



SECURITIES AND FUTURES COMMISSION
證券及期貨事務監察委員會

Consultation Conclusions on (1) the proposal to stop commenting on routine announcements under the Codes on Takeovers and Mergers and Share Repurchases and (2) proposed miscellaneous amendments to the Codes

June 2010



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Introduction

On 21 April 2010 the Securities and Futures Commission (**SFC**) issued a Consultation Paper inviting public comment on a number of proposed amendments to the Hong Kong Codes on Takeovers and Mergers and Share Repurchases (**Codes**). These proposals were formulated in consultation with the Takeovers Panel (**Panel**).

Proposals

The Consultation Paper was set out in two parts:

Part 1 proposed to amend Rule 12.1 of the Takeovers Code to provide that certain routine announcements will no longer be required to be submitted to the Executive for comment prior to publication.

Part 2 proposed various miscellaneous amendments to the Codes. These included a proposal to amend section 16.1 of the Introduction to the Codes relating to the publication of rulings of the Panel and the Takeovers Appeal Committee in matters which are price sensitive or otherwise subject to confidentiality considerations of a commercial nature. A number of other minor “housekeeping” amendments were also proposed.

Market consultation

The consultation period ended on 19 May 2010. The SFC received eight responses. The list of respondents is set out in **Appendix 1**. The Panel and the SFC welcome these responses and are grateful to those who have participated. Their comments and the SFC’s responses to those comments are discussed in this paper.

Respondents generally agreed with the proposed amendments outlined in the Consultation Paper which will be implemented with immediate effect subject to the minor modifications as set out in this paper.

The marked up text of the amendments to the Codes arising from the consultation is set out in **Appendix 2**. All these amendments will become effective on 25 June 2010.

The Consultation Paper, the responses, this Conclusion Paper, the revised Practice Note 5 and a list of documents that need not be submitted to the Executive for comment prior to publication (**Post-Vet List**) are available on the SFC website at www.sfc.hk. Please note that the Post-Vet List (which is attached as **Appendix 4**) may be updated from time to time.



Part 1

Proposal to stop commenting on routine announcements under the Codes on Takeovers and Mergers and Share Repurchases

Background

1. In Part 1 of the Consultation Paper the Executive proposed to relax the requirement under Rule 12.1 of the Takeovers Code for all “documents” (such as announcement and circulars) issued under the Codes to be submitted to the Executive for comment prior to release or publication in respect of certain announcements that are routine in nature and do not attract substantive comment from the Executive.
2. As part of the proposal, the Executive recommended the following:
 - (a) consequential amendments to Rule 12.1 and Note 2 to Rule 12 of the Takeovers Code and the introduction of a new Note to Rule 12.1 (see paragraph 12 of Part 1 of the Consultation Paper);
 - (b) to maintain the Post-Vet List (see paragraph 6 of Part 1 of the Consultation Paper); and
 - (c) to issue a Practice Note (revised Practice Note 5) to provide practical and prescriptive guidance to parties and their advisers in respect of announcements which appear in the Post-Vet List including clarification of instances when the Executive should be consulted in advance of publication.

Comments received and the Commission’s responses

3. All respondents agreed in principle with the proposals in this part of the Consultation Paper, and in particular, Questions 1 – 3. A number of comments were raised relating to specific proposed amendments to the Codes and the draft Practice Note. These comments and the Executive’s response are set out below.

Question 1: Do you agree that the Executive should stop commenting on certain routine announcements (as listed in paragraph 6 of the Consultation Paper)?

Public comment

4. All respondents agreed with the proposal to stop commenting on routine announcements. One respondent noted that the proposal would potentially reduce the burden of compliance for parties and/or their advisers. Another respondent viewed this as a positive development.



Commission's response

5. The Executive welcomes the respondents' support of the proposal. It believes the proposal will not only serve to reduce the cost and burden of compliance for the industry but will also help promote self-discipline among parties and market practitioners to ensure compliance with the Codes.

Public comment

6. One respondent suggested that announcements under Rule 3.7 of the Takeovers Code relating to monthly updates on the progress of "talks" or of the consideration of a possible offer that does not disclose any material new development since the previous announcement should be added to the Post-Vet List.

Commission's response

7. The Executive believes that the commenting process on announcements issued under Rule 3.7 provides a fundamental platform for material issues to be identified and addressed at an early stage as a takeover transaction develops. It is important for Rule 3.7 announcements to be submitted to the Executive for comment as it enables the Executive to provide assistance in resolving any Code issues raised by the Executive or identified by the parties and their advisers at the earliest possible stage in the transaction. In cases where monthly updates under Rule 3.7 are issued on a protracted basis without any material development being disclosed the Executive is always concerned to establish whether talks have been terminated or whether the offeror has decided not to proceed with the offer. The commenting process on Rule 3.7 announcements facilitates these enquiries. In light of the above the Executive does not consider it to be appropriate to include Rule 3.7 announcements in the Post-Vet List at this stage.

Question 2: If your answer to Question 1 is yes, do you agree with the proposed amendments to Rule 12.1 and Note 2 to Rule 12 as well as the introduction of a new Note to Rule 12.1?

Public comment

8. Proposed new Note to Rule 12.1 provides: "...*Notwithstanding the above exemption the Executive may require parties and/or their advisers to submit drafts of any relevant document for comment prior to publication if considered necessary or appropriate.*" (see paragraph 12 of Part 1 of the Consultation Paper)
9. One respondent agreed that the new Note to Rule 12.1 would help discourage relevant parties from abusing the relaxation of Rule 12.1 and suggested that the proposed amendment would give wide discretion to the Executive in deciding the circumstances under which this overriding power may be exercised. The respondent noted that the words "*necessary or appropriate*" do not provide transparency or clarity as to when such power may be exercised and may therefore lead to inconsistency in practice.



10. Another respondent who also supported the proposal questioned whether the parties would be given sufficient advance notice of the Executive's decision to exercise this overriding power. This respondent suggested that the Executive's discretion should be limited to the following instances:

- “(a) where, in light of the nature, size or complexity of the transaction, the Executive determines at the **beginning of a transaction** that the requirement should be applied to all announcements in the Post-Vet List for that transaction.*
- (b) where, in light of new developments, the Executive determines that the requirement should **from then on** be applied to all announcements in the Post-Vet List for that transaction.*
- (c) where, in light of special circumstances from time to time (e.g., undue share price movements and market rumours), the Executive determines that the requirement should be applied to a **specific announcement** in the Post-Vet List for that transaction.*

If the above is in line with what is envisaged by the Executive, then we suggest that the Executive clarifies in paragraph 10 of the Practice Note that, in cases under (a) and (b) above, it will notify the relevant parties upfront or in advance.”

Commission's response

11. The proposal to provide the Executive with an overriding discretion to require the submission of drafts of relevant announcements for review prior to publication is intended to discourage relevant parties from abusing the relaxation of Rule 12.1 and to assist the smooth running of cases with particular difficulties. The proposed new Note is intentionally drafted in wide terms to provide the Executive with the flexibility (a crucial feature of the Codes) to respond to a diverse range of situations which frequently arise in takeover transactions. The Executive therefore does not believe it is appropriate to restrict the circumstances in which the Executive might request parties to submit announcements on the Post-Vet List in advance of publication. In relevant cases the Executive expects to give advance notice to parties if it intends to require announcements to be provided in advance.

Question 3: Do you have any comment on the draft Practice Note (attached as Appendix 2 to the Consultation Paper)?

Public comment

12. Paragraph 5 of the proposed draft Practice Note (see Appendix 2 of the Consultation Paper) provides the following:

*“As stated in Rule 12.1 the Executive will not **normally** comment on drafts of announcements set out in the Post-Vet List. This change recognises the routine nature of such announcements and serves to reduce the cost and burden of compliance for relevant parties and their advisers.” (emphasis added)*



13. One respondent suggested that the word “*normally*” in draft paragraph 5 of the Practice Note should be deleted given the Executive’s overriding power to require submission of announcements in advance under the new Note to Rule 12.1 (see paragraph 8 above).

Commission’s response

14. The Executive believes that the word “*normally*” reflects the fact that new Note to Rule 12.1 provides the Executive with the flexibility to require parties and/or their advisers to submit drafts of relevant announcements for comment in advance of publication if considered necessary or appropriate. The Executive therefore does not propose to adopt this suggestion.

Public comment

15. One respondent suggested that announcements that need not be submitted to the Executive prior to release or publication should include a statement stating that the document has not been submitted to the Executive for comment prior to release and confirming compliance with the Codes.
16. Another respondent did not agree that the proposed relaxation of Rule 12.1 would reduce the burden of compliance. This respondent suggested that issuers and their advisers would need to be more careful when issuing announcements which had not been commented on by the Executive in order to ensure Code compliance under the amended Rule 12.1. The same respondent suggested that a reminder about early consultation with the Executive should be included in new Note 2 to Rule 12.

Commission’s response

17. The current Note 2 to Rule 12 makes it clear that it is the sole responsibility of the issuer of a document (and its directors and advisers) to ensure compliance with the Codes. This message is reflected in new Note 2 to Rule 12 and reinforced in the current Practice Note 5 entitled “Responsibility for documents: Executive’s commenting does not give immunity”. The Executive believes that the relaxation of Rule 12.1 will help reduce over reliance on the commenting process and promote self-discipline among parties and market practitioners to ensure compliance with the Codes. Furthermore, all documents issued under the Codes must include a responsibility statement in accordance with Rule 9.3 of the Takeover Code which requires directors of an issuer to 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.*” In light of the above the Executive does not propose to adopt the respondent’s suggestion as set out in paragraph 15 above.
18. The Executive agrees with the respondent’s view (as set out in paragraph 16) that new Note 2 to Rule 12 should be expanded to make it clear that parties and their advisers should consult the Executive in advance if there is any doubt as to whether an announcement qualifies for post-vetting. Accordingly a final paragraph has been added to new Note 2 to Rule 12 as set out below:



Notes to Rule 12:

2. *The Executive's role in the commenting process*

The Executive's role in the commenting process is no more than a consulting role where the Executive provides assistance in resolving any Code issues raised by the Executive or identified by the parties and their advisers. 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.

Where the Rules prescribe specific disclosure to be made parties and their advisers are expected to exercise due diligence to ensure that the required information is fully disclosed in the first draft document submitted to the Executive for comment under Rule 12.1.

Most importantly, parties and their advisers should not be under the misconception that by expressing that it has no further comment on a draft document the Executive is confirming that the document fully complies with the Codes. The Executive will not verify the accuracy of statements made in documents submitted for 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 Codes.

Parties and their advisers should consult the Executive at the earliest opportunity if there is any doubt as to whether a document qualifies for post-vetting.

Public comment

19. One respondent noted that the proposed guidance in the draft Practice Note on contents of announcements in the Post-Vet List is very helpful. Nevertheless the respondent suggested that announcements of delay in despatch of circulars issued under Rule 8.2 or Rule 8.4 (as set out in paragraph 12 (c) of the Practice Note) should be expanded to include announcements about the corresponding extension of the first closing date under Rule 8.4.

Commission's response

20. An announcement of an extension of an offer should be issued in compliance with Rule 15.1 and sometimes gives rise to important matters relating to certainty of the offer timetable under the Takeovers Code. In light of this the Executive does not consider it appropriate to adopt the respondent's suggestion.

Public comment

21. The same respondent also submitted that since the Post-Vet List is restricted to the announcements listed in paragraph 6 of the Consultation Paper, the List should refer only to "announcements" and not "documents" (which is defined in the Codes to include announcements and circulars amongst other things).



Commission's response

22. As noted by the respondent "document" is defined under the Codes to include "any announcement, advertisement or document issued or published by any party to an offer...". As such the Executive considers it appropriate to use a defined term in the Post-Vet List.

Public comment

23. One respondent suggested adding the Post-Vet List as an appendix to the Codes as many market practitioners still use paper copies of the Codes.

Commission's response

24. As stated in paragraph 9(c) of the Consultation Paper the Executive will continue to monitor certain other types of announcement (such as results announcements under Rule 19.1) to assess whether and, if so when, it might be appropriate to add them to the Post-Vet List. The Executive believes that the incorporation of the Post-Vet List as an appendix to the Codes would reduce the Executive's flexibility to revise it when and if necessary in a timely fashion. The market would be given notice of any such changes. The Post-Vet List is available on the SFC website and readily accessible to market practitioners and the investing public.



Part 2

Proposed miscellaneous amendments to the Codes

Background

25. In Part 2 of the Consultation Paper the Executive proposed a number of miscellaneous amendments to the Codes. These included a proposal to amend section 16.1 of the Introduction to the Codes relating to the publication of rulings of the Panel and the Takeovers Appeal Committee. The Executive also proposed a number of other minor “housekeeping” amendments including a new pagination system for the Codes to enable future amendments to be made in a more efficient manner.

Comments received and SFC’s responses

26. Respondents generally supported the proposals set out in this part of the paper. Five respondents raised specific comments which are considered below.

Question 4: Do you agree with the proposed changes to section 16.1 of the Introduction to the Codes?

27. In paragraphs 15 to 18 of the Consultation Paper, the Executive proposed to amend section 16.1 of the Introduction to the Codes to provide the Panel and the Takeovers Appeal Committee with wider discretion in relation to the timing of the publication of rulings in matters which are price sensitive or otherwise subject to confidentiality considerations of a commercial nature.

Public comment

28. One respondent raised the concern that the proposal to give the Panel and the Takeovers Appeal Committee “*absolute discretion*” to decide whether or not to agree to delay the publication of a ruling would effectively give the Panel and the Takeovers Appeal Committee ultimate power to decide whether to delay the publication of a ruling. It was suggested that this might defeat the purpose of the proposed amendments which is aimed at greater transparency and prompt publication.
29. Another respondent submitted that the Panel and the Takeovers Appeal Committee should apply the provisions of section 16.1 more strictly and, where possible, should refuse applications for delay in the publication of its decisions. This respondent suggested the following amendment to the last sentence of section 16.1 of the Introduction:

“...However, in matters where the Panel and the Takeovers Appeals Committee (as the case may be), in their absolute discretion, deem that there are significant confidential or materially commercially sensitive considerations in relation to the ruling, they may, in their absolute discretion, agree to delay publication of the ruling.”



Commission's response

30. As stated in paragraph 17 of the Consultation Paper, there is a concern that the current wording of section 16.1 is overly restrictive and might contribute to unnecessary delay in the publication of decisions of the Panel and the Takeovers Appeal Committee. Under the current drafting publication of a ruling must be delayed until the information is no longer price sensitive or commercially confidential. The proposed amendment to section 16.1 allows the Panel and the Takeovers Appeal Committee to exercise absolute discretion in determining whether or not to agree to an application by the parties to delay the publication of their ruling. In reaching a decision of whether or not to agree to a delay in the publication of a ruling the Panel and the Takeovers Appeal Committee will consider applications on a case by case basis taking into account all relevant facts and circumstances.
31. Section 16.1 provides that it is the policy of the Panel and the Takeovers Appeal Committee to publish their rulings as soon as reasonably practicable. The Executive believes that the amendments as proposed in the Consultation Paper are sufficient to achieve this aim and will help ensure that the decisions are made available equally and in a timely manner to all market participants who can take account of them when dealing with Code matters.

Public comment

32. One respondent who agreed with the proposal suggested that "... *hearings be conducted on a no-name basis to protect parties involved in the transaction since oftentimes, the matters discussed at these hearings are price sensitive or subject to confidentiality considerations of a commercial nature.*" This respondent also suggested that corresponding amendments should be made to section 15.2 of the Introduction to the Codes.

Commission's response

33. The SFC consulted the market on the procedures for hearings under the Codes in November 2007 and accordingly adopted the proposed amendments in April 2008. In summary sections 13.2 and 13.5 of the Introduction to the Codes provide that all non-disciplinary hearings of the Panel are held in private as they often involve confidential price sensitive information on the basis that the parties must not disclose any details of the hearing to any other person, including the media and must not make use of any information acquired during the course of the hearing for purposes other than those connected with the hearing itself. Disciplinary hearings are held in public as this facilitates fairness and transparency. The Executive believes that existing procedures relating to hearings of the Panel or the Takeovers Appeal Committee are appropriate and therefore does not propose to adopt the suggestion.

Public comment

34. One respondent supported the proposed amendment of the first sentence of section 16.1 of the Introduction but suggested that the remainder of section 16.1 as it is currently drafted be retained. The respondent also suggested that if there is a concern that Panel rulings may be excessively delayed due to



commercial sensitivity (rather than price sensitivity), the approach of the UK Takeover Code could be considered, namely, allowing publication of rulings to proceed but with confidential or commercially sensitive material redacted.

Commission's response

35. The Executive believes that rulings of the Panel and the Takeovers Appeal Committee should be published in full as this facilitates transparency and public understanding of the operation of the Codes. There is a concern that redacted rulings might lead to confusion as well as uninformed market speculation over the content of the redacted material. Given this the Executive does not propose to adopt the respondent's proposal.

Questions 5 to 13

36. In paragraphs 19 to 33 of the Consultation Paper (Questions 5 to 13) the Executive proposed a number of miscellaneous amendments to the Codes. A number of these are clarification or "housekeeping" amendments or reflect current practice.
37. Comments were raised relating to the specific proposed amendments set out in Questions 5, 9, 10 and 11. These comments and the Executive's response are considered below.

Question 5: Do you agree with the proposal to clarify that negative statements should be made if any of the disclosures required under paragraphs (c) to (h) of Rule 3.5 is not applicable?

38. In paragraph 19 of the Consultation Paper the Executive proposed to add a new paragraph after paragraph (h) of Rule 3.5 of the Takeovers Code to clarify that negative statements should be made if any of the disclosures required paragraphs (c) to (h) of Rule 3.5 are not applicable.

Public comment

39. One respondent commented this would provide more clarity on the information disclosed by the listed companies enhancing transparency in the market for investors' benefits. Another respondent sought clarification on whether "[t]he negative statement could simply refer to the relevant paragraph number (or numbers) of Rule 3.5 or it could actually reiterate the substance of the required disclosure."

Commission's response

40. The Executive would like to clarify that negative statements should be disclosed in Rule 3.5 announcements if any of paragraphs (c) to (h) of Rule 3.5 is not applicable. This is consistent with the existing approach adopted in respect of Schedules I to III of the Codes. The Executive believes that merely stating the paragraph number (or numbers) is not sufficiently informative in particular with regards to shareholders who may not be familiar with the Codes.



Public comment

41. One respondent disagreed with the proposal and suggested that it runs contrary to Note 1 to Rule 3.5 which accepts that details of holdings by a group which an adviser is a member (a person acting in concert with the offeror) can be disclosed after the announcement of an offer.

Commission's response

42. As stated in paragraph 19 of the Consultation Paper Rule 3.5 provides for specific disclosures to be made in an announcement of a firm intention to make an offer. Under the proposal a negative statement must be made in the Rule 3.5 announcement if any disclosure under paragraphs (c) to (h) is not applicable. The purpose of the proposal is to make it clear in the Rule 3.5 announcement whether matters or arrangements referred to under paragraphs (c) to (h), being information relating to the offeror (or its concert parties), exist. The Executive does not agree that the proposal contradicts the requirements of Note 1 to Rule 3.5 which relate to holdings or borrowings held by a group of which an adviser is a member which cannot prudently be ascertained before the Rule 3.5 announcement is issued for reasons of secrecy.

Question 9: Do you agree with the proposed amendments to Rule 19.1?

43. In paragraph 23 of the Consultation Paper the Executive proposed to amend Rule 19.1 to reflect the Stock Exchange's new regime for electronic dissemination of regulatory information.

Public comment

44. One respondent suggested the following amendments would more accurately reflect the requirements of the Listing Rules:

"The offeror must publish an announcement in accordance with the requirements of the Listing Rules on the Stock Exchange's website [on the Stock Exchange's website and the offeror's website (if applicable)] by 7:00 p.m. on the closing date stating whether the offer has been revised or extended,..." (emphasis added)

45. The same respondent also suggested that given that in most cases a results announcement is issued jointly by the offeror and the offeree company (being a listed company) and published on the listed offeree company's website Note 1 to Rule 19 (which require notification to the Executive and the Stock Exchange under Rule 19.1 to be communicated to the offeree company and the competing offeror) should be amended so that the listed offeree company, upon receipt of such notification, should issue the announcement jointly with the offeror and publish the results announcement on its website.

Commission's response

46. Listing Rule 2.07C sets out the procedures regarding publication of announcements or notices under the Listing Rules. The Executive believes it is appropriate to require announcements to be published in compliance with the



requirements of the Listing Rules in Rule 19.1. In the event that an unlisted offeror is not able to publish a document on the Stock Exchange's website the document should be submitted to the Executive for publication on the SFC's website. Rule 12.2 of the Takeovers Code has been amended to reflect this (see **Appendix 2**).

47. The Executive notes that it is an established market practice for an offeror to issue a results announcement jointly with the offeree company on the closing date. The announcement is published on the Stock Exchange's website in accordance with the Listing Rules. Therefore the Executive does not consider it necessary to revise Note 1 to Rule 19 as suggested.

Question 10: Do you agree with the proposed amendment to Rule 22.1(b)(ii)?

48. In paragraph 29 of the Consultation Paper the Executive proposed to amend Rule 22.1(b)(ii) as follows:

"...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."

Public comment

49. One respondent suggested replacing the words "in addition to disclosing privately" with "and not privately".

Commission's response

50. The Executive believes the proposed amendment set out in the Consultation Paper already makes it sufficiently clear that the relevant dealings must be disclosed publicly and therefore that additional private disclosure is not required. This is consistent with the other references to public disclosure in the Codes. The Executive therefore does not propose to adopt the suggestion.

Question 11: Do you agree with the proposed amendments to Note 6 to Rule 22?

51. In paragraph 30 of the Consultation Paper the Executive proposed to amend Note 6 to Rule 22 to reflect the current practice of using the prescribed forms which are available on the SFC's website and to remove from Note 6 the requirement to disclose such dealings to the Stock Exchange.

Public comment

52. One respondent asked whether the completed prescribed form could be submitted by fax.

Commission's response

53. Currently completed forms may be submitted to the Executive either by e-mail or by fax. Should the position change in the future the market would be informed accordingly.



Other miscellaneous amendments:

54. All respondents supported the following proposed miscellaneous amendments. The Executive has therefore adopted the relevant amendments as proposed.

Question 6: Do you agree that the final paragraph of each of Notes 1 and 2 to Rule 8 should be deleted as proposed?

Question 7: Do you agree that references to “press” in Rule 10.2, Rule 10.4 and Note 6(a) to Rule 22 should be deleted as proposed?

Question 8: Do you agree with the proposed amendments to Rule 10.7, paragraph 12(a)(i) of Schedule I, paragraph 6(a)(i) of Schedule II and paragraph 16(a)(i) of Schedule III?

Question 12: Do you agree with the proposal to clarify Note 5 to Rule 23.1?

Question 13: Do you agree that Rule 26.7 should be deleted?



Appendix 1

LIST OF RESPONDENTS

Respondents whose comments are published on the SFC website in full:

1. Baker & McKenzie
2. Citigroup Global Markets Asia Limited
3. CLP Holdings Limited
4. CompliancePlus consulting
5. Macquarie Capital (Hong Kong) Limited
6. The Hong Kong Institute of Chartered Secretaries
7. SBI E2-Capital
8. Suen Chi Wai



Appendix 2

MARKED UP TEXT OF AMENDMENTS TO THE CODES

Section 16.1 of the Introduction to the Codes

- 16.1 Irrespective of the outcome of a matter, ~~and subject to confidentiality considerations of a commercial nature,~~ it is the policy of the Panel and the Takeovers Appeal Committee to publish their rulings, and the reasons for those rulings on the SFC's website, as soon as reasonably practicable, so that their activities may be understood by the public. This includes a ruling of the Panel involving a finding of breach or breaches of the Codes which is pending appeal to the Takeovers Appeal Committee. ~~However, in matters where the ruling is price sensitive, or otherwise subject to confidentiality considerations of a commercial nature, the announcement of the ruling will be published as soon as the information is no longer price sensitive or commercially confidential~~ the Panel and the Takeovers Appeal Committee (as the case may be) may, in its absolute discretion, agree to delay the publication of the ruling.

New paragraph after paragraph (h) of Rule 3.5 of the Takeovers Code

- 3.5 Announcement of firm intention to make an offer

...

In the event that any of paragraphs (c) to (h) above is not applicable because no such matter or arrangement exists, a negative statement to this effect must be made.

...

Notes 1 and 2 to Rule 8 of the Takeovers Code

Notes to Rule 8:

1. Documents to be on display

...

~~[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

...

~~[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.]~~



Rule 10.2 of the Takeovers Code

10.2 The assumptions

...

- (b) When a profit forecast is given in a ~~press-an~~ 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.

Rule 10.4 of the Takeovers Code

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-an~~ 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-an~~ 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.

Rule 10.7 of the Takeovers Code

10.7 Taxation, ~~extraordinary items,~~ items which are exceptional because of size, nature and incidence and net profit or loss attributable to 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,~~ items which are exceptional because of size, nature or incidence ~~items~~ and net profit or loss attributable to minority interests.

Rule 12.1 of the Takeovers Code

12.1 Filing of documents for comments

All documents (other than those referred to in the Note to Rule 12.1 below) 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~~.



New Note to Rule 12.1 of the Takeovers Code

Note to Rule 12.1:

The Executive will from time to time publish, on the SFC's website, a list of documents that will not normally be regarded as subject to Rule 12.1 and therefore will not be required to be submitted to the Executive for comment prior to release or publication. A published version of the document must be filed with the Executive immediately after the document is published.

Notwithstanding the above exemption, the Executive may require parties and/or their advisers to submit drafts of any relevant document for comment prior to publication if considered necessary or appropriate.

Rule 12.2 of the Takeovers Code

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. All documents published in respect of unlisted offeree companies must be delivered to the Executive in electronic form for publication on the SFC's website.

The requirements of Rule 12.2 that apply to unlisted offeree companies apply equally to unlisted offerors in the event that they are not able to publish documents on the Stock Exchange's website in accordance with the requirements of the Listing Rules.

Note 2 to Rule 12 of the Takeovers Code

Notes to Rule 12:

...

2. ~~Verification~~ The Executive's role in the commenting process

The Executive's role in the commenting process is no more than a consulting role where the Executive provides assistance in resolving any Code issues raised by the Executive or identified by the parties and their advisers. 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.

Where the Rules prescribe specific disclosure to be made parties and their advisers are expected to exercise due diligence to ensure that the required information is fully disclosed in the first draft document submitted to the



Executive for comment under Rule 12.1.

Most importantly, parties and their advisers should not be under the misconception that by expressing that it has no further comment on a draft document the Executive is confirming that the document fully complies with the Codes. The Executive will not verify the accuracy of statements made in documents submitted for 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 Codes.

Parties and their advisers must consult the Executive at the earliest opportunity if there is any doubt as to whether a document qualifies for post-vetting.

...

Rule 19.1 of the Takeovers Code

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 an announcement in accordance with the requirements of the Listing Rules 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 announcement must be submitted to the Executive ~~and the Stock Exchange~~ by 6.00 p.m. for 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;

...

Rule 22.1(b)(ii) of the Takeovers Code

22.1 ...

(ii) ...

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.~~



Note 6 to Rule 22 of the Takeovers Code

Notes to Rule 22:

...

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 writing to the Executive using the prescribed forms available on the SFC's website~~in electronic form to the Executive and, in respect of relevant dealings in listed securities, also to the Stock Exchange (Listing Division)~~. The Executive will arrange for the posting of the disclosure on the SFC's website.

...

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.

...

(b) Private disclosure

Dealings should be disclosed in writing ~~or in electronic form~~ to the Takeovers and Mergers Executive – Securities and Futures Commission using the prescribed forms available on the SFC's website; they are not published.

Note 5 to Rule 23.1 of the Takeovers Code

Notes to Rule 23.1:

5. Acquisitions for securities

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~~6 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.



Rule 26.7 of the Takeovers Code

~~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.—~~

Paragraph 12(a)(i) of Schedule I

12. Financial information

...

- (i) for the last 3 financial years for which the information has been published, turnover, net profit or loss before and after taxation, net profit or loss attributable to shareholders, net profit or loss attributable to minority interests, the charge for tax, extraordinary items, items which are exceptional because of size, nature or incidence~~items, minority interests~~, the amount absorbed by dividends, and earnings and dividends per share;

...



Paragraph 6(a)(i) of Schedule II

6. Financial information

...

- (i) for the last 3 financial years for which the information has been published, turnover, net profit or loss before ~~and after taxation~~, net profit or loss attributable to shareholders, net profit or loss attributable to minority interests, the charge for tax, ~~extraordinary items, items which are exceptional because of size, nature or incidence~~items, minority interests, the amount absorbed by dividends, and earnings and dividends per share;

...

Paragraph 16(a)(i) of Schedule III

16. Financial information

...

- (i) for the last 3 financial years for which the information has been published, turnover, net profit or loss before ~~and after taxation~~, net profit or loss attributable to shareholders, net profit or loss attributable to minority interests, the charge for tax, ~~extraordinary items, items which are exceptional because of size, nature or incidence~~items, minority interests, the amount absorbed by dividends, and earnings and dividends per share;

...



Appendix 3

Practice Note 5 (PN 5): Post-vetting of certain documents under Rule 12.1

1. Rule 12.1 of the Takeovers Code was amended on 25 June 2010 to provide that “[a]ll documents (**other than those referred to in the Note to Rule 12.1 below**) 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...” (emphasis added to highlight the relevant changes)
2. “Document” is defined in the Codes to include “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 required to be put on display under Notes 1 and 2 to Rule 8 of the Takeovers Code...**” (emphasis added)
3. A new Note to Rule 12.1 has been added to provide, among other things, that the Executive will from time to time publish a list of documents that will not normally be regarded as subject to Rule 12.1 and therefore will not be required to be submitted to the Executive for comment prior to release or publication (**Post-Vet List**). This List can be found in the “Prospectuses, Takeovers & Mergers”-“Takeovers and Mergers” section of the SFC website at www.sfc.hk.
4. The purpose of this Practice Note is to provide guidance to parties and their advisers in respect of announcements appearing in the Post-Vet List.

Commenting process under the Codes

5. As stated in Rule 12.1, the Executive will not normally comment on drafts of announcements set out in the Post-Vet List. This change recognises the routine nature of such announcements and serves to reduce the cost and burden of compliance for relevant parties and their advisers.
6. For the avoidance of doubt, any “document” that is not specified in the Post-Vet List (for example, a circular or an announcement issued under Rule 3 of the Takeovers Code) is still required to be submitted to the Executive for comment before publication in accordance with Rule 12.1.
7. In addition, if an announcement in the Post-Vet List contains additional information relating to other material matters or Code provisions (such as issues relating to profit forecasts or valuations) the announcement would not be considered as falling within the Post-Vet List for the purposes of the Note to Rule 12.1. The relevant announcement would, therefore, be required to be submitted to the Executive for comment under Rule 12.1 of the Takeovers Code before its publication. Parties and their advisers must consult the Executive at the earliest opportunity if there is any doubt as to whether an announcement qualifies for post-vetting (see Note 2 to Rule 12 of the Takeovers Code).



Post-publication review and follow-up action

8. The new Note to Rule 12.1 requires that a published version of the document (i.e. the document which qualifies for post-vetting) must be filed with the Executive immediately after the document is published.
9. The Executive will review the relevant announcement after publication and make appropriate enquiries where necessary. Parties and their advisers are expected to respond promptly to any follow-up enquiries made by the Executive and provide all necessary information (see General Principle 10). A party and/or its advisers should make every effort to resolve an issue once it has been raised which may include the need to publish a supplementary disclosure or clarification announcement.
10. Notwithstanding the exemptions mentioned in paragraph 1 above, the Executive may, where it considers it necessary or appropriate, require a party and/or its advisers to submit drafts of documents which appear in the Post-Vet List for review prior to publication.

Guidance on contents of announcements in the Post-Vet List

11. All documents issued under the Codes must include a responsibility statement as required by Rule 9.3 of the Takeovers Code. This includes announcements that appear in the Post-Vet List. Any proposed modification or change to the responsibility statement, including the exclusion of directors under Rule 9.4, is subject to the Executive's prior consent.
12. Guidance is set out below on specific information that will normally be required in respect of each announcement set out in the Post-Vet List. Where the Codes prescribe specific disclosure to be made, parties and/or their advisers are reminded that they are expected to exercise due diligence to ensure that the required information is fully disclosed in the announcement. In case of doubt the Executive should be consulted at the earliest opportunity.

a) Announcements of the appointment of independent financial advisers under Rule 2.1

Rule 2.1 requires that “[t]he 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.” Rule 2.6 further sets out persons not regarded to be suitable to give independence advice. If there is any doubt regarding compliance with Rule 2.1 and Rule 2.6 parties are encouraged to consult the Executive before the appointment is made and announced. In the event that, following an announcement of its appointment as independent financial adviser, an adviser is considered not suitable to give independent advice a further announcement of a change of independent financial adviser would be required.



b) Announcements of the despatch of circulars under Rule 8 or Rule 25

Typically an announcement informing shareholders of the despatch of a circular under the Codes will be made on or before the date of despatch. In cases where the parties wish to reproduce certain information such as the timetable, recommendation of the independent board committee and/or the independent financial adviser in the despatch announcement, they should take all appropriate care to ensure that such information is properly and accurately extracted from the relevant circular and no additional or new information is included in the announcement. Parties should also submit evidence about the date of despatch in accordance with Note 4 to Rule 8.

c) Announcements of delay in the despatch of circulars under Rule 8.2 or Rule 8.4

Under Rule 8.2 or Rule 8.4, the Executive's consent is required if the offer document, composite document or the offeree board circular cannot be posted within the prescribed period. Rule 8.4 further provides that the Executive's consent will be given only if the offeror agrees to an extension of the first closing date by the number of days in respect of which the delay in the posting of the offeree board circular is agreed. In this connection, parties and their advisers should submit the consent application before the relevant announcement is issued. If it is not possible to obtain a formal written ruling in advance, the Executive's indicative view on the period of extension must be sought in advance of publication of the relevant announcement. The announcement normally should contain a confirmation (i) that the Executive has granted consent to the delay in despatch; or (ii) that an application for consent has been or will be made to the Executive and the Executive has indicated that it is minded to grant consent; and (iii) the expected date of despatch and the reasons for the delay. Such announcement should be published on or before the original despatch date required by Rule 8.2 or Rule 8.4.

d) Announcements of the appointment and resignation of directors of the offeree company under Rule 26.4 and Rule 7

Rule 7 restricts the earliest time the directors of an offeree company may resign except with the consent of the Executive. Rule 26.4 restricts the earliest time that a nominee of an offeror or person acting in concert with it may be appointed to the board of the offeree company except with the consent of the Executive. It follows that where relevant the Executive's consent must be obtained before publication of the announcement.

e) Announcements of placing and top-up transactions under Note 6 on dispensations from Rule 26

Note 6 on dispensations from Rule 26 provides that *"[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...”

Normally a straightforward placing and top-up involves the relevant parties entering into a placing and subscription agreement relating to:

- (i) the placing of existing shares to independent persons; and
- (ii) a subscription by the placing shareholder(s) for new shares up to the number of shares placed.

Only announcements relating to straightforward placing and top-up transactions will qualify for the Post-Vet List. Where a placing and top-up transaction involves other arrangements or agreements, which may or may not be contained in the placing and subscription agreement(s), the Executive must be consulted in advance of publication of the placing and top-up announcement. For example, a placing and top-up involving a repurchase arrangement between the placing shareholder(s) and the placees would not be considered as falling within the Post-Vet List. In all cases of doubt parties should consult the Executive at the earliest opportunity.

In practice the Executive would expect a placing and top-up announcement to contain the following information:

- (i) the terms of the placing and top-up transaction;
- (ii) a statement that the placees and their ultimate beneficial owners are or will be (if not yet procured) independent of and not acting in concert with the placing shareholder(s) and its/their respective concert parties;
- (iii) a statement confirming that the condition precedent relating to the granting of a waiver by the Executive under Note 6 on dispensations from Rule 26 cannot be waived by the placing shareholder(s). The Executive should be consulted in advance if such a condition is waivable; and
- (iv) a statement that an application will be or has been made by the placing shareholder(s) to the Executive for a waiver under Note 6 on dispensations from Rule 26.

Note 6 on dispensations from Rule 26 provides guidance as to the circumstances in which the Executive would normally waive the obligation under Rule 26 for a placing and top-up transaction. It is clearly the responsibility of the financial adviser or placing agent to verify and confirm the independence of placees as soon as practicable. It should be



noted that in the event that the Executive does not grant a waiver under Note 6 on dispensations from Rule 26 and the top-up transaction proceeds as proposed a mandatory general offer obligation under Rule 26 would be triggered. Please also see the article entitled “Responsibility of financial advisers or placing agents to verify and confirm independence of placees in placing and top-up transactions” in the December 2009 Takeovers Bulletin.

Responsibility for documents

13. The Executive would like to remind parties and their advisers who are involved in Code transactions about the newly amended Note 2 to Rule 12 of the Takeovers Code which provides that:

“The Executive’s role in the commenting process is no more than a consulting role where the Executive provides assistance in resolving any Code issues raised by the Executive or identified by the parties and their advisers. 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.

Where the Rules prescribe specific disclosure to be made parties and their advisers are expected to exercise due diligence to ensure that the required information is fully disclosed in the first draft document submitted to the Executive for comment under Rule 12.1.

Most importantly, parties and their advisers should not be under the misconception that by expressing that it has no further comment on a draft document the Executive is confirming that the document fully complies with the Codes. The Executive will not verify the accuracy of statements made in documents submitted for 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 Codes.

Parties and their advisers must consult the Executive at the earliest opportunity if there is any doubt as to whether a document qualifies for post-vetting.”

14. Finally, parties who issue Code related announcements and documents should be aware of possible criminal liability arising under Section 384 of the Securities and Futures Ordinance (Cap. 571) for any false or misleading information contained in such announcements and documents.

25 June 2010



Appendix 4

List of documents that need not be submitted to the Executive for prior comment under Rule 12.1 of the Takeovers Code

The following types of document need not be submitted to the Executive for prior comment under Rule 12.1 of the Takeovers Code:

- Announcements of the appointment of independent financial advisers under Rule 2.1
- Announcements of the despatch of circulars under Rule 8 or Rule 25
- Announcements of delay in the despatch of circulars under Rule 8.2 or Rule 8.4
- Announcements of the appointment and resignation of directors of the offeree company under Rule 26.4 and Rule 7
- Announcements of placing and top-up transactions under Note 6 on dispensations from Rule 26