule 21.3 of the Takeovers Code. In view of a number of comments from respondents the Executive would like to clarify the operation of the Day 39 and Day 46 rules.
23. The Day 46 rule is encompassed in Rule 16.1 of the Takeovers Code which provides that a revised offer must be kept open for at least 14 days after the posting of the revised offer document. This provides shareholders with sufficient information, advice and time (at least 14 days) to reach an informed decision on an offer in accordance with General Principle 5 of the Codes. As Day 60 is the latest date on which an offer may be declared unconditional as to acceptances the latest date on which an offer can be revised is therefore Day 46.
24. Arising from the Day 46 rule, Rule 15.4 of the Takeovers Code imposes an obligation on offeree companies to announce certain financial information by Day 39. The purpose of this Rule is to provide an offeror sufficient time (at least 7 days) to consider any new and important information relating to the offeree company before deciding whether or not to revise its offer which it must do by Day 46.
25. Note 1 to Rule 16.1 helps to ensure certainty of the consideration offered in securities exchange offers by restricting an offeror from issuing announcements which might have an impact on its share price after Day 46. This is based on the concern that such announcements may impact the value of the consideration offered (the offeror’s shares) and so be considered as a revision of the terms of the offer. Paragraph 69 of the Consultation Paper proposed extending these restrictions to announcements of “any new

material information” including any “*capital reorganisation*” as announcements of this kind may impact the value of the offer.

Question 12 Should the activities listed in paragraphs 70 and 75 [of the Consultation Paper] be restricted throughout the offer period under Rule 21.3 or only after “Day 46” under Note 1 to Rule 16.1?

26. There was general support for the proposed amendments to Note 1 to Rule 16.1 and Rule 21.3. Most respondents who expressed a view agreed that the activities specified in paragraph 70 should be subject to the Day 46 rule whilst the activities listed in paragraph 75 should be restricted throughout the offer period under Rule 21.3.

Question 13 Do you agree that the restrictions in Note 1 to Rule 16.1 should be extended to “any material new information” including any “capital reorganisation” that may have the effect of increasing the value of the offer?

27. A number of respondents suggested that the term “any new material information” was too vague and uncertain. The Executive has carefully considered these comments. The Executive acknowledges that setting out an exhaustive list of announcements that are subject to the restrictions in Note 1 to Rule 16.1 would provide greater certainty as to matters that should not be announced after Day 46. However the Executive is not satisfied that any such list would be able to encompass all types of announcement that may contain new material information that could impact the value of the offer. On balance the Executive believes that the restrictions in Note 1 to Rule 16.1 should apply to a wider range of matters. This should help to ensure that offeree shareholders have sufficient time and information to reach an informed decision on an offer before the closing date. The Executive notes that this approach is consistent with Note 1 to Rule 32 of the London Takeover Code.
28. Two respondents raised concerns that Note 1 should address the possible conflict that might arise between the restrictions in Note 1 to Rule 16.1 and the general obligation of listed companies to disclose material developments. The Executive agrees that Note 1 should provide guidance in this regard. The Executive has therefore added the following clarification note to Note 1 to Rule 16.1:

“For the purpose of determining whether a transaction is a “material acquisition or disposal” the Executive will, in general, apply the same tests as those set out in the Listing Rules to determine whether a transaction is a “major transaction”.

For the purpose of this Note 1, “capital reorganisation” includes rights issues, capital distributions or special dividends, dividends in specie other than scrip dividends of the same class and does not include stock splits, stock consolidations, bonus issues of the same class, ordinary dividends not exceeding the earnings per share for the period in respect of which the

dividend is declared, and nominal share capital and share premium reductions not involving any distribution to shareholders.

It is recognised that it may not always be possible for an offeror to avoid the need for an announcement to be made (e.g. due to obligations under the Listing Rules). Where the offeror is aware beforehand of a matter which might give rise to such an announcement obligation, the offeror should make every effort to bring forward the date of the announcement so that the restrictions under this Note 1 would not arise. Where this is not possible or where the matter arises after the offeror is restricted from revising its offer, the Executive should be consulted in advance of any proposed announcement and will normally seek the views of the Stock Exchange or any other regulator in order to satisfy itself that the announcement is in fact required.”

Question 14 If capital reorganisations are to be restricted under Note 1 to Rule 16.1 as proposed, what should be the scope of restricted activities (see paragraph 72 [of the Consultation Paper] for further discussion)?

29. There was general support for the proposal to extend the restrictions in Note 1 to Rule 16.1 to announcements of any capital reorganisation that may have the effect of increasing the value of the offer. A new definition of “*capital reorganisation*” has been added.

Question 15 If the activities referred to in paragraphs 70 and 75 [of the Consultation Paper] should be restricted as proposed, should there be a materiality test: if the size of an offer is less than a small percentage of the offeror’s total issued share capital, the Executive may grant a waiver from the restrictions imposed on such transactions?

30. There were mixed responses to Question 15 with some respondents in favour and some against the introduction of a materiality test below which a waiver would be granted from the requirements of Note 1 to Rule 16.1 and Rule 21.3. The Executive has considered these comments and has concluded that it is not satisfied that it is in the interests of shareholders to introduce a materiality test. The Executive is particularly mindful that the overriding purpose of the restrictions in Note 1 to Rule 16.1 and Rule 21.3 is to give certainty of the value of the offer irrespective of the size of the offeror.

Question 16 Do you think that Rule 21.3, in its current form is wide enough to deal properly with competing offerors? If so, should there be a more general restriction on all offerors from dealing in each other’s relevant securities (as defined in Rule 22) during an offer period?

31. Some respondents supported the proposed amendments to Rule 21.3. One suggested that Rule 21.3 should not prevent an offeror arranging for parties to underwrite a cash alternative to a share exchange offer. The Executive agrees and has added the following paragraph to the end of Rule 21.3:

“This Rule 21.3 does not restrict an offeror or its financial advisers from arranging the underwriting of a cash alternative to the offeror’s securities offered in exchange. However, if any such arrangement is likely to have more than a nominal effect on the value or the market price of the offeror’s securities, the Executive should be consulted.”

32. Two respondents suggested that dealings by competing offerors in the shares of each other should also be restricted whilst another questioned the justification for such a restriction. In light of the comments received the Executive has concluded that restrictions should not be imposed on competing offerors without further public consultation. A number of issues arise including the question of how to determine when a competing offeror should be regarded as “competing” for the purpose of the restrictions. The Executive would also like to consider the possible impact of such restrictions on financial advisers of competing offerors. This matter will be reviewed further in the next Code review.

Rule 28 (partial offers)

Question 17 Do you agree with Option 1 or Option 2? Please give reasons for your response.

33. Paragraphs 105 to 117 of the Consultation Paper consulted the public about the following options for possible changes to Rule 28:
- **Option 1** proposed that the current position under the Codes in terms of the different treatment of partial offers for between 30% and 50% and those for 50% or more would remain unchanged.
 - **Option 2** proposed amending the Codes to provide that all partial offers that may result in a change of control under Rule 26.1 of the Takeovers Code should be permitted under the Codes subject to the approval procedure contained in Rule 28.5 i.e. delete Rule 28.4.
34. The majority of respondents supported Option 2 commenting that it is in line with international practice and that the requirement for approval by minority shareholders provided them adequate protection. Respondents who expressed a preference for Option 1 suggested that it afforded greater protection to minority shareholders.
35. The Executive agrees with the majority of the respondents that Option 2 should be adopted as it does not deprive shareholders of the opportunity to consider a partial offer subject to the approval by over 50% of independent shareholders. The Executive believes that the acceptance form should specify the number of shares in respect of which the offer is approved as this gives shareholders greater voting flexibility.

Rule 32.1 of the Takeovers Code and Rule 6 of the Share Repurchase Code (Takeovers Code implications of share repurchases)

Question 18 Should the Codes be amended to provide for whitewash waivers of general offer obligations triggered as a result of on-market share repurchases and if so, do the provisions set out [in paragraphs 125 to 137 of the Consultation Paper] provide sufficient safeguards for shareholders?

36. Some respondents supported the introduction of whitewash waivers for on-market share repurchases subject to proper safeguards. A number of these respondents raised comments about the appropriateness of the proposed safeguards with one suggestion that further consultation might be necessary.
37. The majority of respondents who expressed a view disagreed that the Codes should be amended to provide whitewash waivers of general offer obligations triggered as a result of on-market share repurchases for the reasons set out in paragraphs 122 and 123 of the Consultation Paper. A number of these respondents highlighted the uncertainties as to price and timing of on-market repurchases which they suggested contribute to the undesirability of such an amendment. These respondents also indicated that the proposed safeguards were in any event inadequate. One respondent emphasised, in light of the prevalence of the controlling shareholder environment in Hong Kong, that Hong Kong regulations have historically and justifiably placed greater attention on ensuring that the interests of minority shareholders are not unfairly prejudiced compared to regulations in other markets. There is a concern that minority interests may be prejudiced in the guise of increasing shareholder value if the proposal is allowed. The Executive agrees with these concerns and believes that it is in the overall best interests of minority shareholders not to amend the Codes in this respect. Therefore Questions 19 to 31 in the Consultation Paper will not be addressed in this paper.

New Rule 37 – The Telecommunications Authority (“TA”)

Question 32 Should the Takeovers Code be amended as proposed in Option 1?

Question 33 Should the Takeovers Code be amended as proposed in Option 2?

38. Paragraphs 139 to 183 of the Consultation Paper proposed amending the Takeovers Code to provide a framework for dealing with reviews by the Telecommunications Authority (TA). The Executive consulted the market about the following 2 options:
- **Option 1** proposed amending the Takeovers Code to provide for the extension of “Day 39” (the latest date for announcement of new information by the offeree company) following any final decision of the TA. Option 1 included a provision that if any such extension were to exceed 3 months after posting of the offer document, the Executive

should be consulted to determine whether the offer should lapse and if so, which provisions of the Takeovers Code would continue to apply.

- **Option 2** proposed closely following the rules in the London Takeover Code relating to a “*competition reference period*”. These rules have been drafted in the context of the UK market where hostile bids are relatively common. Under this option an offer would lapse on the commencement of a Stage 2 review by the TA. Thereafter the offeror would be under no obligation to reinstate the offer after the TA issued his final decision (even if that decision were favourable to the offeror).
39. Most respondents who expressed a preference supported Option 1. The Executive agrees with one respondent’s comments that the advantage of Option 1 is that it provides a broadly suitable framework for the time being. Further amendments may be made to the Codes if necessary in light of actual experience gained in the administration of cases where the TA has exercised his powers under the Telecommunications Ordinance and having regard to the Guidelines. One respondent expressed concerns that Option 1 could potentially result in the offeree company being put into an indefinite offer period. The Executive would like to reiterate that if it appears after consulting with the TA that its enquiries are likely to exceed more than 3 months after posting the offer document, the Executive should be consulted. In such cases the Executive will normally consent to the offer lapsing and will clarify which provisions of the Takeovers Code continue to apply during the lapse period. In considering these issues the Executive would expect to have regard to the relevant principles and practice of the London Takeover Code and the London Panel.

New Rule 31.5 - Requisitioning shareholders meetings after an offer

Question 34 Do you agree with Option 1 or Option 2? Please give reasons for your response.

40. Paragraphs 211 to 216 of the Consultation Paper proposed amending the Takeovers Code to address concerns about risks to shareholders arising from an incumbent board taking deliberate but lawful action to frustrate a successful offeror from exercising board control. The paper proposed 2 options, namely:
- **Option 1** proposed amending the Codes to provide that after the offer has become or is declared unconditional in all respects the offeree board must extend the fullest cooperation to the successful offeror.
 - **Option 2** proposed amending the Codes to provide that the offeree company board must not, without shareholder approval or the offeror’s consent, take or agree to take any action listed in paragraphs (a) to (e) of Rule 4 during the period after the offer has become or is declared unconditional in all respects up to the day of any general meeting at which the shareholders vote on resolution(s) proposed by the offeror for the purpose of securing control of the board of the offeree company.

41. All respondents broadly supported amending the Code to provide safeguards for successful offerors although views differed about the extent of such provisions. A number of respondents preferred Option 2 as it provided clear and certain guidance. Other respondents supported Option 1 but suggested that the specific actions mentioned in Rule 4 of the Takeovers Code should also be explicitly referred to. The Executive agrees with this and has adopted Option 1 as amended below. In response to a comment, the new Rule 31.5 has also been amended to clarify that it only applies once an offeror requisitions a general meeting after its offer has become unconditional in all respects.

“31.5 Requisitioning shareholder meetings after an offer becomes unconditional in all respects

Once an offeror requisitions a general meeting after its offer becomes unconditional in all respects to seek to appoint directors of the offeree company:

- (i) the offeree board must extend the fullest cooperation and convene the general meeting as soon as possible; and*
- (ii) the offeree board must not, without shareholder approval or consent of the offeror, take or agree to take any action listed in paragraphs (a) to (e) of Rule 4 after the end of the offer period and until the conclusion of such general meeting.”*

OTHER COMMENTS

Section 1.7 of the Introduction (role and responsibility of advisers)

42. Paragraph 2 of the Consultation Paper proposed adding the following new Note to section 1.7 to clarify the meaning of “adequate resources”:

“Adequate resources

A financial adviser which is otherwise qualified to act in a transaction under the Codes under section 1.7 of the Introduction is expected to allocate to the transaction in question sufficient experienced and competent professional staff with the active involvement of, or close supervision by, a duly approved responsible officer. The supervisor and his staff are expected to devote sufficient time and effort to the transaction to discharge their responsibilities under the Codes.”

43. One respondent suggested that the proposed new references in section 1.7 of the Introduction to the Codes to “active involvement” and “close supervision” should be reworded in less subjective terms. Another respondent suggested that section 1.7 should be simplified and clarified. The Executive accepts these comments and has amended the Note to section 1.7 as follows:

“Adequate resources

A financial adviser advising on a transaction subject to the Codes is expected to allocate to the transaction in question sufficient experienced and competent professional staff with the appropriate involvement of, or reasonable supervision by, a duly approved responsible officer or a suitably experienced senior member of the financial adviser’s staff. The supervisor and his staff are expected to devote sufficient time and effort to the transaction to discharge the financial adviser’s responsibilities under the Codes.”

Class (9) of the definition of “acting in concert”

44. Paragraph 10 of the Consultation Paper proposed adding a new Note 10 to the Notes to the definition of “*acting in concert*” to provide that where a person transfers voting rights to another person as a gift the transferor and transferee are presumed to be acting in concert under class (9). One respondent suggested that (i) the presumption should not apply to shares that are transferred by way of charitable donation; (ii) the presumption of concertedness should only apply where the donee is a trust that is deemed to be acting in concert under the current definition of “*acting in concert*”, and (iii) there should be a time limit (at most 2 years) beyond which the presumption would no longer apply.
45. The Executive agrees that the presumption of acting in concert should not normally apply to charities and has amended the note accordingly. Regarding trusts, a settlor of a trust is normally presumed to be acting in concert with the “*related trust*” under presumptions (2), (6) and (8) of the definition of acting in concert as the settlor is generally the person who creates the trust and transfers the shares to it. In other cases where an unrelated person donates shares to a non-charitable trust, the Executive believes that the presumption of concertedness should also apply. The Executive does not agree that there should be a time limit beyond which the presumption of concertedness should no longer apply to gifts of voting rights. Once the presumption arises the Executive believes that it should continue unless there is clear evidence that the concert party relationship no longer exists.

Definition of “exempt principal trader” (“EPT”)

46. Paragraph 15 of the Consultation Paper proposed amending the definition of EPT to clarify the scope of dealing activities to which exempt status would normally apply. Some respondents broadly supported the proposed amendments but requested clarification in a number of areas.
47. One of these respondents suggested that the proposed amendments were too narrow and should be broadened to include other dealing activities such as hedging of **new** derivatives.

48. The Executive does not agree. Given the nature of an EPT's trading activities (i.e. not owing fiduciary duties to its clients) the Executive is reluctant to expand EPT dealings to cover a broader range of activities that include activities relating to the creation of new derivative products. The Executive believes that the risk of abuse (in that such dealings might affect the outcome of an offer) outweighs the benefits of greater flexibility. It follows that the Executive does not agree that exempt status should be extended to cover proprietary desk trading either.
49. This respondent also suggested that the exemption should specifically refer to a number of other activities including basket trades with clients. The Executive notes that the London Takeover Code has recently been amended (April 2005) to clarify that the London Panel "*will not normally regard a derivative which is referenced to a basket or index, including relevant securities as connected with an offeror or potential offeror if at the time of dealing the relevant securities in the basket or index represent less than 1% of the class in issue and, in addition, less than 20% of the value of the securities in the basket or index.*" The Executive agrees with this approach and has adopted it into the Note to the definition of "*derivative*".
50. The same respondent also suggested that so long as an intermediary can adequately demonstrate that there are secure Chinese walls in place between its proprietary desk and its corporate finance division, the proprietary desk should be allowed to continue dealing in the relevant securities until the Code transaction is publicly announced from which point further dealing in the relevant securities would be restricted.
51. In principle the Executive agrees. Rule 21.6 and Note 2 to Rule 21.6 of the Takeovers Code provide that discretionary dealings by fund managers connected to the offeror before announcement of a Code transaction will not normally result in that fund manager being presumed to be acting in concert with the offeror provided the fund manager was not at that time aware of its group's connection with the offeror or offeree. The Executive believes that the same principle should apply to principal traders. The Executive notes Rule 7.2 of the London Takeover Code has been recently amended (April 2005) to clarify this. The Executive intends to revisit this issue in the next Code review exercise. In the meantime the Executive will continue to apply the "spirit" of Note 2 to Rule 21.6 to such situations.

Definition of "*offer*"

52. Paragraph 16 of the Consultation Paper proposed adding "*public announcements of standing instructions to purchase shares on a stock exchange*" to the definition of "*offer*". A number of respondents raised concerns about the practical application of this proposal. One respondent suggested that in any event the existing general wording "*offer includes takeover and merger transactions however effected*" is sufficiently wide to cover the scenario referred to in paragraph 16 of the Consultation Paper. The Executive acknowledges a number of these concerns and has not proceeded with this proposal.

Rule 1 (approach) and Rule 1.1 (offer to the board)

53. Paragraph 20 of the Consultation Paper proposed that the requirement in Rule 1.1, that any offer should be put forward to the board of the offeree company before it is announced to the public, should also apply to revision and withdrawal of an offer.
54. One respondent agreed with this proposal. Another respondent disagreed suggesting, amongst other things, that if this amendment is introduced it might encourage unfairness in competitive offers (especially in cases where the directors of the offeree company are acting in concert or are deemed to be acting in concert with one of the competitive bidders). This respondent noted that there was no equivalent provision in the UK where competitive offers are more common. In light of these concerns the Executive has decided not to proceed with this proposed amendment.

Rule 2.1 (independent financial advisers) and Rule 2.8 (independent board committees - “IBC”)

55. Paragraph 26 of the Consultation Paper recommended amending Rule 2.1 to clarify that an independent financial adviser should include in its advice a recommendation as to acceptance or voting. It also recommended amending Rule 2.1 to provide that the IBC should approve the independent financial adviser’s appointment. Paragraph 27 of Consultation Paper proposed amending Rule 2.8 of the Takeovers Code to provide that the IBC should comprise only the independent non-executive directors appointed under the Listing Rules unless they have a direct or indirect interest in the offer.
56. One respondent raised concerns about whether the proposal would have the adverse effect of either preventing the formation of IBCs or unduly reducing the membership of such committees for Takeovers Code purposes. Another suggested that the IBC should comprise all non-executive directors unless they had a conflict. The Executive agrees with this suggestion as it widens the possible pool of members of the IBC without compromising its independence.
57. The same respondent suggested that given the relative wealth of many directors of Hong Kong listed companies there was no reason to believe that a conflict arose merely as a result of a director being a salaried director. This respondent noted there were no similar restrictions in the London Takeover Code. The Executive does not accept this proposition or the suggestion put forward by this respondent. The Executive believes that a stricter approach is necessary given the controlling shareholder environment in Hong Kong, which has far more agreed bids than hostile or competing bids.

Rule 2.4 (board of offeror company) and Note 1 to Rule 2.4

58. Rule 2.4 requires the offeror board to seek independent advice in the case of a reverse takeover or when the directors of the offeror are faced with a conflict. Paragraphs 21 and 22 of the Consultation Paper proposed amending

Rule 2.4 of the Takeovers Code to follow more closely the equivalent Rule 3.2 of the London Takeover Code which is simpler and more in line with General Principle 4 as it clearly seeks to eliminate situations (due to conflict of interest or otherwise) that could derail an offer after it has been announced.

59. Some respondents broadly supported the proposal but suggested that it was impracticable to require the board of the offeror to set out a summary of the advice in the announcement of the offer. One of these respondents suggested it would be more practical for an offeror board to obtain oral advice on relevant matters prior to the announcement of the offer provided that the full advice is disclosed to shareholders in due course. The Executive agrees that it is more practicable for an offeror to seek oral advice prior to the announcement with the full advice to be obtained as soon as possible thereafter. However the Executive continues to believe that a summary of the salient points of the oral advice should be included in the offer announcement so that shareholders are kept informed at the earliest opportunity. The same respondent also asked for clarification of what would not usually constitute a “*conflict of interest*”. The Executive agrees that guidance would be helpful and has adopted similar provisions to the current Note 3 to Rule 2.4 of the Takeovers Code as new Note 4 to Rule 2.4.

Rule 2.10 (takeover and privatisation by scheme of arrangement or capital reorganisation)

60. Paragraphs 31 and 32 of the Consultation Paper proposed amending Rule 2.10 to clarify which types of scheme of arrangement fall within Rule 2.10 and which may be suitable for a waiver. In particular it was proposed that Rule 2.10 be amended to clarify that the Executive will normally only waive the requirements of Rule 2.10 for schemes or capital reorganisations under which the economic interests of shareholders are not affected, such as a scheme to redomicile.
61. One respondent suggested that there is no justification for applying Rule 2.10, and hence creating the need to apply for a waiver, in respect of certain company reorganisations such as a scheme to redomicile, as there are no change of control implications. Another respondent agreed with the proposed amendments but requested guidance on how the Executive would exercise its discretion in aggregating any “*series of transactions*”.
62. The Executive has considered these comments carefully. As stated in paragraph 32 of the Consultation Paper, the difficulty is that some company reorganisations are not purely schemes to “redomicile” in that they may also be used as a means to assist a person to obtain or consolidate control or acquire or privatise a company. Rule 2.10 as amended provides that the Executive will exercise its discretion to aggregate a series of transactions of which the scheme of arrangement or capital reorganisation forms part to determine whether such transactions taken together effectively assist a person to obtain or consolidate control or acquire or privatise a company. The Executive believes that it is implicit that in exercising this discretion it

will take into account all relevant factors in order to determine whether the scheme forms part of a larger overall plan to takeover or privatise a company and that this will turn on the particular circumstances of the case. In cases of doubt the Executive should be consulted at the earliest opportunity.

New Rule 3.8 (announcement of numbers of relevant securities in issue)

63. Paragraph 35 of the Consultation Paper proposed adding a new Rule 3.8 to require companies whose securities are subject to the dealing disclosure regime in Rule 22 to announce the exact number of relevant securities in issue during the offer period. The Executive also remarked that it had noticed that stockbrokers, banks and others at times do not appear to have been aware of their responsibilities under Note 11 to Rule 22 to remind clients of disclosure obligations attaching to associates. The Executive therefore recommended that the new Rule 3.8 should provide that the announcement should also contain a reminder about the disclosure requirements under Rule 22 and a summary of the provisions of Note 11 to Rule 22.
64. One respondent asked for clarification of the meaning of a “*summary*” of Note 11 to Rule 22. Given that the text of Note 11 to Rule 22 is relatively short the Executive has amended the last sentence of new Rule 3.8 as follows:

“The text of Note 11 to Rule 22 should also be included in any announcement commencing an offer period.”

Rule 5 (no withdrawal of an offer) and Note 2 to Rule 5 (competing offer)

65. Paragraph 36 of the Consultation Paper proposed amending Note 2 to Rule 5 to provide that consent of the Executive should be obtained if an offeror wishes to withdraw its offer following the posting of a higher offer by a competitor. One respondent suggested that the note should also contain a reference to the offeree company’s board and its advisers being consulted before any such consent is given. The Executive has amended Note 2 as proposed and added a new Note 5 to Rule 5 accordingly.

New Note 7 to Rule 9.1 (use of comparables)

66. Paragraph 45 of the Consultation Paper proposed adding a new Note 7 to Rule 9.1 regarding the use of comparables in takeover documents to justify recommendations or support arguments.
67. One respondent suggested that the proposed requirement that a comparable be “*fair and representative*” should not be a matter for the Executive to judge as it is a matter of judgment about which different people may reasonably hold different views particularly in hostile offers.

68. The Executive has come across a number of cases where the selection of comparables has been highly selective. This can result in shareholders receiving misleading advice about an offer. The Executive continues to believe that the Codes should provide guidance on the use of comparables as proposed. If an offeror or offeree (as applicable) does not agree with the comparables used by the other party, it may announce its view so that shareholders are apprised of the position.

Rule 10.11 (material changes in financial or trading position)

69. Paragraph 49 of the Consultation Paper proposed amending the Note to Rule 10.11 to require an offeree board and financial adviser to disclose any material difference of opinion between them concerning a material change statement.
70. One respondent strongly disagreed with this proposal suggesting that it would have the potential to impact negatively on the openness of discussions between an offeree company or offeror and its financial adviser. This respondent pointed out that issues concerning the position and outlook of the business are ultimately matters for the commercial judgment of the directors of the company.
71. Rule 10.11 of the Takeovers Code imposes a clear obligation on the directors of the company to provide the Executive with evidence of the steps taken by them to support a no material change statement. This includes a confirmation that the board and the financial adviser have discussed all the aspects referred to in the Note to Rule 10.11.
72. The Executive believes that it is important that any material difference of opinion between the board and its financial adviser in this regard should be brought to the Executive's attention as it is likely that this information will be relevant to shareholders' consideration of the offer and as such should be disclosed in accordance with General Principle 5 of the Codes. The Executive agrees that the directors of the offeror or offeree company bear ultimate responsibility for statements under Rule 10.11 and has amended the Note to Rule 10.11 to clarify this as follows:

"Note to Rule 10.11:

Evidence of steps taken

The evidence required under this Rule 10.11 normally includes a confirmation in writing given to the Executive by the board of the offeror or offeree company ~~to the Executive~~ that the board and the financial adviser have ~~has~~ reviewed, among other things, the financial position of the company (including the latest consolidated management accounts, financial condition, capital and other commitments, contingent liabilities and future cash flow and financing requirements) and the trading position with respect to the company's suppliers and customers. The confirmation should also state that the board and the financial adviser have ~~has~~ discussed all these

aspects with the financial advisers of the company before it makes the confirmation. before the confirmation was made. Under Rule 9.3, the directors of the offeror or offeree company take full responsibility for statements made under this Rule 10.11. However, the directors and the financial adviser should disclose any material difference of opinion between the directors and the financial adviser regarding the material changes or absence of such changes, to the Executive. The Executive may require disclosure of such information in the document if it considers it to be relevant to a shareholder's decision on an offer."

New Rule 16.5 (competitive situations), Rule 15.5 (final day rule), new Note 2 to Rule 15.5 (competitive situations), New Rule 31.4 (restrictions on dealings by a competing offeror whose offer has lapsed)

73. Paragraphs 79 to 85 of the Consultation Paper proposed adopting Rule 32.5 of the London Takeover Code as new Rule 16.5 to provide a flexible framework for resolving competitive situations.
74. One respondent raised concerns as to whether the proposed procedures would achieve a speedy resolution in Hong Kong where the Executive comments on all announcements before they are issued. This respondent suggested that this might encourage parties to use various tactics to deliberately delay the process.
75. In a recent competing bid, one of the offerors actually initiated discussions about adopting the Guillotine procedures at an early stage in the offer. Although at the end of the day it was not necessary to use the procedures, the Executive was confident at the time that there was sufficient time for the parties to agree the procedures had they been needed. If the details of such procedures can be agreed in advance the commenting process by the Executive should be fairly rapid. Early consultation is recommended. A number of minor drafting changes have been made to Rule 31.4 in response to suggestions by this respondent.

Note 8 to Rule 22 (indemnity and other arrangements)

76. Paragraph 89 of the Consultation Paper recommended expanding Note 8 to Rule 22 to clarify that the disclosure requirements apply to any arrangements which involve "rights over shares" as such arrangements may be material to shareholders' consideration of an offer.
77. One respondent disagreed with this proposal suggesting that extending the note to "rights over shares" may lead to unexpected results by including arrangements such as custody arrangements or security for loans. The Executive does not agree with this concern. There is already a clear definition of "rights over shares" in the Codes. All such rights are already required to be disclosed in an announcement issued under Rule 3.5 of the Takeovers Code. Thereafter the Executive believes that disclosure of any dealings in those "rights" is necessary in order to maintain an informed market.

Note 7A to Rule 26.1 (placing)

78. Paragraphs 98 and 99 of the Consultation Paper proposed replacing the current Note 7A to Rule 26 to clarify that it is ultimately the responsibility of the purchaser to make all necessary enquiries to ensure that there are no concert party holdings that might result in the concert group holding 30% or more.
79. One respondent welcomed the proposals. Another respondent suggested that Note 7A should contain a clear statement to the effect that it is subject to the dispensations on Rule 26 and in particular Note 4. The Executive thinks this is self evident and accordingly there is no need to state this expressly in the new Note 7A or indeed elsewhere in the Codes where mandatory offers are referred to.

New Note 20 to Rule 26.1 (employee benefit trusts – “EBTs”)

80. Paragraphs 100 and 101 of the Consultation Paper proposed adopting Note 5 to Rule 9.5 of the London Takeover Code as new Note 20 to Rule 26.1 to clarify that there is no general presumption that the trustees of an EBT are acting in concert with the board of directors or the controlling shareholder of a company. Each case will depend on its own facts.
81. One respondent, who was generally receptive to the proposal, suggested that if the new Note 20 were adopted, the reference to “*employee share schemes*” in class 3 of the definition of “*acting in concert*” in the Takeovers Code should be aligned with the reference to trustees of an employee benefit trust in the new Note 20. The Executive has added the following note to the definition of “*acting in concert*” to clarify that for the purposes of class (3) “*employee share schemes*” do not include EBTs within the meaning of Note 20:

“Note: Class (3) does not apply to an employee benefit trust. The Executive will apply Note 20 to Rule 26.1 to determine whether the directors and shareholders of a company are acting in concert with the trustees of an employee benefit trust of the same company.”

Note 1(i) on dispensations from Rule 26 (whitewashes)

82. Note 1(i) on the dispensations from Rule 26 provides that the Executive will normally not waive a general offer obligation under Rule 26 if the whitewash applicant or its concert parties have acquired voting rights in the company in the 6 months before the announcement of the proposals but subsequent to “*negotiations, discussions or the reaching of understandings or agreements with the directors of the company*” (emphasis added). These are referred to in paragraph 3 of Schedule VI (the Whitewash Guidance Note) as “*disqualifying transactions*”.
83. Paragraph 103 of the Consultation Paper proposed deleting the words “*with the directors of the company*” to clarify that the “*negotiations, discussions or*

the reaching of understandings or agreements” need not be formal or involve the **full** board.

84. Some respondents did not agree with the proposed deletion of the words “*with the directors of the company*” commenting that this left the Note incomplete as to whom the discussions, negotiations, discussions, understandings or agreements had to be with.
85. The Executive acknowledges these concerns and will not delete the words “*with the directors of the company*” from Note 1(i). However the Executive continues to believe that the Note should be amended to clarify that the negotiations and discussions with the directors need not be formal or involve the full board. A whitewash waiver is a dispensation from one of the most basic and fundamental obligations under the Codes. The purpose of the disqualifying transactions provisions is to ensure that there is equal treatment of shareholders (General Principle 1) by prohibiting a whitewash applicant or its concert parties from giving some shareholders a right to “exit” by acquiring their shares when the same opportunity is not available to other shareholders. This prohibition applies as soon as discussions or negotiations, whether formal or informal, involve one or more directors of the company. In cases of doubt the Executive should be consulted at the earliest opportunity. Accordingly, Note 1(i) has been amended as follows (similar amendments have been made to paragraph 3(a) of Schedule VI (Whitewash Guidance Note)):

“negotiations, discussions or the reaching of understandings or agreements with the directors of the company (which would include informal discussions)” (emphasis added).

Note 6 on dispensations from Rule 26 (placing and top-up transactions)

86. Paragraph 104 of the Consultation Paper proposed amending Note 6 to clarify that the Takeovers Code does not apply to a shareholder who has held more than 50% of a company’s voting rights for a minimum of 12 months immediately before a placing and top-up transaction. It was also proposed that in such circumstances, the confirmation from the financial adviser or placement agent regarding independence of the placee or placees should not normally be necessary.
87. One respondent welcomed the clarification regarding the obligations of a financial adviser. This respondent suggested that Note 7 of the Notes on dispensation from Rule 26 should be deleted so that a financial adviser/placing agent would not be required to confirm the independence of the purchaser even in the case of a placing/top-up transaction involving between 30% to 50% of the voting rights of a company.
88. The Executive does not agree with this suggestion. In the absence of a clear confirmation of independence of the placees the Executive would not be in a position to grant a waiver of a general offer obligation which had arisen under Rule 26 as a result of a placing. The Executive believes that the

placing agent or financial adviser is often in the best position to give this confirmation as the placees are their clients. The Executive notes that this is consistent with the “*know your client rule*” in paragraph 5.1 of the Code of Conduct for persons licensed by or registered with the SFC.

Paragraph 1 of Schedule I (the offeror)

89. Paragraph 186 of the Consultation Paper proposed amending paragraph 1 of Schedule I to require the offeror to disclose details of any agreement, arrangement or understanding to transfer securities acquired in pursuance of an offer together with any related charges or pledges.
90. One respondent suggested that the proposal to require disclosure of “*terms and conditions*” of agreements to transfer shares was unnecessarily wide and vague. The Executive acknowledges this and has revised the wording as follows:

“Details, including the terms and conditions of such agreement, arrangement or understanding and any related charges or pledges which may result in the transfer of voting rights, should also be disclosed.”

Paragraph 13 of Schedule II (directors’ service agreements)

91. Paragraph 13 of Schedule II sets out the details of certain directors’ service agreements that must be included in the offeree board circular. Paragraph 198 of the Consultation Paper proposed a number of clarification amendments to paragraph 13. One respondent has suggested that there is still room for further clarification. In particular this respondent suggested that it is unclear from the proposed drafting whether a continuous contract that is terminable only upon giving notice (of e.g. 3 months) would need to be disclosed. The Executive acknowledges that some further clarification may be helpful and has redrafted paragraph 13 as follows:

“13. Details of any service contracts with the offeree company or any of its subsidiaries or associated companies in force for directors of the offeree company:

- (i) which (including both continuous and fixed term contracts) have been entered into or amended within 6 months before the commencement of the offer period;*
- (ii) which are continuous contracts with a notice period of 12 months or more; or*
- (iii) which are fixed term contracts with more than 12 months to run irrespective of the notice period.*

For disclosures made under paragraph (i), particulars must be given of the earlier contracts (if any) which have been replaced or amended as well as the current contracts.

If no disclosures are required to be made under this paragraph, this should be stated.”

Rule 2.9 Shareholder votes to be conducted by way of a poll

92. Rule 2.9 currently provides that “...*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.*”
93. One comment pointed out that the current wording of Rule 2.9 is unclear as to whether the announcement need only disclose the **number of shareholders who voted** at the meeting as opposed to the **number of shareholders who voted in favour and against** a resolution. In most instances where the Codes require a shareholders’ vote, with the exception of schemes of arrangement, the relevant factor is the number of shares voted for or against a resolution and not the number of shareholders. The number of shareholders who vote is however relevant to schemes of arrangement which must be approved by a majority in number of shareholders (as well as 75% in value) attending the meeting. Finally it has also been suggested that the words “*in person or by proxy*” should be deleted from Rule 2.9 as it is implicit that the meaning of voting on a poll includes proxy votes and in-person votes.
94. The Executive agrees with these comments and believes that it is important to clarify this matter by amending Rule 2.9 as follows:

“... the results of the poll (including the number of shares voted for and against the resolution and in the case of a scheme of arrangement, the number of shareholders voting for and against the resolution) ~~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.”

Note 4 to Rules 3.1, 3.2 and 3.3 (gathering of irrevocable commitments)

95. Note 4 to Rules 3.1, 3.2 and 3.3 provides that before an announcement has been issued an offeror may approach “*a very restricted number of sophisticated investors who have a controlling shareholding*”. One respondent suggested that the reference to “*controlling shareholding*” (i.e. 30% or more) is unnecessary and gives rise to real practical difficulties. This respondent commented that provided the investors approached satisfy the requirement that they are “*sophisticated*” the Codes already provide sufficient control over who is approached and protection for them (in particular the requirement that only a very restricted number of parties can be approached and the provisions of Rule 34).
96. The purpose of Note 4 is to impose a strict limit on the number of shareholders that may be approached before the announcement of an offer. This prevents unequal dissemination of information and is consistent with

General Principles 3, 5 and 6. The current Note 4 to Rules 3.1, 3.2 and 3.3 follows the exact wording of the London Takeover Code and in the Executive's view strikes a good balance in that it enables an offeror to approach controlling shareholders subject to confidentiality but prevents wider dissemination of unpublished price sensitive information. Note 4 allows a certain flexibility in providing that "*the Executive may permit particular shareholders to be called and informed of details of a proposed offer which has not been publicly announced*". In such cases the Executive would be concerned to establish whether there are strong reasons why the solicitation cannot be made after the announcement of the offer and to address any concerns that may arise under General Principles 3, 5 and 6.

97. Finally, in a number of recent privatisations, the Executive consented to the offeror approaching a very restricted number of sophisticated investors who in aggregate held more than 10% (but less than a controlling interest) of the disinterested shares for the purpose of Rules 2.2, 2.10 and 2.11. The Executive will consult the market about codifying this practice in the next Code review.

APPENDICES

- Appendix 1** List of Respondents
- Appendix 2** Marked up text of the amended Codes on Takeovers and Mergers and Share Repurchases

List of Respondents

Category A – Respondents who consented to the publication of their submissions

1. Anglo Chinese Corporate Finance, Limited
2. CPA Australia – Hong Kong China Division
3. Hong Kong Institute of Certified Public Accountants
4. The Hong Kong Institute of Company Secretaries
5. Hong Kong Stockbrokers Association Limited
6. Kingsway Group
7. The Law Society of Hong Kong
8. Linklaters on behalf of:
 - ABN AMRO N.V.
 - Citigroup Global Markets Asia Limited
 - Credit Suisse First Boston (Hong Kong) Limited
 - Goldman Sachs (Asia) L.L.C
 - J.P. Morgan Securities (Asia Pacific) Limited
 - Lehman Brothers Asia Limited
 - Merrill Lynch (Asia Pacific) Limited
 - Morgan Stanley Dean Witter Asia Limited
 - Nomura International (Hong Kong) Limited
 - UBS Securities Limited
9. Somerley Limited on behalf of CLP Holdings Limited

Category B – Respondents who requested their submissions to be published on a “no-name” basis

One submission

Category C – Respondents who requested their submissions not to be published

Three submissions

Appendix 1

Marked up text of
The Amended Codes
on
Takeovers and Mergers
and
Share Repurchases

Introduction

INTRODUCTION

- 1. Nature and purpose of the Takeovers Code and Share Repurchase Code**
- 1.1** The Takeovers Code and the Share Repurchase Code have been issued by the SFC in consultation with the Panel.
- 1.2** The primary purpose of the Codes is to afford fair treatment for shareholders who are affected by takeovers, mergers and share repurchases. The Codes seek to achieve fair treatment by requiring equality of treatment of shareholders, mandating disclosure of timely and adequate information to enable shareholders to make an informed decision as to the merits of an offer and ensuring that there is a fair and informed market in the shares of companies affected by takeovers, mergers and share repurchases. The Codes also provide an orderly framework within which takeovers, mergers and share repurchases are to be conducted.
- 1.3** The Codes do not have the force of law. They are framed so far as possible in non-technical language and should not be interpreted as if they are statutes. The Codes represent a consensus of opinion of those who participate in Hong Kong's financial markets and the SFC regarding standards of commercial conduct and behaviour considered acceptable for takeovers, mergers and share repurchases. This consensus of opinion is reflected in rulings made by the Panel when interpreting the Codes given the diverse range of interests represented by the Panel's members. Similar standards of commercial conduct and behaviour are applied in other leading financial centres.
- 1.4** Those who wish to take advantage of the securities markets in Hong Kong should conduct themselves in matters relating to takeovers, mergers and share repurchases in accordance with the Codes. If they do not do so they may find, by way of sanction, that the facilities of such markets are withheld. The Listing Rules expressly require compliance with the Codes.
- 1.5** The responsibilities provided for in the Codes apply to:-
 - (a) directors of companies that are subject to the Codes;
 - (b) persons or groups of persons who seek to gain or consolidate control of companies that are subject to the Codes;
 - (c) their professional advisers;
 - (d) persons who otherwise participate in, or are connected with, transactions to which the Codes apply; and
 - (e) persons who are actively engaged in the securities market.

- 1.6 In addition, any other persons who issue circulars or advertisements to shareholders in connection with takeovers, mergers or share repurchases must observe the highest standards of care and consult with the Executive prior to the release thereof.
- 1.7 The role and responsibility of financial and other professional advisers is of particular importance given the non-statutory nature of the Codes, and it is part of their responsibility to use all reasonable efforts, subject to any relevant requirements of professional conduct, to ensure that their clients understand, and abide by, the requirements of the Codes, and to co-operate to that end by responding to inquiries from the Executive, the Panel or the Takeovers Appeal Committee. Financial and other professional advisers must therefore have the competence, professional expertise and adequate resources to fulfil their role and to discharge their responsibility under the Codes. If a financial adviser is in any doubt about its ability to meet these requirements, it should consult the Executive in advance. If the Executive considers that a financial adviser is not able to meet these requirements, it may not allow that financial adviser to act in that capacity. In such circumstances the financial adviser may ask the Panel to review the decision of the Executive. Financial advisers must also be mindful of conflicts of interest (see Schedule VII of the Codes).

Note to section 1.7:

Adequate resources

A financial adviser advising on a transaction subject to the Codes is expected to allocate to the transaction in question sufficient experienced and competent professional staff with the appropriate involvement of, or reasonable supervision by, a duly approved responsible officer or a suitably experienced senior member of the financial adviser's staff. The supervisor and his staff are expected to devote sufficient time and effort to the transaction to discharge the financial adviser's responsibilities under the Codes.

- 1.8 The Codes are not concerned with the financial or commercial advantages or disadvantages of a takeover, merger or share repurchase, as the case may be. These are matters for the company and its shareholders.
- 1.9 A company contemplating a takeover, merger or share repurchase should apprise itself of applicable company law requirements, if any, which may affect its ability to conduct the proposed transaction.

2. General Principles and Rules

- 2.1 The Codes share common definitions and the General Principles. The General Principles are essentially statements of good standards of conduct to be observed in takeovers, mergers or share repurchases. The General Principles are expressed in broad general terms and do not define the precise extent or

the limits of their application. The Executive and the Panel apply the General Principles in accordance with their spirit and may modify or relax the effect of the language to achieve their underlying purposes.

In addition to the General Principles, each of the Codes contains a series of Rules, some of which are effectively expansions of the General Principles and examples of their application and others are rules of procedure designed to govern specific types of takeovers, mergers or share repurchases. Although the Rules are expressed in more detailed language than the General Principles, they, like the General Principles, are to be interpreted to achieve their underlying purposes. Accordingly, each of the Codes, through the General Principles, may apply to situations not specifically covered by any Rule. Therefore, the spirit of the Rules must be observed as well as their letter and the Executive and the Panel may each modify or relax the application of a Rule if it considers that, in the particular circumstances of the case, strict application of a Rule would operate in an unnecessarily restrictive or unduly burdensome, or otherwise inappropriate, manner.

- 2.2 To assist the interpretation of the Rules, notes have been inserted, where appropriate, to provide guidance as to how the Executive and the Panel will normally interpret the Codes.
 - 2.3 The Executive and the Panel also interpret each of the Codes in the light of previous rulings that have been made under both Codes by the Executive and the Panel, or their predecessor, the Committee on Takeovers and Mergers.
- 3. Amendment of the Codes**
- 3.1 The Codes may be amended or extended from time to time by the SFC in consultation with the Panel.
- 4. Companies and transactions to which the Codes apply**
- 4.1 The Codes apply to takeovers, mergers and share repurchases affecting public companies in Hong Kong and companies with a primary listing of their equity securities in Hong Kong. As a result, although it is generally the nature of the offeree company, the potential offeree company, or the company in which control may change or be consolidated that is relevant, there are also circumstances, specified in Rule 2 of the Takeovers Code, in which it is necessary to consider the treatment of the offeror's shareholders in order to carry out the objectives of the Takeovers Code. The Executive will normally grant a waiver from the requirements of the Share Repurchase Code for companies with a primary listing outside Hong Kong provided that shareholders in Hong Kong are adequately protected.

4.2 In order to determine whether a company is a public company in Hong Kong the Executive will consider all the circumstances and will apply an economic or commercial test, taking into account primarily the number of Hong Kong shareholders and the extent of share trading in Hong Kong and other factors including:-

- (a) the location of its head office and place of central management;
- (b) the location of its business and assets, including such factors as registration under companies legislation and tax status; and
- (c) the existence or absence of protection available to Hong Kong shareholders given by any statute or code regulating takeovers, mergers and share repurchases outside Hong Kong.

If a company is in any doubt about its status as a public company in Hong Kong, it should consult the Executive at an early stage.

4.3 The Takeovers Code is concerned with offers for, and takeovers and mergers of, all relevant companies, however effected. These include partial offers, offers by a parent company for shares in its subsidiary and certain other transactions where control (as defined) of a company is to be obtained or consolidated. References in the Takeovers Code to “takeovers” and “offers” include, where appropriate, all such transactions, including share repurchases by general offer as described below. The Takeovers Code does not apply to offers for non-voting, non-equity capital unless required by Rules 13 and 14 of the Takeovers Code.

4.4 The Share Repurchase Code is concerned with share repurchases of all relevant companies. Share repurchases by general offer will be considered to be offers and the Rules of the Takeovers Code will apply, *mutantis mutandis*, in addition to the Rules of the Share Repurchase Code. Persons engaging in share repurchases by general offer should therefore read the Takeovers Code as well as the Share Repurchase Code.

4.5 Transactions under either of the Codes may from time to time be subject to the jurisdiction of both the Panel and an overseas regulator. In such cases, early consultation with the Executive is strongly recommended so that conflicts between the relevant requirements of the two jurisdictions may be resolved.

5. The Executive

5.1 The Codes are administered by the Executive. The Executive undertakes the investigation of takeovers, mergers and share repurchases and monitors related dealings in connection with the Codes. It is available for consultation and to give rulings on all matters to which the Codes apply.

6. Consulting the Executive

- 6.1** When there is any doubt as to whether a proposed course of conduct is in accordance with the General Principles or the Rules, parties or their advisers should always consult the Executive in advance. In this way, the parties can clarify the basis on which they can properly proceed and thus minimise the risk of taking action which might be a breach of the Codes.
- 6.2** Consultations do not attract any fee. They generally take the form of verbal discussions and will not be concluded with any formal ruling from the Executive. Views expressed by the Executive under consultations are preliminary and do not bind the Executive.
- 6.3** While the Executive will respond to questions on interpretation of the Codes, it should not be expected to answer purely hypothetical questions, or to give provisional rulings (e.g. when the parties with an interest in such rulings cannot be identified).
- 6.4** Parties should be aware that consultations will not result in provisional rulings and, where the Codes require parties to consult, they are not precluded from seeking formal rulings and a fee becomes payable whenever a ruling is sought despite the fact that the process starts as a consultation. Where there is a difference in views between the Executive and parties about a Code issue based on preliminary information during or after a consultation, the Executive, mindful of the non-binding nature of consultations, generally urges parties to seek a formal ruling.

7. Rulings by the Executive

- 7.1** While the Executive may sometimes see fit to make a ruling under the Codes of its own volition, a ruling is more often requested by an interested party. A ruling by the Executive normally involves a consideration of all relevant information in relation to the application and a more thorough analysis than that permissible under a consultation. In some cases the Executive may find it necessary to convene an informal meeting or hear the views of other interested parties before making a ruling. The Executive requires prompt co-operation from those to whom enquiries are directed so that decisions may be both properly informed and given as speedily as possible. Rulings may initially be conveyed to parties orally but will always be confirmed in writing in time.

8. Applications for rulings

- 8.1** Any application for a ruling under either of the Codes should take the form of a written submission addressed to the Executive Director, Corporate Finance Division of the SFC. The submission should be comprehensive and contain all relevant information which the Executive will require to render a fully informed decision. Such information should normally include the following:-

Appendix 2

(a) Summary

The ruling being sought, and any alternative courses of action, should be clearly described, and the issues for consideration summarised. The relevant sections of the Codes should be identified.

(b) Parties

All parties with a material interest in the submission, and their respective financial and legal advisers, should be identified.

(c) Material Facts

All material facts relevant to the application should be stated and should include, as appropriate, the following information:-

- (i) a description of the proposed transaction including the timetable for implementation, related regulatory requirements and the reasons and commercial rationale for the transaction;
- (ii) where known after reasonable inquiry, a description of the relevant offeror and the offeree company including their places of incorporation, a description of their capital structures, group structures, businesses and assets, and the identities of their controlling and substantial shareholders, accompanied by a structural chart depicting the structure of the relevant offeror and the offeree company and the interests of such shareholders, both before and after implementation of the proposed transaction;
- (iii) a historical chronology of related events;
- (iv) the controlling shareholders' interests in the relevant offeror, the offeree company and the proposed transaction;
- (v) the interest which directors of the relevant offeror and the offeree company have in the proposed transaction;
- (vi) the effect which the proposed transaction will have on the relevant offeror and the offeree company;
- (vii) steps to be taken, if any, to safeguard the interests of any independent shareholders;
- (viii) a description of financing arrangements for the proposed transaction;

- (ix) where known after reasonable inquiry, details of any dealings in securities of the offeree company by the relevant offeror, the directors and substantial shareholders of the relevant offeror and the offeree company, and all persons acting in concert with any of them, for the 6 month period immediately preceding the date of the application; and
 - (x) a description of the terms and conditions of material contracts.
- (d) Issues for Consideration

The issues for consideration by the Executive should be described and analysed, and all arguments advanced in support of the ruling being sought.

8.2 A crossed cheque payable to the SFC in the amount of the fee, if any, payable pursuant to the Securities and Futures (Fees) Rules should be enclosed with the submission and, where applicable, the submission should include a brief description of the way in which the fee was calculated. A copy of extracts from Parts 3 and 5 and Schedule 2 of the Securities and Futures (Fees) Rules is attached as Schedule IV of the Codes.

8.3 Each submission should be signed by the applicant and should close with a statement certifying the truth, accuracy and completeness of statements contained in the submission. When the application is filed by an adviser, the statement should confirm that the applicant has authorised the filing of the application by the adviser. Such statement does not relieve the adviser of its obligation to use all reasonable efforts to ensure that its client understands, and abides by, the relevant requirements of the Codes, and that the submission of its client is true, accurate and complete.

9. Review of Executive rulings

9.1 If a party wishes to contest a ruling of the Executive, he may ask for the matter to be reviewed by the Panel, which will normally be convened at short notice. The Executive will arrange with the Panel and the relevant party a practical time for a Panel meeting taking into account the timetable of the transaction. The party and the Executive must supply succinct statements of their respective cases in advance of the meeting and copies of such statements will be provided to the Executive and the party respectively. The Panel has discretion to entertain a request for review by an aggrieved shareholder, if it is satisfied that such request is not frivolous. When the Executive considers that it is necessary to resolve an issue urgently, the Executive may stipulate a reasonable time within which a request for review must be made; in any other case, the Executive must be notified at the latest within 14 days of the event giving rise to the request for the review. Any request for a review shall contain the grounds on which the review is requested.

10. Executive referrals to the Panel

10.1 The Executive may refer a matter to the Panel for a ruling without itself giving a ruling when it considers that there is a particularly novel, important or difficult point at issue.

11. The Panel

11.1 The Panel is a committee of the SFC established under section 8(1) of the Securities and Futures Ordinance (Cap. 571).

11.2 The Panel hears disciplinary matters in the first instance, and reviews rulings by the Executive at the request of any party dissatisfied with such a ruling. It also considers novel, important or difficult cases referred to it by the Executive.

11.3 The Panel consists of up to 30 members drawn from the financial and investment community, at least one of whom should be a non-executive director of the SFC. No Executive Directors or staff of the SFC may be members of the Panel. Members of the Panel are appointed, and may be removed, by the SFC. They normally hold office for a one-year term but may be reappointed at the end of each term. The Panel may co-opt other persons to assist in specific circumstances. Discussions on proposals for review of or amendment to the Codes shall include the Executive Directors and staff of the SFC.

11.4 The Panel will have a Chairman, and one or more Deputy Chairmen. The chairman of each meeting of the Panel will be either the Chairman or a Deputy Chairman of the Panel or, if neither is available, such other member as may be appointed by the Panel. The chairman of each meeting of the Panel will have a deliberative and a casting vote. The quorum for the Panel is five, including a chairman. The Chairman will appoint a Secretary, who will normally be a staff member of the SFC.

11.5 Each member of the Panel and, where applicable, his firm, is required to comply with conflicts of interest guidelines issued by the SFC from time to time.

12. Disciplinary proceedings

12.1 The Executive may institute disciplinary proceedings before the Panel when it considers that there has been a breach of either of the Codes or of a ruling of the Executive or the Panel.

12.2 A disciplinary case is one the sole or main purpose of which is to propose that disciplinary action should be taken. Disciplinary action is to be distinguished from requiring compliance with, or requiring that action be taken to remedy a breach of, the Codes or of a ruling of the Executive or the Panel. In any such

case, the Executive invites the person concerned to appear before the Panel. If the Panel finds there has been a breach of either of the Codes or of a ruling, it may impose any of the following sanctions:-

- (a) private reprimand;
- (b) issuance of a public statement which involves criticism;
- (c) public censure;
- (d) reporting the offender's conduct to the SFC or another regulatory authority (for example, the Stock Exchange, the Hong Kong Monetary Authority or any professional body) or an overseas regulatory authority;
- (e) requiring ~~dealers and advisers,~~ licensed corporations, licensed representatives, registered institutions, or relevant individuals, for a stated period, not to act or continue to act in any or a stated capacity for any person who has failed to comply, or has indicated that he does not intend to comply, with either of the Codes or a ruling;
- (f) banning advisers from appearing before the Executive or the Panel for a stated period; and/or
- (g) requiring further action to be taken as the Panel thinks fit.

The Executive or the Panel may report a person to the regulatory authorities or professional bodies contemplated by section 12.2(d) even though there has been no finding of such a breach if the person so reported is governed by rules, regulations or standards of professional conduct of the relevant regulatory authority or professional body and the Executive or the Panel has reasonable grounds for believing that the conduct of such person may have contravened such rules, regulations or standards of professional conduct.

12.3 The Executive may itself deal with a disciplinary matter if the party to be disciplined agrees to the disciplinary action proposed to be taken by the Executive.

12.4 Failure of any ~~registered person~~ licensed corporation, licensed representative, registered institution, or relevant individuals, to comply with either of the Codes, or a ruling, or a requirement not to act for a named person in accordance with section 12.2(e) above, is a breach of the Codes and may result in disciplinary proceedings against such corporation, representative, institution, or individual under this section 12. It may (in accordance with the provisions of the relevant Ordinances) also lead to suspension or revocation of the his licence or registration of such entity or person.

13. Meetings of the Panel

- 13.1** All meetings of the Panel are informal and private. There are no rules of evidence. A verbatim record may be taken for the benefit of the Panel. The Panel directs its own proceedings and may make any inquiries it deems relevant or appropriate. Parties (i.e. the Executive and the other parties to the proceedings) will be advised of the applicable procedural rules in advance of the date set for the meeting.

On the application of any party, the chairman of the relevant meeting sitting alone may give such procedural directions as he considers appropriate for the determination of a case.

- 13.2** A party is permitted to bring with it to a meeting its financial adviser and/or solicitor. The Panel would not normally allow more than two representatives of the financial adviser or of the solicitor to attend. A party may either present its own case to the Panel or it may have such case presented by its financial adviser on its behalf. If a party wishes to present its case in some other manner, the prior consent of the chairman of the meeting is required. Such consent will only be given in exceptional circumstances.

- 13.3** Normally, the parties should set out their case briefly in writing beforehand and the Executive will submit a written summary of the issues, together with its ruling or views. The parties are permitted to call such witnesses as they may feel necessary.

In general, all parties are entitled to be present throughout the meeting and to see all papers submitted to the Panel. Occasionally, however, a party may wish to present evidence to the Panel which is of a confidential commercial nature. In such exceptional cases, the Panel may, if it is satisfied that such course is justified, be prepared to hear the evidence in question in the absence of some, or all, of the other parties involved. The parties shall be absent during the Panel's deliberation on the case. Representations by shareholders may be presented in writing and are usually heard by the Panel in the absence of those shareholders.

- 13.4** The Panel recognises that its authority can only be sustained if its impartiality is beyond doubt. The SFC, in consultation with the Panel, has therefore adopted conflicts of interest guidelines for the Panel. Accordingly, where the Panel determines, by reference to such conflicts of interest guidelines, that a matter is likely to create a conflict of interest for any member of the Panel, that member may not attend the meeting and an alternate may be appointed. The parties are expected to raise any conflicts of interest concerns they might have at the earliest possible opportunity.

- 13.5** Following the conclusion of a meeting, the Panel will inform the parties of its ruling and the reasons for the ruling as soon as it completes its deliberations. This will be confirmed to the parties in writing as soon as reasonably

practicable and, subject to confidentiality considerations, will normally be published in accordance with section 16 of this Introduction.

- 13.6** As meetings of the Panel are private, none of the parties to the meeting, or persons appearing before the Panel, shall disclose any details of the meeting to any other person, including the media, and shall not make use of any information acquired during the course of the meeting for purposes other than those connected with the meeting itself.

14. The Takeovers Appeal Committee

- 14.1** Like the Panel, the Takeovers Appeal Committee is a committee of the SFC established under section 8(1) of the Securities and Futures Ordinance (Cap. 571).

- 14.2** The Takeovers Appeal Committee reviews disciplinary rulings of the Panel for the sole purpose of determining whether any sanction imposed by the Panel is unfair or excessive based upon the Panel's finding of facts.

- 14.3** The SFC appoints and may remove the Chairman, Deputy Chairman and members of the Takeovers Appeal Committee. The Chairman and Deputy Chairman of the Committee are selected from members of the Securities and Futures Appeal Panel or the Securities and Futures Appeals Tribunal (after its establishment) who have legal training and experience. The other members of the Committee comprise members of the Panel. The Chairman, Deputy Chairman and members of the Committee normally hold office for a one-year term but may be reappointed at the end of each term. The Chairman of the Committee may co-opt other persons to assist it if he thinks fit.

- 14.4** Each meeting of the Takeovers Appeal Committee is presided over by:-

- (a) the Chairman or the Deputy Chairman; or
- (b) another member of the Securities and Futures Appeal Panel or the Securities and Futures Appeals Tribunal (after its establishment) who has legal training and experience and who is designated by the Chairman where he considers it inappropriate that either he or the Deputy Chairman should preside over a particular meeting.

The quorum for the Committee is three including a chairman. No member of the Panel may participate in a meeting if he participated in the disciplinary proceedings in question. Each member of the Committee is required to comply with conflicts of interest guidelines issued by the SFC from time to time.

15. Meetings of the Takeovers Appeal Committee

- 15.1** Proceedings before the Takeovers Appeal Committee are generally conducted in a similar way to those before the Panel.
- 15.2** In all cases, notice of appeal must be given within 5 business days of the delivery by the Panel of its written reasons for the decision in question. The Panel will normally suspend publication in full of its findings during this time, although an appropriate interim announcement, including the findings of fact, may be made. If there is no appeal, any publication by the Panel will follow immediately. If there is an appeal, publication is further suspended until the decision of the Takeovers Appeal Committee has been made.
- 15.3** If an appeal is upheld, the appellant is consulted on the form of statement, if any, which is to be published. If an appeal is dismissed, normally the findings of the Panel will be published and any actions decided upon will be implemented. In either case, the Takeovers Appeal Committee may make any further comment it thinks fit.

16. Publication of rulings

- 16.1** Subject to confidentiality considerations, it is the policy of the Panel and the Takeovers Appeal Committee to publish their rulings, and the reasons for those rulings, so that their activities may be understood by the public. All rulings will normally be given to the parties as soon as possible following the conclusion of a meeting. Rulings suitable for publication will then be reconstituted as written announcements and will be published as promptly as possible. In cases where the ruling is price sensitive, the announcement of the ruling will normally be published shortly after the conclusion of the meeting and a further announcement giving the reasons for the ruling will be published as soon as practicable thereafter.
- 16.2** None of the parties or persons appearing before the Panel or the Takeovers Appeal Committee shall make any announcement of a ruling before the public announcement by the Panel or the Takeovers Appeal Committee. Such parties or persons may comment on the ruling but no announcement by any of them may contain any information about the meeting, or make any reference to the text of the ruling or the reasons for it in terms other than those used in the public announcement issued by the Panel or the Takeovers Appeal Committee.
- 16.3** Subject to confidentiality considerations, it is the policy of the Executive to publish its important rulings and interpretations of the Codes, and the reasons for them, so that its activities may be understood by the public. There may be announcements of rulings in specific cases where the rulings are considered to have general application, or statements of policy which may take the form of Practice Notes setting out in greater detail the Executive's practice and interpretation of the Codes.

17. Co-operation with other authorities

17.1 Information given to the Executive, the Panel or the Takeovers Appeal Committee will be treated in the strictest confidence. Because of the overriding importance of maintaining a fair market and curbing improper activities, this information is made available to the SFC subject to the SFC's own obligations of confidentiality laid down by the Securities and Futures Ordinance (Cap. 571). Subject to those obligations, the SFC may from time to time give information received by it to other regulatory authorities, so that they can discharge their own duties. Conversely, the Executive may from time to time receive information from other regulatory bodies which is relevant to a matter then current. Co-operation with other regulatory authorities is regarded as an important part of the Executive's and the SFC's functions.

18. Review by SFC

18.1 As a matter of general policy, the SFC will not normally review or otherwise involve itself in a ruling of the Panel or the Takeovers Appeal Committee.

Appendix 2

Definitions

DEFINITIONS

Acquisition of voting rights: Acquisition of voting rights includes the exercise of control or direction over voting rights other than by way of a revocable proxy given for no or nominal consideration for the purpose of one meeting of shareholders only.

Acting in concert: Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), actively co-operate to obtain or consolidate “control” (as defined below) of a company through the acquisition by any of them of voting rights of the company.

Without prejudice to the general application of this definition, persons falling within each of the following classes will be presumed to be acting in concert with others in the same class unless the contrary is established:-

- (1) 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;
- (2) 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, ~~subsidiaries or fellow subsidiaries~~;
- (3) a company with any of its pension funds, provident funds and employee share schemes;

Note: Class (3) does not apply to an employee benefit trust. The Executive will apply Note 20 to Rule 26.1 to determine whether the directors and shareholders of a company are acting in concert with the trustees of an employee benefit trust of the same company.

- (4) 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;
- (5) 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);
- (6) 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;

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- (7) partners;
- (8) 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
- (9) 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).

[#] See Note 1 at the end of the definitions.

* See Note 2 at the end of the definitions.

Notes to the definition of acting in concert:

1. *Classes (1) and (8)*

If an individual owns or controls 20% or more of the voting rights of a company in class (1), he and one or more other persons falling within class (8) will be presumed to be acting in concert with one or more persons in class (1) unless the contrary is established.

2. *Full information required*

In cases where the question of whether parties are acting in concert is being investigated, relevant parties will be required to disclose all relevant information including their dealings in the relevant securities of the offeree company or potential offeree company. Failure to do so may result either in disciplinary proceedings or in an inference being drawn that they are acting in concert.

3. *Break up of concert parties*

When a ruling or admission has been made that a group of persons is or has been acting in concert, it will be necessary for clear evidence to be presented before it can be accepted that they are no longer acting in concert.

4. *Consortium offers*

Investors in a consortium formed for the purpose of making an offer (e.g. through a vehicle company) will normally be treated as acting in concert with the offeror. Where such an investor is part of a larger organisation, the Executive should be consulted to establish which other parts of the

organisation will also be regarded as acting in concert. (See also the definitions of connected fund manager and connected principal trader and Rule 21.6 regarding discretionary fund managers.)

5. *Irrevocable undertakings and warranties*

Where a shareholder gives an irrevocable undertaking to an offeror to accept his offer (or, in the case of a scheme of arrangement, to vote in favour of the relevant resolution to approve such scheme of arrangement) and/or provides warranties to an offeror in relation to the offeree company, the giving of the irrevocable undertaking and/or the warranties will not, of itself and in the absence of any other factor, lead to the presumption that the shareholder is acting in concert with that offeror.

6. *Standstill agreements*

Agreements between a company, or the directors of a company, and a shareholder which restrict the shareholder or the directors from either offering for, or accepting an offer for, the shares of the company or from increasing or reducing shareholdings, may be relevant for the purpose of this definition. In cases of doubt, the Executive should be consulted. (See Rule 33.2.)

7. *Class (6) - whitewashes*

For the purposes of class (6), an offer includes a transaction which is to be the subject of a whitewash application.

8. *Close relatives*

For the purposes of classes (2), (6) and (8) “close relatives” shall mean a person’s spouse, de facto spouse, children, parents and siblings.

9. *Underwriting arrangements*

The relationship between an underwriter (or sub-underwriter) of a cash alternative offer and an offeror may be relevant for the purpose of this definition. Underwriting arrangements on arms’ length commercial terms would not normally amount to an agreement or understanding within the meaning of acting in concert. The Executive recognises that such underwriting arrangements may involve special terms determined by the circumstances, such as weighting of commissions by reference to the outcome of the offer. However, in some cases, features of underwriting arrangements, for example the proportion of the ultimate total liability assumed by an underwriter, the commission structure or the degree of involvement of the underwriter with the offeror in connection with the offer, may be such as to

lead the Executive to conclude that a sufficient level of understanding has been created between the offeror and the underwriter to amount to an agreement or understanding within the meaning of acting in concert. In cases of doubt, the Executive should be consulted.

A purchaser may be prepared to acquire part only of a holding, particularly where he wishes to acquire under 30%, thereby avoiding an obligation under Rule 26 to make a general offer. The Executive will be particularly concerned in such cases to see that underwriting arrangements made by a vendor do not amount to an agreement or understanding with the purchaser within the meaning of acting in concert.

10. Transfer of voting rights as a gift or at nominal consideration

In cases where a person transfers voting rights, in whole or in part, to another person, as a gift or for nominal consideration, the transferor and transferee will be presumed to be acting in concert under class (9). Class (9) does not normally apply to a charitable body exempt under the Inland Revenue Ordinance (Cap. 112). The Executive should be consulted in the case of charitable bodies established under overseas jurisdictions.

Associate: It is not practicable to define associate in terms which would cover all the different relationships which may exist in an offer. The term associate will cover all persons acting in concert with an offeror. It is also intended to apply to a wider range of persons (who may not be acting in concert) and will cover all persons who directly or indirectly own or deal in the relevant securities of an offeror or the offeree company in an offer and who have (in addition to their normal interests as shareholders) an interest or potential interest, whether commercial, financial or personal, in the outcome of the offer.

Without prejudice to the generality of the foregoing, the term associate normally includes the following:-

- (1) an offeror's or the offeree company's parent, subsidiaries and fellow subsidiaries, and their associated companies, and companies of which such companies are associated companies;
- (2) any bank and financial and other professional adviser (including a stockbroker)* to an offeror, the offeree company or any company in class (1), including persons controlling[#], controlled by or under the same control as such banks, financial and other professional advisers;
- (3) the directors (together with their close relatives**, related trusts and companies controlled[#] by any of the directors, their close relatives or related trusts) of an offeror, the offeree company or any company in class (1);

- (4) the pension funds, provident funds and employee share schemes of an offeror, the offeree company or any company in class (1);
- (5) any investment company, unit trust or other person whose investments an associate manages on a discretionary basis, in respect of the relevant investment accounts;
- (6) a person who owns or controls 5% or more of any class of relevant securities (as defined in paragraphs (a) to (d) in Note 4 to Rule 22) issued by an offeror or the offeree company, including a person who as a result of any transaction owns or controls 5% or more. When two or more persons act pursuant to an agreement or understanding (formal or informal) to acquire or control such securities, they will be deemed to be a single person for the purpose of this paragraph. Such securities managed on a discretionary basis by an investment management group will, unless otherwise agreed by the Executive, also be deemed to be those of a single person (see Rule 22.3); and
- (7) a company having a material trading arrangement with an offeror or the offeree company.

See Note 1 at the end of the definitions.

** See Note 2 at the end of the definitions.*

*** See Note 8 to the definition of acting in concert.*

Associated company: A company shall be deemed to be an associated company of another company if one of them owns or controls 20% or more of the voting rights of the other or if both are associated companies of the same company.

Business day: A business day is a day on which the Stock Exchange is open for the transaction of business.

Cash purchases: Cash purchases include contracts or arrangements where the consideration consists of a debt instrument capable of being paid off in less than 3 years.

Codes: Codes means the Takeovers Code and the Share Repurchase Code.

Connected fund manager and connected principal trader: A fund manager or principal trader will be connected with an offeror or the offeree company, as the case may be, if the fund manager or principal trader controls[#], is controlled by or is under the same control as:-

- (1) an offeror;
- (2) the offeree company;

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- (3) any bank or financial or other professional adviser (including a stockbroker)* to an offeror or the offeree company; or
- (4) an investor in a consortium formed for the purpose of making an offer (e.g. through a special purpose company).

[#] See Note 1 at the end of the definitions.

* See Note 2 at the end of the definitions.

Control: Unless the context otherwise requires, control shall be deemed to mean a holding, or aggregate holdings, of 30% or more of the voting rights of a company, irrespective of whether that holding or holdings gives de facto control.

Convertible securities: Unless the context otherwise requires, convertible securities means securities convertible or exchangeable into new shares or existing shares in a company.

Derivative: Derivative includes any financial product whose value in whole or in part is determined directly or indirectly by reference to the price of an underlying security or securities ~~whether or not it includes~~ and which does not include the possibility of delivery of such underlying security or securities.

Note to the definition of derivative:

The term “derivative” is intentionally widely defined to encompass all types of derivative transactions. However, it is not the intention of the Codes to restrict dealings in, or require disclosure of, derivatives which have no connection with an offer or potential offer. Offerors, offeree companies and their financial advisers should consult the Executive at the earliest time to determine whether a dealing in a derivative is to be regarded as having a connection with the offer or potential offer. The Executive will not normally regard a derivative which is referenced to a basket or index including relevant securities as connected with an offeror or potential offeror if at the time of dealing the relevant securities in the basket or index represent less than 1% of the class in issue and less than 20% of the value of the securities in the basket or index. In cases of doubt the Executive should be consulted.

Directors: Directors include persons in accordance with whose instructions the directors or a director are accustomed to act.

Document: Unless the context otherwise requires, document includes any announcement, advertisement or document issued or published by any party to an offer or possible offer in connection with such offer or possible offer, other than documents which are required to be put on display for inspection under Notes 1 and 2 to Rule 8 of the Takeovers Code. For this purpose, parties to an offer or possible offer include all offerors, the offeree company, shareholders of an offeror or the offeree company and any persons acting in concert with any of them. Document also includes

any announcement, advertisement or document issued or published by any person in connection with a transaction:-

- (1) where a ruling is sought that no offer obligation arises;
- (2) which is stated to be conditional on no such offer obligation arising; or
- (3) which is stated to be conditional on a ruling being given that no such offer obligation arises.

Employee share repurchase: Employee share repurchase means a share repurchase made by an offeror from one or more of its current or former employees, or the current or former employees of a subsidiary of the offeror, in accordance with an employee share option scheme which has been approved by shareholders of the offeror in general meeting.

Executive: Executive means the Executive Director of the Corporate Finance Division of the SFC or any delegate of the Executive Director.

Exempt fund manager: An exempt fund manager is a person who manages investment accounts on a discretionary basis and is recognised by the Executive as an exempt fund manager for the purposes of the Codes (see Notes to the definitions of exempt fund manager and exempt principal trader).

Exempt principal trader: An exempt principal trader is a person who trades as a principal in securities; only for the purpose of derivative arbitrage or hedging activities such as closing out existing derivatives, delta hedging in respect of existing derivatives, index related product or tracker fund arbitrage in relation to the relevant securities or other similar activities assented to by the Executive during an offer period, particularly the relevant securities assented to by the Executive, and is recognised by the Executive as an exempt principal trader for the purposes of the Codes.

Notes to the definitions of exempt fund manager and exempt principal trader:

1. *Persons who manage investment accounts on a discretionary basis and principal traders may apply to the Executive to seek the relevant exempt status and will have to comply with any requirements imposed by the Executive as a condition of the grant of such status. The Executive will normally require an applicant for exempt principal trader status to describe to the Executive on application the securities and other instruments in which the applicant is or proposes to be trading as principal. This disclosure will be a continuing obligation, in particular at the beginning of and during an offer period. (See Rule 22.)*
2. *When a principal trader or fund manager is connected with an offeror or the offeree company, exempt status is relevant only where the sole reason for the*

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connection is that the principal trader or fund manager controls[#], is controlled by or is under the same control as a financial or other professional adviser (including a stockbroker) to an offeror or the offeree company. References in the Codes to exempt principal traders or exempt fund managers should be construed accordingly. (See also Rule 21.6 regarding discretionary fund managers.)*

[#] See Note 1 at the end of the definitions.

* See Note 2 at the end of the definitions.

Exempt share repurchase: Exempt share repurchase means a share repurchase that falls into one of the following categories:-

- (1) an employee share repurchase;
- (2) a share repurchase made in accordance with the terms and conditions attached to the shares being repurchased which either permit or require such share repurchase without the prior agreement of the owners of the shares;
- (3) a share repurchase made by a company at the request of the owners of the shares repurchased in accordance with the terms and conditions attached to the shares which provide the owners of the shares a right to require the company to effect such share repurchase; and
- (4) a share repurchase that is required by the law of the jurisdiction in which the offeror is incorporated or otherwise established.

Licensed corporation: means a licensed corporation as defined in Part 1 to Schedule 1 of the Securities and Futures Ordinance (Cap. 571).

Licensed representative: means a licensed representative as defined in Part 1 to Schedule 1 of the Securities and Futures Ordinance (Cap. 571).

Listing Rules: Listing Rules means the Rules Governing the Listing of Securities on the Stock Exchange.

Offer: Offer includes takeover and merger transactions however effected, including schemes of arrangement which have similar commercial effect to takeovers and mergers, partial offers, and offers by a parent company for shares in its subsidiary and (where appropriate) share repurchases by general offer.

Note to definition of offer:

A voluntary offer may not normally be made at a price that for the purpose of this Note is substantially below the market price of the shares in the offeree company. A voluntary offer at more than a 50% discount to the lesser of the closing price of the relevant shares of the offeree company on the day before the Rule 3.5 announcement and the 5 day average closing price prior to such day will normally be considered as

being “substantially below the market price of the shares in the offeree company”. The Executive will only grant a waiver from the application of this Note in exceptional circumstances. In all cases which fall within this Note, the Executive should be consulted.

Offeror: Offeror includes companies wherever incorporated and individuals wherever resident. In relation to share repurchases, offeror means a company engaged in, or considering engaging in, a share repurchase in respect of its own shares.

Offer period: Offer period means the period:-

from : the time when an announcement is made of a proposed or possible offer (with or without terms)

until : whichever is the latest of:-

- (1) the date when the offer closes for acceptances;
- (2) the date when the offer lapses;
- (3) the time when a possible offeror announces that the possible offer will not proceed;
- (4) the date when an announcement is made of the withdrawal of a proposed offer; and
- (5) where the offer contains a possibility to elect for alternative forms of consideration, the latest date for making such election.

Notes to the definition of offer period:

1. *In the case of a scheme of arrangement, the offer will normally be considered to be unconditional in all respects only when the scheme becomes effective.*
2. *References to the offer period throughout the Codes are to the time during which the offeree company is in an offer period, irrespective of whether a particular offeror or potential offeror was contemplating an offer when the offer period commenced.*
3. *Where there are two or more offers or possible offers outstanding the closure of an offer period in respect of one offer or possible offer does not affect the termination of any other offer or possible offer.*

Off-market share repurchase: Off-market share repurchase means a share repurchase that is not a share repurchase by general offer, an exempt share repurchase or an on-market share repurchase.

On-market share repurchase: On-market share repurchase means a share repurchase made by:-

- (1) a company having a listing on the Stock Exchange through the facilities of the Stock Exchange in accordance with the Listing Rules;
- (2) a company having a primary listing on the Stock Exchange through the facilities of a recognised exchange, provided such share repurchase is made in accordance with the rules of such recognised exchange;
- (3) a company having a primary listing on the Stock Exchange through the facilities of another exchange in accordance with the Listing Rules applied with references to “the Exchange” in Rules 10.06(1), (2) and (6) of the Listing Rules being construed as references to “on another exchange” or “on the other exchange”, as appropriate;
- (4) a company having a secondary listing on the Stock Exchange through the facilities of the Stock Exchange in accordance with rules of a recognised exchange; or
- (5) a company having a secondary listing on the Stock Exchange through the facilities of a recognised exchange in accordance with rules of such recognised exchange.

Options: Unless the context otherwise requires, options means options to subscribe or purchase new shares or existing shares in a company.

Panel: Panel means the Takeovers and Mergers Panel.

Person: Person may be an individual or a company.

Privatisation: Privatisation means an offer (other than a partial offer), however effected, for a company by a shareholder which has control of that company, as defined above, or by any person or persons acting in concert with such shareholder.

Public company in Hong Kong: Public company in Hong Kong means any company which is subject to the Codes under sections 4.1 or 4.2 of the Introduction to the Codes.

Recognised exchange: Recognised exchange means an exchange recognised by the Executive and the Stock Exchange as having share repurchase rules applicable to the company that are comparable to those of the Listing Rules.

Registered institution: means a registered institution as defined in Part 1 to Schedule 1 of the Securities and Futures Ordinance (Cap. 571).

Relevant individual: means a relevant individual as defined in section 20(10) of the Banking Ordinance (Cap. 155).

Rights over shares: Rights over shares include any rights acquired by a person under an agreement to purchase, or an option to acquire, shares, options, warrants, convertible securities or voting rights (or control of any of them), or any irrevocable commitment to accept an offer.

Ruling: Ruling includes any ruling, waiver, consent, decision, confirmation or other determination in writing under the Codes by the Executive, the Panel or the Takeovers Appeal Committee.

Securities exchange offer: Securities exchange offer means an offer in which the consideration includes securities of the offeror or any other company.

SFC: SFC means the Securities and Futures Commission.

Share repurchase: Share repurchase means a purchase of shares, or an offer to purchase, redeem or otherwise acquire shares of an offeror made by an offeror, including a privatisation, scheme of arrangement or other form of reorganisation that consists in whole or in part of such an offer.

Share repurchase by general offer: Share repurchase by general offer means a share repurchase effected by way of an offer made by an offeror to all holders of shares of a class of shares of the offeror.

Share Repurchase Code: Share Repurchase Code means the Code on Share Repurchases.

Shares: For the purpose of the Share Repurchase Code, shares means shares of all classes and securities which carry a right to subscribe or purchase shares issued directly or indirectly by a company or any of its subsidiaries.

Stock Exchange: Stock Exchange means The Stock Exchange of Hong Kong Limited.

Subsidiary: Subsidiary has the meaning attributed to such term by the Companies Ordinance (Cap. 32) and includes any other entity whose assets and liabilities and results are consolidated in an entity's financial statements (or would be, if they were drawn up as at the relevant date).

Substantial shareholder: Substantial shareholder means a person who holds 10% or more of the voting rights of a company.

TA: means the Telecommunications Authority appointed under section 5 of the Telecommunications Ordinance (Cap. 106).

Takeovers Code: Takeovers Code means the Code on Takeovers and Mergers.

Voting rights: Voting rights means all the voting rights currently exercisable at a general meeting of a company whether or not attributable to the share capital of the company.

Warrants: Unless the context otherwise requires, warrants means rights to subscribe or purchase new shares or existing shares in a company.

Notes to Definitions:

1. *Control*

The normal test for whether a person controls, is controlled by or is under the same control as another person, is by reference to the definition of control, that is by reference to holding 30% or more of the voting rights of a company. In cases of doubt, the Executive should be consulted.

2. *References to banks or financial advisers*

References to “bank” do not apply to a bank whose sole relationship with a party to an offer is the provision of normal commercial banking services or such activities in connection with the offer as confirming that cash is available, handling acceptances and other registration work.

References to “financial and other professional adviser (including a stockbroker)” in relation to a party to an offer do not include an organisation which has stood down, because of a conflict of interest or otherwise, from acting for that party in connection with the offer. If the organisation is to have a continuing involvement with that party during the offer period, the Executive must be consulted. The above exclusion will normally apply only if the Executive is satisfied that the involvement is entirely unconnected with the offer.

3. *Calculation of time*

Where a period laid down by the Codes ends on a day which is not a business day, the period is extended until the next business day.

4. *Shareholders, shares and voting rights*

References to shareholders include persons who hold or acquire voting rights. Similarly, references to shares include voting rights.

General Principles

GENERAL PRINCIPLES

1. Introduction

It is impracticable to devise rules in sufficient detail to cover all circumstances which can arise in offers including share repurchases by general offer. Accordingly, persons engaged in offers should be aware that the spirit as well as the letter of the General Principles and Rules must be observed. Moreover, the General Principles and the spirit of the Codes will apply in areas or circumstances not explicitly covered by any Rule.

While the boards of an offeror and the offeree company and their respective advisers have a duty to act in the best interests of the shareholders of the offeror and offeree company respectively, these General Principles and the Rules will, inevitably, impinge on the freedom of action of boards and persons involved in offers. They must, therefore, accept that there are limitations, in connection with transactions which are the subject of the Codes, on the manner in which the pursuit of those interests can be carried out.

Each director of an offeror and of the offeree company has a responsibility to ensure, so far as he is reasonably able, that the Codes are complied with in the conduct of transactions which are the subject of the Codes.

2. General Principles

1. All shareholders are to be treated even-handedly and all shareholders of the same class are to be treated similarly.
2. If control of a company changes or is acquired or is consolidated, a general offer to all other shareholders is normally required. Where an acquisition is contemplated as a result of which a person may incur such an obligation, he must, before making the acquisition, ensure that he can and will continue to be able to implement such an offer.
3. During the course of an offer, or when an offer is in contemplation, neither an offeror, nor the offeree company, nor any of their respective advisers may furnish information to some shareholders which is not made available to all shareholders. This principle does not apply to the furnishing of information in confidence by the offeree company to a bona fide potential offeror or vice versa.
4. An offeror should announce an offer only after careful and responsible consideration. The same applies to making acquisitions which may lead to an obligation to make a general offer. In either case the offeror and its financial advisers should be satisfied that it can and will continue to be able to implement the offer in full.

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5. Shareholders should be given sufficient information, advice and time to reach an informed decision on an offer. No relevant information should be withheld. All documents must, as in the case with a prospectus, be prepared with the highest possible degree of care, responsibility and accuracy.
6. 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. Parties involved in offers must take care that statements are not made which may mislead shareholders or the market.
7. Rights of control should be exercised in good faith and the oppression of minority or non-controlling shareholders is always unacceptable.
8. Directors of an offeror and the offeree company must always, in advising their shareholders, act only in their capacity as directors and not have regard to their personal or family shareholdings or to their personal relationships with the companies. They should only consider the shareholders' interests taken as a whole when they are giving advice to shareholders. Directors of the offeree company should give careful consideration before they enter into any commitment with an offeror (or anyone else) which would restrict their freedom to advise their shareholders. Such commitments may give rise to conflicts of interest or result in a breach of the directors' fiduciary duties.
9. At no time after a bona fide offer has been communicated to the board of the offeree company, or after the board of the offeree company has reason to believe that a bona fide offer might be imminent, may the board of the offeree company take any action in relation to the affairs of the company, without the approval of shareholders in general meeting, which could effectively result in any bona fide offer being frustrated or in the shareholders being denied an opportunity to decide on its merits.
10. All parties concerned with transactions subject to the Codes are required to co-operate to the fullest extent with the Executive, the Panel and the Takeovers Appeal Committee, and to provide all relevant information.

Code on Takeovers and Mergers

CODE ON TAKEOVERS AND MERGERS

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1. Approach

1.1 Offer to the board

The offer should be put forward in the first instance to the board of the offeree company or to its advisers, and before the offer is announced to the public.

1.2 Identity of offeror

If the offer or an approach with a view to an offer being made is not made by the ultimate offeror or potential offeror, the identity of that person must be disclosed at the outset to the board of the offeree company. When that person is a company, the identity of its ultimate controlling shareholder and the identity of its ultimate parent company, or, where there is a listed company in the chain between such company and its ultimate parent company, the identity of such listed company, must be disclosed.

1.3 Implementation of offer

A board which is approached is entitled to be satisfied that the offeror is, or will be, in a position to implement the offer in full.

1.4 Confidentiality

The vital importance of secrecy before an announcement must be emphasised. All persons privy to confidential information, and particularly price-sensitive information, concerning an offer or contemplated offer must treat that information as secret and may only pass it to another person if it is necessary to do so and if the other person understands the need for secrecy. All such persons must conduct themselves so as to minimise the chances of an accidental leak of information.

Note to Rule 1.4:

Warning clients and others

Financial and legal advisers should, at the beginning of discussions and during the course of the transaction, ensure that their clients and other persons assisting their clients in relation to the transaction understand the importance of secrecy and security. Attention should be drawn to the Takeovers Code, in particular to this Rule 1.4 and to restrictions on dealings.

2. Independent advice, independent committees and shareholder approval

2.1 ~~Board of offeree company~~ Recommendations in relation to an offer

A board which receives an offer, or is approached with a view to an offer being made, ~~must~~should, in the interests of shareholders, establish an independent committee of the board to make a recommendation (i) as to whether the offer is, or is not, fair and reasonable and (ii) as to acceptance or voting. As soon as reasonably practicable, the board must retain a competent independent financial adviser to advise the independent committee board in writing in connection with the offer and in particular as to whether the offer is, or is not, fair and reasonable and as to acceptance and voting. The independent committee must approve the appointment of any independent financial adviser before the appointment is made. The independent financial adviser's written ~~Such~~ advice, including reasons, ~~should be obtained in writing and such written advice should~~ must be made known to shareholders by including it in the offeree board circular along with the recommendations of the independent committee ~~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 any person seeks to use a scheme of arrangement to privatise a company and the 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 proposal shall be borne by the 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

~~Where an offeror 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 conflict of interest 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). The board of an offeror must obtain competent independent advice on any offer when the offer being made is a reverse takeover or when the directors are faced with a conflict of interest. The substance of such advice must be made known to its shareholders.~~

Notes to Rule 2.4:

1. General

When the board of an offeror is required to obtain independent advice under this Rule 2.4, it should do so before announcing an offer or any revised offer. Such advice should be as to whether or not the offer is in the interests of the offeror's shareholders. The board of the offeror may seek oral advice prior to the announcement of the offer with the full advice to be obtained as soon as possible thereafter. In any event the offer announcement must contain a summary of the salient points of the advice received. The full advice must be sent to the offeror's shareholders as soon as practicable and if there is a general meeting of the offeror company to approve the proposed offer at least 14 days in advance. 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*~~ *Conflicts of interest*

~~*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.*~~ *Subject to Note 4 below, 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. The Executive will normally waive the application of this Rule 2.4 in respect of a substantial shareholder who is not acting in concert with the offeror or the directors of the offeree company. Any application for a waiver must be submitted as early as possible.*

4. *Offers by controlling shareholders*

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

2.5 Offers for companies that control the offeror

Where an offeror is a public company in Hong Kong, 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 establish an independent committee to assess the proposed offer and ~~the Executive should be consulted for the purpose described in Rule 2.4 above~~ applies.

2.6 Persons not suited 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 Advice to independent shareholders

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.

2.8 Independent committees

Members of an independent committee of a company's board of directors should comprise ~~consist of~~ all non-executive directors of the company who have no direct or indirect interest in 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 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 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 cases of doubt, the Executive should be consulted, e.g. in the case of an unlisted public company.~~ 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

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. The company convening such meeting must appoint its auditors, share registrar or external accountants who are qualified to serve as auditors for such company, as scrutineer for the vote-taking. The identity of the scrutineer and ~~the~~ results of the poll (including the number of shares voted for and against the resolution and in the case of a scheme of arrangement, the

~~number of shareholders voting for and against the resolution) 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 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.~~

The Executive may aggregate any series of transactions of which the scheme of arrangement or capital reorganisation forms part to determine whether such transactions taken together effectively assist a person to obtain or consolidate control or acquire or privatise a company. The Executive will normally only waive the requirements of the Takeovers Code and in particular this Rule 2.10 in the case of a scheme or capital reorganisation under which:-

- (a) there is no substantial change in percentage shareholding of any shareholder;
- (b) there is no acquisition or consolidation of control by any person or a group of persons; and
- (c) except as a result of any debt restructuring to which the company is a party, shareholders' economic interests in the company are not affected by implementation of the proposal.

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. ~~*Management buy outs and offers made by or with the co-operation of controlling shareholders*~~ *Competent independent advice*

The requirement for competent independent advice is ~~particularly~~ important in all transactions under the Codes when such advice is specifically required. ~~eases 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. In such cases, it is particularly important~~ It is essential that the reasons underlying ~~for~~ the advice and the recommendations are clearly stated and that the adviser discusses all relevant factors with the independent board committee. ~~Furthermore~~ As 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 (see Rule 2.8).

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.

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, 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.

3. Announcements of offers or possible offers

3.1 Announcements to be made by offeror or potential offeror

Before the board of the offeree company is approached, the responsibility for making an announcement will normally rest with the offeror or potential offeror. Although the primary responsibility for making an announcement after the board of the offeree company has been approached lies with the offeree company, as set out in Rule 3.2 below, there may be circumstances where the actions of the offeror or persons acting in concert with it give rise to an obligation on the part of an offeror or potential offeror to make an announcement. The offeror or potential offeror should, therefore, keep a close watch on the offeree company's share price and volume for signs of undue movement.

The offeror or potential offeror must make an announcement:-

- (a) when, before an approach has been made to the offeree company, the offeree company 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 company 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); or
- (c) immediately upon an acquisition of voting rights which gives rise to an obligation to make an offer under Rule 26.

An offeror wishing to approach a wider group, for example, in order to arrange financing for the offer, to seek irrevocable commitments or to organise a consortium to make the offer should consult the Executive. Additionally, the Executive should be consulted in all cases of doubt.

3.2 Announcements to be made by offeree company

Following an approach to the board of the offeree company 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 company. The offeree company must, therefore, keep a close watch on its share price and volume.

The board of the offeree company must make an announcement:-

- (a) when a firm intention to make an offer is notified to the board of the offeree company from a serious source, irrespective of the attitude of the board to the offer;
- (b) when, following an approach to the offeree company, the offeree company 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 between the offeror and the offeree company 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); or
- (d) when the board of a company is aware that there are negotiations or discussions between a potential offeror and the holder, or holders, of shares carrying 30% or more of the voting rights of a company or when the board of a company is seeking potential offerors, and
 - (i) the company 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.

In all cases of doubt the Executive should be consulted.

3.3 Announcements to be made by potential vendor

The potential vendor must make an announcement when there are negotiations or discussions between a potential offeror and the holder, or holders, of shares carrying 30% or more of the voting rights of the company and the company is subject to 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.

In all cases of doubt the Executive should be consulted.

Notes to Rules 3.1, 3.2 and 3.3:

1. *Agreements and letters of intent*

Unless announced publicly, agreements and letters of intent relating to an offer or possible offer to which an offeror or any person acting in concert with it is a party should be disclosed to the Executive.

2. *Undue movements in share price and volume*

Whether or not a movement in the share price or volume of a potential offeree company is undue for the purposes of Rule 3 is a question that will be considered in the light of all relevant facts and not solely by reference to the absolute percentage movement in the price or volume. Factors which may be considered to be relevant in determining whether a price or volume movement is undue for the purposes of these Rules include general market and sector movements, information relating to the company, trading activity in the company's securities and the time period over which the price or volume movement has occurred. In all cases of doubt the Executive should be consulted.

3. *Clear statements*

The Executive will not normally require an announcement under Rule 3.1(a) if it is satisfied that the price or volume movement, rumour or speculation results only from a clear and unequivocal formal public announcement, e.g. (a) a disclosure under Part XV of the Securities and Futures Ordinance (Cap. 571); or (b) an announcement of an intention to purchase.

4. *Gathering of irrevocable commitments*

An offeror may approach a very restricted number of sophisticated investors who have a controlling shareholding to obtain an irrevocable commitment. In all other cases the Executive must be consulted before any approach is made to a shareholder to obtain an irrevocable commitment in connection with an offer. In appropriate circumstances, the Executive may permit particular shareholders to be called and informed of details of a proposed offer which has not been publicly announced. The Executive will wish to be satisfied that the proposed arrangements will provide adequate information as to the nature of the commitment sought; and a realistic opportunity to consider whether or not that commitment should be given and to obtain independent advice if required. The financial adviser concerned will be responsible for ensuring compliance with all relevant legislation and regulations. In all cases attention is drawn to General Principles 3 and 5.

3.4 Suspension of trading

When an announcement is required under this Rule 3 the offeror or the offeree company, as the case may be, should notify the Executive and the Stock Exchange immediately that an announcement is imminent and if there is any possibility that an uninformed market for shares of the offeror or the offeree company could develop prior to publication of the announcement, serious consideration should be given to requesting a suspension of trading in such shares pending publication of the announcement. A potential offeror must not attempt to prevent the board of the offeree company from making an announcement or requesting the Stock Exchange to grant a temporary suspension of trading at any time the board thinks appropriate.

3.5 Announcement of firm intention to make an offer

The announcement of a firm intention to make an offer should be made only when an offeror has every reason to believe that it can and will continue to be able to implement the offer. Responsibility in this connection also rests on the financial adviser to the offeror.

When a firm intention to make an offer is announced, the announcement must contain:-

- (a) the terms of the offer;
- (b) the identity of the offeror and, where the offeror is a company, the identity of its ultimate controlling shareholder and the identity of its ultimate parent company or, where there is a listed company in the chain between such company and its ultimate parent company, the identity of such listed company;
- (c) details of any existing holding of voting rights and rights over shares in the offeree company:-
 - (i) which the offeror owns or over which it has control or direction;
 - (ii) which is owned or controlled or directed by any person acting in concert with the offeror;
 - (iii) in respect of which the offeror or any person acting in concert with it has received an irrevocable commitment to accept the offer; and
 - (iv) in respect of which the offeror or any person acting in concert with it holds convertible securities, warrants or options;

- (d) details of any outstanding derivative in respect of securities in the offeree company entered into by the offeror or any person acting in concert with it;
- (e) all conditions (including normal conditions relating to acceptance, listing and increase of capital) to which the offer is subject; ~~and~~
- (f) details of any arrangement (whether by way of option, indemnity or otherwise) in relation to shares of the offeror or the offeree company and which might be material to the offer- (~~§see Note 8 to Rule 22-~~); and
- (g) details of any agreements or arrangements to which the offeror is party which relate to the circumstances in which it may or may not invoke or seek to invoke a pre-condition or a condition to its offer and the consequences of its doing so, including details of any break fees payable as a result.

The announcement of an offer should include confirmation by the financial adviser or by another appropriate third party that resources are available to the offeror sufficient to satisfy full acceptance of the offer.

Notes to Rule 3.5:

1. *Holdings by a group of which an adviser is a member*

It is accepted that, for reasons of secrecy, it would not be prudent to make enquiries so as to include in an announcement details of any holdings of offeree company shares or options or derivatives in respect of them held by or entered into by other parts of an adviser's group (see class (5) of definition of acting in concert). In such circumstances, details should be obtained as soon as possible after the announcement has been made and the Executive consulted. If the holdings are significant, a further announcement will be required.

2. *Irrevocable commitments*

References to commitments to accept an offer must specify in what circumstances, if any, they will cease to be binding; for example, if a higher offer is made.

3. *Confirmation of resources*

The Executive may require evidence to support a statement that resources are available to satisfy the offeror's obligations in respect of the offer. The Executive may also require evidence that the offeror has

sufficient resources to complete the purchase of shares which gives rise to the offer obligation.

A financial adviser, in discharging its duties under this Rule 3.5 to confirm financial resources, should observe the highest standard of care to satisfy itself of the adequacy of resources, including performance of due diligence. The financial adviser confirming that resources are and will continue to be available will not be expected to produce the cash itself if, in giving the confirmation, it acted responsibly and took all reasonable steps to assure itself that the cash was available.

This confirmation will be required not only when the consideration is in cash, or includes an element of cash, but also when the consideration consists of, or includes, any other assets except new securities to be issued by the offeror.

4. *Subjective conditions*

Companies and their advisers should consult the Executive prior to the issue of any announcement containing conditions which are not entirely objective (see Rule 30.1).

5. *New conditions for increased or improved offers*

See Rule 16.2.

6. *Pre-conditions*

In certain circumstances a potential offeror may make an announcement that it is considering a possible offer at a time when it does not want to be committed to making that offer (a “possible offer announcement”). The Executive must be consulted in advance if it is proposed to make a pre-conditional possible offer announcement.

There may be a case where a potential offeror makes a possible offer announcement which states that it is considering making an offer subject to the satisfaction of certain pre-conditions. Such an announcement may create a misleading or confusing impression about the intentions of the potential offeror, because shareholders may be unable to assess in what circumstances an offer may be forthcoming. Accordingly, it must be clear from the wording of any possible offer announcement referring to pre-conditions whether or not the pre-conditions must be satisfied before an offer can be made, or whether they are effectively waivable.

Although there is no obligation to specify all the pre-conditions to the making of an offer, if a potential offeror does so and states that it will proceed with its offer if they are all satisfied or waived, then any announcement must be structured as a pre-conditional Rule 3.5 announcement. It must, however, be made clear in such an announcement whether or not the pre-conditions are waivable. Such pre-conditions may, depending on the specific circumstances of the case, be subjective in form, in contrast to conditions to an offer which should, under Rule 30, normally be objective.

7. Conditional offers

The Executive should be consulted when a proposed offer is conditional on acceptance or undertakings to accept by one or more shareholders and the proposed announcement does not include a statement by those shareholders.

3.6 Announcements of certain purchases

Acquisitions of voting rights of the offeree company by an offeror or by any person acting in concert with the offeror may give rise to an obligation to make a cash offer or securities offer (Rule 23), to increase an offer (Rule 24) or to make a mandatory offer (Rule 26). Immediately after any acquisition giving rise to any such obligation, an announcement must be made, stating the number of voting rights acquired and the price paid, together with the information required by Rule 3.5 (to the extent that it has not previously been announced).

Note to Rule 3.6:

Potential offerors

The requirement of this Rule 3.6 to make an immediate announcement applies to any publicly announced potential offeror (whether named or not) either where a public indication of the price level of its possible offer has been made and the potential offeror or any person acting in concert with it acquires voting rights at above that level or where there already exists an offer from a third party and the potential offeror or any person acting in concert with it buys at above the price level of that offer. Disclosure will be required in accordance with Rule 22.1.

3.7 Announcement of a possible offer

Until a firm intention to make an offer has been notified a brief announcement by a potential offeror or the offeree company that talks are taking place or that a potential offeror is considering making an offer will normally satisfy the obligations under this Rule 3. If following the announcement of a possible

offer no further announcement has been made in respect of that offer or possible offer within one month, an announcement must be made setting out the progress of the talks or the consideration of a possible offer. This obligation continues (and announcements will be required monthly) until announcement of firm intention to make an offer under Rule 3.5 or of a decision not to proceed with an offer. When talks are terminated or a potential offeror decides not to proceed with an offer an announcement must be made to that effect.

Notes to Rule 3.7:

1. *Identity of offeror*

In any announcement under this Rule 3.7 the Executive may require the potential offeror to be named. This is more likely where the identity of the potential offeror may be price-sensitive.

2. *New offeror*

In the event that a new offeror or potential offeror emerges, the same obligations will apply to that new offeror or potential offeror.

3.8 Announcement of numbers of relevant securities in issue

When an offer period begins, the offeree company must announce, as soon as possible, details of all classes of relevant securities issued by the company, together with the numbers of such securities in issue. An offeror or potential named offeror must also announce the same details relating to its relevant securities following any announcement identifying it as an offeror or potential offeror, unless it has stated that its offer is likely to be solely in cash. In the announcement, the offeree company, the offeror or potential named offeror should remind their respective associates to disclose their dealings in any securities of the offeree company, or in the case of securities exchange offer, any securities in the same class as the securities that are offered as consideration under an offer. The text of Note 11 to Rule 22 should also be included in any announcement commencing an offer period.

If the information included in an announcement made under this Rule 3.8 changes during the offer period, a revised announcement must be made as soon as possible.

Note to Rule 3.8:

Relevant securities

See Note 4 to Rule 22.

4. No frustrating action

Once a bona-fide offer has been communicated to the board of an offeree company or the board of an offeree company has reason to believe that a bona-fide offer may be imminent, no action which could effectively result in an offer being frustrated, or in the shareholders of the offeree company being denied an opportunity to decide on the merits of an offer, shall be taken by the board of the offeree company in relation to the affairs of the company without the approval of the shareholders of the offeree company in general meeting. In particular the offeree company's board must not, without such approval, do or agree to do the following:-

- (a) issue any shares;
- (b) create, issue or grant, or permit the creation, issue or grant of, any convertible securities, options or warrants in respect of shares of the offeree company;
- (c) sell, dispose of or acquire assets of a material amount;
- (d) enter into contracts, including service contracts, otherwise than in the ordinary course of business; or
- (e) cause the offeree company or any subsidiary or associated company to purchase or redeem any shares in the offeree company or provide financial assistance for any such purchase.

Where the offeree company is under a prior contractual obligation to take any such action, or where there are other special circumstances, the Executive must be consulted at the earliest opportunity. In appropriate circumstances the Executive may grant a waiver from the general requirement to obtain shareholders' approval.

Notes to Rule 4:

1. Consent by the offeror

The requirement of a shareholders' meeting may be waived by the Executive if the offeror (or, in the case of more than one offeror, all offerors) agrees.

2. Service contracts

The Executive will regard amending or entering into a service contract with, or creating or varying the terms of employment of, a director as entering into a contract "otherwise than in the ordinary course of business" for the purpose of this Rule 4 if the new or amended contract

or terms constitute an abnormal increase in his emoluments or a significant improvement in his terms of service.

This will not prevent any such increase or improvement which results from a genuine promotion or new appointment but the Executive must be consulted in advance in such cases.

3. *Votes of controlling shareholders and directors*

The Executive should be consulted on whether shareholdings of controlling shareholders, directors and their respective associates should be voted at the shareholders' meeting, where an actual or potential conflict of interest exists.

4. *Executive waiver*

The Executive, when deciding whether to grant a waiver of the requirement to obtain shareholders' approval, will take particular account of what details, if any, the offeree company's board of directors has disclosed to its shareholders of any contractual obligation, duty or right, the fulfilment or enforcement of which may result in the offer being frustrated or the shareholders of the offeree company being denied the opportunity to decide on the merits of the offer.

5. *Notice of general meeting*

The notice convening a meeting of shareholders pursuant to this Rule 4 must include information about the offer or possible offer.

6. *"Material amount"*

For the purpose of determining whether a disposal or acquisition is of a "material amount" the Executive will, in general, apply the same tests as those set out in the Listing Rules to determine whether a transaction is a "discloseable transaction".

If several transactions relevant to this Rule 4, but not individually material, occur or are intended, the Executive will aggregate such transactions to determine whether the requirements of this Rule 4 are applicable to any of them.

The Executive should be consulted in advance where there may be any doubt as to the application of the above.

7. *When there is no need to proceed with an offer*

The Executive may allow an offeror not to proceed with its offer if, prior to the posting of the offer document, the offeree company:-

- (a) passes a resolution in general meeting as envisaged by this Rule 4; or*
- (b) announces a transaction which would require such a resolution but for the fact that it is pursuant to a contract entered into earlier or that the Executive has ruled that an obligation or other special circumstance exists.*

8. *Established share option schemes*

Where the offeree company proposes to grant options over shares, the timing and level of which are in accordance with its normal practice under an established share option scheme, the Executive will normally give its consent.

9. *Interim dividends*

The declaration and payment of an interim dividend by the offeree company, outside the normal course, during an offer period may be contrary to General Principle 9 and this Rule 4 in that it could effectively frustrate an offer. The offeree companies and its advisers must, therefore, consult the Executive in advance.

5. No withdrawal of an offer

When there has been an announcement of a firm intention to make an offer, except with the consent of the Executive, the offeror must proceed with the offer unless the offer is subject to the fulfilment of a specific condition and that condition has not been met.

Notes to Rule 5:

1. *Specific change of circumstances*

A change in general economic, industrial or political circumstances will not justify failure to proceed with an announced offer: to support an application to the Executive not to proceed, circumstances of an exceptional and specific nature are required.

2. *Competing offer*

~~An offeror need not normally proceed with an announced offer~~The Executive would normally consent to the withdrawal of an announced offer if a competitor has already posted a higher offer, which carries no additional conditions other than those necessary for the implementation of such announced offer. The Executive should be consulted if either offer is a securities exchange offer.

3. *Announcement required*

If an offeror is permitted to withdraw or an offer lapses because of non-fulfilment of a condition, the offeror will be required to make an announcement giving reasons for the withdrawal.

4. *Frustrating action and invoking of conditions*

See Note 7 to Rule 4 and Note 2 to Rule 30.1.

5. *In considering whether to grant consent under this Rule 5, the Executive may seek to hear the views of the offeree company and its advisers.*

6. Equality of information to competing offerors

~~Relevant~~ Any information, relating to the offeree company, including particulars of shareholders, given by the offeree company to an one offeror or potential offeror, whether named or unnamed, must, should, on request, be provided ~~furnished~~ equally and promptly to any another offeror or bona-fide potential offeror, even if that other offeror is less welcome. The other offeror or potential offeror should specify the questions to which it requires answers. It is not entitled, by asking in general terms, to receive all the information supplied to its competitor. This requirement will normally apply only when there has been a public announcement of the existence of the offeror or potential offeror to which information has been given or, if there has been no public announcement, when the offeror or bona fide potential offeror requesting information under this Rule 6 has been informed authoritatively of the existence of another potential offeror.

Notes to Rule 6:

1. *Offeree company's obligation following offeror's announcement*

Following the announcement of a firm intention to make an offer, the offeree company must, as soon as possible but in any event within 48 hours of a request, provide the offeror with all relevant details of its outstanding voting rights, the issued shares and, to the extent not issued, the allotted shares and details of any conversion or subscription rights or any other rights pursuant to the exercise of which shares may be unconditionally allotted or issued during the offer period. In the case of conditionally allotted shares, the details should include the conditions and the date on which such conditions may be satisfied. In the case of rights, the details should include the number of shares which may be unconditionally allotted or issued during the offer period as a result of the exercise of such rights, identifying separately those attributable to rights which commence or expire on different dates, and the various prices at which these rights could be exercised.

2. *Allotment of shares by offeree company during offer period*

The offeree company must immediately notify any offeror of any allotment or issue of shares and of the exercise of any rights mentioned in Note 1 to Rule 6 during the offer period and provide the offeror as soon as possible with all relevant details. An offeror must make appropriate arrangements to ensure that any person to whom shares of a type to which the offer relates are unconditionally allotted or issued during the offer period will have an opportunity of accepting the offer in respect of such shares. In cases of doubt, the Executive must be consulted.

3. *Management buy-outs*

If the offer or potential offer is a management buy-out or similar transaction, the information which this Rule 6 requires to be given to competing offerors or potential offerors is at least that information generated by the offeree company (including the management of the offeree company acting in their capacity as such) which is passed to external providers or potential providers of finance (whether equity or debt) to the offeror or potential offeror. The Executive expects the directors of the offeree company who are involved in making an offer to co-operate with the independent board committee of the offeree company and its advisers in the assembly of this information.

If the offer or potential offer is a management buy-out or similar transaction, the offeror or potential offeror must, on request, promptly furnish the independent board committee of the offeree company or its advisers with at least all information which has been furnished by the offeror or potential offeror to external providers or potential providers of finance (whether equity or debt) for the buy-out.

In all of the above circumstances, the Executive should be consulted.

4. *Conditions attached to the passing of information*

The passing of information pursuant to this Rule 6 should not be made subject to any conditions other than those relating to the confidentiality of the information passed; reasonable restrictions forbidding the use of the information passed to solicit customers or employees; and, the use of the information solely in connection with an offer or potential offer. Any such conditions imposed should be no more onerous than those imposed upon any other offeror or potential offeror.

A requirement that a party sign a hold harmless letter in favour of a firm of accountants or other third party will normally be acceptable provided that any other offeror or potential offeror has been required to sign a letter in similar form.

7. Resignation of directors of offeree company

Once a bona-fide offer has been communicated to the board of the offeree company or the board of the offeree company has reason to believe that a bona-fide offer is imminent, except with the consent of the Executive, the directors of an offeree company ~~or any of its subsidiaries~~ should not resign until the first closing date of the offer, or the date when the offer becomes or is declared unconditional, or shareholders have voted on the waiver of a general offer obligation under Note 1 on dispensations from Rule 26, whichever is the later.

Notes to Rule 7:

1. Restrictions on control by offeror

Reference is made to Rule 26.4 which restricts the offeror's ability to control the offeree company prior to posting of the offer document.

2. Executive's consent

The Executive will normally consent to the resignation of a director if the offeror is a controlling shareholder before commencement of the offer period except when such director is eligible to serve on the independent board committee established under Rule 2.1. In such circumstances the Executive will not normally consent to such director's resignation unless the Executive has also granted consent for the exclusion of that director from the independent board committee under Rule 2.8.

8. Timing and contents of documents

8.1 Availability of information

Information about companies involved in an offer must be made equally available to all shareholders as nearly as possible at the same time and in the same manner.

Notes to Rule 8.1:

1. *Furnishing of information to offerors*

This Rule 8.1 does not prevent the furnishing of information in confidence by an offeree company to a bona fide potential offeror or vice versa.

2. *Press, television and radio interviews*

Parties involved in an offer must take particular care not to release new material in interviews or discussions with the media.

3. *Meetings*

Subject always to Rule 34, meetings of representatives of the offeror or the offeree company or their respective advisers with shareholders of either the offeror or the offeree company, analysts, stockbrokers or others engaged in investment management or advice may take place during the offer period, provided that no material new information is forthcoming, no significant new opinions are expressed and the following provisions are observed. Except with the consent of the Executive, an appropriate representative of the financial adviser to the offeror or the offeree company must be present. That representative will be responsible for confirming in writing to the Executive, not later than 12.00 noon on the business day following the date of the meeting, that no material new information was forthcoming and no significant new opinions were expressed at the meeting.

Should there be any dispute as to whether the provisions of this Note have been complied with, the relevant financial adviser will be expected to satisfy the Executive that they have been. Financial advisers may, therefore, find it useful to record the proceedings of meetings, although this is not a requirement. The offeror or the offeree company and their respective financial advisers must ensure that no meetings are arranged without the relevant financial adviser's knowledge.

The above provisions apply to all such meetings held during an offer period wherever they take place and even if with only one person or firm. Meetings with employees in their capacity as such (rather than in their capacity as shareholders) are not normally covered by this Note, although the Executive should be consulted if any employees hold a significant number of shares.

4. *Information issued by associates (e.g. financial advisers or stockbrokers)*

Rule 8.1 does not prevent the issue of circulars during the offer period to their own investment clients by brokers or advisers to any party to the transaction provided such issue has previously been approved by the Executive.

In giving to their own clients material on the companies involved in an offer, associates must bear in mind the essential point that new information must not be restricted to a small group. Accordingly, such material must not include any statements of fact or opinion derived from information not generally available.

The associate's status must be clearly disclosed.

Attention is drawn to class (2) of the definition of associate, as a result of which, for example, this Note will be relevant to stockbrokers who, although not directly involved with the offer, are associates of an offeror or the offeree company because the stockbroker is in the same group as the financial adviser to an offeror or the offeree company.

In this connection, financial advisers to an offeror or the offeree company should, after the commencement of an offer period, stop issuing research reports on the offeree company and in the case of a securities exchange offer, the offeror company, except with the Executive's prior consent. The concern is that these reports may contain profit forecast statements which require full compliance with Rule 10. The financial adviser is not required to retrieve research reports already distributed prior to the offer period but all entities within the financial adviser's group should stop distributing these old reports and they should be removed from the websites. The Executive should be consulted and it would normally regard any research reports issued within 6 months prior to the offer period as being "live".

5. *Profit forecasts, asset valuations and estimates etc.*

All persons involved should be fully aware of the verification and reporting obligations under the Takeovers Code in respect of profit forecasts, asset valuations and estimates of other figures key to the

offer. Release of any profit forecast, asset valuation or estimate of key figures without compliance with the relevant Takeovers Code requirements may constitute a breach of the Takeovers Code, regardless of whether the forecast, valuation or estimate is withdrawn.

6. *Announcements and circulars*

If, notwithstanding the provisions of Notes 2, 3 and 4 to Rule 8.1, any material new information or significant new opinions are released, they must be announced immediately to the shareholders and the market. The Executive may also require the information to be disseminated by means of a circular to shareholders. If such new information or opinion is not capable of being substantiated as required by the Takeovers Code (e.g. a profit forecast), this must be made clear and it must be formally withdrawn in the circular or announcement.

8.2 Offer document time limit

The offer document, which must not be dated more than 3 days prior to despatch, should normally be posted by or on behalf of the offeror within 21 days (or, in the case of a securities exchange offer, 35 days) of the date of the announcement of the terms of the offer. In an agreed offer the offeror and offeree company are encouraged to combine the offer document and the offeree board circular in a composite document to be posted within this period. The Executive's consent is required if the offer document or composite document may not be posted within this period. (See also Rules 8.4 and 15.1.)

Notes to Rule 8.2:

1. *Schemes of arrangement*

In cases of schemes of arrangement, the Executive should be consulted if an extended period is required to accommodate the Court timetable.

2. *Pre-conditions*

The Executive's consent is required if the making of an offer is subject to the prior fulfilment of a pre-condition and the pre-condition cannot be fulfilled within the time period contemplated by this Rule 8.2. Under such circumstances, the Executive will normally require that the offer document be posted within 7 days of fulfilment of the pre-condition.

~~3. *Date of despatch*~~

~~*Evidence of the date of despatch, e.g. a copy of the posting certificate, must be provided to the Executive.*~~

8.3 Contents of offer document

The offer document submitted by the offeror to the offeree company's shareholders should contain the information required by Schedule I, together with any other relevant information to enable offeree company's shareholders to reach a properly informed decision.

8.4 Timing and contents of offeree board circular

The offeree company should send to its shareholders within 14 days of the posting of the offer document a circular containing the information set out in Schedule II, together with any other information it considers to be relevant to enable its shareholders to reach a properly informed decision on the offer. The Executive's consent is required if the offeree board circular may not be posted within this period, and Such consent will only be given if the offeror agrees to an extension of the first closing date (see Rule 15.1) by the number of business days in respect of which the delay in the posting of the offeree board circular is agreed. If such consent is granted, the time restrictions under Rules 15.4, 15.5 and 16 will be extended by the same number of days. In that case the offer should be kept open for at least 14 days after despatch of the delayed offeree board circular to allow shareholders sufficient time to consider the offeree board circular.

The offeree board circular must include the views of the offeree company's board or its independent committee on the offer and the written advice of its financial adviser as to whether the offer is, or is not, fair and reasonable and the reasons therefor. Reference is made in this regard to Rule 2. If the offeree company's financial adviser is unable to advise whether the offer is, or is not, fair and reasonable the Executive should be consulted.

Note to Rule 8.4:

Preparation of circular

It is the responsibility of the offeree company's board and its advisers to start preparation of the offeree board circular as soon as an offer is announced so as to minimise the possibility of any delay in meeting this timetable. If the offeree company's board considers that all the information required may not be available in time, it must consult the Executive immediately. In any event the Executive will require that, within this timetable, a circular is sent to the shareholders of the offeree company containing all the information available at that time with a clear statement of the information not available, the reasons for the delay in producing it and when it will be available.

8.5 Subsequent documents

Documents subsequently sent to shareholders of the offeree company by either party must contain details of any material changes in information previously

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published by or on behalf of the relevant party during the offer period. If there have been no such changes this must be stated. In particular, the following matters must be updated:-

- (a) changes or additions to material contracts;
- (b) shareholdings and dealings;
- (c) directors' emoluments;
- (d) special arrangements;
- (e) ultimate owner of securities acquired under the offer;
- (f) arrangements in relation to dealings; and
- (g) changes to directors' service contracts.

When a profit forecast has been made, documents subsequently sent to shareholders of the offeree company by the party making the forecast must comply with the requirements of Rule 10.5.

8.6 English/Chinese language

Each document is to be written in English or Chinese and shall include or be accompanied by a translation, as the case requires, in Chinese or English, unless the Executive has previously agreed to waive this requirement.

Notes to Rule 8:

1. *Documents to be on display*

Except with the consent of the Executive, copies of the following documents must be made available for inspection, on the website (which may be a transaction specific website) of the issuer of the offer document or offeree board circular, as appropriate, from the time the offer document or offeree board circular, as appropriate, is published until the end of the offer period. The offer document or offeree board circular must state which documents are so available and the website address ~~plae~~ where inspection can be made. The Executive must be consulted immediately if there is any difficulty in complying with this Note.

- (a) *memorandum and articles of association (in some jurisdictions known as by-laws) of the offeror or offeree company or equivalent documents;*

- (b) *audited consolidated accounts of the offeror or the offeree company for the last 2 financial years for which these have been published;*
- (c) *any report, letter, valuation or other document any part of which is exhibited or referred to in any document issued by or on behalf of the offeror or the offeree company;*
- (d) *written consents of the financial advisers stating that they have given and not withdrawn their consent to the publication of their names in the document;*
- (e) *where a profit forecast has been made:-*
 - (i) *the reports of the auditors or consultant accountants and of the financial advisers;*
 - (ii) *the letters giving the consent of the auditors or consultant accountants and of the financial advisers to the issue of the relevant document with the report in the form and context in which it is included or, if appropriate, to the continued use of the report in a subsequent document;*
- (f) *where an asset valuation has been made:-*
 - (i) *the valuation certificate and associated report containing details of the aggregate valuation;*
 - (ii) *the letter stating that the valuer has given and not withdrawn his consent to the publication of his name in the relevant document;*
- (g) *any document evidencing an irrevocable commitment to accept or reject an offer;*
- (h) *where the Executive has given consent to aggregation of dealings, a full list of all dealings (see Note 4 to paragraph 4 of Schedule I, Note 3 to paragraph 2 of Schedule II and Note 2 to paragraph 5 of Schedule III);*
- (i) *each material contract referred to in paragraph 26 of Schedule I and paragraph 9 of Schedule II;*
- (j) *each service contract referred to in paragraph 13 of Schedule II;*

- (k) *all derivative contracts which in whole or in part have been disclosed under Rule 22.1, paragraph 4 of Schedule I, paragraph 2 of Schedule II, or paragraph 5 of Schedule III. Documents in respect of the first mentioned must be made available for inspection from the time the offer document or the offeree board circular is published or from the time of disclosure, whichever is the later;*
- (l) *documents relating to the financing arrangements for the offer where such arrangements are described in the offer document in compliance with the third sentence of paragraph 12(β) of Schedule I;*
- (m) *documents in relation to an inducement fee or similar arrangement; ~~and~~*
- (n) *any other document required by the Executive to be displayed; and*
- (o) *a copy of any agreement or arrangement or, if not reduced to writing, a memorandum of all the terms of such agreement or arrangement, disclosed in the offer document pursuant to paragraph 14A of Schedule I.*

[This note will apply from 1 January 2006. Note 1 to Rule 8 of the February 2002 edition continues to apply until such date. Please keep pages 4.36, 4.37 and 4.38 of the February 2002 edition until 1 January 2006.]

2. Display of documents on websites ~~Copies of documents~~

A copy of each document to be displayed under Note 1 above must be provided in electronic form acceptable to the Executive for display on the SFC's website before the despatch of the offer document or offeree board circular, as appropriate. Such document must state which documents are on display and the address of the website on which they are displayed.

After the end of the offer period, the provider of the documents on display may make arrangements to remove such documents from the relevant websites.

~~A copy of each document on display must, on request, promptly be made available by an offeror or offeree company to the other party and to any competing offeror or potential offeror.~~

[This note will apply from 1 January 2006. Note 2 to Rule 8 of the February 2002 edition continues to apply until such date. Please keep pages 4.36, 4.37 and 4.38 of the February 2002 edition until 1 January 2006.]

3. *Overseas shareholders*

The Executive would not normally waive the requirements under this Rule 8 so that shareholders in an overseas jurisdiction are excluded from receiving the offer document, unless the Executive is satisfied that it would be unduly burdensome to do so in such overseas jurisdiction. For example, the Executive may grant a waiver under this Rule 8 if issuance of the offer document to particular overseas shareholders requires registration of the document as a prospectus under overseas law and the number of shareholders in such jurisdiction is relatively small. However, the Executive will be concerned to see that all material information in the offer document is made available to such shareholders.

4. *Date of despatch*

Evidence of the date of despatch, e.g. a copy of the posting certificate, must be provided to the Executive in relation to an offer document, revised offer document or offeree board circular.

9. Standard of care and responsibility

9.1 Prospectus standard

Each document issued or statement made in relation to an offer or possible offer or during an offer period must, as is the case with a prospectus, satisfy the highest standards of accuracy and the information given must be adequately and fairly presented. This applies whether it is issued or made by the company direct, or by an adviser on its behalf, or by any other relevant person. Those who issue or make any such document or statement must ensure that it remains accurate and up to date throughout the offer period, and must notify shareholders of any material changes as soon as possible.

Notes to Rule 9.1:

1. *Financial advisers' responsibility for release of information*

The Executive regards financial advisers as being responsible to the Executive for guiding their clients and any relevant public relations advisers with regard to any information released in relation to an offer or possible offer or during an offer period.

Advisers must ensure at an early stage that directors and officials of companies are warned that they must consider carefully the Takeovers Code implications of what they say, particularly when giving interviews to, or taking part in discussions with, the media. It is very difficult after publication to alter an impression given or a view or remark attributed to a particular person. Control of any possible abuse lies largely with the person being interviewed. In appropriate circumstances, the Executive will require a statement of retraction. Particular areas of sensitivity on which comment must be avoided include future profits and prospects, asset values and the likelihood of the revision of an offer (see also the Notes to Rule 8.1).

2. *Unambiguous language*

The language used in documents, releases or advertisements must clearly and concisely reflect the position being described. In particular, the word "agreement" must be used with great care. Statements must be avoided which may give the impression that any persons have committed themselves to certain courses of action (e.g. accepting in respect of their own shares) when they have not in fact done so.

3. *Sources*

The source for any fact which is material to an argument must be clearly stated, including sufficient detail to enable the significance of the fact to be assessed; however, if the information has been included in a document recently sent to shareholders, an appropriate cross reference may instead be made.

4. *Quotations*

A quotation (e.g. from a newspaper or a stockbroker's circular) must not be used out of context and details of the origin must be included.

Since quotations will necessarily carry the implication that the comments quoted are endorsed by the board, such comments must not be quoted unless the board is prepared, where appropriate, to corroborate or substantiate them to the standard required under the Takeovers Code and the directors' responsibility statement pursuant to Rule 9.3 is included.

5. *Diagrams etc.*

Pictorial representations, charts, graphs and diagrams must be presented without distortion and, when relevant, must be to scale.

6. *Use of television, videos, audio tapes etc.*

If any of these are to be used, even when they do not constitute advertisements (see Rule 12.3), the Executive must be consulted in advance.

7. *Use of comparables*

Any comparables referred to in a document must be a fair and representative sample. The bases for compiling any comparables must be clearly stated in the document.

9.2 Sufficient information

Shareholders must be given sufficient information and advice to enable them to reach a properly informed decision as to the merits or demerits of an offer. Such information must be available to shareholders early enough to enable them to make a decision in good time. The obligation of an offeror in these respects towards the shareholders of the offeree company is no less than the offeror's obligation towards its own shareholders.

9.3 Directors' joint and several responsibility

All documents should state that all directors of the company issuing the document jointly and severally accept full responsibility for the accuracy of information contained in the document and confirm, having made all reasonable inquiries, that to the best of their knowledge, opinions expressed in the document have been arrived at after due and careful consideration and there are no other facts not contained in the document, the omission of which would make any statement in the document misleading.

9.4 Executive's consent for exclusion of directors

If it is proposed that any director should be excluded from such a statement, the Executive's consent is required. In such cases, the exclusion and reasons for it should be stated in the document.

Notes to Rules 9.3 and 9.4:

1. *Delegation of responsibility*

If detailed supervision of any document has been delegated to a committee of the board, each of the remaining directors of the company must reasonably believe that the persons to whom supervision has been delegated are competent to carry it out and must have disclosed to the committee all relevant facts directly relating to himself (including his close relatives and related trusts) and all other relevant facts known to him and relevant opinions held by him which, to the best of his knowledge and belief, either are not known to any member of the committee or, in the absence of his specifically drawing attention thereto, are unlikely to be considered by the committee during the preparation of the document. This does not, however, override the requirements of the Listing Rules relating to the acceptance of responsibility for listing documents where applicable.

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 may fulfil his responsibilities under the Takeovers Code. These arrangements should ensure that:-

- (a) the board is provided promptly with copies of all documents issued by or on behalf of their company which bear on the offer; the board receives promptly details of all dealings in relevant securities made by their company or its associates and details of any agreements, understandings, guarantees, expenditure (including fees) or other obligations entered into or incurred by or on behalf of their company in the context of the offer which do not relate to routine administrative matters;*

- (b) *those directors with day-to-day responsibility for the offer are in a position to justify to the board all their actions and proposed courses of action; and*
- (c) *the opinions of advisers are available to the board.*

The above procedures should be followed, and board meetings held, as and when necessary throughout the offer in order to ensure that all directors are kept up-to-date with events and with actions taken.

Any director who has any doubt concerning the propriety of any action as far as the Takeovers Code is concerned should ensure that the Executive is consulted.

The above procedures shall not affect the directors' joint and several responsibility under Rule 9.3.

The Executive requires directors to co-operate with it in connection with its enquiries; this will include the provision, promptly on request, of copies of minutes of board meetings and other information available to them which may be relevant to the enquiry.

2. *Joint announcement and composite document*

When a joint announcement is released or the offer document and the offeree board circular are combined in a composite document, all directors of the offeror should take responsibility for the joint announcement or the composite document, other than for the information in the announcement or document relating to the offeree company. The directors of the offeree company should take responsibility for the information in the announcement or document relating to the offeree company.

3. *Conflicts of interest*

Where a director has a conflict of interest, depending on the circumstances, such a director may amend the responsibility statement required by Rule 9.3 to make it clear that he does not accept responsibility for the views of the board on the offer. See also Note 3 to paragraph 1 of Schedule II.

4. *When an offeror is controlled*

If an offeror is controlled, directly or indirectly, by another person or company, the Executive must be consulted. The Executive will normally require that, in addition to the directors of the offeror, such

other person or the directors of an ultimate parent company or, if there is a listed company in the chain between the ultimate parent company and the offeror, the directors of the listed company take responsibility for documents issued by or on behalf of the offeror. In the case of professional trustee companies, the Executive would look to the person in accordance with whose directions or wishes the trustees are accustomed to act and such person would be required to take responsibility.

5. *Quoting information about another company*

Where a company issues a document or advertisement containing information about another company which makes it clear that such information has been compiled from published sources, the directors of the company issuing the document or advertisement need, as regards the information so compiled, only take responsibility for the correctness and fairness of its reproduction or presentation. The responsibility statement may be amended accordingly. Where statements of opinion or conclusions concerning another company or unpublished information originating from another company are included, these must normally be covered by a responsibility statement by the directors of the company issuing the document or advertisement or by the directors of the other company. The qualified form of responsibility statement provided for in this Note is not acceptable in such instances.

10. Profit forecasts and other financial information

Profit forecasts

10.1 Standards of care

There are obvious hazards attached to the forecasting of profits. This should in no way detract from the necessity of maintaining the highest standards of accuracy and fair presentation in all communications to shareholders in an offer. A profit forecast must be compiled with due care and consideration by the directors, whose sole responsibility it is; the financial advisers must satisfy themselves that the forecast has been prepared in this manner by the directors.

Note to Rule 10.1:

Existing forecasts

At the outset, an adviser should invariably check whether or not his client has a forecast on the public record so that the procedures required by Rule 10.3(d) can be set in train with a minimum of delay.

10.2 The assumptions

- (a) When a profit forecast appears in any document addressed to shareholders in connection with an offer, the assumptions, including the commercial assumptions, upon which the directors have based their profit forecast, must be stated in the document.
- (b) When a profit forecast is given in a press announcement made at the commencement of or during an offer period, any assumptions on which the forecast is based should be included in the announcement.

Notes to Rules 10.1 and 10.2:

1. Requirement to state the assumptions

- (a) *It is important that by listing the assumptions on which the forecast is based useful information should be given to shareholders to help them in forming a view as to the reasonableness and reliability of the forecast. This should draw the shareholders' attention to, and where possible quantify, those uncertain factors which could materially disturb the ultimate achievement of the forecast.*
- (b) *There are inevitable limitations on the accuracy of some forecasts and these should be indicated to assist shareholders in their review. A description of the general nature of the*

business or businesses with an indication of any major hazards in forecasting in these particular businesses should normally be included.

- (c) *The forecast and the assumptions on which it is based are the sole responsibility of the directors. However, a duty is placed on the financial advisers to discuss the assumptions with their client and to satisfy themselves that the forecast has been made with due care and consideration. Auditors or consultant accountants must satisfy themselves that the forecast, so far as the accounting policies and calculations are concerned, has been properly compiled on the basis of the assumptions made.*

Although the accountants have no responsibility for the assumptions, they will as a result of their review be in a position to advise the company on what assumptions should be listed in the circular and the way in which they should be described. The financial advisers and accountants obviously have substantial influence on the information about assumptions to be given in a circular; neither should allow an assumption to be published which appears to be unrealistic, or one to be omitted which appears to be important, without commenting appropriately in its report.

2. *General rules*

- (a) *The following general rules apply to the selection and drafting of assumptions.*

(i) *The shareholder should be able to understand their implications and so be helped in forming a judgement as to the reasonableness of the forecast and the main uncertainties attaching to it.*

(ii) *The assumptions should be specific rather than general, definite rather than vague.*

(iii) *Assumptions about factors which the directors can influence may be included, provided they are clearly identified as such. However, assumptions relating to the general accuracy of estimates should be avoided. The following would not be acceptable:-*

“Sales and profits for the year will not differ materially from those budgeted for.”

“There will be no increases in costs other than those anticipated and provided for.”

Every forecast involves estimates of income and of costs and must obviously be dependent on these estimates. Assumptions of the type illustrated above do not help the shareholder in considering the forecast.

- (iv) *The assumptions should not relate to the accuracy of the accounting systems. If the systems of accounting and forecasting are such that full reliance cannot be placed on them, this should be the subject of some qualification in the forecast itself. It is not satisfactory for this type of deficiency to be covered by the assumptions. The following would not be acceptable:-*

“The book record of stock and work-in-progress will be confirmed at the end of the financial year.”

- (v) *The assumptions should relate only to matters which may have a material bearing on the forecast.*

- (b) *Even the more specific type of assumption may still leave shareholders in doubt as to its implications, for instance:-*

“No abnormal liabilities will arise under guarantees.”

“Provisions for outstanding legal claims will prove adequate.”

Such phrases might be dismissed on the grounds that the first relates to the unforeseen and the second to the adequacy of the estimating system. In both these examples information would be necessary about the extent or basis of the provision already made and/or about the circumstances in which unprovided for liabilities might arise.

- (c) *There may be occasions, particularly when an estimate relates to a period already ended, when no assumptions are required.*

3. Report by independent financial adviser

An independent financial adviser to the offeree company may perform a financial adviser’s role under Rule 10.1 and Note 1(c) to Rules 10.1 and 10.2.

10.3 Reports required in connection with profit forecasts

- (a) A forecast made by an offeror offering solely cash need not be reported on. With the consent of the Executive, this exemption may be extended to an offeror offering a non-convertible debt instrument.

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- (b) In all other cases, the accounting policies and calculations for the forecasts must be examined and reported on by the auditors or consultant accountants. Any financial adviser mentioned in the document must also report on the forecasts.
- (c) When income from land and buildings is a material element in a forecast, that part of the forecast should normally be examined and reported on by an independent valuer: this requirement does not apply where the income is virtually certain, e.g. known rents receivable under existing leases.
- (d) Except with the consent of the Executive, any profit forecast which has been made before the commencement of the offer period must be examined, repeated and reported on in the document sent to shareholders.
- (e) Exceptionally, the Executive may accept that, because of the uncertainties involved, it is not possible for a forecast previously made to be reported on in accordance with the Takeovers Code nor for a revised forecast to be made. In these circumstances, the Executive would insist on shareholders being given a full explanation as to why the requirements of the Takeovers Code were not capable of being met.

10.4 Publication of reports and consent letters

Whenever a profit forecast is made during an offer period, the reports must be included in the document addressed to shareholders containing the forecast. When the forecast is made in a press announcement, that announcement must contain a statement that the forecast has been reported on in accordance with the Takeovers Code and the reports have been lodged with the Executive. If a company's forecast is published first in a press announcement, it must be repeated in full, together with the reports, in the next document sent to shareholders by that company. The reports must be accompanied by a statement that those making them have given and not withdrawn their consent to publication.

10.5 Subsequent documents - continuing validity of forecast

When a company includes a forecast in a document, any document subsequently sent out by that company in connection with that offer must, except with the consent of the Executive, contain a statement by the directors that the forecast remains valid for the purpose of the offer and that the financial advisers and accountants who reported on the forecast have indicated that they have no objection to their reports continuing to apply.

10.6 Statements which will be treated as profit forecasts

(a) When no figure is mentioned

Even when no particular figure is mentioned or even if the word “profit” is not used, certain forms of words may constitute a profit forecast, particularly when considered in context. Examples are “profits will be somewhat higher than last year” and “performance in the second half-year is expected to be similar to our performance and results in the first half-year” (when interim figures have already been published). Whenever a form of words puts a floor under, or a ceiling on, the likely profits of a particular period or contains the data necessary to calculate an approximate figure for future profits, it will be treated by the Executive as a profit forecast which must be reported on. In cases of doubt, professional advisers should consult the Executive in advance.

(b) Estimates of profit for a completed period

An estimate of profit for a period which has already expired should be treated as a profit forecast.

(c) Forecasts for a limited period

A profit forecast for a limited period (e.g. the following quarter) is subject to this Rule 10.

(d) Dividend forecasts

A dividend forecast is not normally considered to be a profit forecast unless, for example, it is accompanied by an estimate as to dividend cover.

(e) Profit warranties

The Executive must be consulted in advance if a profit warranty is to be published in connection with an offer as it is likely to be regarded as a profit forecast.

10.7 Taxation, extraordinary items, exceptional items and minority interests

When a forecast of profit before taxation appears in a document addressed to shareholders, there must be included forecasts of taxation, extraordinary items, exceptional items and minority interests.

10.8 When a forecast relates to a period which has commenced

Whenever a profit forecast is made in relation to a period in which trading has already commenced, any previously published profit figures in respect of any expired part of that trading period, together with comparable figures for the same part of the preceding year, must be stated.

~~Other financial information~~

10.9 Interim and preliminary figures

Except with the consent of the Executive, any unaudited profit figures published during an offer period must be reported on. This provision does not, however, apply to:-

- (i) unaudited statements of annual or interim results which have already been published;
- (ii) unaudited statements of annual results which comply with the requirements for preliminary profits statements as set out in the Listing Rules;
- (iii) unaudited statements of interim results which comply with the requirements for half-yearly reports as set out in the Listing Rules in cases where the board of the offeree company has not publicly advised its shareholders not to accept an offer; or
- (iv) unaudited statements of interim results by offerors which comply with the requirements for half-yearly reports as set out in the Listing Rules, whether or not the offer has been publicly recommended by the board of the offeree company but provided the offer could not result in the issue of securities which would represent 10% or more of the enlarged voting share capital of the offeror.

The Executive should be consulted in advance if the company is not listed on the Stock Exchange but wishes to take advantage of the exemptions under (ii), (iii) or (iv) above.

Note to Rule 10.9:

Growth Enterprise Market companies

References to interim results include quarterly results for companies listed on the Growth Enterprise Market of the Stock Exchange.

10.10 Merger benefits statements in securities exchange offers

In a securities exchange offer, a quantified statement about the expected financial benefits of a proposed takeover or merger is deemed to be a profit forecast statement for the purpose of this Rule 10. In addition to satisfying the existing standards of information and requirements under Rules 9 and 10 of the Takeovers Code, a person issuing such a statement must provide:-

- (a) the bases of the belief (including sources of information) supporting the statement;
- (b) an analysis and explanation of the constituent elements sufficient to enable shareholders to understand the relative importance of these elements; and
- (c) a base figure for any comparison drawn.

These requirements may also be applicable to statements to the effect that an acquisition will enhance an offeror's earnings per share where such enhancement depends in whole or in part on material merger benefits.

Parties wishing to make earnings enhancement statements which are not intended to be profit forecasts must include an explicit and prominent disclaimer to the effect that such statements should not be interpreted to mean that earnings per share will necessarily be greater than those for the relevant preceding financial period.

Parties should also be aware that the inclusion of unquantified earnings enhancement statements, if combined with merger benefits statements and/or other published financial information, may result in the market being provided with information from which the prospective profits for the offeror or the enlarged offeror group or at least a floor or ceiling for such profits can be inferred. Such statements would then be subject to this Rule 10. If parties are in any doubt as to the implications of the inclusion of such statements, they should consult the Executive in advance.

Note to Rule 10.10:

Statements that will be treated as profit forecasts

Quantified statements of merger benefits or earnings enhancements, such as a statement by an offeror that it would expect the offeree company to contribute \$x million of profit post acquisition, will be treated as profit forecasts. The Executive will also apply tests similar to those in Rule 10.6 to determine whether statements that do not mention any particular figure constitute profit forecasts. General statements that do not provide a floor or ceiling for profits,

such as a statement by an offeror that it expects to achieve synergies through the rationalisation of head office costs, would not be regarded as forecasts.

10.11 Material changes in financial or trading position

Where a document to shareholders includes information about material changes in the financial or trading position or outlook of the offeror or offeree company subsequent to the last published audited accounts, in accordance with Schedules I and II or, in the case of a share repurchase by general offer or off-market share repurchase, Schedule III respectively, such information must be reported on in accordance with this Rule 10 if this information constitutes a profit forecast under Rule 10.6. The directors of the company must provide the Executive with evidence of the steps taken by them to support ~~the~~any statement included in such a document that there have been no such material changes (or none save as disclosed in the document).

Note to Rule 10.11:

Evidence of steps taken

The evidence required under this Rule 10.11 normally includes a confirmation in writing given to the Executive by the board of the offeror or offeree company ~~to the Executive~~ that the board and the financial adviser have~~has~~ reviewed, among other things, the financial position of the company (including the latest consolidated management accounts, financial condition, capital and other commitments, contingent liabilities and future cash flow and financing requirements) and the trading position with respect to the company's suppliers and customers. The confirmation should also state that the board and the financial adviser have~~has~~ discussed all these aspects ~~with the financial advisers of the company before it makes the confirmation.~~ before the confirmation was made. Under Rule 9.3, the directors of the offeror or offeree company take full responsibility for statements made under this Rule 10.11. However, the directors and the financial adviser should disclose any material difference of opinion between the directors and the financial adviser regarding material changes or absence of such changes to the Executive. The Executive may require disclosure of such information in the document if it considers it to be relevant to a shareholder's decision on an offer.

11. Asset valuations

N.B. All references in this Rule 11 to “the ~~Valuation Standards~~ ~~Guidance Note~~” are to “The HKIS Valuation Standards on Properties ~~Valuation of Property Assets~~ ~~Guidance Note~~” published by The Hong Kong Institute of Surveyors.

11.1 Disclosure of valuations

When valuations of assets are given in connection with an offer details of the valuations or an appropriate summary thereof must be included in the offer document, offeree board circular or other documents. The valuations should be supported by the opinion of a named independent valuer.

(a) Type of asset

This Rule 11 applies not only to land, buildings and process plant and machinery but also to other tangible and intangible assets. Where the assets consist of securities listed on the Stock Exchange that are not suspended from trading, a separate valuation and consent letter will not be necessary if the valuation is carried out by a qualified accountant or financial adviser to the company. In the case of securities listed on other exchanges, the Executive should be consulted.

Where it is proposed to give a valuation of assets, other than land and buildings, based on discounted cash flows or projections of profits, earnings or cash flows, the Executive must be consulted. Since it may be possible to derive a forecast of profits from such valuations, they will normally be regarded as if they were profit forecasts to which Rule 10 would apply. The Executive will normally only grant a waiver to allow such valuations to be given other than in accordance with Rule 10 in exceptional circumstances or where the predictability of cash flows is reasonably assured.

(b) The valuer

In relation to land and buildings, a valuer should be a ~~corporate~~ professional member of The Hong Kong Institute of Surveyors or some other person approved by the Executive.

In respect of other assets, the valuer should normally be the financial adviser to the relevant party in respect of the offer. The Executive may, in appropriate cases, accept a valuation by a suitably qualified and experienced professional valuer which is also reported on by the financial adviser. In such cases the valuer must be able to demonstrate to the satisfaction of the Executive that it and the personnel engaged in the valuation meet any legal or regulatory requirements which apply in the circumstances in which the particular valuation is required and that

they have, in respect of the particular type of property or asset, sufficient current local and international (as appropriate) knowledge of the particular market and the skills and understanding necessary to undertake the valuation competently.

(c) In connection with an offer

In certain cases, offer documents, offeree board circulars or other documents will include statements of assets reproducing directors' estimates of asset values published with the company's accounts in accordance with the Listing Rules or the Tenth Schedule to the Companies Ordinance (Cap. 32), or in the case of companies incorporated outside Hong Kong, equivalent statutory requirements. The Executive will not regard such estimates as "given in connection with an offer" unless asset values are a particularly significant factor in assessing the offer and the estimates are, accordingly, given considerably more prominence in the offer documents, offeree board circulars or other relevant documents than merely being referred to in a note to a statement of assets in an appendix. In these circumstances, such estimates must be supported by an independent valuer in accordance with this Rule 11.

(d) Another party's assets

A party to a takeover transaction will not normally be permitted to issue a valuation, appraisal or calculation of worth of the assets owned by another party unless it is supported by the unqualified opinion of a named independent valuer and that valuer has had access to sufficient information to carry out a property valuation, appraisal or calculation of worth either in accordance with the Valuation Standards Guidance Note or, in respect of assets other than land and buildings, to appropriate standards approved by the Executive. Comments by one party about another's valuation, appraisal or calculation of worth of its own assets are unlikely to be permitted. In all cases, the Executive must be consulted in advance.

(e) Selective valuations not acceptable

Valuations of assets must not be prepared or presented on a selective basis unless the Executive accepts that special circumstances justify it. (See also Rule 11.6.)

(f) Companies with significant property interests

Except with the consent of the Executive, a valuation of properties will be required in the case of an offer for a company with significant property interests and, in the case of a securities exchange offer, where the offeror company has significant property interests. As a general

guide, this should be taken to refer to a company or group of companies, the book value of whose property assets or consolidated property assets, respectively, exceeds 15% of the book value of total assets or total group assets, as the case may be.

When the company or group of companies has significant property interests but the respective property assets or consolidated property assets represent less than 50% of the book value of its total assets or total group assets, as the case may be, a valuation of property assets held by its associated companies will not normally be required.

If the property assets or consolidated property assets, respectively, of a company or group of companies represent 50% or more of the book value of its total assets or total group assets, as the case may be, a valuation of the property assets held by the associated companies over which it exercises a significant degree of control will be required. Significant degree of control means a direct or indirect interest of 30% or more of the voting rights of a company.

(g) Companies with property situated in developing property markets

If the valuation of assets of either the offeree company or offeror company includes valuation of property in developing property markets, the Executive should be consulted to determine the extent to which the requirements of Practice Note 12 to the Listing Rules should apply.

11.2 Basis of valuation

- (a) In any valuation of an asset or business the basis of valuation must be clearly stated. Only in exceptional circumstances should it be qualified and in that event the valuer must explain the meaning of the words used. The material assumptions made in a valuation must be stated in the valuation. These assumptions should be made taking into account the principles set out in the Notes to Rule 10.2.
- (b) In relation to valuations of land and buildings, attention is drawn to the Valuation Standards Guidance Note. Special assumptions (see VS2.3GN(HK) 4 of the Valuation Standards Guidance Note) should not normally be made in a valuation but, if such assumptions are permitted by the Executive, they should be fully explained.
- (c) For non-specialised properties, the basis of valuation will normally be ~~open~~ market value as defined in the Valuation Standards Guidance Note. A property which is occupied for the purposes of the business will be valued at existing use value. Where a property has been adapted or fitted out to meet the requirements of a particular business, the ~~open~~ market value should relate to the property after the works

have been completed. Alternatively, the ~~open~~-market value may relate to the state of the property before the works had been commenced and the works of adaptation may be valued separately on a depreciated replacement cost basis, subject to adequate potential profitability. Specialised properties occupied by the business should be valued on a depreciated replacement cost basis, as defined in the Valuation Standards subject to adequate potential profitability. Properties held as investments or which are surplus to requirements and are held pending disposal should be valued at ~~open~~-market value.

- (d) In the case of land currently being developed or with immediate development potential, in addition to giving the open market value in the state existing at the date of valuation, the valuation should include:-
- (i) the value after the development has been completed;
 - (ii) the estimated total cost, including carrying charges, of completing the development and the anticipated dates of completion and of letting or occupation; and
 - (iii) a statement whether planning or other regulatory consent has been obtained and, if so, the date thereof and the nature of any conditions attaching to the consent which affect the value.

11.3 Potential tax liability

When a valuation is given in connection with an offer, there should normally be a statement regarding any potential tax liability which would arise if the assets were to be sold at the amount of the valuation, accompanied by an appropriate comment as to the likelihood of any such liability crystallising.

11.4 Current valuation

A valuation must state the effective date as at which the assets were valued and the professional qualifications and address of the valuer. If a valuation is not current, the valuer must state that a current valuation would not be materially different. If this statement cannot be made, the valuation must be updated.

Note to Rule 11.4:

Effective date

The Executive will normally regard any valuation that is more than 3 months old as not current.

11.5 Opinion and consent letters

(a) Standards of care

There are obvious hazards attached to the valuation of an asset or business; this should in no way detract from the necessity of maintaining the highest standards of accuracy and fair presentation in all communications to shareholders in an offer. A valuation must be made with due care and consideration by the valuer or financial adviser making the valuation.

(b) Publication of opinion

The opinion of value must be contained in the document containing the asset valuation. In the case of a property valuation, the document containing the valuation must contain a summary of the valuation setting out the address sufficient to identify each property and the valuation of each property.

(c) Consent

The document must also state that the valuer has given and not withdrawn its written consent to the publication of its valuation report.

(d) Valuation certificate to be on display

Where a valuation of assets is given in any document addressed to shareholders, the full valuation report must be made available for inspection, in the manner described in Note 1 to Rule 8, together with an associated report or schedule containing details of the aggregate valuation. Where the Executive is satisfied that such disclosure may be commercially disadvantageous to the company concerned, it may consent to the report or schedule appearing in a summarised form.

11.6 Waiver in certain circumstances

In exceptional cases, certain companies, in particular property companies, which are the subject of an unexpected offer may find difficulty in obtaining, within the time available, the opinion of an independent valuer to support an asset valuation, as required by this Rule 11, before the offeree board circular has to be sent out. In such cases, the Executive may be prepared exceptionally to waive strict compliance with this requirement. The Executive will only do this where the interests of shareholders seem on balance to be best served by permitting informal valuations to appear coupled with such substantiation as is available. Advisers to offeree companies who wish to make use of this procedure should consult the Executive at the earliest opportunity.

Appendix 2

Note to Rule 11:

Independent valuer

For the purposes of this Rule 11, an “independent valuer” means a valuer who meets the requirements of an “independent external valuer” as defined in Appendix 1.1 of the Valuation Standards ~~GN(HK) 3 of the Guidance Note~~ and, in addition, has no material connection with other parties to the transaction. The independent valuer must also meet the requirements of the Listing Rules.

12. Issuance of documents

12.1 Filing of documents for comments

All documents 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 thereon. 6 final copies of the document must be filed with each of the Executive and the Stock Exchange.

12.2 Publication of documents

All announcements in respect of listed companies must be made in accordance with the requirements of the Listing Rules. All announcements in respect of unlisted offeree companies must be published as a paid announcement in at least one leading English language newspaper and one leading Chinese language newspaper published daily and circulating generally in Hong Kong. ~~Copies of a~~ All documents published in respect of unlisted offeree companies must be delivered to the Executive ~~and the Stock Exchange (Listing Division)~~ in electronic form; ~~in accordance with their requirements from time to time,~~ for publication on ~~their respective~~ the SFC's websites.

12.3 Advertisements

The publication of advertisements during an offer period is prohibited unless the advertisement falls within one of the categories listed below. In addition, except where the advertisement falls within category (a), it must be filed ~~cleared~~ with the Executive in accordance with Rule 12.1.

The categories are as follows:-

- (a) product advertisements not bearing on an offer or possible offer (where there could be any doubt, the Executive must be consulted);
- (b) corporate image advertisements not bearing on an offer or possible offer;
- (c) advertisements giving information, the publication of which by advertisement is required or specifically permitted by the Stock Exchange; or
- (d) advertisements communicating information relevant to holders of bearer securities.

Notes to Rule 12:

1. *Adequate time*

~~When clearance of documents is being sought, the Executive should be given~~ afforded a reasonable time for consideration of a document when it is submitted for comment. It is also emphasised that ~~The first draft of the document submitted to the Executive should be in advanced form and points of difficulty should be drawn to the attention of the Executive as early as possible. If a draft document in a substantially final form is not submitted in a substantially final form before 5.00 p.m. on a business day, the Executive would expect difficulties in commenting on clearing such~~ the document on the same day, particularly if there are outstanding points or issues of difficulty.

2. *Verification*

It is the sole responsibility of the issuer of the document (and its directors and advisers) to ensure that the Codes are fully complied with. The Executive will not verify the accuracy of statements made in documents submitted for clearance comment. If it subsequently becomes apparent that any statement was incorrect, or any document was incomplete, the Executive may require an immediate correction to be issued in addition to considering any possible disciplinary action in accordance with the Takeovers Codes.

3. *Source*

Each document must clearly and prominently identify the party on whose behalf it is published.

13. Appropriate offers for convertibles, warrants, etc.

13.1 Offeree companies with convertible securities

Where an offer is made for equity share capital and the offeree company has convertible securities outstanding, the offeror must make an appropriate offer or proposal to the holders of the convertible securities to ensure that their interests are safeguarded. Equality of treatment is required.

13.2 Competent independent advice

The board of the offeree company must obtain competent independent advice in writing on the offer or proposal to the holders of such securities and the substance of such advice must be made known to all holders of its securities in accordance with Rule 2.1, together with the board's views on the offer or proposal.

13.3 Despatch of appropriate offers

Whenever practicable the offer or proposal should be despatched to the holders of such securities at the same time that the offer document is posted to shareholders, but if this is not practicable the Executive should be consulted and the offer or proposal should be despatched as soon as possible thereafter.

13.4 Conditions of appropriate offers

The offer or proposal required by this Rule 13 must be made conditional on the offer for equity share capital becoming or being declared unconditional and should not normally be subject to any other conditions. It may, however, be put by way of a scheme to be considered at a meeting of the holders of such securities.

13.5 Warrants, options and subscription rights

If an offeree company has warrants, options or subscription rights outstanding in respect of any class of equity share capital (including non-transferable options), the provisions of this Rule 13 apply as appropriate.

Notes to Rule 13:

1. Consideration for appropriate offers

Normally the consideration under any such offer or proposal in relation to convertible securities, warrants, options or subscription rights will be considered appropriate if it is based on the offer price for the relevant equity share capital and such "see-through" price should be regarded as the minimum offer price. However, there may be

cases where another basis is more appropriate, and if the offeror is of the view that the consideration should be determined on some other basis, the Executive should be consulted in advance. A higher offer would not be considered appropriate if it is part of a special deal to provide an incentive to persons who also hold shares or other securities of the offeree company to accept the offer.

2. *Equality of treatment*

“Equality of treatment” under Rule 13.1 should be taken to mean equality of treatment within a class of security holders as opposed to equality of treatment between different classes of securities.

3. *When conversion rights etc. are exercisable during an offer*

All relevant documents issued to shareholders of the offeree company in connection with an offer must also, where practicable, be issued simultaneously to the holders of securities convertible into, rights to subscribe for and options over shares of the same class as those to which the offer relates. If those holders are able to exercise their rights during the course of the offer and to accept the offer in respect of the resulting shares, their attention should be drawn to this in the documents.

14. Offers for more than one class of equity shares

Where a company has more than one class of equity share capital, a comparable offer must be made for each class whether such capital carries voting rights or not. The Executive must be consulted in all such cases.

The comparable offer or proposal for each class of share capital required by this Rule 14 should normally be subject to similar conditions. It may, however, be put by way of a scheme to be considered at meetings separately in respect of each class of the equity share capital.

Notes to Rule 14:

1. *Comparable offers*

In order to achieve comparability, this Rule 14 may involve an offeror paying a higher price for a particular class of shares than the highest price paid by him in the preceding 6 months for shares of that class. A comparable offer need not be an identical offer but the difference must be capable of being justified to the Executive, who will have regard to all relevant circumstances including the rights attaching to each class of shares and may also consider the historical record of their market prices.

2. *Offer for non-voting equity shares only*

Where an offer for non-voting equity shares only is being made, comparable offers for voting classes are not required.

3. *Offers must be interconditional*

An offer for one class of equity share capital must be conditional on the offers for other classes of equity share capital becoming or being declared unconditional.

15. Timing of the offer

15.1 Closing dates

Where an offer document and the offeree board circular are posted on the same day or are combined in a composite document, the offer must initially be open for acceptance for at least 21 days following the date on which the offer document is posted. Where the offeree board circular is posted after the date on which the offer document is posted, the offer must be open for acceptance for at least 28 days following the date on which the offer document is posted. The first closing date for all offers shall be that 21st or 28th day. The latest time for acceptance is 4.00 p.m. on the closing day unless the offer is extended in accordance with Rule 19.1.

In any announcement of an extension of an offer, either the next closing date must be stated or, if the offer is unconditional as to acceptances, a statement may be made that the offer will remain open until further notice. In the latter case, at least 14 days' notice in writing must be given, before the offer is closed, to those shareholders who have not accepted the offer and an announcement must be published.

Where an offer closes without having become unconditional it shall be deemed to have lapsed.

15.2 No obligation to extend

There is no obligation to extend an offer the conditions of which are not met by the first or any subsequent closing date.

15.3 Offer to remain open for 14 days after unconditional

Where a conditional offer becomes or is declared unconditional (whether as to acceptances or in all respects), it should remain open for acceptance for not less than 14 days thereafter. In the latter case, When an offer becomes or is declared unconditional in all respects, at least 14 days' notice in writing must be given before the offer is closed to those shareholders who have not accepted the offer.

Note to Rule 15.3:

Announcement as to unconditionality

An announcement is required to be made both when an offer becomes unconditional as to acceptances and when it becomes unconditional in all respects.

15.4 Offeree company announcements after ~~day~~ “Day 39”

Except with the consent of the Executive (who should be consulted at the earliest opportunity), the board of the offeree company should not announce any 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) after the 39th day following the posting of the initial offer document. Where a matter which might give rise to such announcement being made ~~the announcement of trading results and dividends would normally take place~~ after the 39th day is known to the offeree company, every effort should be made to bring forward the date of the announcement, but, where this is not practicable, or where the matter arises after that date, the Executive will normally give its consent to a later announcement. If an announcement of the kind referred to in this Rule 15.4 paragraph is made after the 39th day, the Executive will normally be prepared to grant an extension of “Day 46” (Rule 16.1) and/or “Day 60” (Rule 15.5) as appropriate. ~~the period of 60 days referred to in Rule 15.5.~~

15.5 Final day rule

Except with the consent of the Executive, an offer (whether revised or not) may not become or be declared unconditional as to acceptances after ~~midnight~~ 7.00 p.m. on the 60th day after the day the initial offer document was posted. The Executive’s consent will normally be granted only:-

- (i) in a competitive situation (see Note 2 below); ~~if a competing offer has been announced (in which case both offerors will normally be bound by the timetable established by the posting of the competing offer document which is posted later);~~
- (ii) if the board of the offeree company consents to an extension;
- (iii) as provided for in Rule 15.4; or
- (iv) if the offeror’s receiving agent requests an extension for the purpose of complying with Note 2 to Rule 30.2.

In the event of an extension with the consent of the Executive in circumstances other than those set out in paragraphs (i) to (iii) above, acceptances or purchases in respect of which relevant documents are received after 4.00 p.m. on the relevant closing date may only be taken into account with the consent of the Executive, which will only be given in exceptional circumstances.

Notes to Rule 15.5:

1. Schemes of arrangement

In cases of schemes of arrangement, the Executive should be consulted if a modified timetable is required to accommodate the Court timetable.

2. Competitive situations

If a competing offer has been announced, both offerors will normally be bound by the timetable established by the posting of the competing offer document. In addition, the Executive will extend “Day 60” for the purposes of any procedure established by the Executive in accordance with Rule 16.5. The Executive will not normally grant its consent under Rule 15.5(ii) in a competitive situation unless its consent is sought before the 46th day following the posting of the competing offer document. The Executive should be consulted at the earliest opportunity if there is any doubt as to the application of this Note.

3. TA decisions

If there is a delay in a decision of the TA under section 7P of the Telecommunications Ordinance (Cap. 106) after posting of the offer document, the Executive will normally extend “Day 39” (see Rule 15.4) to the second day following the announcement of such decision with consequent changes to “Day 46” (see Rule 16.1) and “Day 60”. If there is a significant delay or there is an appeal against the TA’s decision whereby the extended “Day 39” under this Note 3 is likely to be more than 3 months from the posting of the offer document, the Executive should be consulted to determine whether the offer should lapse and to what extent the relevant provisions of the Takeovers Code will continue to apply after lapsing of the offer.

15.6 Compulsory acquisition

Where an offeror has stated in the offer document its intention to avail itself of any powers of compulsory acquisition, the offer may not remain open for acceptance for more than 4 months from the posting of the offer document, unless the offeror has by that time become entitled to exercise such powers of compulsory acquisition, in which event it must do so without delay.

15.7 Time for fulfilment of all other conditions

Except with the consent of the Executive, all conditions must be fulfilled or the offer must lapse 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.

15.8 Acceptances and purchases to be taken into account

For the purpose of the acceptance condition, the offeror may only take into account acceptances or purchases of shares in accordance with the Notes to Rule 30.2 before the last time for acceptance set out in the offeror's relevant document or announcement. This time must be no later than 4.00 p.m. on the relevant closing date.

16. Revised and alternative offers

16.1 Offer open for 14 days after revision

If, in the course of an offer, the offeror revises its terms, all offeree company shareholders, whether or not they have already accepted the offer, will be entitled to the revised terms. A revised offer must be kept open for at least 14 days following the date on which the revised offer document is posted. Therefore, no revised offer document may be posted in the 14 days ending on the last day the offer is able to become unconditional as to acceptances. (See Rules 23, 24 and 26.)

Notes to Rule 16.1:

1. *Announcements which may increase the value of an offer*

Where an offer involves an exchange of equity or potential equity, the announcement by an offeror of any material new information (including trading results, profit or dividend forecasts, asset valuations, merger benefits statements, ~~or~~ proposals for dividend payments, for a capital reorganisation or for any material acquisition or disposal) may have the effect of increasing the value of the offer. An offeror will not, therefore, normally be permitted to make such announcements after it is precluded from revising its offer. If an announcement of trading results and/or dividends would normally the kind referred to in this Note 1 might fall to be made in accordance with the offeror's usual timetable during the offer period, the Executive must be consulted at the earliest opportunity and an offeror will not be permitted to make a no increase statement as defined in Rule 18.3 prior to the release of ~~the above announcement~~ the announcement.

For the purpose of determining whether a transaction is a "material acquisition or disposal" the Executive will, in general, apply the same tests as those set out in the Listing Rules to determine whether a transaction is a "major transaction".

For the purpose of this Note 1, "capital reorganisation" includes rights issues, capital distributions or special dividends, dividends in specie other than scrip dividends of the same class and does not include stock splits, stock consolidations, bonus issues of the same class, ordinary dividends not exceeding the earnings per share for the period in respect of which the dividend is declared, and nominal share capital and share premium reductions not involving any distribution to shareholders.

It is recognised that it may not always be possible for an offeror to avoid the need for an announcement to be made (e.g. due to

obligations under the Listing Rules). Where the offeror is aware beforehand of a matter which might give rise to such an announcement obligation, the offeror should make every effort to bring forward the date of the announcement so that the restrictions under this Note 1 would not arise. Where this is not possible or where the matter arises after the offeror is restricted from revising its offer, the Executive should be consulted in advance of any proposed announcement and will normally seek the views of the Stock Exchange or any other regulator in order to satisfy itself that the announcement is in fact required

2. *When revision is required*

An offeror will normally be required to revise its offer if it, or any person acting in concert with it, purchases securities at above the offer price (see Rule 24) or it becomes obliged to introduce an ~~cash~~ offer under Rule 23 or to make a cash offer, or to increase an existing cash offer, under Rule 26.

3. *When revision is not permitted*

Since an offer must remain open for acceptance for 14 days following the date on which the revised offer document is posted, an offeror will generally not be able to revise its offer, and must not place itself in a position where it would be required to revise its offer, in the 14 days ending on the last day its offer is able to become unconditional. Nor must an offeror place itself in a position where it would be required to revise its offer if it has made a no increase statement as defined in Rule 18.3.

4. *Triggering a mandatory offer under Rule 26*

When an offeror, which is making a voluntary offer either in cash or with a cash alternative, makes an acquisition which causes it to have to extend a mandatory offer under Rule 26 at no higher price than the existing cash offer, the change in the nature of the offer will not be viewed as a revision (and will thus not be precluded by an earlier no increase statement), even if the offeror is obliged to waive any outstanding condition. However, such an acquisition can only be made if the offer can remain open for acceptance for a further 14 days following the date on which the revised offer document is posted.

16.2 New conditions for increased or improved offers

An offeror may introduce new conditions to be attached to a revised offer, but only to the extent necessary to implement the revised offer and subject to the consent of the Executive.

16.3 Timing and revision

In general, the provisions of Rules 15, 16, 18 and 20 apply equally to alternative offers, including cash alternatives.

Notes to Rule 16.3:

1. *Elections*

For the purpose of this Rule 16.3, an arrangement under which shareholders elect, subject to the election of other shareholders, to vary the proportion in which they are to receive different forms of consideration is not regarded as an alternative offer and may be closed without notice on any closing date. This must be clearly stated in the offer document.

2. *Shutting off*

Normally, if an offer has become or is declared unconditional as to acceptances, all alternative offers which have not been closed prior to that date must remain open in accordance with Rule 15.3.

In accordance with Rule 15.2, if on a closing date an offer is not unconditional as to acceptances, an alternative offer (except a cash alternative provided to satisfy the requirements of Rule 26) may be closed without prior notice. However, if, on the first closing date on which an offer is capable of being declared unconditional as to acceptances, the offer is not so declared and is extended, all alternative offers must remain open for 14 days thereafter but may then be closed without prior notice.

16.4 Reintroduction of alternative offers

Where a firm statement has been made that an alternative offer will not be extended or reintroduced, neither that alternative, nor any substantially similar alternative, may be extended or reintroduced. Where, however, such a statement has not been made and an alternative offer has closed, an offeror will not be precluded from reintroducing that alternative at a later date. Reintroduction constitutes a revision of the offer and is, therefore, subject to the requirements of, and only permitted as provided in, this Rule 16.

16.5 Competitive situations

If a competitive situation continues to exist in the later stages of the offer period, the Executive will normally require revised offers to be published in accordance with an auction procedure, the terms of which will be determined by the Executive. That procedure will normally require final revisions to

competing offers to be announced by the 46th day following the posting of the competing offer document but enable an offeror to revise its offer within a set period in response to any revision announced by a competing offeror on or after the 46th day. The procedure will not normally require any revised offer to be posted before the expiry of a set period after the last revision to either offer is announced. The Executive will consider applying any alternative procedure which is agreed between competing offerors and the board of the offeree company.

Notes to Rule 16.5:

1. Dispensation from obligation to post

The Executive will normally grant dispensation from the obligation to post a revised offer, which is lower than the final revised offer announced by a competing offeror, when the board of the offeree company consents.

2. Guillotine

The Executive may impose a final time limit for announcing revisions to competing offers for the purpose of any procedure established in accordance with this Rule 16.5 taking into account representations by the board of the offeree company, the revisions previously announced and the duration of the procedure.

17. Acceptor's right to withdraw

An acceptor shall be entitled to withdraw his acceptance after 21 days from the first closing date of the offer, if the offer has not by then become unconditional as to acceptances. This entitlement to withdraw shall be exercisable until such time as the offer becomes or is declared unconditional as to acceptances: however, on the 60th day (or any date beyond which the offeror has stated that its offer will not be extended) the final time for the withdrawal must coincide with the final time for the lodgement of acceptances set out in Rule 15.5, and this time must not be later than 4.00 p.m.

18. Statements during course of offer

18.1 No misleading statements

Parties to an offer or possible offer and their advisers must take care not to issue statements which, while not factually inaccurate, may mislead shareholders and the market or may create uncertainty. In particular, an offeror must not make a statement to the effect that it may improve its offer without committing itself to doing so and specifying the improvement.

Notes to Rule 18.1:

1. *Holding statements*

While an offeror may need to consider its position in the light of new developments, and may make a statement to that effect, and while a potential competing offeror may make a statement that it is considering making an offer, it is not acceptable for such a statement to remain unclarified for more than a limited time, particularly in the later stage of the offer period. Before any statements of this kind are made, the Executive must be consulted as to the period allowable for clarification. This does not detract in any way from the obligation to make timely announcements under Rule 3.

2. *Statements of support*

The board of the offeree company must not make any statement about the level of support from its shareholders unless their up-to-date intention has been clearly stated to the offeree company or its advisers. The Executive will require any such statement to be verified to its satisfaction. This may include immediate confirmation being given directly to the Executive by the relevant shareholders.

18.2 No extension statements

If statements in relation to the duration of an offer such as “the offer will not be extended beyond a specified date unless it is unconditional as to acceptances” (“no extension statements”) are included in documents sent to offeree company shareholders, or are made by or on behalf of an offeror, its directors, officials or advisers, and not withdrawn immediately if incorrect, only in wholly exceptional circumstances will the offeror be allowed subsequently to extend its offer beyond the stated date except where the right to do so has been specifically reserved. The provisions of Rule 15.3 will apply in any event.

18.3 No increase statements

If statements in relation to the value or type of consideration such as “the offer will not be further increased” or “our offer remains at \$x per share and it will not be raised” (“no increase statements”) are included in documents sent to offeree company shareholders, or are made by or on behalf of an offeror, its directors, officials or advisers, and not withdrawn immediately if incorrect, only in wholly exceptional circumstances will the offeror be allowed subsequently to amend the terms of its offer in any way even if the amendment would not result in an increase of the value of the offer (e.g. the introduction of a lower paper alternative) except where the right to do so has been specifically reserved.

Notes to Rule 18:

1. *Firm statements*

In general, an offeror will be bound by any firm statements as to the duration or finality of its offer. Any statement of intention will be regarded for this purpose as a firm statement and accordingly the expression “present intention” should not be used as it may be misleading to shareholders. Furthermore, the Executive will treat any indication of finality as absolute, unless the offeror clearly states the circumstances in which the statement will not apply, and will not distinguish between the precise words chosen, i.e. the offer is “final”, or will not be “increased”, “amended”, “revised”, “improved”, “changed”, and similar expressions will all be treated in the same way.

2. *Competitive situations*

Subject to Note 4 to this Rule 18 below, if a competitive situation arises after a no extension or no increase statement has been made, the offeror can choose not to be bound by it and to be free to extend its offer provided that:-

- (a) an announcement to this effect is given as soon as possible (and in any event within 4 business days after the day of the announcement of the competing offer) and a circular is sent to shareholders at the earliest opportunity; and*
- (b) any shareholders of the offeree company who accepted the offer after the date of the no extension or no increase statement are given a right of withdrawal for a period of 8 days following the date on which the circular is sent.*

3. *Recommendations*

Subject to Note 4 to this Rule 18 below, an offeror can choose not to be bound by a no extension or no increase statement which would otherwise prevent the posting of an increased or improved offer recommended for acceptance by the board of the offeree company.

4. *Reservation of right to set statements aside*

A no extension or no increase statement may be set aside in the circumstances set out in Notes 2 and 3 to this Rule 18 above only if the offeror has specifically reserved the right to do so in such circumstances at the time the statement was made; this applies whether or not the offer was recommended at the outset. The first offer document sent to shareholders in which mention is made of the statement must contain prominent reference to this reservation (precise details of which must also be included in the document). Any subsequent mention by the offeror of the statement must be accompanied by a reference to the reservation or, at the least, to the relevant sections in the document containing the details. If the right to set aside the statement has not been specifically reserved as set out above, only in wholly exceptional circumstances will the offeror be allowed to extend or increase its offer, as the case may be (except for a 14 day extension pursuant to Rule 15.3), even if a recommendation from the board of the offeree company is forthcoming or if the offer is unconditional in all respects.

5. *Rule 15.4 announcements*

Subject to Note 4 above, if the offeree company makes an announcement of the kind referred to in Rule 15.4 after the 39th day and after a no increase statement has been made, the offeror can choose not to be bound by that statement and to be free to revise its offer if permitted by the Executive under Rule 15.4, provided that notice to this effect is given as soon as possible (and in any event within 4 business days after the date of the offeree company announcement) and shareholders are informed in writing at the earliest opportunity.

19. Announcement of results of offer

19.1 Nature of announcement

By 6.00 p.m. (or such later time as the Executive may in exceptional circumstances permit) on a closing date the offeror must inform the Executive and the Stock Exchange of its decision in relation to the revision, extension, expiry or unconditionality of the offer. The offeror must publish a ~~teletext~~ announcement ~~through~~ on the Stock Exchange's website by 7.00 p.m. on the closing date stating whether the offer has been revised or extended, has expired or has become or been declared unconditional (and, in such case, whether as to acceptances or in all respects). A draft of such ~~teletext~~ announcement must be submitted to the Executive and the Stock Exchange by 6.00 p.m. for ~~clearance~~ comment. Such announcement must be republished in accordance with Rule 12.2 on the next business day thereafter and must state the total number of shares and rights over shares:-

- (a) for which acceptances of the offer have been received;
- (b) held, controlled or directed by the offeror or persons acting in concert with it before the offer period; and
- (c) acquired or agreed to be acquired during the offer period by the offeror or any persons acting in concert with it.

~~The announcement must include the details of voting rights, rights over shares, derivatives and arrangements as required in Rule 3.5(c), (d) and (f). The announcement must also specify the percentages of the relevant classes of share capital, and the percentages of voting rights, represented by these numbers. (See also Rule 2.9, Rule 15.1 and the Note to Rule 15.3).~~

19.2 Consequences of failure to announce

The Executive should be consulted if an offeror is unable to comply with any of the requirements of this Rule 19. The Executive may require that acceptors be granted a right of withdrawal, on terms acceptable to the Executive, until the requirements of this Rule 19 can be met.

Notes to Rule 19:

1. *Informing other parties*

The notification to the Executive and the Stock Exchange under Rule 19.1 should be communicated to the offeree company and any other competing offeror as soon as practicable after communication to the Executive and the Stock Exchange.

2. *Statements regarding acceptances*

If any statements are made during an offer period by an offeror, any person acting in concert with it or its advisers about the level of acceptances or the number or percentage of acceptors, an immediate announcement must be made giving the details mentioned in this Rule 19.

3. *Statements about withdrawals*

When the offeree company is proposing to draw attention to withdrawals of acceptance, the Executive must be consulted before any announcement is made.

4. *Incomplete acceptances and offeror purchases*

Acceptances not complete in all respects and purchases must only be included in the totals in an announcement under this Rule 19 where they could be counted towards fulfilling an acceptance condition under Note 1 to Rule 30.2.

5. *Persons acting in concert*

An announcement under this Rule 19 must make it clear to what extent acceptances have been received from persons acting in concert with the offeror and must state the number of shares and rights over shares (as nearly as practicable) held before the offer period and acquired or agreed to be acquired during the offer period by persons acting in concert with the offeror.

6. *Acceptances of cash alternatives*

Acceptances of cash alternatives are required to be disclosed under this Rule 19.

7. *Partial offers and share repurchase by general offers*

Where the offer is a partial offer or a share repurchase by general offer, the announcement of the results of the offer must include details of the way in which each shareholder's pro rata entitlement was determined.

20. Settlement of consideration and return of share certificates

20.1 Timing of acquisition and payment

(a) General

Shares represented by acceptances in any offer other than a partial offer shall not be acquired by the offeror until the offer has become, or has been declared, unconditional. Such shares shall be paid for by the offeror as soon as possible but in any event within 10 days of the later of the date on which the offer becomes, or is declared, unconditional and the date of receipt of a duly completed acceptance. In the case of an offer which is unconditional from the start (see Rule 30.2), the consideration must be posted or delivered within 10 days from the receipt of duly completed acceptances.

(b) Partial offer

Shares represented by acceptances in a partial offer shall not be acquired by the offeror before the close of the partial offer. Such shares must be paid for by the offeror as soon as possible but in any event within 10 days following the close of the partial offer.

20.2 Withdrawn or lapsed offers

If an offer is withdrawn or lapses, the offeror must, as soon as possible but in any event within 10 days thereof, post the share certificates lodged with acceptance forms to, or make such share certificates available for collection by, those offeree company shareholders who accepted the offer.

Note to Rule 20:

Equality of treatment

All shareholders should be treated equally. Any commitment or arrangement to make payment or settle the consideration for certain shareholders at a particular time may constitute a special deal and therefore be prohibited.

21. Restrictions on dealings before and during the offer

21.1 Restrictions on dealings before the offer

No dealings of any kind in the securities of the offeree company (including convertible securities, warrants, options and derivatives in respect of such securities) may be transacted by any person, not being the offeror, who has confidential price-sensitive information concerning an actual or contemplated offer or revised offer between the time when there is reason to suppose that an approach or an offer or revised offer is contemplated and the announcement of the approach, the offer, the revised offer, or of the termination of the discussions. Such restriction does not apply to persons acting in concert with an offeror in respect of such dealings where the securities the subject of such dealings are excluded from the offer or where there are no-profit arrangements in place.

No such dealings may take place in the securities of the offeror except where the offer or proposed offer is not price-sensitive in relation to those securities.

No person who is privy to such information may make any recommendation to any other person as to dealing in the relevant securities.

21.2 Restrictions on dealings during the offer

During an offer period, the offeror and persons acting in concert with the offeror must not sell any securities in the offeree company except with the prior consent of the Executive and following 24 hours public notice that such sales might be made. Save as provided below, the Executive will not give consent for sales particularly where a mandatory offer under Rule 26 is being made. Sales below the value of the offer will not be permitted. After there has been an announcement that sales may be made, neither the offeror nor persons acting in concert with it may make further purchases and only in exceptional circumstances will the Executive permit the offer to be revised.

The consent of the Executive is not required for placing or underwriting arrangements made during an offer in order to achieve the minimum public shareholding to maintain the listing of the offeree company's shares provided that such arrangements are not effective prior to the date when the offer becomes or is declared unconditional. If an offeror wishes to make such arrangements in order to hold less than 75% (or such percentage as may be relevant in the event that the Stock Exchange has accepted that a percentage other than 25% of the offeree company's shares needs to be in public hands to maintain the listing of the offeree company's shares) of the offeree company's shares, the consent of the Executive is required.

Notes to Rules 21.1 and 21.2:

1. *No-profit arrangements*

Arrangements made by a potential offeror with a person acting in concert with it whereby offeree company securities are purchased (which would include entering into options or derivatives in respect of securities of the offeree company) by the person acting in concert, on the basis that the offeror will bear all the risks and receive all the benefits, are not prohibited by this Rule 21. Arrangements which contain a benefit or potential benefit to the person acting in concert (beyond normal expenses and carrying costs) are, however, normally prohibited. In cases of doubt, the Executive must be consulted.

2. *Other circumstances in which dealings may not take place*

An offeror or other persons may also be restricted from dealing or procuring others to deal in certain other circumstances, e.g. before the announcement of an offer, if the offeror has been supplied by the offeree company with confidential price-sensitive information in the course of offer discussions.

3. *Consortium offers and joint offerors*

If an offer is to be made by more than one offeror or by a company formed by a group of persons to make an offer or by any other consortium offer vehicle, the offerors or group involved will normally be considered to be in a consortium for the purpose of this Note.

The Executive must be consulted before any purchases of offeree company securities are made by members or potential members of a consortium. If there are existing holdings of such securities, it will be necessary to satisfy the Executive that they were acquired before the consortium was formed or contemplated.

It will not normally be acceptable for members of a consortium to purchase such securities unless there are, for example, when a consortium company is to be the offeror, appropriate arrangements to ensure that such purchases are made proportionate to members' interests in the consortium company or under arrangements which give no profit to the purchaser.

4. *No dealing contrary to published advice*

Directors and financial advisers to a company who own securities in that company must not deal in such securities contrary to any advice they have given to shareholders, or to any advice with which it can reasonably be assumed that they were associated, without giving

sufficient public notice of their intentions together with an appropriate explanation. For the purposes of this Note, securities in a company include options and derivatives in respect of or referenced to such securities.

5. *Discretionary clients*

Sales of securities of the offeree company for discretionary clients by fund managers connected with an offeror, unless they are exempt fund managers, may be relevant (see Rule 21.6).

6. *Dealings between an offeror and connected exempt principal traders*

See Rule 35.2.

21.3 Restrictions on share dealings and transactions by offeror during ~~non-cash~~ securities exchange offers

Except with the consent of the Executive, ~~W~~where the consideration under an offer includes securities of the offeror or a person acting in concert with it, neither the offeror nor any person acting in concert with it may deal in any such securities or conduct any on-market repurchase of such securities during the offer period.

Where the consideration under an offer includes securities of an offeror or a person acting in concert with it, and after the announcement of a firm intention to make an offer under Rule 3.5, such offeror or the issuer of the securities may not propose or conduct any off-market share repurchase, or share repurchase by general offer, until the end of the offer period. This restriction does not apply to repurchases announced before the offeror's Rule 3.5 announcement.

This Rule 21.3 does not restrict an offeror or its financial advisers from arranging the underwriting of a cash alternative to the offeror's securities offered in exchange. However, if any such arrangement is likely to have more than a nominal effect on the value or the market price of the offeror's securities, the Executive should be consulted.

21.4 Dealings after termination of discussions

If discussions are terminated or the offeror decides not to proceed with an offer after an announcement has been made that offer discussions are taking place or that an approach or offer is contemplated, no dealings in securities (including convertible securities, warrants, options and derivatives, in respect of such securities) of the offeree company by the offeror, persons acting in concert with it or any person privy to this information may take place prior to an announcement of the position.

21.5 Dealings in offeree company securities by certain offeree company associates

During the offer period, except for exempt fund managers and exempt principal traders, no financial adviser or stockbroker (or any person controlling, controlled by or under the same control as any such adviser or stockbroker) to an offeree company (or any of its parents, subsidiaries or fellow subsidiaries, or their associated companies or companies of which such companies are associated companies) shall, except with the consent of the Executive:-

- (i) for its own account, or for any of its investment accounts managed on a discretionary basis, purchase offeree company shares or deal in convertible securities, warrants, options or derivatives in respect of such shares;
- (ii) make any loan to a person to assist him in making any such purchases or carrying out any such dealings save for lending in the ordinary course of business and on normal commercial terms; or
- (iii) enter into any indemnity or option arrangement or any arrangement, agreement or understanding, formal or informal, of whatever nature, which may be an inducement for a person to retain, deal or refrain from dealing in relevant securities of the offeree company.

Note to Rule 21.5:

Recommended or unconditional mandatory offers

The Executive will normally give its consent under this Rule 21 where the offer is recommended by the board of the offeree company and there is no competing offer, or where the offer is an unconditional mandatory offer pursuant to Rule 26.

21.6 Dealings for discretionary clients during an offer period

- (a) After the identity of an offeror or potential offeror is publicly known, fund managers who manage investment accounts on a discretionary basis and who are connected with the offeror will, subject to paragraph (b) below, be presumed to be acting in concert with the offeror in respect of those investment accounts. Rules 23, 24, 25 and 26 will then be relevant to purchases of offeree company securities and Rule 21.2 to sales of offeree company securities.

Similarly, fund managers who manage investment accounts on a discretionary basis and who are connected with the offeree company will, subject to paragraph (b) below, be presumed to be acting in concert with, for example, directors of the offeree company, who are

also shareholders, in respect of those investment accounts. Rule 26 may be relevant.

When obligations under, or infringements of, the above-mentioned Rules could arise, the relevant fund managers should consult the Executive before dealing in securities of an offeror or the offeree company as appropriate.

- (b) The presumptions in paragraph (a) will not apply to an exempt fund manager which is connected to an offeror or the offeree company where the sole reason for that connection is that the fund manager controls[#], is controlled by or is under the same control as a financial or other professional adviser (including a stockbroker) to the offeror or the offeree company. (See Note 2 to the definitions of exempt fund manager and exempt principal trader.)

[#] See Note 1 at the end of the definitions.

Notes to Rule 21.6:

1. *Qualifications*

- (a) *The presumptions in Rule 21.6(a) may be rebutted in appropriate circumstances and the Executive should be consulted in advance.*
- (b) *If an exempt fund manager is in fact acting in concert with an offeror, the usual concert party consequences will follow.*
- (c) *If an offeror or potential offeror, or any company in its group, has funds managed on a discretionary basis by an exempt fund manager, Rule 21.6 may be relevant. If, for example, any securities of the offeree company are owned by the offeror through such exempt fund manager, the exception in Rule 21.6(b) in relation to exempt fund managers may not apply in respect of those securities. The Executive should be consulted in such cases.*
- (d) *Where a fund manager is connected with an offeror by reason of class (4) of the definitions of connected fund manager and connected principal trader, the Executive may, in appropriate circumstances, waive the acting in concert presumption in Rule 21.6(a), for example where the investment in a consortium is insignificant.*

2. *Dealings before an offeror's identity is publicly known*

Dealings for discretionary clients by fund managers connected with an offeror, before its identity is publicly known, will not normally be relevant for the purpose of Rule 21.6. However, if, once that identity is publicly known, it becomes apparent that the shares in the offeree company held by the offeror and persons acting in concert with it, including shares held on behalf of discretionary clients by fund managers to which the presumption in Rule 21.6(a) applies, carry 30% or more of the voting rights of the offeree company, the Executive should be consulted.

22. Disclosure of dealings during offer period**22.1 Dealings by parties and by associates for themselves or for discretionary clients****(a) Own account**

Dealings in relevant securities by an offeror or the offeree company, and by any associates, for their own account during an offer period must be publicly disclosed in accordance with Notes 5, 6 and 7 to this Rule 22.

(b) For discretionary clients

- (i) Dealings in relevant securities by an offeror or the offeree company, and by any associates, for the account of discretionary investment clients during an offer period must be publicly disclosed in accordance with Notes 5, 6 and 7 to this Rule 22.

If, however, the associate is an exempt fund manager connected with an offeror or the offeree company, paragraph (ii) below will apply.

- (ii) Except with the consent of the Executive, dealings in relevant securities during an offer period for the account of discretionary investment clients by an associate which is an exempt fund manager connected with an offeror or the offeree company must be privately disclosed in accordance with Notes 5, 6 and 7 to this Rule 22.

If, however, the exempt fund manager is an associate by virtue of class (6) of the definition of associate, the exempt fund manager must disclose publicly under Rule 22.1 in addition to disclosing privately.

22.2 Dealings by parties and by associates for non-discretionary clients

Except with the consent of the Executive, dealings in relevant securities during an offer period by an offeror or the offeree company, and by any associates, for the account of non-discretionary investment clients (other than an offeror, the offeree company and any associates) must be privately disclosed in accordance with Notes 5, 6 and 7 to this Rule 22.

22.3 Discretionary accounts

If a person manages investment accounts on a discretionary basis, relevant securities so managed will be treated, for the purpose of this Rule 22, as controlled by that person and not by the person on whose behalf the relevant securities are managed.

Except with the consent of the Executive, where more than one discretionary investment management operation is conducted in the same group, relevant securities controlled by all such operations will be treated for the purpose of this Rule 22 as those of a single person and must be aggregated (see Note 10 to this Rule 22).

22.4 Connected exempt principal traders

Dealings in relevant securities by an exempt principal trader connected with an offeror or the offeree company should be aggregated and disclosed, in accordance with Note 6(a) to this Rule 22, not later than 10.00 a.m. on the business day following the date of the transactions, stating the following details:-

- (i) total purchases and sales;
- (ii) the highest and lowest prices paid and received; and
- (iii) whether the connection is with an offeror or the offeree company.

In the case of dealings in options or derivatives, full details should be given so that the nature of the dealings can be fully understood (see Note 7 to this Rule 22).

Notes to Rule 22:

1. *Consultation with the Executive*

In any case of doubt as to the application of this Rule 22 the Executive should be consulted.

2. *Disclosure of dealings in offeror securities*

Disclosure of dealings in relevant securities of an offeror is only required in the case of a securities exchange offer.

3. *Offer period*

This Rule 22 applies only during an offer period. Dealings by associates (other than persons acting in concert with any offeror) need not 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.

4. *Relevant securities*

Relevant securities for the purpose of this Rule 22 include:-

- (a) securities of the offeree company which are being offered for or which carry voting rights;*
- (b) equity share capital of the offeree company and an offeror;*
- (c) securities of an offeror which carry the same or substantially the same rights as any to be issued as consideration for the offer;*
- (d) securities carrying conversion or subscription rights into any of the foregoing; and*
- (e) options and derivatives in respect of any of the foregoing.*

The taking, granting, exercising, lapsing or closing out of an option (including a traded option contract) in respect of any of the foregoing or the exercise or conversion of any security under (d) above whether in respect of new or existing securities and the acquisition of, entering into, closing out, exercise (by either party) of any rights under, or issue or variation of, a derivative will be regarded as a dealing in relevant securities (see also Notes 7 and 9 to this Rule 22).

5. *Timing of disclosure*

Disclosure must be made no later than 10.00 a.m. on the business day following the date of the transaction. Where dealings have taken place on stock exchanges in the time zones of the United States and there may be difficulty in disclosing dealings by 10.00 a.m., the Executive should be consulted.

6. *Method of disclosure*

- (a) Public disclosure*

Dealings should be disclosed in writing to all offerors and the offeree company or their respective financial advisers. At the same time all such dealings should be disclosed in electronic form to the Executive and, in respect of relevant dealings in listed securities, also to the Stock Exchange (Listing Division); and to the relevant financial adviser, who will be responsible for distribution to the press. The Executive will arrange for the

posting of the disclosure on the SFC's website. ~~The required press distribution list will be that published by the SFC and available on its website.~~

Persons proposing to engage in dealings should also acquaint themselves with the disclosure requirements of Part XV of the Securities and Futures Ordinance (Cap. 571).

If parties to an offer and their associates choose to make press announcements regarding dealings in addition to making formal disclosures, they must ensure that no confusion results.

Public disclosure may be made by the party concerned or by an agent acting on its behalf. Where there is more than one agent (e.g. a merchant bank and a stockbroker), particular care should be taken to ensure that the responsibility for disclosure is agreed between the parties and that it is neither overlooked nor duplicated.

(b) Private disclosure

Dealings should be disclosed in writing or in electronic form to the Takeovers and Mergers Executive - Securities and Futures Commission; they are not published.

7. Details to be included in disclosures

(a) Public disclosure (Rules 22.1(a) and 22.1(b))

A specimen disclosure form may be obtained from the Executive or the SFC's website. Disclosures should follow that format.

A disclosure of dealings must include the following information:-

- (i) the total of the relevant securities in question purchased or sold, or redeemed or purchased by the company itself;*
- (ii) the prices paid or received (in the case of an average price bargain, each underlying trade should be disclosed);*
- (iii) the identity of the associate or other person dealing and, if different, the owner or controller;*

- (iv) *if the dealing is by an associate, an explanation of how that status arises;*
- (v) *if the disclosure is made by a 5% shareholder or group of shareholders, a statement to that effect;*
- (vi) *the resultant total amount of relevant securities owned or controlled by the associate or other person in question (including those of any person with whom there is an agreement or understanding) and the percentage which it represents; and*
- (vii) *if relevant, details of any arrangements required by Note 8 to this Rule 22.*

For the purpose of disclosing identity, the ultimate beneficial owner or controller must be specified, in addition to the person dealing. The naming of nominees or vehicle companies is insufficient. The Executive may require additional information to be disclosed when it appears to be appropriate, for example to identify other persons who have an interest in the securities in question. Subject to Note 10 to this Rule 22, in the case of disclosure of dealings by fund managers on behalf of discretionary clients, the clients need not be named.

In the case of option business or dealings in options or derivatives full details should be given so that the nature of the dealings can be fully understood. For options this should include the number of securities under option, the exercise period (or in the case of exercise, the exercise date), the exercise price and any option money paid or received. For derivatives this should include, at least, the number of reference securities to which they relate (when relevant), the maturity date (or if applicable the closing out date) and the reference price.

If an associate is an associate for more than one reason (for example because he falls within classes (6) and (7) of the definition of associate), all the reasons must be specified.

- (b) *Private disclosure (Rules 22.1(b)(ii) and 22.2)*

Private disclosure under Rule 22.1(b)(ii) by exempt fund managers connected with an offeror or the offeree company must be in the form required by the Executive. A specimen disclosure form may be obtained from the Executive or the SFC website.

A private disclosure under Rule 22.2 must include the identity of the associate dealing, the total of relevant securities purchased or sold and the prices paid or received (in the case of an average price bargain, each underlying trade should be disclosed). A specimen disclosure form may be obtained from the Executive. Rule 22.2 disclosures should follow that format. In the case of dealings in options or derivatives the same information as specified in Note 7(a) to this Rule 22 is required.

8. *Indemnity and other arrangements*

For the purpose of this Note 8, an arrangement includes any arrangement involving rights over shares, any indemnity arrangement, or option arrangements, and any agreement or understanding, formal or informal, of whatever nature, relating to relevant securities which may be an inducement to deal or refrain from dealing.

If any person is party to such an arrangement with any offeror or an associate of any offeror, whether in respect of relevant securities of that offeror or the offeree company, not only will that render such person an associate of that offeror but it is also likely to mean that such person is acting in concert with that offeror; in that case Rules 21, 23, 24, 25 and 26 and paragraph 4 of Schedule I will be relevant. If any person is party to such an arrangement with an offeree company or an associate of an offeree company, not only will that render such person an associate of the offeree company but Note 5 to Rule 26.1 and paragraph 2 of Schedule II may be relevant.

When such an arrangement exists with any offeror, with the offeree company or with an associate of any offeror or the offeree company, details of the arrangement must be publicly announced and disclosed in the relevant circular, whether or not any dealing takes place: (See also Rule 21.5-).

Details of any change to any term of an indemnity or other arrangement which has previously been disclosed under this Note 8 must also be disclosed. In cases of doubt, the Executive should be consulted.

9. *Dealings in options and derivatives*

A disclosure of dealings in options or derivatives is only required if the person dealing in such options or derivatives owns or controls 5% or more of the class of securities which is the subject of the option or to whose price the derivative is referenced.

10. *Discretionary fund managers*

The principle normally applied by the Executive is that where the investment decision is made by a discretionary fund manager the relevant securities are treated as controlled by him and not by the person on whose behalf the fund is managed. For that reason, Rule 22.3 requires a discretionary fund manager to aggregate the investment accounts which he manages for the purpose of determining whether he has an obligation to disclose. The beneficial owner would not normally, therefore, be concerned with disclosure to the extent that his investment is managed on a discretionary basis.

This approach assumes that the discretionary fund manager does not take instructions from the beneficial owner on the dealings in question and that fund management arrangements are not established or used to avoid disclosure.

Where a transaction is carried out by a discretionary fund manager for the account of a person who is acting in concert with the offeror or the offeree company or a 5% shareholder, disclosure is also required by the discretionary fund manager of that person's dealings.

11. *Responsibilities of stockbrokers, banks and other intermediaries*

Stockbrokers, banks and others who deal in relevant securities on behalf of clients have a general duty to ensure, so far as they are able, that those clients are aware of the disclosure obligations attaching to associates and other persons under Rule 22 and that those clients are willing to comply with them. Principal traders and dealers who deal directly with investors should, in appropriate cases, likewise draw attention to the relevant Rules. However, this does not apply when the total value of dealings (excluding stamp duty and commission) in any relevant security undertaken for a client during any 7 day period is less than \$1 million.

This dispensation does not alter the obligation of principals, associates and other persons themselves to initiate disclosure of their own dealings, whatever total value is involved.

Intermediaries are expected to co-operate with the Executive in its dealings enquiries. Therefore, those who deal in relevant securities should appreciate that stockbrokers and other intermediaries will supply the Executive with relevant information as to those dealings, including identities of clients, as part of that co-operation.

12. *Unlisted public companies*

The requirements to disclose dealings apply also to dealings in relevant securities of unlisted public companies.

13. *Potential offerors*

After an offer period commences, If a potential offeror has been the subject of an announcement that talks are taking place (whether or not the potential offeror has been named) or has announced that he is considering making an offer, the all potential offerors and their his associates must disclose dealings in accordance with this Rule 22, and such disclosure must include the identity of the potential offeror. For the purpose of this Note a potential offeror is any party who has approached the board of the offeree company with a view to an offer being made.

However if a potential offeror is not named in any such an announcement and so long as the identity of ~~this~~ the potential offeror remains undisclosed to the public, with the consent of the Executive, a person who is an associate of such potential an offeror solely by virtue of class (2) of the definition of associate may be exempted from strict compliance with this Rule 22 in the following manner:-

- (a) With respect to dealings for discretionary clients (whether or not the associate is an exempt fund manager), the associate may disclose its dealings privately under Rule 22.1.*
- (b) With respect to dealings by an exempt principal trader not prohibited by Rule 35, the associate may disclose its dealings privately under Rule 22.4.*
- (c) With respect to proprietary dealings (other than those covered by paragraph (b) above), if these dealings are permitted under Rule 21.2, ~~and may not result in an obligation under Rules 23 or 24~~ an associate may disclose these dealings privately under this Rule 22. Any other proprietary dealings must be disclosed publicly under this Rule 22.*

Once the identity of the potential offeror is publicly disclosed, these exemptions will no longer apply and the associate will be required to comply fully with this Rule 22.

23. ~~When cash offer required~~ Nature of consideration to be offered

23.1 When cash offer is required

Except with the consent of the Executive in cases falling under paragraph (a) or (b) below, a cash offer is required where:-

- (a) the shares of any class under offer in the offeree company purchased for cash (but see Note 5 to this Rule 23.1) by an offeror, and any person acting in concert with the offeror, during the offer period and within 6 months prior to its commencement carry 10% or more of the voting rights currently exercisable at a class meeting of that class in which case the offer for that class shall be in cash or 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 prior to its commencement;
- (b) subject to paragraph (a) above, shares of any class under offer in the offeree company are purchased for cash (but see Note 5 to this Rule 23.1) by an offeror or any person acting in concert with it during the offer period, in which case the offer for that class shall be in cash or 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; or
- (c) in the view of the Executive there are circumstances which render such a course necessary in order to give effect to General Principle 1.

If the offeror considers that the highest price (for the purposes of this Rule 23.1) should not apply in a particular case, the offeror should consult the Executive, which has discretion to agree a lower price.

(See also Rule 36.)

Notes to Rule 23.1:

1. *Price*

In calculating the price paid, stamp duty and dealing costs should be excluded.

2. *Gross purchases*

The Executive will normally regard Rule 23.1(a) as applying to gross purchases of shares over the relevant period and will not allow the deduction of any shares sold over that period. However, in exceptional circumstances and with the consent of the Executive, shares sold some

considerable time before the beginning of the offer period may be deducted.

3. *When the obligation is satisfied*

The obligation to make cash available under this Rule 23.1 will be considered to have been met if, at the time the purchase was made, a cash offer or cash alternative at a price per share not less than that required by this Rule 23.1 was open for acceptance, even if that offer or alternative closes for acceptance immediately thereafter. If the cash offer or cash alternative is less than that required under this Rule 23.1 (or there is no cash offer or alternative or they have closed already), the offeror is under an obligation to revise the offer and Rule 16 shall apply.

4. *Equality of treatment*

The discretion given to the Executive in Rule 23.1(c) to require cash to be made available in certain cases where less than 10% has been purchased in the 6 months prior to the commencement of the offer period will not normally be exercised unless the vendors are directors or other persons closely connected with the offeror or the offeree company. In such cases, relatively small purchases could be relevant.

Rule 23.1(c) may also be relevant when 10% or more has been acquired in the previous 6 months for a mixture of securities and cash.

5. *Acquisitions for securities, ~~including placings~~*

~~*Shares acquired in exchange for securities will be deemed to be purchases for cash for the purpose of this Rule 23 if an offeror or its associates arrange, or in any way facilitate, the placing of such consideration securities. Also, even where there is no such placing, if an offeror or any person acting in concert with it acquires in exchange for securities any relevant shares, either during or in the one month preceding any offer period, the shares will normally be deemed to have been purchased for cash on the basis of the value of the securities at the time of the transaction. However, if the vendor of the offeree company shares is required to hold the offeror's securities received in exchange until either the offer has lapsed or the offer consideration has been posted to accepting shareholders, no obligation under this Rule 23 is incurred.*~~

For the purpose of this Rule 23.1, shares acquired by an offeror and any person acting in concert with it in exchange for securities, either during or in the 12 months preceding the commencement of the offer period, will normally be deemed to be purchases for cash on the basis of the value of the securities at the time of the purchase. However, if

the vendor of the offeree company shares is required to hold the securities received in exchange until either the offer has lapsed or the offer consideration has been posted to accepting shareholders, no obligation under Rule 23.1 will be incurred.

6. *No revision during final 14 days of offer period*

Since an offer must remain open for acceptance for 14 days following the date on which the revised offer document is posted, an offeror will generally not be able to revise its offer, and an offeror should not place itself in a position where it would be required to revise its offer under this Rule 23.1 in the 14 day period ending on the last day its offer is able to become unconditional as to acceptances. If an obligation under this Rule 23.1 arises during the course of an offer period and a revision of the offer is necessary an immediate announcement must be made. (See Rule 16.)

7. *Convertible securities, warrants, options and subscription for new shares*

The conversion or exercise of convertible securities, warrants, options or other subscription rights will be treated as purchases of the underlying shares at a price calculated by reference to the purchase price of the convertible securities, warrants or options and the relevant conversion or exercise terms. Subscription for new shares will be treated as a purchase for the purposes of this Rule 23.1. In any case of doubt, the Executive should be consulted.

8. *Relevant factors for adjusted price*

Factors which the Executive might take into account when considering an application for an adjusted price include:-

- (a) the size and timing of the relevant purchases;*
- (b) the attitude of the offeree board;*
- (c) whether shares have been purchased at high prices from directors or other persons closely connected with the offeror or the offeree company; and*
- (d) the number of shares purchased in the preceding 6 months.*

9. *Discretionary clients*

Dealings for discretionary clients by fund managers connected with an offeror, unless they are exempt fund managers, may be relevant (see Rule 21.6).

10. *Allotted but unissued shares*

When shares of a company carrying voting rights have been allotted (even if provisionally) but have not yet been issued, for example, under a rights issue when the shares are represented by renounceable letters of allotment, the Executive should be consulted. Such shares are likely to be relevant for the purpose of calculating percentages under this Rule 23.1.

11. *Cum dividend*

When accepting shareholders are entitled under the offer to retain a dividend declared or forecast by the offeree company but not yet paid, the offeror, in establishing the level of the cash offer, may deduct from the highest price paid the net dividend to which offeree company shareholders are entitled.

12. *Offer period*

References to the offer period in this Rule 23.1 are to the time during which the offeree company is in an offer period, irrespective of whether the offeror was contemplating an offer when the offer period commenced.

23.2 When a securities offer is required

Where purchases of any class of the offeree company shares carrying 10% or more of the voting rights currently exercisable at a class meeting of that class have been made by an offeror and any person acting in concert with it in exchange for securities in the 3 months prior to the commencement of and during the offer period, such securities will normally be required to be offered to all other holders of shares of that class.

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, an obligation to make an offer in cash or to provide a cash alternative will also arise under Rule 23.

Notes to Rule 23.2:

1. *Basis on which securities are to be offered*

Any securities required to be offered pursuant to this Rule 23.2 must be offered on the basis of the same number of consideration securities received by the vendor for each offeree company share rather than on the basis of securities equivalent to the value of the securities received by the vendor at the time of the relevant purchase. Where there has

been more than one relevant purchase, offeror securities must be offered on the basis of the greater or greatest number of consideration securities received for each offeree company share.

2. Equality of treatment

The Executive may require securities to be offered on the same basis to all other holders of shares of that class even though the amount purchased is less than 10% or the purchase took place more than 3 months prior to the commencement of the offer period. However, this discretion will not normally be exercised unless the vendors of the relevant shares are directors of, or other persons closely connected with, the offeror or the offeree company.

3. Vendor placings

Shares acquired in exchange for securities will normally be deemed to be purchases for cash for the purposes of this Rule 23.2 if an offeror or any of its associates arranges the immediate placing of such consideration securities for cash, in which case no obligation to make a securities offer under this Rule will arise.

4. Management retaining an interest

In a management buy-out or similar transaction, if the only offeree company shareholders who receive offeror securities are members of the management of the offeree company, the Executive will not, so long as the requirements of Note 3 to Rule 25 are complied with, require all offeree company shareholders to be offered offeror securities pursuant to Rule 23.2, even though such members of the management of the offeree company propose to sell, in exchange for offeror securities, more than 10% of the offeree company's shares.

If however, offeror securities are made available to any non-management shareholders (regardless of the size of their holding of offeree company shares), the Executive will normally require such securities to be made available to all shareholders on the same terms.

5. Acquisition for a mixture of cash and securities

The Executive should be consulted where 10% or more has been acquired during the offer period and within 6 months prior to its commencement for a mixture of securities and cash.

6. Purchases in exchange for securities to which selling restrictions are attached

Where an offeror and any person acting in concert with it has purchased 10% or more of the voting rights of any class of shares in the offeree company during the offer period and within 6 months prior to its commencement and the consideration received by the vendor includes shares to which selling restrictions of the kind set out in the second sentence of Rule 23.2 are attached, the Executive should be consulted.

7. Applicability of the Notes to Rule 23.1 to Rule 23.2

See Notes 2, 5, 6, 7 and 9 to 12 to Rule 23.1 which may be relevant.

24. Purchases resulting in an obligation to offer a minimum level of consideration

24.1 (a) Purchases before a Rule 3.5 announcement

Except with the consent of the Executive in cases falling under paragraph (i) or (ii) below, when an offeror or any person acting in concert with it has purchased shares in the offeree company:-

- (i) within the 3 month period prior to the commencement of the offer period;
- (ii) during the period, if any, between the commencement of the offer period and an announcement made by the purchaser in accordance with Rule 3.5; or
- (iii) prior to the 3 month period referred to in (i), if in the view of the Executive there are circumstances which render such a course necessary in order to give effect to General Principle 1,

the offer to the shareholders of the same class shall not be on less favourable terms.

(b) Purchases after a Rule 3.5 announcement

If, after an announcement made in accordance with Rule 3.5 and during the offer period, the offeror or any person acting in concert with it purchases shares in the offeree company at above the offer price (being the then current value of the offer), then the offeror must increase the offer to not less than the highest price (excluding stamp duty and dealing costs) paid for any shares so acquired.

Purchases of shares in the offeree company may also give rise to an obligation under Rule 23. Where an obligation is incurred under Rule 23 by reason of any such purchases, compliance with Rule 23 will normally be regarded as satisfying any obligations under this Rule 24 in respect of those purchases.

(See also Rule 36.)

24.2 Offers involving a further issue of listed securities

For the purposes of this Rule 24, if the offer involves a further issue of securities of a class already listed on the Stock Exchange, the current value of the offer on a given day should normally be established by reference to the weighted average traded price of board lots (excluding special bargains and odd lots) of such securities traded during the immediately preceding trading

day. If the offer involves a combination of cash and securities and further purchases of the offeree company's shares oblige the offeror to increase the value of the offer, the offeror must endeavour, as far as practicable, to effect such increase while maintaining the same ratio of cash to securities as is represented by the offer.

24.3 Shareholder notification

Immediately after the purchase of shares at above the offer price, it must be announced that a revised offer will be made in accordance with this Rule 24 (see also Rule 16). The announcement should also state the number and class of shares purchased and the price paid.

Notes to Rule 24:

1. *No increase during final 14 days of offer period*

Since an offer must remain open for acceptance for 14 days following the date on which the revised offer document is posted, an offeror will generally not be able to revise its offer, and an offeror should not place itself in a position where it would be required to increase its offer under this Rule 24 in the 14 day period ending on the last day its offer is capable of becoming unconditional as to acceptances (see also Rule 16).

2. *Convertible securities, warrants, options and subscription for new shares*

The conversion or exercise of convertible securities, warrants, options or other subscription rights will be treated as purchases of the underlying shares at a price calculated by reference to the purchase price of the convertible securities, warrants or options and the relevant conversion or exercise terms. Subscription for new shares will be treated as a purchase for the purposes of this Rule 24. In any case of doubt, the Executive should be consulted.

3. *Cum dividend*

When accepting shareholders are entitled under the offer to retain a dividend declared or forecast by the offeree company but not yet paid, purchases in the market or otherwise by an offeror or any person acting in concert with it may be made at prices up to the net cum dividend equivalent of the offer value without necessitating any revision of the offer.

4. *Adjusted terms*

The Executive's discretion to agree adjusted terms pursuant to Rule 24.1(a)(i) or (ii) will only be exercised in exceptional circumstances.

Factors which the Executive might take into account when considering an application for adjusted terms include:-

- (a) whether the relevant purchase was made on terms then prevailing in the market;*
- (b) changes in the market price of the shares since the relevant purchase;*
- (c) the size and timing of the relevant purchase;*
- (d) the attitude of the offeree company's board;*
- (e) whether shares have been purchased at high prices from directors or other persons closely connected with the offeror or the offeree company; and*
- (f) whether a competing offer has been announced for the offeree company.*

5. *Purchases prior to the 3 month period*

The discretion given to the Executive in Rule 24.1(a)(iii) will not normally be exercised unless the vendors are directors or other persons closely connected with the offeror or the offeree company.

6. *No less favourable terms*

For the purpose of Rule 24.1(a), except where Rule 26 (mandatory offer) or Rule 23 (requirement for cash offer or securities offer) applies, it will not be necessary to make a cash offer available even if shares have been purchased for cash. However, any securities offered as consideration must, at the date of the announcement of the firm intention to make the offer, have a value at least equal to the highest relevant purchase price. The proposed consideration should be discussed with the Executive, which will be concerned to see that the price at which the securities are valued in the calculation of the consideration is not affected by undue movements in price or volume of trading in the securities. If there has been any such undue movement in the period leading to such an announcement, the Executive may require the consideration to be adjusted or re-calculated so as to exclude, so far as practicable, the effects of the undue movement.

If there is a restricted market in the securities of an offeror, or if the amount of securities to be issued of a class already listed is large in relation to the amount already issued, the Executive may require justification of prices used to determine the value of the offer.

7. *Unlisted securities*

An offer where the consideration consists of securities for which an immediate listing is not to be sought will not be regarded as satisfying any obligation incurred under this Rule 24.

8. *Discretionary clients*

Dealings for discretionary clients by fund managers connected with an offeror, unless they are exempt fund managers, may be relevant (see Rule 21.6).

9. *Offer period*

References to the offer period in this Rule 24 are to the time during which the offeree company is in an offer period, irrespective of whether the offeror was contemplating an offer when the offer period commenced.

25. Special deals with favourable conditions

Except with the consent of the Executive, neither the offeror nor any person acting in concert with it may make any arrangements with shareholders or enter into arrangements to purchase or sell securities of the offeree company, or which involve acceptance of an offer, either during an offer or when an offer is reasonably in contemplation or for 6 months after the close of such offer if such arrangements have favourable conditions which are not to be extended to all shareholders.

Notes to Rule 25:

1. *Top-ups and other arrangements*

An arrangement with special conditions attached includes any arrangement where there is a promise to make good to a vendor of shares any difference between the sale price and the price of any subsequent successful offer or any other price top-up arrangements. An irrevocable commitment to accept an offer combined with an option to put the shares should the offer fail will also be regarded as such an arrangement.

Arrangements made by an offeror with a person acting in concert with it, whereby shares in the offeree company are purchased by the person acting in concert on the basis that the offeror will bear all the risks and receive all the benefits, are not prohibited by this Rule 25. Arrangements which contain a benefit or potential benefit to the person acting in concert (beyond normal expenses and carrying costs) are, however, normally prohibited. In cases of doubt, the Executive must be consulted.

2. *Finders' fees*

The Rule also covers cases where a shareholder in an offeree company is to be remunerated for playing a part in promoting an offer. The Executive will not normally consent to such remuneration unless provided that the shareholding is not substantial and it can be demonstrated that the arrangement is on normal commercial terms and that a person who had performed the same services, but had not at the same time been a shareholder, would have been entitled to receive no less remuneration. It is not acceptable for such remuneration to be shared with any other shareholder of the offeree company. The Executive must be consulted at the earliest opportunity in all circumstances where this Note may be relevant.

3. *Management retaining an interest*

Sometimes an offeror may wish to arrange for the management of the offeree company to remain financially involved in the business. The methods by which this may be achieved vary but the principle which the Executive is concerned to safeguard is that the risks as well as the rewards associated with an equity shareholding should apply to the management's retained interest. For example, the Executive would not normally find acceptable an option arrangement which guaranteed the original offer price as a minimum. The Executive will normally require, as a condition of its consent, that the independent adviser to the offeree company publicly states that in its opinion the arrangements with the management of the offeree company are fair and reasonable. In addition, where the offeror and the management of the offeree company together hold more than 5% of the equity share capital of the offeree company, the Executive will also normally require such arrangements to be approved at a general meeting of the offeree company's shareholders. At this meeting the vote must be a vote of independent shareholders. Holdings of convertible securities, warrants, options and other subscription rights may also be relevant in determining whether a general meeting is required, particularly where such rights are exercisable during an offer. The Executive must be consulted in all circumstances where this Note may be relevant.

4. *Disposal of offeree company assets*

In some cases, certain assets of the offeree company may be of no interest to the offeror. There is a possibility, if a shareholder in the offeree company seeks to acquire the assets in question, that the terms of the transaction will be such as to confer a special benefit on him; in any event, the arrangement is not capable of being extended to all shareholders. The Executive will normally consent to such a transaction, provided that the independent adviser to the offeree company publicly states that in his opinion the terms of the transaction are fair and reasonable and the transaction is approved at a general meeting of the offeree company's shareholders. At this meeting the vote must be a vote of shareholders who are not involved in or interested in the transaction (otherwise than solely as shareholders of the offeree company). Where such a sale of assets takes place after the relevant period, the Executive will be concerned to see that there was no element of pre-arrangement in the transaction.

The Executive will consider allowing such a procedure in respect of other transactions where the issues are similar, e.g. a transaction with an offeree company shareholder involving offeror assets.

5. Repayment of shareholder loans

A repayment to a shareholder of indebtedness due by the offeree company, or an assignment by a shareholder to the offeror or a person acting in concert with the offeror of a debt due from the offeree company, may be considered as a special deal under this Rule 25. The Executive would normally consent to such repayment or assignment if it is an arms length transaction on normal commercial terms, subject to compliance with all the requirements under Note 4 to Rule 25.

26. Mandatory offer

26.1 When mandatory offer required

Subject to the granting of a waiver by the Executive, when

- (a) any person acquires, whether by a series of transactions over a period of time or not, 30% or more of the voting rights of a company;
- (b) two or more persons are acting in concert, and they collectively hold less than 30% of the voting rights of a company, and any one or more of them acquires voting rights and such acquisition has the effect of increasing their collective holding of voting rights to 30% or more of the voting rights of the company;
- (c) any person holds not less than 30%, but not more than 50%, of the voting rights of a company and that person acquires additional voting rights and such acquisition has the effect of increasing that person's holding of voting rights of the company by more than 2% from the lowest percentage holding of that person in the 12 month period ending on and inclusive of the date of the relevant acquisition; or
- (d) two or more persons are acting in concert, and they collectively hold not less than 30%, but not more than 50%, of the voting rights of a company, and any one or more of them acquires additional voting rights and such acquisition has the effect of increasing their collective holding of voting rights of the company by more than 2% from the lowest collective percentage holding of such persons in the 12 month period ending on and inclusive of the date of the relevant acquisition;

that person shall extend offers, on the basis set out in this Rule 26, to the holders of each class of equity share capital of the company, whether the class carries voting rights or not, and also to the holders of any class of voting non-equity share capital in which such person, or persons acting in concert with him, hold shares (see also Rule 36).

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

Notes to Rule 26.1:

1. *Persons acting in concert*

The majority of questions which arise relate to persons acting in concert. The definition of "acting in concert" contains a list of persons who are presumed to be acting in concert unless the contrary is

established. The following Notes illustrate how this Rule 26 and definition are interpreted by the Executive.

There may also be circumstances where there are changes in the make-up of a group acting in concert that effectively result in a new group being formed or the balance of the group being changed significantly. This may occur, for example, as a result of the sale of all or a substantial part of his shareholding by one member of a concert party group to other existing members or to another person. The Executive will apply the criteria set out below, and in particular in Note 6(a) and Note 7 to this Rule 26.1 and may require a general offer to be made even when no single member holds 30% or more.

2. *Shareholders coming together to act in concert*

Acting in concert requires the co-operation of two or more parties. Where a party has acquired shares independently of other shareholders, or potential shareholders, but subsequently comes together with other shareholders to co-operate to obtain or consolidate control of a company and their existing shareholdings amount to 30% or more of the voting rights of that company, the Executive would not normally require a general offer to be made under Rule 26.1. Such parties having once joined together however, the provisions of Rule 26.1 would apply so that:-

- (a) if the combined shareholdings amounted to less than 30% of the voting rights of that company, an obligation to make an offer would arise if any member of that group acquired further shares such that total holdings of voting rights reached 30% or more; or*
- (b) if the combined shareholdings amounted to between 30% and 50% of the voting rights of that company, no member of that group could acquire shares which would result in acquisitions by the group amounting to more than 2% of the voting rights of the company in any 12 month period without incurring a similar obligation.*

3. *Banks*

An arm's length agreement between a shareholder and a bank under which the shareholder borrows money for the acquisition of shares which gives rise to an obligation under this Rule 26 will not normally result in the bank becoming a concert party. However, see class (9) of the definition of acting in concert.

4. *Shareholders voting together*

The Executive will not normally regard the action of shareholders voting together on particular resolutions as action which of itself should lead to an offer obligation, but that circumstance may be taken into account as one indication that the shareholders are acting in concert.

5. *Directors of a company*

The directors of companies opposing an offer, their advisers, and others acting in concert with them, should consult the Executive before the acquisition of any voting rights which might lead to the incurring of an obligation under this Rule 26.

(See also class (6) of the definition of acting in concert.)

6. *Acquisition of voting rights by members of a group acting in concert*

While the Executive accepts that the concept of persons acting in concert recognises a group as being the equivalent of a single person, the holdings of members and the membership of such groups may change at any time. This being the case, there will be circumstances when the acquisition of voting rights by one member of a group acting in concert from another member of the concert group or from a non-member, will result in the acquirer of the voting rights having an obligation to make an offer.

(a) *Acquisitions from another member*

Whenever the holdings of a group acting in concert total 30% or more of the voting rights of a company and as a result of an acquisition of voting rights from another member of the group a single member comes to hold 30% or more or, if already holding between 30% and 50%, has acquired more than 2% of the voting rights in any 12 month period, an obligation to make an offer will normally arise.

In addition to the factors set out in Note 7 to this Rule 26.1, the factors which the Executive will take into account in considering whether to waive the obligation to make an offer include:-

- (i) *whether the leader of the group or the largest individual shareholding has changed and whether the balance between the shareholdings in the group has changed significantly;*

- (ii) *the price paid for the shares acquired; and*
- (iii) *the relationship between the persons acting in concert and how long they have been acting in concert.*

The Executive would normally grant the acquirer of such voting rights a waiver from such general offer obligation if:-

- (i) *the acquirer is a member of a group of companies comprising a company and its subsidiaries and the acquirer has acquired the voting rights from another member of such group of companies; or*
- (ii) *the acquirer is a member of a group of persons comprising an individual, his close relatives and related trusts, and companies controlled by him, his close relatives or related trusts, and the acquirer has acquired the voting rights from another member of such group of persons.*

(b) *Acquisitions from non-members*

When the group holds between 30% and 50% of the voting rights, an offer obligation will arise if there are acquisitions from non-members of more than 2% in aggregate in any 12 month period. When the group holds over 50%, subject to Note 17 to this Rule 26.1 no obligations normally arise from acquisitions by any member of the group. However, subject to considerations similar to those set out in paragraph (a) of this Note, the Executive may regard as giving rise to an obligation to make an offer the acquisition by a single member of the group of voting rights sufficient to increase his holding to 30% or more or, if he already holds between 30% and 50%, by more than 2% in any 12 month period.

(c) *Calculation of highest price*

For the purpose of calculating the highest price paid in the event of an offer under this Rule 26, the prices paid for voting rights transferred between members of a group acting in concert may be relevant where, for example, all voting rights held within a group are transferred to that member making the offer or where prices paid between members are materially above the market price.

7. *Vendor of part only of a shareholding*

Shareholders sometimes wish to sell part only of their holdings or a purchaser may be prepared to acquire part only of a holding. This arises particularly where an acquirer wishes to acquire under 30%, thereby avoiding an obligation under this Rule 26 to make a general offer. The Executive will be concerned to see whether in such circumstances the arrangements between the purchaser and vendor effectively allow the purchaser to exercise a significant degree of control over the retained voting rights, in which case a general offer would normally be required. These concerns will also apply when the purchaser is already a member of a group acting in concert with the vendor, or when the purchaser joins such a group.

The Executive will also take into account any other transactions between the purchaser and the vendor, and between the purchaser and other members of the group acting in concert with the vendor. This could include, for example, the aggregation of transfers of voting rights to the purchaser over a period of time, or arrangements which have an effect similar to transfer, such as the underwriting by a purchaser of a rights issue which the vendor has agreed not to take up, or a placing of shares with the purchaser.

A judgement on whether such a significant degree of control exists will obviously depend on the circumstances of each individual case, but, by way of guidance, the Executive would regard the following points as having some significance:-

- (a) there would be less likelihood of a significant degree of control over the retained voting rights if the vendor was not an “insider”;*
- (b) the payment of a very high price for the voting rights would tend to suggest that control over the entire holding was being secured;*
- (c) if the parties negotiate options over the retained voting rights it may be more difficult for them to satisfy the Executive that a significant degree of control is absent. On the other hand, where the retained voting rights are in themselves a significant part of the company’s capital (or even in certain circumstances represent a significant sum of money in absolute terms) a correspondingly greater element of independence may be presumed; and*
- (d) it would be natural for a vendor of part of a controlling holding to select a purchaser whose ideas as regards the way the*

company is to be directed are reasonably compatible with his own. It is also natural that a purchaser of a substantial holding in a company should press for board representation and perhaps make the vendor's support for this a condition of purchase. Accordingly, these factors, divorced from any other evidence of a significant degree of control over the retained voting rights, would not lead the Executive to conclude that a general offer should be made.

7A. *Placing*

The Executive would not give its consent to the acquisition of a holding of 30% or more by a person in conjunction with arrangements by the purchaser to place sufficient voting rights to reduce the holding below 30%.

~~*A purchaser may be prepared to acquire part only of a holding, particularly where he wishes to acquire under 30%, thereby avoiding an obligation under this Rule 26 to make a general offer. The Executive will be concerned to see that the arrangements made by the vendor to dispose of his remaining voting rights do not effectively allow the purchaser to exercise a significant degree of control over such voting rights not acquired by the purchaser. Where the remaining voting rights are placed by the vendor, the Executive will require confirmation from any financial adviser or placement agent involved in the placing or disposal of the identity of the placee or placees and whether they are independent. A procedure similar to that set out in Note 7 on dispensations from Rule 26 will be followed. A placing with a number of persons having a common link, such as the discretionary clients of a fund manager who would be connected with the purchaser if he were an offeror, would not normally be acceptable. If in such circumstances the fund manager would have exempt status, it may apply to the Executive for consent to such placing.*~~

When a purchaser acquires just under 30% of the voting rights of a company, it is the prime responsibility of the purchaser to ensure that it and parties acting in concert with it will not hold an aggregate of 30% or more of the voting rights of the company as a result of the acquisition. In the event that such voting rights would result in the concert group holding in aggregate 30% or more of the voting rights of the company a mandatory offer obligation will be triggered under this Rule 26.

Other general interpretations

8. *The chain principle*

Occasionally, a person or group of persons acting in concert acquiring statutory control of a company (which need not be a company to which the Takeovers Code applies) will thereby acquire or consolidate control, as defined in the Codes, of a second company because the first company itself holds, either directly or indirectly through intermediate companies, a controlling interest in the second company, or holds voting rights which, when aggregated with those already held by the person or group, secure or consolidate control of the second company. The Executive will not normally require an offer to be made under this Rule 26 in these circumstances unless either:–

- (a) the holding in the second company is significant in relation to the first company. In assessing this, the Executive will take into account a number of factors including, as appropriate, the assets and profits of the respective companies. Relative values of 60% or more will normally be regarded as significant; or*
- (b) one of the main purposes of acquiring control of the first company was to secure control of the second company.*

The Executive should be consulted in all cases which may come within the scope of this Note to establish whether, in the circumstances, any obligation arises under this Rule 26.

“Statutory control” in this Note means the degree of control which a company has over a subsidiary.

9. *Triggering a mandatory offer during a voluntary offer*

If it is proposed to incur an obligation under this Rule 26 during the course of a voluntary offer by the acquisition of voting rights, the Executive must be consulted in advance. Once such an obligation is incurred, an offer in compliance with this Rule 26 must be announced immediately.

If no change in the consideration is involved it will be sufficient, following the announcement, simply to notify offeree company shareholders in writing of the new total holding of the offeror, of the fact that the acceptance condition in the form required by Rule 26.2 is the only condition remaining, and of the period for which the offer will remain open following posting of the document.

An offer made in compliance with this Rule 26 must remain open for not less than 14 days following the date on which the document is posted to offeree company shareholders.

Notes 3 and 4 to Rule 16.1 set out certain restrictions on the incurring of an obligation under this Rule 26 during the offer period.

10. *Convertible securities, warrants and options*

In general, the acquisition of convertible securities, warrants or options does not give rise to an obligation under this Rule 26 to make an offer but the exercise of any conversion or subscription rights or options will be considered to be an acquisition of voting rights for the purpose of this Rule 26.

The Executive will, however, give special consideration to the granting and taking of options, and will have regard to the time when the option is exercisable, whether the grantor of the option has also sold part of his holding (see Note 7 to this Rule 26.1), the consideration paid for the option, and any other circumstances in which the relationship and arrangements between the two parties concerned are such that effective control over underlying voting rights has or may have passed to the taker of the option. Where the Executive takes the view that effective control over the voting rights has passed, it will treat the grant of the option as constituting an acquisition of the voting rights.

The Executive will not normally require an offer to be made following the exercise of convertible securities, warrants, options or other subscription rights in respect of new securities provided that the issue of convertible securities, warrants or options to the person exercising the rights is approved by a vote of independent shareholders in general meeting in the manner described in Note 1 on dispensations from Rule 26.

Any holder of conversion or subscription rights who intends to exercise such rights and so to hold 30% or more of the voting rights of a company (or to have acquired more than 2% of such voting rights in any 12 month period) should consult the Executive before doing so to determine whether an offer obligation would arise under this Rule 26 and if so at what price. (See also Note 2(c) to Rule 26.3.)

Where there are conversion or subscription rights currently capable of being exercised, this Rule 26 is invoked at a level of 30% of the existing voting rights. Where they are capable of being exercised during an offer period, Note 2 to Rule 6 and Note 3 to Rule 30.2 will be relevant. (See also Note 18 to this Rule 26.1.)

11. *The 2% creeper - acquisitions and dispositions of voting rights during 12 month period*

A person, or group of persons acting in concert, holding 30% or more of the voting rights of a company is free to acquire and dispose of further voting rights within a band of 2% above the greater of 30% or its lowest percentage holding of voting rights in the previous 12 month period without incurring an obligation to make a general offer. Within this band dispositions of voting rights may be netted off against acquisitions thereof.

12. *The 2% creeper - effect of dispositions*

If a person, or group of persons acting in concert, holding 30% or more of the voting rights of a company disposes of voting rights in circumstances other than those mentioned in Note 11 to this Rule 26.1, the reduced holding establishes a new lowest percentage holding for purposes of the 2% creeper. As a result, an obligation to make a general offer will arise if:-

- (i) the reduced holding is 30% or more and is increased by net acquisitions of voting rights by more than 2% in any 12 month period, or*
- (ii) following a reduction of the holding below 30% it is increased to 30% or more.*

Except as mentioned in Note 11 to this Rule 26.1, dispositions of voting rights may not be netted off against acquisitions thereof.

13. *The 2% creeper - effect of dilution*

Subject to Note 14 to this Rule 26.1, the dilution of a holding of voting rights by the issue of new shares or otherwise will normally be regarded by the Executive as equivalent to a reduction by way of a disposition of voting rights.

14. *The 2% creeper - placing and top-up transactions*

For purposes of the creeper a placing shareholder who conducts a placing and top-up transaction pursuant to Note 6 on dispensations from Rule 26 shall be deemed to have a lowest percentage holding equal to the lower of the lowest percentage holding which the placing shareholder had in the 12 month period prior to or immediately after the placing and top-up transaction. A placing shareholder will be treated similarly if the top-up transaction does not give rise to an offer under this Rule 26 but the transaction complies with the requirements of Notes 6 or 7 on dispensations from Rule 26.

Where a placing shareholder has completed a whitewashed transaction within the 12 months immediately before the placing and top-up transaction, Note 15 to this Rule 26.1 should be read together with this Note for the purpose of determining the lowest percentage holding which the placing shareholder had in that 12 month period.

15. *The 2% creeper - effect of whitewash*

When a person, or group of persons acting in concert, would otherwise be obliged to make a mandatory offer pursuant to this Rule 26 but the obligation is waived pursuant to a vote of independent shareholders in accordance with the terms of Note 1 on dispensations from Rule 26, such person, or group of persons, shall be deemed to have a lowest percentage holding equal to the percentage holding of such person, or group of persons, immediately after the whitewashed transaction. Any acquisition of additional voting rights by such person, or group of persons, subsequent to the whitewashed transaction shall be subject to the 2% creeper under Rule 26.1 by reference to the lowest percentage holding in the 12 month period ending on the date of the completion of the relevant acquisition. (See also Notes 11 and 12 to this Rule 26.1.)

By way of example, if a person, or group of persons acting in concert, originally holding 31% comes to hold 38% of the voting rights of a company as a result of a whitewashed transaction, such person or group of persons would be deemed to have a lowest percentage holding of 38% and thereby be free to acquire voting rights within the 2% band above 38% in the following 12 month period, unless any disposal of voting rights causes the lowest percentage holding of such person or group of persons to fall below 38%.

16. *The 2% creeper - voting rights acquired during mandatory offer*

For purposes of the 2% creeper, following a mandatory offer which does not become unconditional an offeror shall be deemed to have a lowest percentage holding equal to his aggregate holding of voting rights of the offeree company at the close of the offer period, including any voting rights which he acquired during the offer.

17. *The 2% creeper - holdings between 48% and 50%*

It should be noted also that the restriction in Rule 26.1(c) and (d) applies to any immediately preceding 12 month period if at any time during such period a person, or group of persons acting in concert, holds 50% or less of the voting rights. Thus, a person or group of persons with 49% of the voting rights of a company will be restricted from acquiring more than a further 2% of the offeree company's voting rights (resulting in a total of 51%) for a period of 12 months thereafter.

18. *Allotted but unissued shares*

When shares of a company carrying voting rights have been allotted (even if only provisionally) but have not yet been issued, for example, under a rights issue when the shares are represented by renounceable letters of allotment, the Executive should be consulted.

19. *Discretionary clients*

Dealings for discretionary clients by fund managers connected with an offeror or the offeree company, unless they are exempt fund managers, may be relevant (see Rule 21.6).

20. *Employee benefit trusts*

The Executive must be consulted in advance of any proposed acquisition of new or existing shares if the aggregate holdings of the directors, any other shareholders acting, or presumed to be acting, in concert with any of the directors and the trustees of an employee benefit trust ("EBT") will, as a result of the acquisition, equal or exceed 30% of the voting rights or, if already exceeding 30% will increase further. The Executive must also be consulted in any case where a shareholder (or group of shareholders acting, or presumed to be acting, in concert) holds 30% or more (but not more than 50%) of the voting rights and it is proposed that an EBT acquires shares.

The mere establishment and operation of an EBT will not by itself give rise to a presumption that the trustees are acting in concert with the directors and/or a controlling shareholder (or group of shareholders acting, or presumed to be acting, in concert). The Executive, will, however, consider all relevant factors including: the identities of the trustees; the composition of any remuneration committee; the nature of the funding arrangements; the percentage of the issued share capital held by the EBT; the number of shares held to satisfy awards made to directors; the number of shares held in excess of those required to satisfy existing awards; the prices at which, method by which and persons from whom existing shares have been or are to be acquired; the established policy or practice of the trustees as regards decisions to acquire shares or to exercise votes in respect of shares held by the EBT; whether or not the directors themselves are presumed to be acting in concert; and the nature of any relationship existing between a controlling shareholder (or group of shareholders acting, or presumed to be acting, in concert) and both the directors and the trustees. Its consideration of these factors may lead the Executive to conclude that the trustees are acting in concert with the directors and/or a controlling shareholder (or group).

This Note will not apply in respect of shares held within the EBT but controlled by the beneficiaries.

26.2 Conditions

Except with the consent of the Executive:-

- (a) offers made under this Rule 26 must be 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; and
- (b) no acquisition of voting rights which would give rise to a requirement for an offer under this Rule 26 may be made if the making or implementation of such offer would or might be dependent on the passing of a resolution at any meeting of shareholders of the offeror or upon any other conditions, consents or arrangements.

Notes to Rule 26.2:

1. *When more than 50% is held*

An offer made under this Rule 26 should normally be unconditional when the offeror and persons acting in concert with it hold more than 50% of the voting rights before the offer is made.

2. *When dispensations may be granted*

The Executive will not normally consider a request for a dispensation under this Rule 26 other than in exceptional circumstances, such as when the necessary cash is to be provided, wholly or in part, by a cash underwritten alternative which is conditional on the obtaining of a listing for new shares. The Executive will normally require that both the announcement of the offer and the offer document include statements that if the acceptance condition is satisfied but the listing condition is not, within the time required, and as a result the offer lapses:-

- (i) *the offeror will immediately make a new cash offer in compliance with this Rule 26 at the price required by this Rule 26; and*
- (ii) *until posting of the offer document in respect of that new offer, the offeror and persons acting in concert with it can only exercise less than 30% of the voting rights of the offeree company.*

When a dispensation is given, the offeror must endeavour to obtain a listing for the new shares with all due diligence.

3. *Acceptance condition*

Notes to Rule 30.2 apply to offers under this Rule 26.

In the event that an offer under Rule 26 lapses because a purchase may not be counted as a result of Note 7 to Rule 30.2 and subsequently the purchase is completed, the Executive should be consulted. It will require appropriate action to be taken such as the making of a new offer or the reduction of the offeror's holding.

4. *TA consent*

No acquisition of voting rights which would give rise to a requirement for an offer under this Rule 26 may be made if such acquisition or offer may result in a "change" in relation to a carrier licence within the meaning of section 7P(16) of the Telecommunications Ordinance (Cap. 106). The restrictions in Rule 26.2 mean that the offeror cannot make the offer conditional upon any TA decision. A potential offeror under this Rule 26 must seek consent of the TA under section 7P(6) of the Telecommunications Ordinance before he triggers an obligation to make a general offer under Rule 26.1.

If an offeror triggers a mandatory offer without obtaining the TA's consent he will be in breach of this Note 4 and subject to possible disciplinary action.

26.3 Consideration

- (a) Offers made under this Rule 26 must, in respect of each class of equity share capital involved, 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 of the offeree company during the offer period and within 6 months prior to its commencement. The cash offer or the cash alternative must remain open after the offer has become or is declared unconditional for not less than 14 days thereafter. The Executive should be consulted where there is more than one class of equity share capital involved.
- (b) The Executive's consent is required if the offeror considers that the highest price should not apply in a particular case.

Notes to Rule 26.3:

1. *Nature of consideration*

When voting rights have been acquired for a consideration other than cash, the offer must nevertheless be in cash or be accompanied by a cash alternative of at least equal value, which must be determined by an independent valuation.

When there have been significant acquisitions in exchange for securities, General Principle 1 may be relevant and such securities may be required to be offered to all shareholders: a cash offer will also be required. The Executive should be consulted in such cases.

2. *Calculation of the price*

(a) *In calculating the price paid, stamp duty and broker's commission should be excluded.*

(b) *If voting rights have been acquired in exchange for listed securities, the price will normally be established by reference to the weighted average traded price of board lots (excluding special bargains and odd lots) of the listed securities on the date of the acquisition.*

(c) *If voting rights have been acquired by the conversion or exercise of convertible securities, warrants, options or other subscription rights, the price will normally be established by reference to the purchase price of the convertible securities, warrants or options and the relevant conversion or exercise terms. If however the convertible securities or warrants were issued or sold privately to the purchaser, the Executive may also take into account the weighted average traded price of board lots (excluding special bargains and odd lots) of the relevant shares on the day on which notice of conversion or subscription was submitted.*

The Executive should be consulted in advance in the circumstances described in (b) and (c) above.

3. *Dividends*

When accepting shareholders are entitled under the offer to retain a dividend declared by the offeree company but not yet paid, the offeror, in establishing the level of the cash offer, may deduct from the highest price paid the net dividend to which offeree company shareholders are entitled.

4. *Dispensations from highest price*

Factors which the Executive might take into account when considering an application for an adjusted price include:-

- (a) the size and timing of the relevant purchases;*
- (b) the attitude of the board of the offeree company;*
- (c) whether shares had been purchased at high prices from directors or other persons closely connected with the offeror or the offeree company; and*
- (d) the number of shares purchased in the preceding 12 months.*

26.4 Restrictions on control by offeror

Except with the consent of the Executive, no nominee of an offeror or persons acting in concert with it may be appointed to the board of the offeree company or any of its subsidiaries, nor may an offeror and persons acting in concert with it exercise offeree company voting rights, until the offer document has been posted.

Note to Rule 26.4:

Cross reference to Rule 7

Reference is made to Rule 7 which restricts the ability of the directors of an offeree company to resign prior to the first closing date of the offer, or the date when the offer becomes or is declared unconditional, whichever is the later.

26.5 Obligations of directors selling shares

When directors (and their close relatives, related trusts and companies controlled by them, their close relatives or related trusts) sell shares to a purchaser as a result of which the purchaser is required to make an offer under this Rule 26, such directors must ensure that as a condition of the sale the purchaser undertakes to fulfil his obligations under this Rule 26.

26.6 Holdings of between 30% and 35%

Where a person, or two or more persons acting in concert, holds 30% or more of the voting rights of a company but less than 35% of such voting rights immediately prior to implementation of this Rule on 19 October 2001 then, for so long as such holding remains in this range and until 10 years after that date:-

- (a) the Takeovers Code (other than this Rule 26.6) shall be interpreted and applied as if the 30% trigger in Rule 26.1(a) and (b) was 35% for such person or persons; and
- (b) such person or persons are not subject to the 2% creeper under Rule 26.1(c) and (d).

Where a person, or two or more persons acting in concert, holds less than 30% of the voting rights of a company but holds convertible securities, warrants, options or subscription rights immediately prior to implementation of this Rule on 19 October 2001, that together with any voting rights held immediately prior to that date, on conversion, exercise or subscription in whole or in part on or after that date could result in such person or persons holding 30% or more of the voting rights of a company but less than 35% of such voting rights, the above provisions will apply following conversion, exercise or subscription in whole or in part in respect of such convertible securities, warrants, options or subscription rights. If, following any one or more conversion, exercise or subscription in part, the holding of such person or persons becomes 30% or more but less than 35% and subsequently falls below 30%, these provisions cease to apply in respect of any remaining convertible securities, warrants, options or subscription rights that have not been converted or exercised.

For the avoidance of doubt, where such person or persons continue to hold 30% or more but less than 35% of the voting rights of the company at the end of the 10 year period, it will not be necessary for them to sell voting rights to take such holding below 30% in order to avoid a mandatory offer obligation.

Note to Rule 26.6:

Where the holding of such person or persons is diluted below 30% and the strict application of this Rule 26.6 to such person or persons would operate harshly, the Executive should be consulted.

26.7 Transitional provisions for the creeper

For the 12 months following implementation of this Rule on 19 October 2001, the creeper under Rules 26.1(c) and (d) shall be applied, in all respects other than under Rule 26.6, in the following manner:-

- (a) the 2% limit shall apply so as to cover the period from the date of the relevant acquisition back to 19 October 2001; and
- (b) the 5% limit previously applicable under the Takeovers Code shall apply so as to cover the period from the date of the relevant acquisition back to the date 12 months prior to the relevant acquisition.

Note to Rule 26.7:

Effect of transitional provisions for the creeper

The effect of the transitional provisions for the creeper can be illustrated by the following examples. Assuming there is no other acquisition or disposal of voting rights, if a person or group of persons acquires 4% of the voting rights of a company 3 months before 19 October 2001, such person or group of persons will be restricted from acquiring more than 1% of the company's voting rights within 9 months following 19 October 2001. Thereafter, the person or persons will be subject to the 2% limit. If a person or group of persons has acquired 1% of the voting rights of a company 3 months before 19 October 2001, such person or group of persons will be restricted from acquiring more than 2% in the 12 month period after 19 October 2001.

Notes on dispensations from Rule 26:

1. *Vote of independent shareholders on the issue of new securities ("Whitewash")*

(See Schedule VI - Whitewash Guidance Note for the detailed requirements of the Takeovers Code under this Note.)

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 this Rule 26, the Executive will normally waive the obligation if there is an independent vote at a shareholders' meeting. For this purpose "independent vote" means a vote by shareholders who are not involved in, or interested in, the transaction in question. The requirement for a mandatory offer will also be waived, provided there has been an independent vote of shareholders, in cases involving the underwriting of an issue of shares. If an underwriter incurs an obligation under this Rule 26 unexpectedly, for example as a result of failure by a sub-underwriter in respect of all or part of his liability, the Executive should be consulted.

The appropriate provisions of the Code apply to whitewash proposals. Full details of the potential holding of voting rights must be disclosed in the document sent to shareholders relating to the issue of the new securities, which must also include competent independent advice on the proposals the shareholders are being asked to approve, together with a statement that the Executive has agreed to waive any consequent obligation under this Rule 26 to make a mandatory offer.

Reference should be made to Note 15 to Rule 26.1 which provides that when a person, or group of persons acting in concert, would otherwise be obliged to make a mandatory offer pursuant to this Rule 26, but the

obligation is waived pursuant to a vote of independent shareholders in accordance with the terms of this Note, such person, or group of persons, shall be deemed to have a lowest percentage holding equal to the percentage holding of such person, or group of persons, immediately following the whitewashed transaction. Any acquisition of additional voting rights by such person, or group of persons, subsequent to the whitewashed transaction shall be subject to the 2% creeper under Rule 26.1 by reference to the lowest percentage holding in the 12 month period ending on the date of the completion of the relevant acquisition.

Notwithstanding the fact that the issue of new securities is made conditional upon the prior approval by independent vote of a majority of the shareholders at a general meeting of the company:-

- (i) the Executive will not normally waive an obligation under this Rule 26 if the person to whom the new securities are to be issued or any persons acting in concert with him ~~has~~have 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, discussions or the reaching of understandings or agreements with the directors of the company (which would include informal discussions) in relation to the proposed issue of new securities; and*
- (ii) a waiver will not be granted or if granted will be invalidated if, without the prior consent of the Executive, any acquisitions or disposals of voting rights are made by such persons in the period between the announcement of the proposals and the ~~shareholders' meeting~~completion of the subscription.*

Following the meeting at which the proposals are considered by shareholders, an announcement must be made by the offeree company giving the result of the meeting and the number and percentage of voting rights attaching to the shares to which the potential controlling shareholders have become entitled as a result.

Where the final controlling shareholding is dependent on the results of underwriting, the offeree company must make an announcement following the issue of new securities stating the number of shares and percentage of voting rights held by the controlling shareholders at that time.

2. *Enforcement of security for a loan, receivers, etc.*

Where a shareholding in a company is charged to a bank or lending institution on an arm's length basis and in the ordinary course of its business as security for a loan and, as a result of enforcement, the lender would otherwise incur an obligation to make a general offer under this Rule 26, the Executive will normally waive the requirement, provided that the security was not given at a time when the lender had reason to believe that enforcement was likely. In any case where arrangements are to be made involving a transfer of voting rights to the lender, but which do not amount to enforcement of the security, the Executive will wish to be convinced that such arrangements are necessary to preserve the lender's security and will also take into account the proviso above. When following enforcement a lender wishes to sell all or part of his shareholding, the provisions of this Rule 26 apply to the purchaser.

Although a receiver or liquidator of a company is not required to make an offer when he takes control of a holding of 30% or more of the voting rights of another company, the provisions of this Rule 26 apply to a purchaser from such a person.

3. *Rescue operations*

There are occasions when a 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 the provisions of this Rule 26 and normally require a general offer. The Executive will consider waiving the requirements of this Rule 26 in such circumstances; particular attention will be paid to the views of the directors and advisers of the potential offeree company.

The requirements of this Rule 26 will not normally be waived in a case where a major shareholder in a company rather than that company itself is in need of rescue. The situation of that shareholder may have little relevance to the position of other shareholders and, therefore, the purchaser from such major shareholder must expect to be obliged to extend an offer under this Rule 26 to all other shareholders.

In considering whether to grant a waiver, the Executive must be satisfied about the urgency of the rescue and that it would be impracticable for the rescue proposal to be submitted for approval by shareholders not involved in or interested in the transaction under Note 1 on dispensations from Rule 26. If the urgency of the rescue is not established, the Executive may require an independent vote as a

condition for a waiver. The Executive will also have regard to whether the rescue proposal is equitable to the existing shareholders and whether existing shareholders will have the right to participate in the rescue proposal on the same terms as the rescuing party, so far as practicable. Any application for a waiver under this Note must be submitted as early as possible.

4. *Inadvertent mistake*

If, due to an inadvertent mistake, a person incurs an obligation to make an offer under this Rule 26, the Executive will not normally require an offer if sufficient voting rights are disposed of within a limited period to persons unconnected with him.

5. *Balancing block: where 50% will not accept*

Situations may arise where a person, or group of persons acting in concert, acquires 30% or more of the voting rights of a company at a time when another person, or group of persons acting in concert, already holds 30% or more of the voting rights of that company. In such a situation the Executive will not normally waive the requirement for that person or group of persons to make a general offer under this Rule 26 unless:-

- (a) there is a single person holding 50% or more of the voting rights of the company who states that he will not accept the offer which the purchaser would otherwise be obliged to make; or*
- (b) the Executive is provided with written confirmation from the holders of 50% or more of the voting rights of that company that they would not accept the offer which the purchaser would be obliged to make.*

6. *Placing and top-up transactions*

A waiver from the obligation to make a general offer under this Rule 26 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 part of his holding with one or more independent persons (see Note 7 on dispensations from Rule 26) and then, as soon as is practicable, subscribes for new shares up to the number of shares placed at a price substantially equivalent to the placing price after taking account of expenses incurred in the transaction. Such a waiver is required even if the placing and top-up are to be effected simultaneously whether by way of placing and subscription agreements that are inter-conditional or otherwise. For purposes of the 2% creeper the placing shareholder shall be deemed to have a lowest percentage holding equal to the lower of the lowest

percentage holding which he had in the 12 month period prior to or immediately after the placing and top-up transaction. Reference is made in this regard to Note 14 to Rule 26.1. A waiver under this Note ~~from the obligation to make a general offer under this Rule 26~~ will not be required where a shareholder, ~~who~~ together with persons acting in concert with him has continuously held~~holds~~ more than 50% of the voting rights of a company for at least 12 months immediately preceding the relevant,~~carries out a placing and top-up transaction~~as described above. ~~However, the Executive will require confirmation from the financial adviser or placement agent of the controlling shareholder that the placee or placees are independent and may require information as to the identity of the placee or placees.~~

7. *Verification of independence of placees*

When compliance with a Rule or a waiver is dependent upon a disposition or placement of voting rights to independent persons the Executive will normally require the financial adviser, placement agent or acquirer of the voting rights to verify and/or confirm that the purchaser is independent of, and does not act in concert with, the vendor of the voting rights, and such verification or confirmation shall be provided in such manner as the Executive may reasonably require to satisfy itself of the acquirer's independence. In the case of a single placee the Executive will be particularly concerned with verifying the independence of the placee.

27. Prompt registration of transfers

The board and officials and registrars of an offeree company should use their best endeavours to ensure the prompt registration of transfers during an offer period so that shareholders can freely exercise their voting and other rights.

28. Partial offers

28.1 Executive's consent required

The Executive's consent is required for any partial offer. Consent will normally be granted in the case of an offer (a) which could not result in the offeror and persons acting in concert with it holding 30% or more of the voting rights of a company; or (b) where the offeror and persons acting in concert with it hold more than 50% of the voting rights of a company and the offer is for up to such number of shares as would take the holding of voting rights to not more than 75% of the voting rights of the company, or such higher percentage as the Listing Rules may permit.

28.2 Acquisitions prior to the offer

~~In the case of an offer which could result in the offeror and persons acting in concert with it holding 30% or more, but which must result in their holding less than 100%, of the voting rights of a company, such consent will not normally be granted if the offeror or persons acting in concert with it have acquired, selectively or in significant numbers, voting rights in the offeree company during the 6 months preceding the application for consent or if voting rights have been acquired at any time after the partial offer was reasonably in contemplation.~~

If a partial offer may result in the offeror obtaining or consolidating control in the manner described under Rule 26.1, the Executive's consent under Rule 28.1 will not normally be granted if the offeror or persons acting in concert with it have acquired voting rights in the offeree company during the 6 months prior to the commencement of an offer period.

28.3 Acquisitions during and after the offer

In all partial offers, the offeror and persons acting in concert with it may not acquire voting rights in the offeree company during the offer period. In cases of successful partial offers where the offeror obtains or consolidates control in the manner described under Rule 26.1, in addition, in the case of a successful partial offer, neither the offeror, nor any person who acted in concert with the offeror in the course of the partial offer, nor any person who is subsequently acting in concert with any of them, may, except with the consent of the Executive, acquire voting rights of the offeree company during the 12 month period immediately following the end of the offer period. Rule 31.3 does not apply to partial offers. See also Rule 31.2.

Note to Rule 28.3:

Discretionary clients

Dealings for discretionary clients by fund managers connected with the offeror, unless they are exempt fund managers, may be relevant (see Rule 21.6).

28.4 No extension of closing date

Rule 15 normally applies to partial offers. If on a closing day acceptances received exceed the precise number of shares stated in the offer document under Rule 28.7, subject to the application of Rule 28.5, the offeror must declare the partial offer unconditional as to acceptances and comply with Rule 15.3 by extending the final closing day to the 14th day thereafter. The offeror cannot further extend the final closing day. If the acceptance condition is fulfilled an offeror may also declare a partial offer unconditional as to acceptances prior to the first closing day, provided that he fully complies with Rule 15.3. The offeror cannot extend the final closing day to a day beyond the 14th day after the first closing day. The offer document must contain specific and prominent reference to the requirements in this Rule 28.4.

~~**28.4** Offer for between 30% and 50%~~

~~In the case of an offer which could result in the offeror holding not less than 30%, and which must result in a holding of not more than 50%, of the voting rights of a company, consent will not normally be granted.~~

28.5 Offer for 30% or more requires independent approval

Any offer which could result in the offeror holding 30% or more of the voting rights of a company must normally be conditional, not only on the specified number of acceptances being received, but also on approval of the offer, signified by means of a separate box on the form of acceptance specifying the number of shares in respect of which the offer is approved, being given by shareholders holding over 50% of the voting rights not held by the offeror and persons acting in concert with it. This requirement may be waived if over 50% of the voting rights of the offeree company are held by one independent shareholder who has indicated his approval under this Rule 28.5.

28.6 Control position warning

In the case of a partial offer which could result in the offeror holding more than 50% of the voting rights of the offeree company, the offer document must contain specific and prominent reference to this and to the fact that, if the offer succeeds, the offeror will be free, subject to Rule 28.3, to acquire further shares without incurring any obligation to make a general offer.

28.7 Precise number of shares to be stated

A partial offer must be made for a precise number of shares, such number must be stated, and the offer may not be declared unconditional as to acceptances unless acceptances are received for not less than that number.

28.8 Pro rata entitlement

Partial offers must be made to all shareholders of the class and arrangements must be made for those shareholders who wish to do so to accept in full for the relevant percentage of their holdings. Shares tendered in excess of this percentage must be accepted by the offeror from each shareholder in the same proportion as the number tendered to the extent necessary to enable him to obtain the total number of shares for which he has offered.

28.9 Comparable offer

When an offer is made for a company with more than one class of equity share capital which could result in the offeror holding shares carrying 30% or more of the voting rights, a comparable offer must be made for each other class.

Notes to Rule 28:

1. *Cross reference to Rule 20.1(b)*

Reference is made to Rule 20.1(b) which prescribes the timing of acquisition of and payment for shares represented by acceptances in a partial offer.

2. *Odd lots*

As far as practicable an offeror in a partial offer should arrange its acceptance procedures to minimise the number of existing and new odd lot shareholdings.

29. Proxies

An offeror may not require a shareholder as a term of his acceptance of an offer to appoint a particular person as his proxy to vote in respect of his shares in the offeree company or to appoint a particular person to exercise any other rights or take any other action in relation to those shares unless the appointment is on the following terms, which must be set out in the offer document:-

- (a) the proxy may not vote, the rights may not be exercised and no other action may be taken unless the offer is unconditional or, in the case of voting by the proxy, it will become unconditional or lapse immediately upon the outcome of the resolution in question;
- (b) where relevant, the votes are to be cast as far as possible to satisfy any outstanding condition of the offer;
- (c) the appointment ceases to be valid if the acceptance is withdrawn; and
- (d) the appointment applies only to shares assented to the offer.

30. Conditions

30.1 Subjective conditions

An offer must not normally be made subject to conditions which depend on judgements by the offeror or the fulfilment of which is in its hands.

Notes to Rule 30.1:

1. *An element of subjectivity*

The Executive may be prepared to accept an element of subjectivity in certain special circumstances where it is not practicable to specify all the factors on which satisfaction of a particular condition may depend, especially in cases involving official authorisations, the granting of which may be subject to additional material obligations for the offeror. It would also normally be acceptable in an announcement for an offer to be expressed as being conditional on statements or estimates being appropriately verified.

2. *Invoking conditions*

An offeror should not invoke any condition, other than the acceptance condition, so as to cause 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.

3. *Listing conditions*

Except with the consent of the Executive, where securities are offered as consideration and it is intended that they should be listed on the Stock Exchange, the relevant listing condition should be in terms which ensure that it is capable of being satisfied only when the decision of the Stock Exchange to admit the securities to listing has been approved ~~announced~~ by the Stock Exchange.

30.2 Acceptance condition

Except with the consent of the Executive, all offers, except partial offers made under Rule 28, shall be conditional upon the offeror having received acceptances in respect of shares which, 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% of the voting rights of the offeree company.

A voluntary offer may be made conditional on an acceptance level of shares carrying a higher percentage of the voting rights.

Mandatory offers made under Rule 26 shall be subject to no other conditions, whether as to minimum or maximum levels of acceptances required to be received or otherwise. It follows that the offer should be unconditional where the offeror and persons acting in concert with it hold more than 50% of the voting rights before such offer is made.

Notes to Rule 30.2:

1. *Acceptances*

An acceptance may not be counted towards fulfilling an acceptance condition unless:-

- (a) *it is received by the offeror's receiving agent on or before the last time for acceptance set out in the offeror's relevant document or announcement and the offeror's receiving agent has recorded that the acceptance and any relevant documents required by this Note have been so received; and*
- (b) *the acceptance form is duly completed and is:-*
 - (i) *accompanied by share certificates in respect of the relevant shares and, if those certificates are not in the name of the acceptor, such other documents (e.g. a duly stamped transfer of the relevant shares in blank or in favour of the acceptor executed by the registered holder) in order to establish the right of the acceptor to become the registered holder of the relevant shares; or*
 - (ii) *from a registered holder or his personal representatives (but only up to the amount of the registered holding and only to the extent that the acceptance relates to shares which are not taken into account under another subparagraph of this paragraph (b)); or*
 - (iii) *certified by the offeree company's registrar or the Stock Exchange.*

If the acceptance form is executed by a person other than the registered holder, appropriate evidence of authority (e.g. grant of probate or certified copy of a power of attorney) must be produced.

2. *Offeror's receiving agent's certificate*

Before an offer may become or be declared unconditional as to acceptances, the offeror's receiving agent must have issued a certificate to the offeror or its financial adviser which states the

number of acceptances which have been received which comply with Note 1 to this Rule 30.2 and the number of shares otherwise acquired, whether before or during an offer period.

Copies of the receiving agent's certificate must be sent to the Executive and the offeree company's financial adviser by the offeror or his financial adviser as soon as possible after it is issued.

3. *Convertible securities, warrants and options*

For purposes of the 50% acceptance condition, the Executive should be consulted regarding the offeror's ability to count voting rights attached to shares issuable upon the exercise of conversion or subscription rights attached to convertible securities, warrants or options which the offeror acquires during the offer period. The Executive will normally allow the offeror to count such voting rights for this purpose provided he discloses his intention to do so in the announcement and offer document and first takes all steps which he is required to take to exercise such conversion or subscription rights for all purposes. Such voting rights would then be considered to be outstanding for the purpose of calculating the 50% acceptance condition.

4. *Information to offeror during offer period and extension of offer to new shares*

See the Notes to Rule 6 for information about the offeree company's share capital which is to be supplied to an offeror, and the offeror's obligations in relation to new shares.

5. *Dispensation from 50% acceptance condition*

The Executive may in exceptional circumstances permit an offer to be subject to acceptance by holders of shares carrying less than 50% of the voting rights.

6. *New shares*

For the purpose of the acceptance condition, the offeror must take account of all shares carrying voting rights which are unconditionally allotted or issued before the offer becomes or is declared unconditional as to acceptances, whether pursuant to the exercise of conversion or subscription rights or otherwise. If in any case, for example, as a result of a rights issue, shares have been allotted in renounceable form (even if provisionally), the Executive should be consulted.

7. *Purchases*

A purchase of shares by an offeror or a person acting in concert with the offeror may be counted towards fulfilling an acceptance condition. For this purpose, a purchase made through the Stock Exchange in the normal course of trading securities on the Stock Exchange and with no pre-arrangement or collusion between the parties to such transaction or their agents may be counted from the time of such dealing on the Stock Exchange. In all other cases, the purchase may be counted if and when the purchase is fully completed and settled. In the event that a purchase made through the Stock Exchange is not fully settled in accordance with the rules of the Stock Exchange, the Executive may require the offeror and/or its concert parties to take such action as the Executive may determine is appropriate in the circumstances, which may include the issue of a correcting announcement.

31. Restrictions following offers and possible offers

31.1 Delay before subsequent offer

- (a) Except with the consent of the Executive, where an offer has been announced or posted but has not become or been declared unconditional, and has been withdrawn or has lapsed, neither the offeror nor any person who acted in concert with it in the course of the original offer, nor any person who is subsequently acting in concert with any of them, may within 12 months from the date on which such offer is withdrawn or lapses either:-
 - (i) announce an offer or possible offer for the offeree company (including a partial offer which could result in the offeror holding shares carrying 30% or more of the voting rights of the offeree company), or
 - (ii) acquire any voting rights of the offeree company if the offeror or persons acting in concert with it would thereby become obliged under Rule 26 to make an offer.
- (b) The restrictions in this Rule 31.1 may also apply, for a period of 6 months, where a person, having made an announcement which, although not amounting to the announcement of an offer, raises or confirms the possibility that an offer might be made, does not announce a firm intention either to make, or not to make, an offer within a reasonable time thereafter.
- (c) Where a person makes an announcement that he does not intend to make an offer for a company, the restrictions in this Rule 31.1 will normally apply for 6 months unless there is a material change of circumstances or there has occurred an event which the person specified in his announcement as an event which would enable it to be set aside. Such an announcement must be as clear and unambiguous as possible. If a person intends to include in an announcement specific reservations to set it aside, he should consult the Executive in advance of issuing such an announcement.

31.2 Partial offers

- (a) The restrictions in Rule 31.1(a) also apply following a partial offer:-
 - (i) for not less than 30% and not more than 50% of the voting rights of the offeree company whether or not the offer has become or been declared unconditional. When such an offer has become or been declared unconditional, the period of 12 months runs from that date;

- (ii) for more than 50% of the voting rights of the offeree company which has not become or been declared unconditional; and
 - (iii) for less than 30% of the voting rights of the offeree company which has not become or been declared unconditional.
- (b) The restrictions in Rule 31.1(b) also apply following a partial offer which could only result in a holding of less than 30% of the voting rights of the offeree company which has become or been declared wholly unconditional.
- (c) The restrictions in Rule 31.1(c) also apply where a person makes an announcement that he does not intend to make a partial offer for a company.

Notes to Rules 31.1 and 31.2:

1. *Recommended and competing offers*

The Executive will normally grant consent under Rules 31.1 and 31.2 when:-

- (a) *the new offer is recommended by the board of the offeree company and the offeror is not, or is not acting in concert with, a director or substantial shareholder of the offeree company. Such consent will not normally be granted within 3 months of the lapsing of an earlier offer in circumstances where the offeror was prevented from revising or extending its previous offer as a result of a no increase statement or a no extension statement; ~~or~~*
- (b) *the new offer follows the announcement of an offer by a third party for the offeree company; or*
- (c) *the new offer follows the announcement by the offeree company of a “whitewash” proposal (see Note 1 on dispensations from Rule 26) or of a reverse takeover (see Note 2 to Rule 2.4) which has not failed or lapsed or been withdrawn.*

2. *Rule 31.1 (b)*

Paragraph (b) of Rule 31.1 applies irrespective of the precise wording of the announcement and the reason it was made. For example, it is relevant in the case of an announcement that a person is “considering his options” if, in all the circumstances, those options may reasonably be understood to include the making of an offer. However, the Executive envisages that this provision will only be applied occasionally and usually only if the Executive is persuaded by the

potential offeree company that the damage to its business from the uncertainty outweighs the disadvantage to its shareholders of losing the prospect of an offer.

The question as to what is “a reasonable time” has to be determined by reference to all the circumstances of the case: the stage which the offeror’s preparations had reached at the time the announcement was made is likely to be relevant.

3. *Privatisation offers*

In cases of unsuccessful privatisation offers, the offeror will normally be precluded from buying any shares in the offeree company within 12 months of the offer lapsing if the result would be that the listing of the offeree company’s shares on the Stock Exchange would be discontinued, unless previously approved by shareholders in accordance with the Listing Rules.

4. *Transactions conditional on not incurring a general offer obligation*

Where a person announces a transaction that is subject to a condition that he does not incur a general offer obligation, Rule 31.1 will apply in the following circumstances:-

- (a) if such person does not reserve the right to waive the condition, Rule 31.1(c) applies;*
- (b) if such person reserves the right to waive the condition and does waive it, an offer obligation is incurred and Rule 31.1(a) applies; or*
- (c) if such person reserves the right to waive the condition and does not waive it, Rule 31.1(c) applies.*

31.3 6 months delay before acquisition above offer price

Except with the consent of the Executive, if a person, together with any person acting in concert with him, holds more than 50% of the voting rights of a company, neither that person nor any person acting in concert with him may, within 6 months after the end of the offer period of any previous offer made by him to the shareholders of that company which became or was declared unconditional, make a second offer to, or acquire any shares from, any shareholder in that company at a higher price than that made available under the previous offer. For this purpose the value of a securities exchange offer shall be calculated as at the day the offer became, or was declared, unconditional.

*Notes to Rule 31.3:*1. *Issue of new shares*

For the avoidance of doubt the issue of new shares by placing, subscription or in exchange for assets does not need the consent of the Executive under this Rule 31.3.

2. *Convertible securities, warrants and options*

The acquisition of convertible securities, warrants or options convertible or exercisable into existing shares in a company at a price, based on the acquisition price and the relevant conversion and exercise terms, above the offer price may be relevant for the purposes of this Rule 31.3. In any such case, the Executive must be consulted.

The exercise of convertible securities, warrants or options will be considered to be an acquisition of shares for the purpose of this Rule 31.3.

31.4 Restrictions on dealings by a competing offeror whose offer has lapsed

Except with the consent of the Executive, where an offer made by one of two or more competing offerors has lapsed, neither that offeror, nor any person acting in concert with that offeror, may acquire shares in the offeree company on terms better than those made available under its lapsed offer until each of the other competing offers has either been declared unconditional in all respects or has itself lapsed. For these purposes, the value of the lapsed offer shall be calculated as at the day the offer lapsed.

31.5 Requisitioning shareholder meetings after an offer becomes unconditional in all respects

Once an offeror requisitions a general meeting after its offer becomes unconditional in all respects to seek to appoint directors of the offeree company:

- (i) the offeree board must extend the fullest cooperation and convene the general meeting as soon as possible; and
- (ii) the offeree board must not, without shareholder approval or consent of the offeror, take or agree to take any action listed in paragraphs (a) to (e) of Rule 4 after the end of the offer period and until the conclusion of such general meeting.

32. Share repurchases

32.1 Code implications of share repurchases

If as a result of a share repurchase a shareholder's proportionate interest in the voting rights of the repurchasing company increases, such increase will be treated as an acquisition of voting rights for purposes of the Takeovers Code. As a result, a shareholder, or group of shareholders acting in concert, could obtain or consolidate control of a repurchasing company and thereby become obliged to make a mandatory offer in accordance with Rule 26. If so the Executive should be consulted at the earliest opportunity. In the case of a share repurchase by general offer or an off-market share repurchase, as such terms are defined in the Codes, the Executive will treat an application for a waiver from the requirement to make a mandatory offer in accordance with Rule 26 as if it were an application for a whitewash waiver in accordance with Note 1 on dispensations from Rule 26. The Executive will normally grant such a waiver if:-

- (a) the Takeovers Code implications of the share repurchase are disclosed in the repurchasing company's offer document;
- (b) the share repurchase is approved in accordance with applicable shareholder approval requirements of the Share Repurchase Code by those shareholders who could not become obliged to make a mandatory offer as a result of the share repurchase; and
- (c) a procedure on the lines of that set out in Note 1 on dispensations from Rule 26 of the Takeovers Code and Schedule VI is followed. (See also paragraph 9 of Schedule VI.)

For the purpose of Rule 22, dealings in relevant securities include share repurchases of the relevant securities of a repurchasing company.

Notes to Rule 32.1:

1. Responsibility for making an offer

If an offer obligation under this Rule 32.1 and Rule 26 is incurred and a dispensation is not granted, the prime responsibility for making the offer will attach to the principal member or members of the group of persons who are acting in concert and who, as a result of a share repurchase, obtain or consolidate control of the repurchasing company. In certain circumstances, the obligation to make such an offer may attach to other members of that group but no such obligation will attach to the company itself. However, the directors of the company and its principal shareholders may, depending on the

circumstances, be presumed to be acting in concert unless the contrary is established.

2. *A shareholder not acting in concert with the directors*

A shareholder who comes to exceed the limits in Rule 26.1 in consequence of a company's redemption or purchase of its own shares will not normally incur an obligation to make a mandatory offer unless that shareholder is a director, or the relationship of the shareholder with any one or more of the directors is such that the shareholder is, or is presumed to be, acting in concert with any of the directors. A shareholder who has appointed a representative to the board of the company will be treated for these purposes as a director. However, there is no presumption that all the directors (or any two or more directors) are acting in concert solely by reason of a proposed redemption or purchase by the company of its own shares, or the decision to seek shareholders' authority for any such redemption or purchase. The exception will not normally apply, and an obligation to make a mandatory offer may therefore be imposed, if a shareholder (or any relevant member of a group of shareholders acting in concert) has purchased shares at a time when he had reason to believe that such a redemption or purchase of its own shares by the company would take place.

32.2 Redemption or purchase of securities by the offeree company

(a) Shareholders' approval

During the course of an offer, or even before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent, no redemption or purchase by the offeree company of its own securities may, except in pursuance of a contract entered into earlier, be effected without the approval of the shareholders at a general meeting. The notice convening the meeting must include information about the offer or anticipated offer. Where an obligation or other special circumstance exists without a formal contract, the Executive must be consulted and its consent to proceed without a shareholders' meeting obtained (Rule 4 may be relevant).

(b) Public disclosure

For the purpose of Rule 22, dealings in relevant securities include the redemption or purchase of, or taking or exercising an option over, any of its own relevant securities by the offeree company. The total amount of securities of the relevant class remaining in issue following the redemption or purchase must also be disclosed.

(c) Disclosure in the offeree board circular

The offeree board circular must state the amount of relevant securities of the offeree company which the offeree company has redeemed or purchased during the period commencing 6 months prior to the offer period and ending with the latest practicable date prior to the posting of the document, and the details of any such redemptions and purchases, including dates and prices.

32.3 Redemption or purchase of securities by the offeror company

The offer document must state (in the case of a securities exchange offer only) the amount of relevant securities of the offeror which the offeror has redeemed or purchased during the period commencing 6 months prior to the offer period and the details of any such redemptions and purchases, including dates and prices.

(See also Rule 21.3.)

33. Inducement fees, break fees and standstill agreements

33.1 Inducement fees or break fees

In all cases where an inducement fee or break fee is proposed, certain safeguards must be observed. In particular, an inducement fee or break fee must be de minimis (normally no more than 1% of the offer value) and the offeree company board and its financial adviser must confirm to the Executive in writing that each of them believes that the fee is in the best interests of shareholders. Any inducement or break fee arrangement must be fully disclosed in the announcement made under Rule 3.5 and in the offer document. Relevant documents must be put on display in accordance with Rule 8.

The Executive should be consulted at the earliest opportunity in all cases where an inducement fee, break fee or any similar arrangement is proposed.

Note to Rule 33.1:

Arrangements to which ~~the~~ Rule 33.1 applies

An inducement fee or break fee is an arrangement which may be entered into between an offeror or a potential offeror and the offeree company pursuant to which a cash sum will be payable by the offeree company if certain specified events occur which have the effect of preventing the offer from proceeding or causing it to fail (e.g. the recommendation by the offeree company board of a higher competing offer).

This Rule 33.1 will also apply to any other favourable arrangements with an offeror or potential offeror which have a similar or comparable financial or economic effect, even if such arrangements do not actually involve any cash payment.

Such arrangements will include, for example, penalties, put or call options or other provisions having similar effects, regardless of whether such arrangements are considered to be in the ordinary course of business. In cases of doubt the Executive should be consulted.

33.2 Standstill agreements

Any agreement between the offeree company and its shareholders or other parties which restricts the ability of, or restrains, any person from making a general offer for the offeree company must be fully disclosed to its shareholders on a timely basis by the board of the offeree company. Failure to do so will normally result in the Executive requiring independent

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shareholders' approval of the legal action proposed to be taken by the board of the offeree company to enforce such agreements which could effectively frustrate an offer. A standstill agreement may be relevant for the purpose of considering whether the parties to such agreement are acting in concert. (See Note 6 to the definition of acting in concert.)

34. Shareholder solicitations

34.1 Information to be used in connection with shareholder solicitations

Any person proposing to solicit proxies, votes or acceptances of offers may only use for such purpose previously published information which remains accurate, and is not misleading at the time it is quoted.

34.2 Soliciting shareholders

Except with the consent of the Executive, shareholders, other than institutional shareholders, may only be solicited by staff of the financial adviser to the soliciting person who are fully conversant with the requirements of, and their responsibilities under, the Takeovers Code.

34.3 Consultation to be encouraged

Shareholders must not be put under pressure and must be encouraged to consult their professional advisers.

Notes to Rule 34:

1. *Consent to use other staff*

If it is impossible to use staff of the financial adviser to the soliciting person, the Executive may consent to the use of other people subject to:-

- (a) an appropriate script for staff being approved by the Executive;*
- (b) the financial adviser carefully briefing the staff prior to the start of the operation and, in particular, stressing:-*
 - (i) that staff must not depart from the script;*
 - (ii) that staff must decline to answer questions the answers to which fall outside the information given in the script; and*
 - (iii) the staff's responsibilities under General Principle 3; and*
- (c) the operation being supervised by the financial adviser.*

2. *New information*

If, in spite of this Rule 34, new information is given to some shareholders, such information must immediately be made generally available to shareholders in the manner described in Note 6 to Rule 8.1.

35. Dealings by connected exempt principal traders

35.1 Prohibited dealings

An exempt principal trader connected with an offeror or the offeree company must not carry out any dealings with the purpose of assisting the offeror or the offeree company, as the case may be.

Note to Rule 35.1:

Suspension of exempt status

Any dealings by an exempt principal trader connected with an offeror or the offeree company with the purpose of assisting an offeror or the offeree company, as the case may be, or any dealings outside the specified activities for which it has received exemption, will constitute a serious breach of the Takeovers Code. Accordingly, if the Executive determines that a principal trader has carried out such dealings, it will be prepared to rule that the principal trader should cease to enjoy exempt status for such period of time as the Executive may consider appropriate in the circumstances.

35.2 Dealings between offerors and connected exempt principal traders

An offeror and any person acting in concert with it must not deal as principal with an exempt principal trader connected with the offeror in relevant securities (as defined in Rule 22) of the offeree company during the offer period. To ensure compliance with this Rule 35.2, it may be necessary either for the offeror and any person acting in concert with it to refrain from dealing in relevant securities or for the principal trader to refrain from dealing as a principal in relation to such securities. The Executive must be consulted if a connected exempt principal trader believes that it has grounds to deal in relevant securities where such dealings cannot reasonably be expected to assist the offeror.

35.3 Assenting securities

Securities owned by an exempt principal trader connected with an offeror must not be assented to the offer until the offer becomes or is declared unconditional as to acceptances.

35.4 Voting

Securities owned by an exempt principal trader connected with an offeror or the offeree company must not be voted in the context of an offer.

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Note to Rule 35:

Disclosure of dealings

See Rule 22.4.

36. Obligations of other persons

In addition to the offeror, each of the principal members of a group of persons acting in concert with him may, according to the circumstances of the case, have the obligation to extend an offer.

The prime responsibilities under Rules 23, 24 and 26 normally attach to the person who makes the acquisition which imposes the obligation under the relevant Rule. If such person is not a principal member of the group acting in concert, the relevant obligation may attach to the principal member or members and, in exceptional circumstances, to other members of the group acting in concert. This could include a member of the group who does not hold any shares when the obligation arises. In this context, the Executive will not normally regard the underwriter of a mandatory offer, by virtue of his underwriting alone, as being a member of a group acting in concert and, therefore, responsible for making the offer or any other relevant obligations.

Code on Share Repurchases

CODE ON SHARE REPURCHASES

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1. Methods of share repurchase

A company may only engage in the following types of share repurchase:-

- (a) an on-market share repurchase;
- (b) an off-market share repurchase approved in accordance with Rule 2;
- (c) an exempt share repurchase; and
- (d) a share repurchase by general offer in accordance with the General Principles and Rules of the Codes.

A share repurchase may normally be made only by the company the shares of which are the subject of the share repurchase. Where a wholly owned subsidiary of a company has issued securities exercisable or convertible into shares of that company such subsidiary may redeem or repurchase such securities in accordance with the terms of their issue.

2. Off-market share repurchases

Off-market share repurchases must be approved by the Executive before a repurchasing company acquires any shares pursuant to such share repurchase. Such approval will normally be conditional upon the following:-

- (a) approval of the proposed off-market share repurchase by at least three-fourths of the votes cast on a poll by disinterested shareholders in attendance in person or by proxy at a general meeting of shareholders duly convened and held to consider the proposed transaction (see also Rule 2.9);
- (b) the notice of meeting convening such general meeting being accompanied by a circular containing, in addition to the information to be disclosed in an offer document by virtue of Rule 4 and, where applicable, Rule 5, the following:-
 - (i) the identity of the proposed offeree(s) and a description of its (their) business activities and its (their) relationship with the offeror, if any;
 - (ii) a description of the terms and conditions of the agreement(s) between the company and the proposed offeree(s); and
 - (iii) the advice of an independent financial adviser and the recommendation of an independent committee of the company's board of directors as to whether shareholders should approve or disapprove the off-market share repurchase proposal;
- (c) a certified copy of the resolution contemplated by Rule 2(a) being filed with the Executive within 3 days of the general meeting of shareholders at which such resolution is passed; and
- (d) a copy of the agreement(s) referred to in Rule 2(b)(ii) above being available for inspection by shareholders at the meeting convened to consider the off-market share repurchase proposal and during the period from the date of mailing the notice of meeting up to and including the date of such general meeting.

3. Shareholder approval

3.1 General meeting to approve a share repurchase by general offer

A share repurchase by general offer must be approved by a majority of the votes cast by shareholders in attendance in person or by proxy at a general meeting of the shareholders duly convened and held to consider the proposed share repurchase. Such general meeting shall be convened by a notice of meeting which is accompanied by the offer document (see also Rule 2.9). If shareholders do not approve the share repurchase, the offer must lapse.

A certified copy of the ordinary resolution contemplated by this Rule 3.1 must be filed with the Executive within 3 days of the general meeting of shareholders at which such resolution is passed.

Note to Rule 3.1:

Exemption from Companies Ordinance (Cap. 32)

The offeror must apply to the Executive for exemption from the requirements of section 49BA(3)(a) so as to allow the notice of general meeting to be accompanied by the offer document and for the offer document to be despatched within 21 days of the announcement. No fee will be charged for such application for exemption. (See Rule 5.1(c) and also paragraph 5.0 of Schedule V.)

3.2 Approval by independent shareholders

If a shareholder has a material interest in a share repurchase which is different from the interests of all other shareholders, the Executive will normally require the share repurchase to be approved by a majority of the votes cast by all other shareholders in attendance in person or by proxy at a general meeting of shareholders duly convened and held to consider the share repurchase.

3.3 Approval of delistings and privatisations by independent shareholders

If after a proposed share repurchase the shares of an offeror are to be delisted from the Stock Exchange or the company is to be privatised,

- (a) the directors of the offeror and any persons acting in concert with them will not be considered to be independent and therefore they may not vote at the meeting of shareholders convened in accordance with the Listing Rules; and

- (b) the share repurchase by general offer must be approved by:-
 - (i) at least 75% of the votes attaching to the shares owned by independent shareholders that are cast either in person or by proxy at a duly convened general meeting; and
 - (ii) the number of votes cast against the resolution being not more than 10% of the votes attaching to the shares owned by independent shareholders.

3.4 Different classes of equity share capital

If the offeror has more than one class of equity share capital, the Executive should be consulted as it may require the share repurchase to be made subject to approval by a majority of the votes cast by holders of each class of shares in attendance in person or by proxy at separate class meetings of such shareholders duly convened and held to consider the proposed share repurchase.

4. The offer document

4.1 Contents of offer document

A share repurchase by general offer shall be made by way of an offer document which shall contain the information required by Schedule III, together with any other relevant information to enable shareholders to reach a properly informed decision.

4.2 Securities that may be exercised or converted

An offer document need not be despatched to registered holders of securities that may be exercised or converted into shares of the class of shares that is the subject of a share repurchase by general offer if the offer price is lower than the exercise or conversion price of such securities by more than 10%. If in doubt the Executive should be consulted.

5. Application of the Takeovers Code to sShare repurchases by general offer

5.1 Application of Takeovers Code

~~Share repurchases by general offer must be conditional on the approval of shareholders in accordance with Rule 3 and must be made in accordance with the Rules of this Share Repurchase Code and the applicable Rules of the Takeovers Code. In all cases an offeror must consult the Executive at an early stage to determine the applicability to the proposed share repurchase by general offer of the provisions~~Rules of the Codes and the Notes thereto.

In the case of a share repurchase by general offer seeking to privatise or delist the company, all provisionsRules of the Takeovers Code will normally apply. In the case of a share repurchase by general offer or off-market share repurchase which involves a "whitewash", in addition to the Rules set out in this Rule 5, Note 1 on dispensations from Rule 26 of the Takeovers Code and Schedule VI of the Codes would also apply.

In all other share repurchases by general offer, and where applicable, in the case of off-market share repurchases, the following Rules of the Takeovers Code will normally apply:-

- (a) Rule 1.4;
- (b) Rules 2.1; ~~2.2~~ and 2.6-~~2.9~~2.11;
- (c) Rules 3.2 and 3.4-3.7;
- (d) Rule 5;
- (e) Rules 8.1, 8.2, 8.5 and 8.6;
- (f) Rule 9;
- (g) Rules 10.1-10.9 and 10.11;
- (h) Rules 11 and 12;
- (i) Rules 15-20;
- (j) Rules 21.1, 21.3, 21.4 and 21.6;
- (k) Rules 22 and 23;
- (l) Rules 24.1 and 24.3;

- (m) Rule 25;
- (n) Rule 27;
- (o) Rule 29;
- (p) Rule 30.1;
- (q) Rules ~~32.1 and~~ 32.3; and
- (r) Rules 34 and 35.

Note to Rule 5.1:

Notes to Rules of the Takeovers Code

In the case of a number of the Rules of the Takeovers Code listed above in this Rule 5.1 that may be applicable to share repurchases by general offer some of the Notes to such Rules may not be relevant and the Executive should be consulted.

5.2 Excluded shareholders

Where an offeror has shareholders located in a jurisdiction the laws of which prohibit a share repurchase by general offer to be made in accordance with the requirements of the Codes, the Executive must be consulted. The Executive will be concerned to ensure that the interests of such shareholders are not unduly prejudiced.

5.3 Pro rata entitlement

Share repurchases by general offer must be made to all shareholders of the class and arrangements must be made for those shareholders who wish to do so to accept in full for the relevant percentage of their holdings. Shares tendered in excess of this percentage must be accepted by the offeror from each shareholder in the same proportion as the number tendered to the extent necessary to enable the offeror to obtain the total number of shares for which the offer has been made.

5.4 On-market share repurchases

An offeror shall not engage in an on-market share repurchase following the announcement of a share repurchase by general offer up to and including the date share repurchase by general offer closes, lapses or is withdrawn, as the case may be.

6. Takeovers Code implications of share repurchases

If as a result of a share repurchase a shareholder's proportionate interest in the voting rights of an offeror increases, such increase will be treated as an acquisition for the purposes of the Takeovers Code and Rule 32 of the Takeovers Code shall apply.

7. Prohibition on distributions

A company shall not announce or engage in a distribution of shares following the announcement of a share repurchase for the period beginning on the date of such announcement and ending on the 31st day immediately following completion or withdrawal of the share repurchase.

This Rule 7 will not normally apply to share distributions which do not involve the raising of capital such as bonus issues and dividends in specie. Any person proposing to engage in a share distribution during the period contemplated by this Rule 7 should consult the Executive in advance of such distribution and any announcement thereof.

8. Waivers

The Executive has discretion to waive compliance with requirements of the Share Repurchase Code particularly if any party to a share repurchase considers that compliance would be unduly burdensome, e.g. in the case of a share repurchase by general offer to odd lot shareholders or a share repurchase by general offer for non-voting fixed participation shares which are more analogous to debt securities than equity securities.

**Schedules
of the Codes on
Takeovers and Mergers
and
Share Repurchases**

SCHEDULES*

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<ul style="list-style-type: none"> • All terms used in Schedules I, II, III, VI, and VII <u>and VIII</u> have the meanings attributed to them by the definitions of the Codes. 		

SCHEDULE I

OFFER DOCUMENT FOR TAKEOVERS AND MERGERS

The offer document should contain the following statements in a prominent position:-

IMPORTANT

If you are in doubt as to any aspect of this offer, you should consult a ~~stockbroker or other registered dealer~~licensed securities dealer or registered institution in securities, a bank manager, solicitor, professional accountant, or other professional adviser.

If you have sold all your shares in you should at once hand this document and the accompanying form to the purchaser or to the licensed securities dealer or registered institution in securities ~~bank or stockbroker or other agent~~ through whom the sale was effected for transmission to the purchaser.

Except with the consent of the Executive, the document should include the following information:-

The Offeror

1. The name and address of the offeror and any financial adviser or other person making the offer on behalf of the offeror, and the principal members of the offeror's concert group. Unless otherwise agreed with the Executive, the offer document must contain a statement as to whether or not any securities acquired in pursuance of the offer will be transferred, charged or pledged to any other persons, together with the names of the parties to any such agreement, arrangement or understanding and particulars of all securities in the offeree company held by such persons, or a statement that no such securities are held. Details, including the terms and conditions of such agreement, arrangement or understanding and any related charges or pledges which may result in the transfer of voting rights, should also be disclosed.
2. If either the offeror or any principal member of its concert group is a company, in respect of such companies the identity of the ultimate controlling shareholders, and the names of the directors and the directors of their ultimate parent companies, or where there is a listed company in the chain between such companies ies and their ultimate parent companies, the directors of such listed company.

Intentions regarding the offeree company and its employees

3. (i) The offeror's intentions regarding the continuation of the business of the offeree company;
- (ii) the offeror's intentions regarding any major changes to be introduced in the business, including any redeployment of the fixed assets of the offeree company;
- (iii) the long-term commercial justification for the proposed offer; and
- (iv) the offeror's intentions with regard to the continued employment of the employees of the offeree company and of its subsidiaries.

Shareholdings and dealings

4. (i) The shareholdings of the offeror in the offeree company;
- (ii) the shareholdings in the offeror (in the case of a securities exchange offer only) and in the offeree company in which directors of the offeror are interested;
- (iii) the shareholdings in the offeror (in the case of a securities exchange offer only) and in the offeree company which any persons acting in concert with the offeror own or control (with the names of such persons acting in concert);
- (iv) the shareholdings in the offeror (in the case of a securities exchange offer only) and in the offeree company owned or controlled by any persons who, prior to the posting of the offer document, have irrevocably committed themselves to accept or reject the offer, together with the names of such persons; and
- (v) the shareholdings in the offeror (in the case of a securities exchange offer only) and in the offeree company owned or controlled by a person with whom the offeror or any person acting in concert with the offeror has any arrangement of the kind referred to in Note 8 to Rule 22 of the Takeovers Code.

If in any of the above categories there are no shareholdings, this fact should be stated. This will not apply to categories (iv) or (v) if there are no such irrevocable commitments or arrangements.

If any party whose shareholdings are required by this paragraph 4 to be disclosed, including a party who has no shareholdings, has dealt for value in the shares in question during the period beginning 6 months prior to the offer period and ending with the latest practicable date prior to the posting of the

offer document, the details, including dates and prices, must be stated. If no such dealings have taken place, this fact should be stated.

Notes:

1. *Relevant shareholdings*

References in this paragraph 4 to shareholdings should be taken to mean:-

- (a) in the case of shareholdings in the offeree company, holdings of:-*
 - (i) securities which are being offered for or which carry voting rights;*
 - (ii) convertible securities, warrants, options and derivatives in respect of (i); and*
- (b) in the case of shareholdings in the offeror company, holdings of:-*
 - (i) equity share capital;*
 - (ii) securities which carry substantially the same rights as any to be issued as consideration for the offer; and*
 - (iii) convertible securities, warrants, options and derivatives in respect of (i) or (ii).*

2. *Options and derivatives*

Where holdings of options are disclosed, the exercise period and the exercise price must be given. Where dealings involving options are disclosed, the date of taking or granting the option, the number of securities under the option, the exercise period, the exercise price and any option money paid or received must be stated. The exercise of an option must also be disclosed; the date of exercise, the exercise price and any option money paid or received must be stated.

Where holdings of derivatives are disclosed, the number of reference securities to which they relate (when relevant), the maturity date and the reference price must be given. Where dealings involving derivatives are disclosed, the number of reference securities to which they relate, the date of entering into or closing out of the derivative, the maturity date and the reference price must be stated. In each case, full details must be given so that the nature of the holding or dealing can be fully understood.

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3. *Meaning of “interested”*

References to directors being “interested” in shareholdings are interpreted in the manner described in Part XV of the Securities and Futures Ordinance (Cap. 571).

4. *Aggregation*

There may be cases where no useful purpose would be served by listing a large number of transactions. In such cases the Executive will accept in documents some measure of aggregation of dealings by a person provided that no significant dealings are thereby concealed. The following approach is normally acceptable:-

- (i) for dealings during the offer period and the month prior to its commencement there should be no aggregation;*
- (ii) for dealings in the 2 months prior to that period, purchases and sales in that period can be aggregated on a daily basis; and*
- (iii) for dealings in the 3 months prior to that period, purchases and sales can be aggregated on a weekly basis.*

Purchases and sales should not be netted off and the highest and lowest prices should be stated. A full list of all dealings should be sent to the Executive and should be made available for inspection.

5. *Irrevocable commitments*

References to irrevocable commitments to accept or reject an offer must make it clear if there are circumstances in which they cease to be binding, for example, if a higher offer is made.

6. *Discretionary clients*

Shareholdings of the discretionary clients of fund managers connected with an offeror, unless they are exempt fund managers, and their dealings since the commencement of the offer period may be relevant and the Executive should be consulted.

Partial offer

- 5. In the case of a partial offer, the reasons for making a partial offer rather than a full offer.

Shares offered for and dividends

6. Precise particulars of the securities in respect of which the offer is made and a statement whether they are to be acquired cum or ex any dividend or other distribution which has been or may be declared.
- 6A. Whether, in the event of a person accepting the offer, the offeror will pay any stamp duty which that person will become liable to pay in respect of the transaction under the Stamp Duty Ordinance (Cap.117) or if the offeror will not so pay the stamp duty, the rate of the stamp duty that such person will become liable to pay in respect of the transaction under that Ordinance.

Conditions of offer

7. The price or other consideration to be paid for the securities.
8. All conditions of the offer and in particular whether the offer is conditional upon acceptances being received in respect of a minimum number and the last day on which the offer can become unconditional as to acceptances. The offer document must include particulars of all documents required, and procedures to be followed, for acceptance of the offer.
9. A statement whether or not the offeror intends to avail itself of any powers of compulsory acquisition.

Market prices of offeree company's and offeror's securities

10. (a) The closing price on the Stock Exchange (or on a stock exchange where they are listed) of the securities of the offeree company which are the subject of the offer:-
 - (i) on the latest practicable date prior to publication of the offer document;
 - (ii) on the last business day immediately preceding the date of the initial announcement, if any, and on the last business day immediately preceding the date of the offer announcement under Rule 3.5 of the Takeovers Code ~~of the offer~~; and
 - (iii) at the end of each of the ~~6~~-calendar months during the period commencing 6 months preceding the commencement of the offer period and ending on the latest practicable date prior to the posting of the offer document ~~date of the initial announcement~~.

If any of the securities are not so listed, any information available as to the number and price of transactions which have taken place during the

period stipulated in (iii) above ~~preceding 6 months~~ should be stated together with the source, or an appropriate negative statement.

- (b) The highest and lowest closing market prices with the relevant dates during the period ~~between the start of the commencing~~ 6 months preceding the commencement of the offer period ~~date of the initial announcement~~ and ending on the latest practicable date prior to the posting of the offer document.
- (c) If any document issued by the offeror contains a comparison of the value of the offer with previous prices of the offeree company's securities, a comparison between the current value of the offer and the price of the offeree company's securities on the last business day prior to the commencement of the offer period must be prominently included, no matter what other comparisons are made.

Such information should also be provided for securities of the offeror if the consideration for the offer involves such securities.

Resources for offer

- 11. Where the offer consists of, or includes, cash or any other assets except new securities to be issued by the offeror company, the offer document must include confirmation by a financial adviser or by another appropriate independent party that resources are available to the offeror sufficient to satisfy full acceptance of the offer.

Financial information

- 12. (a) In the case of a securities exchange offer the following information about the offeror:-
 - (i) for the last 3 financial years for which the information has been published, turnover, net profit or loss before and after taxation, the charge for tax, extraordinary items, exceptional items, minority interests, the amount absorbed by dividends, and earnings and dividends per share;
 - (ii) a statement of the assets and liabilities as shown in the last published audited accounts;
 - (iii) a cash flow statement if provided in the last published audited accounts;
 - (iv) any other primary statement shown in the last published audited accounts;

- (v) all material changes in the financial or trading position or outlook of the offeror subsequent to the last published audited accounts or a statement that there are no known material changes;
 - (vi) details relating to the items referred to in paragraph 12(a)(i) of this Schedule I above in respect of any interim statement or preliminary announcement made since the last published audited accounts; ~~and~~
 - (vii) significant accounting policies together with any points from the notes to the relevant published accounts which are of major relevance to an appreciation of the information contained in paragraphs 12(a)(i) to (vi) of this Schedule I above;
 - (viii) details of any qualification contained in the auditors' report in respect of each of the last 3 financial years or a statement that there is no such qualification; and
 - (ix) where, because of a change in accounting policy, figures are not comparable to a material extent, this should be disclosed and the approximate amount of the resultant variation should be stated.
- ~~(b) Where, because of a change in accounting policy, figures are not comparable to a material extent, this should be disclosed and the approximate amount of the resultant variation should be stated.~~
- (be) Except for cash offers seeking to privatise the offeree company, and without any waiver of the acceptance condition, All offer documents must contain a description of how the offer is to be financed and the source of the finance. The principal lenders or arrangers of such finance must be named. Where the offeror intends that the payment of interest on, repayment of or security for any liability (contingent or otherwise) will depend to any significant extent on the business of the offeree company, a description of the arrangements contemplated will be required. Where this is not the case, a negative statement to this effect must be made.

Notes:

1. *Where the offeror is a subsidiary company*

The Executive will normally look through unlisted subsidiaries in interpreting this paragraph 12 of Schedule I unless, with the approval of the Executive, the subsidiary in question is regarded as being of sufficient substance in relation to the group and the offer. Accordingly

if the offeror is part of a group, information will normally be required on the ultimate holding company in the form of group accounts.

2. *Further information requirements*

If the offeror is not listed on the Stock Exchange, in addition to the above requirements, the Executive would normally expect it to include a general description of the business interests of the offeror and/or other person(s) concerned and details of those assets which the Executive considers may be relevant to the business of the offeree company.

3. *Partial offers*

Where the offer is a partial offer, the offer document must contain the information required under paragraph 12(a) of this Schedule I, whether the consideration is securities or cash.

Arrangements in connection with offer

13. Details of any benefit which will be given to any director of the offeree company as compensation for loss of office or otherwise in connection with the offer.

14. A statement as to whether or not any agreement, arrangement or understanding (including any compensation arrangement) exists between the offeror or any person acting in concert with it and any of the directors, recent directors, shareholders or recent shareholders of the offeree company having any connection with or dependence upon the offer, and full particulars of any such agreement, arrangement or understanding.

14A. Details of any agreements or arrangements to which the offeror is party which relate to the circumstances in which it may or may not invoke or seek to invoke a condition to its offer and the consequences of its doing so, including details of any break fees payable as a result.

Takeovers Code obligations

15. (i) A statement of the obligations of the offeror and the rights of the offeree company shareholders under Rules 15, 16, 17, 19 and 20 of the Takeovers Code.

(ii) The address of the websites on which documents are displayed under Note 1 to Rule 8 of the Takeovers Code.

Further information in cases of securities exchange offers

The following additional information should be given by the offeror when it is offering its securities in exchange for the securities of the offeree company:

16. The nature and particulars of its business and its financial and trading prospects.
17. The date and country of its incorporation.
18. The address of its principal office in Hong Kong.
19. The authorised and issued share capital and the rights of the shareholders in respect of capital, dividends and voting.
20. Whether or not the securities being offered will rank pari passu with the existing issued securities of the offeror, and if not, a precise description of the rights of the holders of the securities, including as to ranking for dividends and capital.
21. Details of shares issued and shares repurchased since the end of the last financial year of the offeror.
22. Details of options, warrants and conversion rights affecting shares in the offeror.
23. Details of any re-organisation of capital during the 2 financial years preceding the commencement of the offer period.
24. Details of any bank overdrafts or loans, or other similar indebtedness, mortgages, charges, or guarantees or other material contingent liabilities of the offeror and any of its subsidiaries, or, if there are no such liabilities, a statement to that effect. Such details should be as of a date which is not more than 3 months preceding the latest practicable date prior to the posting of the document.
25. Details of any material litigation to which the offeror is, or may become, a party.
26. Details of every material contract entered into after the date 2 years before the commencement of the offer period, not being a contract entered into in the ordinary course of the business carried on or intended to be carried on by the offeror or any of its subsidiaries, including particulars of dates, parties, principal terms and conditions and any consideration passing to or from the offeror or any of its subsidiaries.

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27. How and when the documents of title to the securities will be issued.
28. Whether and in what manner the emoluments of the directors of the offeror will be affected by the acquisition of the offeree company or by any other associated transaction. If there will be no effect, this must be stated.

Note:

Commissions etc.

Information given under this paragraph 28 should include any alterations to fixed amounts receivable or, as far as practicable, the effect of any factor governing commissions or other variable amounts receivable. Grouping or aggregating the effect of the transaction on the emoluments of several or all of the directors will normally be acceptable.

29. The effect of full acceptance of the offer upon the offeror's assets, liabilities, profits and business which may be significant for a proper appraisal of the offer. This does not require a profit forecast to be made.

Estimated value of unlisted paper consideration

30. When the offer involves the issue of unlisted securities, an estimate of the value of such securities by an appropriate adviser, together with the assumptions and methodology used in arriving at the value.

No set-off of consideration

31. A statement to the effect that settlement of the consideration to which any shareholder is entitled under the offer will be implemented in full in accordance with the terms of the offer without regard to any lien, right of set-off, counterclaim or other analogous right to which the offeror may otherwise be, or claim to be, entitled against such shareholder.

Note:

Consent to set-off

The Executive would only grant consent to an offeror to set-off consideration where a shareholder consents to such set-off or in exceptional circumstances.

Arrangements in relation to dealings

32. Any arrangements of the kind referred to in the third paragraph of Note 8 to Rule 22 of the Takeovers Code which exist between the offeror, or any person acting in concert with the offeror, and any other person; if there are no such arrangements, this should be stated. If the directors of the offeror or their financial advisers are aware of any such arrangements between any other associate of the offeror and any other person, such arrangements must also be disclosed.

SCHEDULE II

OFFEREE BOARD CIRCULAR FOR TAKEOVERS AND MERGERS

Except with the consent of the Executive, the offeree board circular should include the following information:-

Views of offeree board

1. The names of the directors of the offeree company and whether they recommend that the shareholders should accept or reject the offer, or a statement that the directors are unable to make a recommendation (with reasons for the recommendation or for making no recommendation). A copy of the written advice of the offeree company's financial advisers must also be given.

Notes:

1. *When a board has effective control*

A board whose shareholdings confer control over a company which is the subject of an offer must carefully examine the reasons behind the advice it gives to shareholders and must be prepared to explain its decisions publicly. Shareholders in companies which are effectively controlled by the directors must accept that in respect of any offer the attitude of their board will be decisive.

2. *Split boards*

If the board of the offeree company is split in its views on an offer, the directors who are in a minority should also publish their views. The Executive will normally require that these views be circulated by the offeree company.

3. *Conflicts of interest*

Where a director has a conflict of interest, he should not normally be joined with the remainder of the board in the expression of its views on the offer, and the nature of the conflict should be clearly explained to shareholders.

4. *Financial adviser's consent*

The circular must, unless issued by the financial adviser in question, include a statement that the financial adviser has given and not withdrawn his consent to the issue of the circular with the inclusion of

his recommendation or opinion in the form and context in which it is included.

5. *Management buy-outs*

If the offer is a management buy-out or similar transaction, a director will normally be regarded as having a conflict of interest where it is intended that he should have any continuing role (whether in an executive or non-executive capacity) in either the offeror or offeree company in the event of the offer being successful.

6. *Views of the board on the offeror's plans for the company and its employees*

The board of the offeree company should, insofar as relevant, comment upon the statements in the offer document regarding the offeror's intentions in respect of the offeree company and its employees.

Shareholdings and dealings

2. (i) The shareholdings of the offeree company in the offeror;
- (ii) the shareholdings in the offeree company and in the offeror in which directors of the offeree company are interested;
- (iii) the shareholdings in the offeree company and (in the case of a securities exchange offer only) in the offeror owned or controlled by a subsidiary of the offeree company, by a pension fund of the offeree company or of a subsidiary of the offeree company, or by an adviser to the offeree company as specified in class (2) of the definition of associate but excluding exempt principal traders;
- (iv) the shareholdings in the offeree company and (in the case of a securities exchange offer only) in the offeror owned or controlled by a person who has an arrangement of the kind referred to in Note 8 to Rule 22 of the Takeovers Code with the offeree company or with any person who is an associate of the offeree company by virtue of classes (1), (2), (3) and (4) of the definition of associate;
- (v) except with the consent of the Executive, the shareholdings in the offeree company and (in the case of a securities exchange offer only) in the offeror which are managed on a discretionary basis by fund managers (other than exempt fund managers) connected with the offeree company (the beneficial owner need not be named); and
- (vi) whether the directors of the offeree company intend, in respect of their own beneficial shareholdings, to accept or reject the offer.

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If in any of the above categories, other than category (v), there are no shareholdings, then this fact should be stated. This will not apply to category (iv) above if there are no such arrangements.

If any person whose shareholdings are required by categories (i) or (ii) above to be disclosed (whether there is an existing holding or not) has dealt for value in the shares in question during the period beginning 6 months prior to the offer period and ending with the latest practicable date prior to the posting of the offeree board circular, the details, including dates and prices, must be stated.

If any person whose shareholdings are required by categories (iii), (iv) or (v) above to be disclosed (whether there is an existing holding or not) has dealt for value in the shares in question during the offer period and ending with the latest practicable date prior to the posting of the offeree board circular, the details, including dates and prices, must be stated.

In all cases, if no such dealings have taken place this fact should be stated.

Notes:

1. *When directors resign*

When, as part of the transaction leading to an offer being made, some or all of the directors of the offeree company resign, the foregoing requirements of this paragraph 2 of Schedule II apply to them and their shareholdings and dealings must be disclosed in the offeree board circular in the usual way.

2. *Arrangements in relation to dealings*

The circular from the offeree board advising shareholders on an offer, whether recommending acceptance or rejection of the offer, must disclose any arrangements of the kind referred to in the third paragraph of Note 8 to Rule 22 of the Takeovers Code which exist between the offeree company, or any person who is an associate of the offeree company by virtue of classes (1), (2), (3) or (4) of the definition of associate, and any other person; if there are no such arrangements, this should be stated. If the directors or their financial advisers are aware of any such arrangements between any other associate of the offeree company and any other person, such arrangements must also be disclosed.

3. *Notes to paragraph 4 of Schedule I*

The Notes to paragraph 4 of Schedule I apply equally to this paragraph 2 of Schedule II.

Share capital of offeree company

3. The authorised and issued share capital and the rights of the shareholders in respect of capital, dividends and voting.
4. The number of shares issued since the end of the last financial year of the offeree company.
5. Details of options, warrants and conversion rights affecting shares in the offeree company.

Financial information

6. (a) The following information about the offeree company:-
 - (i) for the last 3 financial years for which the information has been published, turnover, net profit or loss before and after taxation, the charge for tax, extraordinary items, exceptional items, minority interests, the amount absorbed by dividends, and earnings and dividends per share;
 - (ii) a statement of the assets and liabilities shown in the last published audited accounts;
 - (iii) a cash flow statement if provided in the last published audited accounts;
 - (iv) any other primary statement shown in the last published audited accounts;
 - (v) all material changes in the financial or trading position or ~~prospects~~outlook of the offeree company subsequent to the last published audited accounts or a statement that there are no known material changes;
 - (vi) details relating to items referred to in paragraph 6(a)(i) of this Schedule II above in respect of any interim statement or preliminary announcement made since the last published audited accounts; ~~and~~
 - (vii) significant accounting policies together with any points from the notes to the relevant published accounts which are of major relevance to an appreciation of the information contained in paragraphs 6(a)(i) to (vi) of this Schedule II above; and

(viii) details of any qualification contained in the auditors' report in respect of each of the last 3 financial years or a statement that there is no such qualification.

(b) Where, because of a change in accounting policy, figures are not comparable to a material extent, this should be disclosed and the approximate amount of the resultant variation should be stated.

7. Details of any bank overdrafts or loans, or other similar indebtedness, mortgages, charges, or guarantees or other material contingent liabilities of the offeree company and any of its subsidiaries, or, if there are no such liabilities, a statement to that effect. Such details should be as of a date which is not more than 3 months preceding the latest practicable date prior to the posting of the document.
8. Details of any material litigation to which the offeree company is, or may become, a party.

Material contracts

9. Details of every material contract entered into ~~not~~ after the date 2 years before the commencement of the offer period, not being a contract entered into in the ordinary course of business carried on or intended to be carried on by the offeree company or any of its subsidiaries, including particulars of dates, parties, principal terms and conditions and any consideration passing to or from the offeree company or any of its subsidiaries.

Arrangements affecting directors

10. Details of any benefit to be given to any director of the offeree company as compensation for loss of office or otherwise in connection with the offer.
11. Details of any agreement or arrangement between any director of the offeree company and any other person which is conditional on or dependent upon the outcome of the offer or otherwise connected with the offer.
12. Details of any material contract entered into by the offeror in which any director of the offeree company has a material personal interest.

Directors' service agreements

13. Details of any service contracts with the offeree company or any of its subsidiaries or associated companies in force for directors of the offeree company:

- (i) which (including both continuous and fixed term contracts) have been entered into or amended within 6 months before the commencement of the offer period;
- (ii) which are continuous contracts with a notice period of 12 months or more; or
- (iii) which are fixed term contracts with more than 12 months to run irrespective of the notice period.

For disclosures made under paragraph (i), particulars must be given of the earlier contracts (if any) which have been replaced or amended as well as the current contracts.

If no disclosures are required to be made under this paragraph, this should be stated.

~~Details of any service contracts with the offeree company or any of its subsidiaries or associated companies in force for directors of the offeree company which have more than 12 months to run. If any contracts have been entered into or amended within 6 months before the commencement of the offer period, particulars must be given in respect of the earlier contracts (if any) which have been replaced or amended as well as in respect of the current contracts. If there have been none, this should be stated.~~

Notes:

1. Particulars to be disclosed:-

- (a) *the name of the director under contract;*
- (b) *the expiry date of the contract;*
- (c) *the amount of fixed remuneration payable under the contract, excluding arrangements for pension payments; and*
- (d) *the amount of any variable remuneration payable under the contract (e.g. commission on profits) with details of the formula for calculating such remuneration.*

Where there is more than one contract, a statement of the aggregate remuneration payable is normally regarded as fulfilling the requirements under (c) of this Note, except to the extent that this method would conceal material anomalies which ought to be disclosed (e.g. because one director is remunerated at a very much higher rate than the others). In cases where contracts have been replaced or amended, however, the particulars of remuneration payable under

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both the existing and the earlier contracts must relate to each individual separately.

2. *Recent increases in remuneration*

The Executive will regard as an amendment to a service contract any case where the remuneration of an offeree company director (with a service contract with more than 12 months to run) is increased materially within 6 months of the date of the offeree board circular. Therefore, any such material increase must be disclosed in the offeree board circular and the current and previous levels of remuneration stated.

14. The address of the websites on which documents are displayed under Note 1 to Rule 8 of the Takeovers Code.

SCHEDULE III

OFFER DOCUMENT FOR SHARE REPURCHASES BY GENERAL OFFER

Except with the consent of the Executive, ~~t~~The offer document should contain in a prominent position the following statements:-

IMPORTANT

If you are in doubt as to any aspect of this offer, you should consult a ~~stockbroker or other registered dealer~~licensed securities dealer or registered institution in securities, a bank manager, solicitor, professional accountant, or other professional adviser.

If you have sold all your shares in you should at once hand this document and the accompanying form to the purchaser or the licensed securities dealer or registered institution in securities ~~bank or stockbroker or other agent~~ through whom the sale was effected for transmission to the purchaser.

The offer document should include the following information:-

The offeror

1. The date when the document is despatched, the name and address of the offeror and any financial adviser or other person making the offer on behalf of the offeror, and the principal members of the offeror's concert group.

Intentions of offeror

2. The offeror's intention, if any, to rely upon section 168B of the Companies Ordinance (Cap. 32) or any comparable provision of applicable company law.
3. The offeror's intention, if any, to continue to meet the public float requirements of Rule 8.08 of the Listing Rules.

Intentions of potential new controlling shareholder

4. The Takeovers Code implications of the proposed share repurchase and, if the repurchase could result in a change of control, as that term is defined in the Takeovers Code, the intentions of the potential new controlling shareholder(s) as regards:-
 - (a) the continuation of the business of the offeror;
 - (b) any major changes to be introduced to the offeror's business, including any redeployment of fixed assets; and

- (c) the continued employment of the employees of the offeror and its subsidiaries.

Shareholdings and dealings

- 5. (i) The shareholdings in the offeror in which directors of the offeror are interested;
- (ii) the shareholdings in the offeror in which any persons acting in concert with the directors of the offeror are interested (with the names of such persons acting in concert);
- (iii) the shareholdings in the offeror in which any persons who, prior to the posting of the offer document, have irrevocably committed themselves to accept or reject the offer are interested, together with the names of such persons; and
- (iv) the shareholdings of each shareholder of the offeror which holds 10% or more of the voting rights of the offeror;

and the percentage which such numbers represent of the offeror's outstanding share capital and the identity of each such person.

If in any of the above categories there are no shareholdings, this fact should be stated. This will not apply to categories (iii) or (iv) if there are no such irrevocable commitments or shareholders.

If any party whose shareholdings are required by this paragraph 5 to be disclosed, including a party who has no shareholdings, has dealt for value in the shares in question during the period beginning 6 months prior to the offer period and ending with the latest practicable date prior to the posting of the offer document, the details, including dates and prices, must be stated. If no such dealings have taken place, this fact should be stated. This will not apply to category (iv) above.

Notes:

1. Relevant shareholdings

References in this paragraph 5 to shareholdings should be taken to mean holdings of:-

- (i) securities which are being offered for or which carry voting rights; and*
- (ii) convertible securities, warrants, options and derivatives in respect of (i).*

2. *Notes to paragraph 4 of Schedule I*

Notes 2 to 6 to paragraph 4 of Schedule I apply equally to this paragraph 5 of Schedule III.

6. Where known after reasonable inquiry, the intentions of each of the persons referred to in paragraph 5 of this Schedule III as regards acceptance of the offer including the number of shares to be tendered to the offer by each such person and the percentage which such number represents of their entire holdings. If such intentions cannot be determined after reasonable inquiry, a statement to such effect.
7. Assuming the offer is successful, the effect which the offer will have on the percentage voting rights of the persons referred to in paragraph 5 of this Schedule III.

~~Partial offer~~ Terms of the share repurchase

8. The reasons for the proposed share repurchase and for the number of shares proposed to be repurchased.
9. ~~In the case of a partial offer~~ The pro rating and odd lot procedures of the offer.

Shares offered for and dividends

10. Particulars of the class and number of shares to be repurchased and a statement as to whether the shares to be repurchased are to be acquired cum or ex any dividend or other distribution which has been or may be declared.

Conditions of offer

11. The consideration to be offered for the shares.
12. All conditions of the offer and in particular whether the offer is conditional upon acceptances being received in respect of a minimum number and the last day on which the offer can become unconditional as to acceptances. The offer document must include particulars of all documents required, and procedures to be followed, for acceptance of the offer.

Market prices of shares

13. (a) The closing price on the Stock Exchange (or on a stock exchange where they are listed) of the shares which are the subject of the offer:-
- (i) on the latest practicable date prior to publication of the offer document;

- (ii) on the last business day immediately preceding the date of the initial announcement, if any, and on the last business day immediately preceding the date of the offer announcement under Rule 3.5 of the Takeovers Code of the offer;
 - (iii) at the end of each of the ~~6~~-calendar months during the period commencing 6 months preceding the commencement of the offer period and ending on the latest practicable date prior to the posting of the offer document ~~preceding the date of the initial announcement;~~ and
 - (iv) if any of the shares are not so listed, any information available as to the number and price of transactions which have taken place during the period stipulated in (iii) above ~~preceding 6 months~~—should be stated together with the source, or an appropriate negative statement.
- (b) The highest and lowest closing market prices with the relevant dates during the period ~~between the start of the~~commencing 6 months preceding the commencement of the offer period~~date of the initial announcement~~ and ending on the latest practicable date prior to the posting of the offer document.
- (c) If any document issued by the offeror contains a comparison of the value of the offer with previous prices of the offeree company's shares, a comparison between the current value of the offer and the price of the offeree company's shares on the last business day prior to the commencement of the offer period must be prominently included, no matter what other comparisons are made.

Resources for offer

14. Where the offer is in cash, or includes an element of cash, confirmation by a financial adviser or by another appropriate independent party that resources are available to the offeror sufficient to satisfy full acceptance of the offer.
15. A description of how the offer is to be financed and the source of the finance. If funds are to be raised or borrowed for such purpose, the terms and conditions of such arrangements and the names of the principal lenders or arrangers of such finance.

Financial information

16. (a) The following information about the offeror:-
 - (i) for the last 3 financial years for which the information has been published, turnover, net profit or loss before and after taxation,

the charge for tax, extraordinary items, exceptional items, minority interests, the amount absorbed by dividends, and earnings and dividends per share;

- (ii) a statement of the assets and liabilities as shown in the last published audited accounts;
- (iii) a cash flow statement if provided in the last published audited accounts;
- (iv) any other primary statement shown in the last published audited accounts;
- (v) all material changes in the financial or trading position or outlook of the offeror subsequent to the last published audited accounts or a statement that there are no known material changes;
- (vi) details relating to the items referred to in (i) of this paragraph 16(a) in respect of any interim statement or preliminary announcement made since the last published audited accounts; ~~and~~
- (vii) significant accounting policies together with any points from the notes to the relevant published accounts which are of major relevance to an appreciation of the information contained in (i) to (vi) of this paragraph 16(a); and
- (viii) details of any qualification contained in the auditors' report in respect of each of the last 3 financial years or a statement that there is no such qualification.

(b) Where, because of a change in accounting policy, figures are not comparable to a material extent, this should be disclosed and the approximate amount of the resultant variation should be stated.

17. The nature and particulars of its business and its financial and trading prospects.
18. Details of any bank overdrafts or loans, or other similar indebtedness, mortgages, charges, or guarantees or other material contingent liabilities of the offeror and any of its subsidiaries, or, if there are no such liabilities, a statement to that effect. Such details should be as of a date which is not more than 3 months preceding the latest practicable date prior to the posting of the document.
19. Details of any material litigation to which the offeror is, or may become, a party.

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20. The effect which the share repurchase will have on the offeror's earnings per share, net assets per share, liabilities and working capital and, if materially adverse, an explanation of how such effects will be addressed or an appropriate negative statement.

Share capital

21. The authorised and issued share capital and the rights of the shareholders in respect of capital, dividends and voting.
22. Details of shares issued and shares repurchase since the end of the last financial year of the offeror.
23. Details of options, warrants and conversion rights affecting shares in the offeror.
24. Details of any re-organisation of capital during the 2 financial years preceding the commencement of the offer period.
25. The number and price of shares of the offeror that were repurchased by the offeror during the 12 month period immediately preceding the date of the offer document and the dates on which such repurchases were made.
26. If any shares of the class of shares to be repurchased were issued during the 2 year period immediately preceding the date of the offer, the date of such distribution, the issue price per share and the aggregate proceeds received by the offeror.
27. The frequency and amount of dividends that have been paid out by the offeror to holders of shares proposed to be repurchased during the 2 year period immediately preceding the date of the offer document together with a description of the offeror's ability to pay dividends, and any plan or intention to declare a dividend or alter a dividend policy.

Code obligations

28. A statement of the obligations of the offeror and the rights of the shareholders under Rules 15, 16, 17, 19 and 20 of the Takeovers Code.
29. The address of the websites on which documents are displayed under Note 1 to Rule 8 of the Takeovers Code.

SCHEDULE IV

**EXTRACTS FROM PARTS 3 AND 5 AND SCHEDULE 2
OF THE SECURITIES AND FUTURES
(FEES) RULES**

PART 3

**FEES PRESCRIBED FOR PURPOSES OF
SECTION 395(1)(a)(ii) OF ORDINANCE**

4. Interpretation of Part 3

In this Part, unless the context otherwise requires-

“Codes” means the codes entitled “The Codes on Takeovers and Mergers and Share Repurchases” and published by the Commission under section 399(2)(a) and (b) of the Ordinance;

“Executive” means the Executive Director of the Corporate Finance Division of the Commission or any delegate of the Executive Director;

“Introduction to the Codes” means the part of the Codes entitled “Introduction”;

“offer” has the meaning assigned to it by the Codes and, in any case where section 5(2)(a)(ii) is applicable, includes any of the alternative offers or offers of different values (as the case may be) referred to in that section;

“offer document” means a document required to be submitted to the Executive under the Codes in connection with an offer;

“offeree company” means a corporation for which an offer is made in accordance with the Codes;

“off-market share repurchase” has the meaning assigned to it by the Codes;

“off-market share repurchase circular” means a document required to be submitted to the Executive under the Share Repurchase Code in connection with an off-market share repurchase;

“relevant shares” -

- (a) in relation to an offer contained in an offer document, means the securities which are the subject of the offer;

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- (b) in relation to an off-market share repurchase contained in an off-market share repurchase circular, means the securities which are the subject of the off-market share repurchase; or
- (c) in relation to a whitewashed offer, means the securities which would be the subject of the offer;

“ruling” includes any ruling, waiver, consent, decision, confirmation or other determination in writing, made under the Codes by the Executive, the Takeovers Panel or the Takeovers Appeal Committee;

“Share Repurchase Code” means the parts of the Codes respectively entitled “Introduction”, “Definitions”, “General Principles”, “Code on Share Repurchases” and “Schedules”;

“Takeovers Appeal Committee” means the committee established under section 8 of the Ordinance and known as the Takeovers Appeal Committee;

“Takeovers Code” means the parts of the Codes respectively entitled “Introduction”, “Definitions”, “General Principles”, “Code on Takeovers and Mergers” and “Schedules”;

“Takeovers Panel” means the committee established under section 8 of the Ordinance and known as the Takeovers and Mergers Panel;

“whitewash document” means a document required to be submitted to the Executive under the Whitewash Guidance Note in Schedule VI to the Codes;

“whitewashed offer”, in relation to a whitewash document, means an offer which would be required to be made under Rule 26 of the Takeovers Code in the absence of a waiver under Note 1 on dispensations from Rule 26 of the Takeovers Code.

5. Fees relating to offer documents, off-market share repurchase circulars and whitewash documents

- (1) Where a first draft of an offer document, off-market share repurchase circular or whitewash document is submitted to the Executive for comment, a fee which is prescribed, opposite the applicable value set out in column 1 of Schedule 2, in column 2 of that Schedule shall be payable to the Commission.
- (2) For the purposes of subsection (1), the applicable value shall be equivalent-
 - (a) in the case of an offer document-
 - (i) subject to subparagraph (ii), to the value of the offer contained in the offer document; or

- (ii) where the offer document contains alternative offers to the same offeree company, or contains 2 or more offers of different values to different offeree companies, to the value of the offer contained in the offer document which has the lower or lowest value;
 - (b) in the case of an off-market share repurchase circular, to the value of the off-market share repurchase contained in the off-market share repurchase circular; or
 - (c) in the case of a whitewash document, to the value of the whitewashed offer.
- (3) Where any offer contained in a draft offer document previously submitted to the Executive for comment is replaced by a revised offer, and a revised offer document is submitted to the Executive in connection with the revised offer, there shall be payable to the Commission a fee the amount of which shall be the difference between-
- (a) the fee previously paid under subsection (1) on the submission of the draft offer document; and
 - (b) the fee which would have been payable under subsection (1) had the revised offer been contained in such draft offer document.
- (4) For the purposes of this section-
- (a) the value of any offer contained in an offer document or the value of an off-market share repurchase contained in an off-market share repurchase circular shall be-
 - (i) where the relevant shares are under the offer or the off-market share repurchase (as the case may be) to be acquired for cash, the total amount of such cash;
 - (ii) where the relevant shares are under the offer or the off-market share repurchase (as the case may be) to be acquired in exchange for securities, the total value of such securities on the date of announcement of a firm intention to make the offer or the off-market share repurchase (as the case may be) in accordance with the Codes; or
 - (iii) where the relevant shares are under the offer or the off-market share repurchase (as the case may be) to be acquired partly for cash and partly in exchange for

securities, the aggregate of the total amount of such cash and the total value of such securities on the date of announcement of a firm intention to make the offer or the off-market share repurchase (as the case may be) in accordance with the Codes; and

- (b) the value of a whitewashed offer in the case of a whitewash document shall be-
 - (i) where the relevant shares would under such whitewashed offer be acquired for cash, the total amount of such cash;
 - (ii) where the relevant shares would under such whitewashed offer be acquired in exchange for securities, the total value of such securities on the date of announcement of a firm intention to enter into the transaction which would require such whitewashed offer to be made in the absence of a waiver under Note 1 on dispensations from Rule 26 of the Takeovers Code; or
 - (iii) where the relevant shares would under such whitewashed offer be acquired partly for cash and partly in exchange for securities, the aggregate of the total amount of such cash and the total value of such securities on the date of announcement of a firm intention to enter into the transaction which would require such whitewashed offer to be made in the absence of a waiver under Note 1 on dispensations from Rule 26 of the Takeovers Code,

and where the application of this subsection may, in the case of any offer contained in an offer document or any whitewashed offer in the case of a whitewash document, result in 2 or more variable values, only the lower or lowest value shall be taken into account.

- (5) The payment of a fee payable under this section shall be accompanied by a statement showing the value of the offer, off-market share repurchase or whitewashed offer concerned and the manner in which the fee is determined having regard to subsection (4).
- (6) Where a first draft of an offer document, a first draft of an off-market share repurchase circular and a first draft of a whitewash document, or any combination of them, are combined in a draft when submitted to the Executive for comment-

- (a) the fee payable under subsection (1) shall be the aggregate of the respective fees payable under that subsection in respect of each such first draft as if each such first draft had not been so combined in the draft, and the provisions of this section shall apply accordingly; and
- (b) without prejudice to paragraph (a), subsection (3) shall apply as if-
 - (i) the reference to a draft offer document in subsection (3) included a reference to the draft in which each such first draft is so combined; and
 - (ii) the reference to a revised offer document included a reference to that draft as revised to include the revised offer.

6. Fees for applications to Takeovers Panel or Takeovers Appeal Committee

Where, pursuant to the Codes, a person other than the Executive applies to the Takeovers Panel for a review of any ruling of the Executive, or applies to the Takeovers Appeal Committee for a review of the appropriateness of any sanction imposed by the Takeovers Panel pursuant to the Codes-

- (a) a fee of \$50,000 shall be payable by the person to the Commission; and
- (b) an additional fee of \$20,000 shall be payable by the person to the Commission within 30 days after the delivery by the Takeovers Panel or the Takeovers Appeal Committee (as the case may be) of its ruling, in respect of each day or part of a day in excess of the first 2 days on which the Takeovers Panel or the Takeovers Appeal Committee (as the case may be) meets for the purposes of the review.

7. Fees for hearings concerning compliance with Codes or any rulings under them

- (1) Where a hearing takes place before the Takeovers Panel in any disciplinary proceedings instituted under section 12 of the Introduction to the Codes, a fee, the amount of which shall be determined in accordance with subsection (3), shall, within 30 days after the delivery by the Takeovers Panel of its ruling, be payable to the Commission by any person who in the opinion of the Takeovers Panel-
 - (a) has caused unnecessary expense to be incurred in connection with the investigation by the Commission of any allegation against the person or with the conduct of the hearing; or

- (b) has committed a breach of the Takeovers Code, the Share Repurchase Code or a ruling of the Executive or the Takeovers Panel.
- (2) Where a hearing takes place before the Takeovers Panel for the purpose of deliberating the appropriate sanction to be imposed upon a person who has agreed that he is in breach of the Takeovers Code, the Share Repurchase Code or a ruling of the Executive or the Takeovers Panel, a fee, the amount of which shall be determined in accordance with subsection (3), shall be payable to the Commission by the person within 30 days after the delivery by the Takeovers Panel of its ruling.
- (3) The fee payable under subsection (1) or (2) shall be \$50,000 and, in addition, \$20,000 in respect of each day or part of a day in excess of the first 2 days on which the Takeovers Panel meets for the purposes of the hearing in question.

8. Fees for miscellaneous applications

- (1) Subject to subsection (2), where any person applies to the Executive for any ruling under the Takeovers Code or the Share Repurchase Code and no fee is otherwise provided for by these Rules for the application, a fee of \$24,000 shall be payable by the person to the Commission.
- (2) Where a fee has been paid under section 5 on the submission of a first draft of a whitewash document, or of a draft in which a first draft of a whitewash document is combined with any first draft of any other document, no fee shall be payable under subsection (1) for an application to the Executive for a waiver in relation to the whitewash document under Note 1 on dispensations from Rule 26 of the Takeovers Code.

9. Time for payment of fees

- (1) The fee prescribed in section 5 shall be payable-
 - (a) in the case of a fee payable under section 5(1), at the time when-
 - (i) subject to subparagraph (ii), the first draft concerned; or
 - (ii) where section 5(6)(a) applies, the draft concerned,is submitted to the Executive; or
 - (b) in the case of a fee payable under section 5(3), at the time when-

- (i) subject to subparagraph (ii), the revised offer document concerned; or
- (ii) where section 5(6)(b)(ii) applies, the draft concerned (being the draft as revised to include the revised offer as described in that section 5(6)(b)(ii)),

is submitted to the Executive.

- (2) The fee prescribed in section 6(a) shall be payable at the time when the application concerned is made to the Takeovers Panel or the Takeovers Appeal Committee (as the case may be).
- (3) The fee prescribed in section 8(1) shall be payable at the time when the application concerned is made to the Executive.

PART 5

MISCELLANEOUS

11. Waiver of fees

- (1) ... the Commission may, in relation to any person or class of persons-
 - (a) waive, in whole or in part, the payment of any fee provided for under these Rules; or
 - (b) refund, in whole or in part, any fee paid as provided for under these Rules,

if it is of the opinion that otherwise the payment of the fee would be unduly burdensome or inappropriate.

SCHEDULE 2

**FEEES PRESCRIBED FOR PURPOSES OF
SECTION 395(1)(a)(ii) OF ORDINANCE**

Applicable value	Fee
Not exceeding \$75,000,000	\$25,000
Exceeding \$75,000,000 but not exceeding \$125,000,000	\$75,000
Exceeding \$125,000,000 but not exceeding \$300,000,000	\$150,000
Exceeding \$300,000,000 but not exceeding \$600,000,000	\$250,000
Exceeding \$600,000,000 but not exceeding \$1,200,000,000	\$350,000
Exceeding \$1,200,000,000 but not exceeding \$2,000,000,000	\$500,000
Exceeding \$2,000,000,000	\$500,000, plus 0.01% of the value over \$2,000,000,000

SCHEDULE V

GUIDELINES FOR THE EXEMPTION OF LISTED COMPANIES FROM THE SHARE REPURCHASE REQUIREMENTS OF SECTION 49BA OF THE COMPANIES ORDINANCE (CAP. 32)

1.0 Definitions

1.1 Save for the terms hereinafter defined, and unless the context otherwise requires, terms used in these Guidelines shall have the meanings assigned to them by the Ordinance and any amendments thereto. In these guidelines:-

“Associate” has the meaning assigned to such term by the Listing Rules;

“Chief Executive” has the meaning assigned to such term by the Listing Rules;

“Code” means the Code on Share Repurchases approved and published from time to time by the SFC;

“Executive” means the Executive Director of the Corporate Finance Division of the SFC or any delegate of the Executive Director;

“Guidelines” means these guidelines for the exemption of listed companies from the share repurchase requirements of section 49BA of the Ordinance that can be granted pursuant to section 49BA(11);

“Listing Rules” means the Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Ltd.;

“On-market share repurchase” has the meaning assigned to such term by the definitions to the Code;

“Off-market share repurchase” has the meaning assigned to such term by the definitions to the Code;

“Ordinance” means the Companies Ordinance (Cap. 32);

“Panel” means the Takeovers and Mergers Panel;

“SFC” means the Securities and Futures Commission;

“SF Ordinance” means the Securities and Futures Ordinance (Cap. 571);

“Share repurchase” has the meaning assigned to such term by the definitions to the Code; and

“Substantial shareholder” means a person who holds 10% or more of the voting rights of a company.

2.0 Nature and purpose of the Guidelines

2.1 Section 49B(1) of the Ordinance provides that a listed company may purchase its own shares in accordance with the sections of the Ordinance referred to in section 49B(1) provided the company is authorised to do so by its articles. Section 49BA is among the sections of the Ordinance referred to in section 49B(1). Section 49BA prescribes, among other things, the ways in which a listed company may purchase its own shares and related shareholder approval and disclosure requirements.

2.2 The Code imposes similar requirements upon all public companies in Hong Kong regardless of their places of incorporation. Rule 8 of the Code provides, among other things, that the Executive may, upon the application of any person with an interest in a share repurchase, waive compliance with one or more provisions of the Code.

2.3 Section 49BA(11) of the Ordinance provides that the SFC may exempt any listed company from any of the provisions of section 49BA, subject to such conditions as it thinks fit. Section 49BA(11) of the Ordinance is intended to provide listed companies which are subject to the Ordinance with the same flexibility to seek relief from the share repurchase requirements of section 49BA of the Ordinance as Rule 8 of the Code affords all public companies in Hong Kong in respect of the share repurchase requirements of the Code.

2.4 The SFC has delegated its power to grant exemptions pursuant to section 49BA(11) of the Ordinance to the Executive and the Panel pursuant to section 10(1) of the SF Ordinance. The Executive is thereby authorised to exercise the SFC’s discretion to grant exemptions from the share repurchase requirements of section 49BA in the first instance, and to refer novel, difficult or important exemption applications to the Panel for its consideration. The Panel is authorised to exercise the SFC’s discretion to grant the exemptions sought by any novel, important or difficult exemption applications that are referred to it by the Executive, and it is also authorised to review decisions made by the Executive in the first instance at the request of an aggrieved applicant. Applications for exemption from the share repurchase requirements of section 49BA of the Ordinance are therefore subject to the same procedural rules as applications for waivers from the share repurchase requirements of the Code. Reference is made in this regard to the Introduction to, and Rule 8 of, the Code.

2.5 Section 49BA(12) of the Ordinance provides that the SFC may suspend or withdraw an exemption granted under section 49BA(11) on the ground that the conditions subject to which the exemption was granted have not been complied with or such other ground as the SFC thinks fit. Section 49BA(12) further provides that the SFC may vary any condition attached to an

exemption granted pursuant to section 49BA(11). The SFC has also delegated its powers under section 49BA(12) to the Executive and the Panel pursuant to section 10(1) of the SF Ordinance. The Executive and the Panel are thereby authorised to exercise the SFC's discretion to suspend, withdraw or vary exemptions granted pursuant to section 49BA(11) in the manner contemplated by paragraph 2.4 hereof for exemptions from the share repurchase requirements of section 49BA.

- 2.6** The Guidelines are intended to provide listed companies with guidance as to the way in which the Executive and the Panel may exercise the discretion that has been delegated to them by the SFC to grant exemptions from the share repurchase requirements of section 49BA. The Guidelines are not exhaustive. They are simply intended to assist listed companies with an understanding of matters that the Executive and the Panel will take into consideration when deciding to exercise such discretion. They may be modified or varied as circumstances require.

3.0 Application for an exemption or variation

- 3.1** An application for an exemption from section 49BA of the Ordinance, or for a variation of an exemption previously granted, should be made in writing and directed to the Executive. Exemption applications which seek relief from share repurchase requirements of the Ordinance which are common to both the Ordinance and the Code should also seek relief from the comparable Code requirements.

- 3.2** An applicant, when deciding what matters to include in its written application, should have regard to the Guidelines and the General Principles of the Code. The Executive or the Panel, as the case may be, may request additional information or make such enquiries as it considers appropriate when considering any application.

- 3.3** These Guidelines provide for general or "blanket" exemptions and specific exemptions. Exemptions, whether general or specific, may be made subject to such conditions as either the Executive or the Panel considers to be reasonably appropriate in the circumstances.

4.0 General or "blanket" exemptions

- 4.1** A general or "blanket" exemption is intended to relieve all listed companies, or an identifiable group of companies, from one or more of the share repurchase requirements of section 49BA of the Ordinance. Such an exemption would only be granted during a so-called "market emergency" and only if the exemption is considered to be in the best interests of the market.

- 4.2** An application for a general or "blanket" exemption would normally be referred by the Executive to the Panel for its consideration and any exemption granted by the Panel would normally be made conditional upon approval by

the SFC. Both the Panel and the SFC would consider the matter promptly. Such an exemption would be strictly limited in terms of its duration and the number of shares that could be repurchased, and it would require all share repurchases effected in reliance upon the exemption to be made by way of an on-market share repurchase conducted in accordance with the Listing Rules.

5.0 Specific exemptions

5.1 A specific exemption is intended to relieve a particular listed company from one or more of the share repurchase requirements of section 49BA of the Ordinance. It is currently anticipated that three types of specific exemptions would be granted.

5.2 The first type of specific exemption would relieve an applicant from the requirement to obtain the prior authorisation of its shareholders for a proposed share repurchase if a disorderly market for the shares of the company had developed, or was reasonably expected to develop, and time did not permit a shareholder's meeting to be held. Such an exemption would normally be conditional upon the share repurchase being made by way of an on-market share repurchase conducted in accordance with the Listing Rules.

5.3 The second type of specific exemption would also relieve an applicant from the requirement to obtain the prior authorisation of its shareholders for a proposed share repurchase if the proposed share repurchase constituted an off-market share repurchase for a small number of shares of the company from a shareholder who was not a director, chief executive or substantial shareholder of the company or an associate thereof. Such an exemption would normally be granted only if the costs of prior shareholder authorisation were outweighed by the benefits to the company of the proposed share repurchase.

5.4 The third type of specific exemption would relieve an applicant from the requirements of section 49BA(3)(a) and thereby allow companies to comply with the requirements under Rule 3 of the Code to send to shareholders the offer document within 21 days of the announcement of the proposed repurchase and to send the offer document with the notice of general meeting. Such an exemption would be granted in all cases and would attract no fee.

SCHEDULE VI**WHITEWASH GUIDANCE NOTE**

(See Note 1 on dispensations from Rule 26 of the Takeovers Code.)

1. Introduction

- (a) This Whitewash Guidance Note sets out the procedures to be followed if the Executive is to be asked to waive the obligation to make a general offer under Rule 26 of the Takeovers Code which would otherwise arise where, as a result of the issue of new securities as consideration for an acquisition or cash injection or in fulfilment of obligations under an agreement to underwrite the issue of new securities, a person or group of persons acting in concert acquires voting rights to an extent which would normally give rise to an obligation to make a general offer.
- (b) Where the word “offeror” is used in a particular Rule, it should be taken in the context of a whitewash as a reference to the potential controlling shareholders. Similarly, the phrase “offeree company” should be taken as a reference to the company which is to issue the new securities and in which the actual or potential controlling position will arise.
- (c) The General Principles of the Codes apply equally to a transaction which is the subject of the whitewash procedures.

2. Specific grant of waiver required

In each case, specific grant of a waiver from the Rule 26 obligation is required. Such grant will be subject to:-

- (a) there having been no disqualifying transactions (as set out in paragraph 3 of this Schedule VI) by the person or group seeking the waiver in the period from the date 6 months prior to the announcement of the proposals and up to and including the date of the shareholders’ meeting;
- (b) prior consultation with the Executive by the parties concerned or their advisers;
- (c) approval in advance by the Executive of the circular to shareholders setting out the details of the proposals and containing the information required in paragraph 4 of this Schedule VI below;

- (d) compliance by the person or group seeking the waiver with the following Rules of the Takeovers Code, where relevant:-
- (i) Rule 2.1 and Note 2 to Rule 2 (appointment of independent financial adviser and its competence);
 - (ii) Rule 2.8 (establishment of independent board committee);
 - (iii) Rule 3 (when an announcement is required and contents of an announcement);
 - (iv) Rules 7 and 26.4 (timing of resignation of offeree company directors and appointment of offeror nominees to the board of the offeree company);
 - (v) Rule 8 (timing and content of documents);
 - (vi) Rule 9 (standard of care and responsibility);
 - (vii) Rule 10 (profit forecasts and other financial information);
 - (viii) Rule 12 (~~clearance of documents~~filing and publication of ~~documents~~announcements);
 - (ix) Rule 18 (statements during course of offer);
 - (x) Rule 25 (special deals); and
 - (xi) Rule 34 (shareholder solicitations).
- (e) approval of the proposals by an independent vote at a meeting of the holders of any relevant class of securities, whether or not any such meeting needs to be convened to approve the issue of the securities in question; and
- (f) disenfranchisement of the person or group seeking the waiver and of any other non-independent party at any such meeting.

Notes:

1. *Early consultation*

Consultation with the Executive at an early stage is essential. Late consultation may well result in delays to planned timetables. Experience suggests that the documents sent to shareholders in connection with the whitewash procedure may have to pass through several proofs before they meet the Executive's requirements and no

waiver of the Rule 26 obligation will be granted until such time as the documentation has been approved by the Executive.

2. *Listing Division*

It must be noted that, in the case of listed companies, clearance of the circular by the Listing Division of the Stock Exchange does not constitute approval of the circular by the Executive.

3. Disqualifying transactions

Notwithstanding the fact that the issue of new securities is made conditional upon the prior approval of a majority of the shareholders independent of the transaction at a general meeting of the company:-

- (a) the Executive will not normally waive an obligation under Rule 26 of the Takeovers Code if 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, discussions or the reaching of understandings or agreements with the directors of the company (which would include informal discussions) in relation to the proposed issue of new securities; and
- (b) a waiver will not be granted or if granted will be invalidated if, without the prior consent of the Executive, any acquisitions or disposals of voting rights are made by such persons in the period between the announcement of the proposals and the shareholders' meeting completion of the subscription.

Notes:

- 1. Class (6) of the definition of acting in concert would apply to directors of a company and a whitewash would be regarded as an offer for this purpose.
- 2. If the applicant for a whitewash waiver or a person acting in concert with him acquires shares within 6 months after the shareholders' meeting from a person who was a director or substantial shareholder of the company at the time of the whitewash, such acquisition will be deemed to be a special deal transaction prohibited under Rule 25 of the Takeovers Code. The applicant or his concert party may seek consent from the Executive if the acquisition is de minimis.

4. Circular to shareholders

The circular must contain the following information and statements or, where relevant, comply appropriately with the Rules of the Takeovers Code as set out below:-

- (a) competent independent advice contemplated by Rule 2 to the offeree company regarding the transaction, the controlling position which it will create and the effect which this will have on shareholders generally;
- (b) full details of the maximum potential controlling holding of voting rights:-
 - (i) where this is dependent upon the outcome of underwriting arrangements, it should be assumed that the potential controlling shareholders will, in addition to any other entitlement, take up their full underwriting participation; and
 - (ii) where convertible securities, warrants, options or other subscription rights are to be issued, the potential controlling holding of voting rights must be indicated on the assumption that only the controlling shareholders will convert or exercise the subscription rights, and will do so in full and at the earliest opportunity (the date of which must also be given);
 - (c) where the maximum potential holding of voting rights resulting from the proposed transaction will exceed 520% of the voting rights of the company, specific and prominent reference to this possibility and to the fact that the potential controlling shareholders may increase their holding without incurring any further obligation under Rule 26 to make a general offer;
- (d) in cases where the potential controlling shareholding will be held by more than one person, the identity of the potential controlling shareholders and their individual potential holding of voting rights in addition to the information required under paragraph 4(k) of this Schedule VI below;
- (e) a statement that the Executive has agreed, subject to approval by independent shareholders, to waive any obligations to make a general offer which might result from the transaction;
- (f) Note 1 to Rule 8 and paragraph 14 of Schedule II (documents to be on display);

- (g) Rule 9.2, paragraphs 1, 2, 3, 6 and 10 of Schedule I and paragraphs 6, 7 and 8 of Schedule II (information to shareholders which must include full details of the assets, if any, being injected);
- (h) Rules 9.3 and 9.4 (responsibility statements, etc.);
- (i) Rules 10 and 11 (profit forecasts, financial information, merger benefits statements and asset valuations relating to the offeree company or relating to assets being acquired by the offeree company);
- (j) paragraph 14 of Schedule I and paragraphs 10, 11 and 12 of Schedule II (arrangements in connection with the proposal);
- (k) paragraph 4 of Schedule I and paragraph 2 of Schedule II (disclosure of shareholdings and dealings). Dealings should be covered for the 6 months prior to the announcement of the proposals until the latest practicable date prior to the posting of the circular but dealings by persons in categories 2(iii), (iv) or (v) of paragraph 2 of Schedule II need not be disclosed. Paragraph 2(vi) is applicable and directors' voting intention must be disclosed;
- (l) paragraph 9 of Schedule II (material contracts);
- (m) paragraph 13 of Schedule II (service contracts of directors and proposed directors); and
- (n) paragraphs 3 to 5 of Schedule II (share capital of the offeree company).

5. Underwriting and placing

In cases involving the underwriting or placing of offeree company securities, the Executive must be given details of all the proposed underwriters or placees, including any relevant information to establish whether or not there is a group acting in concert, and the maximum percentage which they could come to hold as a result of implementation of the proposals.

6. Announcements following shareholders' approval

- (a) Following the meeting at which the proposals are considered by shareholders, an announcement must be made by the offeree company giving the result of the meeting and the number and percentage of voting rights attaching to the shares to which the potential controlling shareholders have become entitled as a result: (see also Rule 2.9).
- (b) Where the final controlling holding of voting rights is dependent on the results of underwriting, the offeree company must make an announcement following the issue of the new securities stating the

number and percentage of voting rights held by the controlling shareholders at that time.

- (c) Where convertible securities, warrants, options or other subscription rights are to be issued:-
 - (i) the announcement of the potential controlling holding of voting rights must be made on the basis of the assumptions described in paragraph 4(b) of this Schedule VI above; and
 - (ii) following each issue of new securities a further announcement must be made confirming the number and percentage of voting rights held by the controlling shareholders at that time.

Note:

Copies of announcements

Copies of announcements made under this paragraph 6 should be sent to the Executive.

7. Subsequent acquisitions by controlling shareholders

When a person, or group of persons acting in concert, would otherwise be obliged to make a mandatory offer pursuant to Rule 26 of the Takeovers Code but the obligation is waived pursuant to a vote of independent shareholders in accordance with the terms of Note 1 on dispensations from Rule 26 of the Takeovers Code, such person, or group of persons, shall be deemed to have a lowest percentage holding equal to the percentage holding of such person, or group of persons, immediately after the whitewashed transaction. Any acquisition of additional voting rights by such person, or group of persons, subsequent to the whitewashed transaction shall be subject to the 2% creper under Rule 26.1 of the Takeovers Code by reference to the lowest percentage holding in the 12 month period ending on the date of the completion of the relevant acquisition. (See Note 15 to Rule 26.1 of the Takeovers Code.)

8. Convertible securities, warrants and options

Where shareholders approve the issue of convertible securities, or the issue of warrants or the grant of options to subscribe for new shares where no immediate voting rights are obtained, the Executive will view the approval as sanctioning maximum conversion or subscription at the earliest possible moment without the necessity for the making of an offer under Rule 26 of the Takeovers Code. After conversion or subscription, the potential controlling shareholders shall be deemed to have a lowest percentage holding equal to their percentage holding immediately after the conversion or subscription. (See also Note 15 to Rule 26.1 of the Takeovers Code.)

If the potential controlling shareholders acquire further voting rights after the date of the ~~resolution~~issue of the relevant convertible securities, warrants and options, the waiver will only apply to conversion into, or subscription for, such number of voting rights as, when added to the purchases, does not exceed the number originally approved by shareholders. Such further acquisition of voting rights would be subject to Rule 26 of the Takeovers Code so that an offer obligation would arise if as a result the percentage shareholding of the potential controlling shareholders increased to 30% or, if already over 30%, by more than 2% in any 12 month period.

Where shareholders approve the issue of convertible securities, or the issue of warrants or the grant of options to subscribe for new shares without the necessity for the making of an offer under Rule 26 of the Takeovers Code on conversion or subscription, for so long as any of these securities remain outstanding the company must include in its annual and interim accounts a statement describing the securities outstanding, the impact of full conversion or subscription and the fact that shareholders have approved that no offer under Rule 26 of the Takeovers Code would arise on full conversion or subscription. Such statement should be disclosed together with the disclosure of the interests of directors and substantial shareholders.

~~(See also Note 6 to Rule 26.1 of the Takeovers Code.)~~

9. Share repurchases

If following the approval by shareholders in a company under Note 1 on dispensations from Rule 26 of the Takeovers Code of the issue of convertible securities, or the issue of warrants or the grant of options, and prior to conversion or subscription the company repurchases shares, the percentage shareholding of the potential controlling shareholders may increase and Rule 32.1 of the Takeovers Code may apply. Where Rule 32.1 of the Takeovers Code does not apply because the potential controlling shareholders are not directors or acting in concert with any directors, the waiver will apply to conversion into, or subscription for, such number of voting rights as originally approved by shareholders. Where the potential controlling shareholders are directors or acting in concert with any directors, they must seek further approval of shareholders for the conversion into, or subscription for, such number of voting rights as originally approved by shareholders.

10. Underwriting

Where a person or group of persons acting in concert seeks approval of shareholders for a maximum potential controlling holding of voting rights that may arise as a result of underwriting an issue of new securities, the percentage holding of voting rights following the issue shall be deemed to have been whitewashed, regardless of whether the increase in this percentage holding would have incurred a general offer obligation. The underwriting shareholder

shall be deemed to have a lowest percentage holding equal to his percentage holding immediately after the issue.

~~Where such person or persons wish to acquire any voting rights after the shareholders' meeting to approve the proposal but before completion of the issue of the new securities, they must consult the Executive to determine the circumstances, if any, in which such acquisitions may be made.~~

11. Issue of new shares and off-market share repurchases

The Executive will not normally grant a waiver of an obligation under Rule 26 of the Takeovers Code, or if granted such waiver will be invalidated, if the potential controlling shareholders subscribe 30% or more (or more than 2% if they are holding between 30% to 50%) new shares of a company and the company repurchases a substantial number of shares of the company from other shareholders in an off-market share repurchase. For the purpose of this paragraph, the Executive reserves the right to aggregate transactions or arrangements over a reasonable period of time. If in doubt, parties must consult the Executive at the earliest opportunity.

SCHEDULE VII

CONFLICTS OF INTEREST GUIDANCE NOTE

Instances where conflicts of interest may arise include those resulting from the possession of material confidential information or where the adviser is part of a multi-service financial organisation, as exemplified below.

(a) Material confidential information

A financial adviser may have the opportunity to act for an offeror or the offeree company in circumstances where the adviser is in possession of material confidential information relating to the other party, for example, because it was a previous client or because of involvement in an earlier transaction. This will often necessitate the financial adviser declining to act, for example, because the information is such that a conflict of interest is likely to arise. Such a conflict will normally be incapable of resolution simply by isolating information within the relevant organisation or by assigning different personnel to the transaction.

(b) Conflicts of multi-service financial organisations

A financial adviser, or proposed financial adviser, that is part of a multi-service financial organisation should be alert to possible conflicts of interest.

Such conflicts may arise in particular where organisations involve an auditor's practice or a lending institution. For example a financial adviser must not act as independent financial adviser to an offeree company under Rule 2 of the Takeovers Code if the financial adviser, or any of its affiliated entities, is the auditor of the offeree company.

In all cases of possible conflict the Executive must be consulted.

(c) Segregation of businesses

It is incumbent upon multi-service financial organisations to familiarise themselves with the implications under the Codes of conducting other businesses in addition to, for example, corporate finance or stockbroking. If one part of such an organisation is involved in an offer, for example, in giving advice to an offeror or the offeree company, a number of Rules of the Codes may be relevant to other parts of that organisation, whose actions may have serious consequences under the Codes. Compliance departments of such organisations have an important role in this respect and are encouraged to liaise with the Executive in cases of doubt.

The concepts of "exempt fund managers" and "exempt principal traders" in the Takeovers Code are in recognition of the fact that fund management and

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principal trading may be conducted on a day-to-day basis quite separately within the same organisation; but it is necessary for such organisations to satisfy the Executive that this is the case. It is essential, therefore, that such organisations arrange their affairs to ensure not only total segregation of those operations but also that those operations are conducted without regard for the interests of other parts of the same organisation or of their clients. The Takeovers Code contains a number of Rules which are designed to ensure that the principles on which these concepts are based are upheld.

SCHEDULE VIII

RECEIVING AGENTS' CODE OF PRACTICE

Note: This Schedule VIII should be read in conjunction with Rules 26.2 and 30.2 of the Takeovers Code and, in particular, Notes 1, 2 and 7 to Rule 30.2.

INTRODUCTION

1. This Code of Practice has been drawn up after consultation with the Stock Exchange and Hong Kong Federation of Share Registrars. It is reproduced with the agreement and support of these bodies.
2. It is essential when determining the result of an offer under the Takeovers Code that appropriate measures are adopted such that all parties to the offer may be confident that the result of the offer is arrived at by an objective procedure which, as far as possible, eliminates areas of doubt. This Code of Practice is designed to ensure that those acceptances and purchases which may be counted towards fulfilling the acceptance condition and thus included in the certificate are properly identified to enable the receiving agent to provide the certificate required by Note 2 to Rule 30.2. Receiving agents are also required to establish appropriate procedures such that acceptances and purchases can be checked against each other and between different categories so that no shareholding will be counted twice.
3. The principles and procedures outlined in this Code of Practice are, except with the prior consent of the Executive, to be followed in all cases. It must be understood that the co-operation between the offeree company's registrar and the offeror's receiving agent is expected to ensure that the procedures can be undertaken in a timely manner. Co-operation is interpreted to include the provision of data in a form convenient for the receiving agent. For example, if the receiving agent so requests, following the announcement of an offer, the registrar should, if practicable, provide the register in computer readable form. Whenever possible, if requested to do so, the registrar should provide, in similar form, details of changes to the register rather than a complete new register.
4. Receiving agents will have direct access to the Executive should they believe that there is insufficient co-operation or that they are being given instructions contrary to this Code of Practice.

QUALIFICATIONS FOR ACTING AS A RECEIVING AGENT

5. A receiving agent to an offer must either:-
 - (a) be a member of the Federation of Share Registrars; or

- (b) be an organisation which has satisfied the Executive that it has the experience and resources necessary to act as receiving agent in connection with the relevant offer.

THE PROVISION OF THE OFFEREE COMPANY'S REGISTER

6. (a) When a firm intention to make an offer is announced, the offeree company should instruct its registrar to respond within two business days to a request from the offeror for the provision of the register which should be updated to reflect the position as at the close of business on the date of the request.

- (b) The offeree company's registrar should also be instructed to keep the register as up-to-date as the register maintenance system will allow. The registrar should ensure that maintenance is such that it can comply with paragraph (c) below. The updating procedures should include, in addition to the registration of transfer, the registration of all changes affecting the register (e.g. grants of representation, marriage certificates, changes of address etc.).

- (c) The registrar must provide updates, on a daily basis, to the register within two business days after notification of the transfer and, in addition, copies of all documents which would lead to a change in the last copy register provided to the offeror must be provided as rapidly. On the final register day* any such information received by the offeree company's registrar but not yet provided to the offeror's receiving agent must be made available for collection by the offeror's receiving agent, at the latest, by noon on the day preceding the final closing date[§] of the offer.

From the final register day* until the time that the offer becomes or is declared unconditional as to acceptances or lapses, the offeree company's registrar should continue to update the register on a daily basis so that all transfers and other documents which have been received by the offeree company's registrar by 1.00 p.m. on the final closing date of the offer are processed by 5.00 p.m. that day at the latest. In addition, copies of these documents should be relayed immediately to the offeror's receiving agent insofar as not previously notified.

- (d) Arrangements should be made to ensure that the offeror's receiving agent has access to the offeree company's registrar during office hours (i.e. from 9.00 a.m. to 6.00 p.m.) on any business days, during the period between the final register day* and the time the offer becomes or is declared unconditional as to acceptances or lapses, in order that any queries arising from acceptances and purchases can be investigated and accurate decisions taken. In case of urgency, the offeror's

[§]* See definitions at end of this Schedule.

receiving agent should also be given access to the offeree company's registrar on any days that are not business days or outside office hours on a business day, provided that the receiving agent gives reasonable notice to the registrar to obtain its consent. Such consent should not be unreasonably withheld by the registrar.

COUNTING OF ACCEPTANCES

7. The offeror's receiving agent must ensure that all acceptances counted as valid meet the requirements set out in Note 1 to Rule 30.2.

COUNTING OF PURCHASES

8. The offeror's receiving agent must ensure that all purchases counted as valid meet the requirements set out in Note 7 to Rule 30.2.

DISCLAIMERS IN RECEIVING AGENTS' CERTIFICATES

9. Certificates issued by the offeror's receiving agent should be unqualified, save for a disclaimer (if necessary) as to limitations on the responsibility of the receiving agent for the errors of third parties which are not evident from the documents available to the receiving agent. A disclaimer in the following form would normally be acceptable; any variation should be agreed specifically by the Executive in advance:-

"In issuing this certificate we have, where necessary relied on the following matters:

- (i) certifications of acceptance forms by the offeree company's registrar;
- (ii) certifications by the offeree company's registrar that a transfer of shares has been executed by or on behalf of the registered holder in favour of the offeror company or its nominees.

As the offeror company's receiving agent, we have examined with due care and attention the information provided to us, and as appropriate, made due and careful enquiry of relevant persons, in order that we may issue this certificate and have no reason to believe that the information contained in it cannot be relied upon but, subject thereto, we accept no responsibility or liability whatsoever in respect of any error of the offeree company's registrar or the offeror company's buying broker for the matters set out above to the extent that we have relied upon them in issuing this certificate."

DEFINITIONS:

*final register day - the day two days prior to the final closing date[§] of an offer.

§final closing date - the 60th day or other date beyond which the offeror has stated that its offer will not be extended.