



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

Consultation Paper on proposed amendments to the Codes on Takeovers and Mergers and Share Buy- backs

19 January 2018



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Introduction

The Securities and Futures Commission (**SFC**) invites market participants and interested parties to submit written comments on this Consultation Paper on proposed amendments to the Codes on Takeovers and Mergers and Share Buy-backs (**Codes**).

The Codes apply to takeovers, mergers and share buy-backs affecting companies with a primary listing of equity securities in Hong Kong, Real Estate Investment Trusts with a primary listing of their units in Hong Kong and public companies in Hong Kong. The current proposals result from a review conducted by the Executive in consultation with the Takeovers Panel (**Panel**).

Proposals

In this Consultation Paper the Executive proposes amendments to various provisions of the Codes together with the reasons for such changes. We invite the market to provide responses to our specific questions although general comments on any other matters discussed are welcome. This Consultation Paper is divided into six parts:

Part 1 proposes to introduce a number of provisions which clarify (i) the obligations of parties when dealing with the Executive, the Panel and the Takeovers Appeal Committee and (ii) the power of the Executive, the Panel and the Takeovers Appeal Committee to make compliance rulings as pre-emptive measures to prevent breaches to protect shareholders. It also proposes to empower the Panel to require compensation to be paid to shareholders who have suffered as a result of a breach of certain provisions of the Codes.

Part 2 proposes to amend the definition of associate to eliminate overlap and potential inconsistencies that arise out of the similarities between the definition of associate and the definition of acting in concert.

Part 3 proposes to raise the voting approval threshold for whitewash waivers from a simple majority of independent votes to 75% and to introduce an explicit requirement to require separate resolutions to be put to independent shareholders for the underlying transaction(s) and the whitewash waiver.

Part 4 aims to provide a level playing field for companies incorporated in jurisdictions which have no compulsory acquisition rights (such as the mainland China) that seek to delist in Hong Kong through a general offer. In such cases, it is proposed that appropriate measures should be put in place to protect minority shareholders.

Part 5 proposes to clarify the scope of disclosure of holdings and dealings in relevant securities, in particular where the offeror is offering securities of another company as consideration in an offer. It is also proposed to relax some requirements including the timing of dealing disclosures.

Part 6 proposes various miscellaneous amendments to the Codes to codify existing practice and to effect a number of “housekeeping” amendments.

The consolidated proposed amendments discussed in this Consultation Paper are marked up against the current version of the Codes in **Appendix 1**.



Consultation period

The consultation will last for three months until 19 April 2018. Any person wishing to submit comments on behalf of an organisation should provide details of the organisation whose views they represent. In addition, respondents who wish to suggest alternative approaches are encouraged to submit the proposed text of possible amendments that would be necessary to incorporate their suggestions into the Codes.

Comments may be submitted as follows:

By mail to: Corporate Finance Division
The Securities and Futures Commission
35th Floor, Cheung Kong Center
2 Queen's Road Central
Hong Kong

Re: Consultation Paper on proposed amendments to the
Codes on Takeovers and Mergers and Share Buy-backs

By fax to: (852) 2810-5385

By online submission at: <http://www.sfc.hk/edistributionWeb/gateway/EN/consultation/>

By e-mail to: takeoverscode_review@sfc.hk

All submissions received before expiry of the consultation period will be taken into account before the proposals are finalised and a consultation conclusions paper will be published in due course.

Please note that the names of respondents and the contents of their submissions may be published, in whole or in part, on the SFC's website and in other documents to be published by the SFC. In this connection, please read the Personal Information Collection Statement attached to this Consultation Paper.

If you do not wish the SFC to publish your name and/or submission please say so in a statement when making your submission.

Securities and Futures Commission
Hong Kong

19 January 2018



Personal information collection statement

This Personal Information Collection Statement (**PICS**) is made in accordance with the guidelines issued by the Privacy Commissioner for Personal Data¹. The PICS sets out the purposes for which your Personal Data¹ will be used following collection, what you are agreeing to with respect to the SFC's use of your Personal Data and your rights under the Personal Data (Privacy) Ordinance (Cap. 486) (**PDPO**).

Purpose of collection

The Personal Data provided in your submission to the SFC in response to this Consultation Paper may be used by the SFC for one or more of the following purposes:

- (a) to administer the relevant provision² and codes and guidelines published pursuant to the powers vested in the SFC;
- (b) in performing the SFC's statutory functions under the relevant provisions;
- (c) for research and statistical purposes; or
- (d) for other purposes permitted by law.

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Personal Data may be disclosed by the SFC to members of the public in Hong Kong and elsewhere as part of the public consultation on this Consultation Paper. The names of persons who submit comments on this Consultation Paper, together with the whole or any part of their submissions, may be disclosed to members of the public. This will be done by publishing this information on the SFC website and in documents to be published by the SFC during the consultation period or at its conclusion.

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Personal Data provided to the SFC in response to this Consultation Paper will be retained for such period as may be necessary for the proper discharge of the SFC's functions.

¹ Personal data means personal information as defined in the Personal Data (Privacy) Ordinance (Cap. 486).

² The term "relevant provisions" is defined in section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571) and refers to the provisions of that Ordinance together with certain provisions in the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32), the Companies Ordinance (Cap. 622) and the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615).



Enquiries

Any enquiries regarding the Personal Data provided in your submission on this Consultation Paper, or requests for access to Personal Data or correction of Personal Data, should be addressed in writing to:

The Data Privacy Officer
The Securities and Futures Commission
35/F Cheung Kong Center
2 Queen's Road Central
Hong Kong.

A copy of the Privacy Policy Statement adopted by the SFC is available upon request.



PART 1: DEALINGS WITH AND POWERS OF THE EXECUTIVE, PANEL AND TAKEOVERS APPEAL COMMITTEE

Dealings with the Executive, Panel and Takeovers Appeal Committee

1. The primary purpose of the Codes is to afford fair treatment to shareholders who are affected by takeovers, mergers and share buy-backs. The Codes are non-statutory in nature and designed to facilitate fair, efficient and timely decision-making. This is important for investor protection and the credibility of the Codes and the Panel. It also helps to ensure flexibility, speed and certainty which enable parties to know where they stand under the Codes in a timely fashion.
2. In a number of recent cases parties dealing with the Executive have not conducted themselves in an open and co-operative manner. This has hampered the decision-making process which is not in the interests of fair, efficient and timely decision making. It is important in all Codes transactions that parties disclose all relevant information which they are aware of to the Executive and correct or update the information if it changes so that we (or as appropriate the Panel or Takeovers Appeal Committee) can reach a fully informed decision. This is consistent with General Principle 10 which provides that “[a]ll 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.”
3. We therefore propose to clarify the obligations of parties dealing with the Executive by adding a new section 5.2 to the Introduction to the Codes as set out below. This amendment is broadly consistent with section 9(a) of the Introduction to The City Code on Takeovers and Mergers (**London Code**).

“Dealings with the Executive

5.2 Any person dealing with the Executive must do so in an open and co-operative way. Prompt co-operation and assistance is expected from persons dealing with the Executive and those to whom enquiries and other requests are directed. In such dealings, a person must disclose any information known to him and relevant to the matter being considered (and correct or update that information if it changes). A person dealing with the Executive or to whom enquiries or requests are directed must provide true, accurate and complete information.

Where a matter has been determined by the Executive and a person becomes aware that information supplied to the Executive was not true, accurate or complete, that person must promptly contact the Executive to correct the position. In addition, where a determination of the Executive has continuing effect (such as the grant of exempt status or a concert party ruling), the party or parties to that determination must promptly notify the Executive of any new information relevant to that determination.

For the avoidance of doubt, nothing in this section limits the general application of General Principle 10.”



4. We also propose the following amendments to section 7.1 of the Introduction to the Codes to reiterate the requirement:

“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 cooperation 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. Particular attention should be paid to the obligations under section 5.2 of this Introduction.”

5. Similar clarification should be made in relation to dealings with the Panel and the Takeovers Appeal Committee. We propose to add the following new sections 11.18 and 14.9 to the Introduction to the Codes:

“Dealings with the Panel

11.18 The obligations set out in section 5.2 of this Introduction apply equally to a person dealing with the Panel.”

“14.9 The obligations set out in section 5.2 of this Introduction apply equally to a person dealing with the Takeovers Appeal Committee.”

Question 1: Do you agree with the proposals regarding parties’ dealings with the Executive, Panel and Takeovers Appeal Committee? If not, please give reasons.

Compliance rulings

6. Section 7 of the Introduction to the Codes provides as follows:

“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 ...”

7. It is clear from section 7 that the Executive has the discretion to issue a ruling under the Codes if it considers the circumstances to be appropriate. In recent years we have issued a number of rulings to explain to parties that certain action would amount to a breach of the Codes and to warn them that if they were to proceed with such action they may be subject to disciplinary action under the Codes. We believe that where possible it is more effective to take pre-emptive action to prevent a breach (or further breach) of the Codes in order to protect shareholders and the market. Pre-emptive action also helps to avoid disciplinary proceedings which are time consuming and resource intensive both for the parties involved and the Executive, and in some cases the Panel. We therefore propose to add new sections 7.2 and 13.12 to the Introduction to the Codes and to amend section 13.10 to the Introduction to the Codes to clarify the Executive’s and the Panel’s existing power to issue compliance rulings as set out below.



These changes are consistent with section 10(b) of the Introduction to the London Code:

“Compliance rulings

7.2 If the Executive is satisfied that:

(a) there is a reasonable likelihood that a person will contravene a requirement imposed by or under the Codes; or

(b) a person has contravened a requirement imposed by or under the Codes,

the Executive may give any direction that appears to it to be necessary in order to:

(i) restrain a person from acting (or continuing to act) in breach of a relevant requirement under the Codes; or

(ii) restrain a person from doing (or continuing to do) a particular thing, pending determination of whether that or any other conduct of his is or would be a breach of a relevant requirement under the Codes; or

(iii) otherwise secure compliance with a relevant requirement under the Codes.”

“13.10 The Chairman of the hearing may give any preliminary or procedural direction (including a compliance ruling of the nature described in section 7.2 of this Introduction) as he considers appropriate for the determination of a matter without the need for a hearing. Any ruling made by the Chairman is a ruling of the Panel.”

“13.12 The Panel may also give directions of the nature described in section 7.2 of this Introduction.”

Question 2: Do you agree with the proposal to add new sections 7.2 and 13.12 to the Introduction to the Codes and to amend section 13.10 to the Introduction to the Codes? If not, please give reasons.

Compensation rulings

8. We recommend that the Panel is provided with the explicit power to require a person found to be in breach of certain provisions of the Codes to pay compensation to shareholders. The purpose of a compensation ruling would be to provide financial redress to shareholders or former shareholders who have suffered as a result of a breach of the Codes. For example, in a case where an offeror has failed to make a mandatory offer as required by Rule 26.1 of the Takeovers Code, rather than requiring a general offer to be made forthwith, the Panel might consider it more appropriate to require the person(s) found to be in breach to pay compensation to shareholders who should have received an offer at the time the obligation was triggered. The proposed amendment is consistent with the Panel’s approach in the cases of Shun Ho Resources Holdings Limited (29 November 1995) (**Shun Ho**) and Kong Tai International Holdings Limited (24 June 1999) (**Kong Tai**). In both cases the Panel imposed a cold shoulder



order on the offending party that was to be uplifted if the relevant party compensated shareholders who should have received a general offer.

9. The proposed amendment is also broadly consistent with the London Code (see section 10(c) of the Introduction to the London Code) and The Singapore Code on Take-overs and Mergers (**Singapore Code**) (see section 2 of the Introduction to the Singapore Code).
10. We propose that the Panel's power to require compensation to be paid should be limited to a breach of the following Rules, each of which relates to the obligation to make an offer on terms prescribed by the Codes:
 - (a) **Rules 13 and 14** – appropriate offers and comparable offers – offers are required to be made for other classes of relevant securities.
 - (b) **Rule 16** – entitlement to revised consideration – Rule 16.1 requires that, if an offer is revised, all shareholders will be entitled to receive the revised offer whether or not they have accepted the original offer.
 - (c) **Rule 23** – nature of consideration – situations when a cash offer or a securities offer is required.
 - (d) **Rule 24** – purchases resulting in an obligation to offer a minimum level of consideration – no less favourable terms must be extended to shareholders of the same class if a certain level of acquisition has been made during specified periods.
 - (e) **Rule 25** – special deals – transactions between an offeror, or potential offeror, or parties acting in concert with it and a shareholder in the offeree company which have favourable conditions that are not extended to other shareholders are prohibited. This reflects General Principle 1 of the Codes which provides that “[a]ll shareholders are to be treated even-handedly and all shareholders of the same class are to be treated similarly”.
 - (f) **Rule 26** – mandatory offer obligation – reflects General Principle 1 and requires a mandatory offer to be made to shareholders if either the trigger or creper threshold is exceeded.
 - (g) **Rule 28** – partial offer – requirements in relation the making of partial offers.
 - (h) **Rule 30** – conditions to an offer – 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.
 - (i) **Rule 31.3** – 6-month delay before acquisition above offer price – upholds General Principle 1 by restricting the offeror and its concert parties from purchasing further securities at above the offer price in the 6 months after close of the offer.



11. We therefore propose to add the following new section 13.13 to the Introduction to the Codes:

“13.13 Where a person has breached the requirements of Rules 13, 14, 16, 23, 24, 25, 26, 28, 30 or 31.3 of the Takeovers Code, the Panel may make a ruling requiring the person concerned to pay, within such period as is specified, to the holders, or former holders, of securities of the offeree company such amount as the Panel thinks just and reasonable so as to ensure that such holders receive what they would have been entitled to receive if the relevant Rule had been complied with. In addition, the Panel may make a ruling requiring simple or compound interest to be paid at a rate and for a period (including in respect of any period prior to the date of the ruling and until payment) to be determined. The Panel’s power to make a ruling under this section may be exercised irrespective of whether any sanction referred to in section 12.2 is imposed.”

Question 3: Do you agree with the new proposal regarding compensation rulings? If not, please give reasons.

Disciplinary proceedings and remedial / compliance rulings

12. Sections 12.1 and 12.2 of the Introduction to the Codes provide (emphasis added):

“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:-...”*

13. As referred to in paragraph 8 above, in the Shun Ho and Kong Tai cases the Panel imposed a cold shoulder order on the offending party that was to be uplifted if the relevant party compensated shareholders who should have received a general offer. These cases set a clear precedent in relation to the imposition of compensation orders by the Panel. However, given the wording of section 12.2, it might be argued that the Panel is precluded in disciplinary matters from issuing such rulings (in addition or as an alternative to disciplinary sanctions) as they might be viewed as remedial in nature. These arguments could result in disciplinary proceedings being unnecessarily restrictive which might in turn detract from the Codes’ underlying purpose, namely, to afford fair treatment of shareholders who are affected by takeovers, mergers and share buy-backs.
14. We therefore propose the following amendments to section 12.2 of the Introduction to the Codes to allow the Panel to impose appropriate sanctions and/or remedial measures in all disciplinary matters:



~~“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:- ...”~~

Question 4: Do you agree with the proposed amendments to section 12.2 to the Introduction to the Codes? If not, please give reasons.



PART 2: DEFINITION AND USE OF THE TERM “ASSOCIATE”

15. The term “associate” is principally relevant to the disclosure of dealings under Rule 22 of the Takeovers Code. It covers all persons acting in concert with an offeror as well as “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 an offer”. The definition of associate sets out seven classes of persons who are normally treated as associates of the offeror or the offeree company. A number of these classes overlap with the classes of presumption of acting in concert.
16. We believe that the definition of associate and some of its classes are unnecessarily wide and therefore propose to amend the definition as discussed below. The definition of associate was deleted from the London Code on 19 April 2010.

Overlap with classes of presumption of acting in concert

17. The starting point is that we believe that all persons acting in concert with an offeror or the offeree company should also be considered to be associates of such offeror or offeree company (as the case may be). We therefore propose to retain in the definition of associate the concept that persons acting in concert will normally be considered to be associates.
18. Five of the seven classes of associate have equivalents or near equivalents in the classes of presumption of acting in concert as illustrated in the following table (emphasis added to show the key differences):

Associate		Acting in concert	
class (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	class (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
class (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	class (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)



class (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)	class (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
class (4)	the pension funds, provident funds and employee share schemes of an offeror, the offeree company or any company in class (1)	class (3)	a company with any of its pension funds, provident funds and employee share schemes
class (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	class (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

19. To eliminate the overlap and potential inconsistencies arising from that overlap, we propose to delete or amend classes (1) to (5) of the definition of associate as discussed below.
20. Class (1) of the definition of associate is identical to class (1) of the definition of acting in concert, and is also relevant to three other classes of associate, namely, classes (2), (3) and (4). Class (1) covers a wide range of entities which can be divided broadly into 3 categories:
- (i) a company, its parent, its subsidiaries and fellow subsidiaries;
 - (ii) associated companies of a company, its parent, its subsidiaries and fellow subsidiaries; and
 - (iii) associated companies of the associated companies in (ii).
21. An “associated company” is defined as “[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.”



Class (1) of the definition of associate (group companies)

22. There is no meaningful difference between class (1) of the definition of associate and its corresponding class of presumption of acting in concert. As such, the Executive proposes to delete class (1) of associate.

Classes (2), (3) and (4) of the definition of associate (advisers, directors and funds)

23. The key difference between classes (2), (3) and (4) of the definition of associate and their corresponding classes of presumption of acting in concert is that, in addition to relationships with the offeror and offeree company, these classes cover relationships with certain other group companies, namely, the parent, subsidiaries and fellow subsidiaries of the offeror/offeree company, associated companies of the offeror/offeree company and of any such parent/subsidiaries/fellow subsidiaries, and companies of which such companies are associated companies (**class (1) companies**).
24. *Class (2) of the definition of associate (banks, financial advisers and other professional advisers)* - There is a concern that including financial advisers and other professional advisers of associated companies is unnecessarily wide and rarely provides meaningful disclosure in the context of an offer (unless they are acting in concert with the offeree company or an offeror, in which case they would also be an associate under the new class (1)). As such we propose that only financial advisers and other professional advisers of companies in the same group as an offeror or the offeree company (i.e. an offeror's or the offeree company's parent, subsidiaries and fellow subsidiaries) should be covered.
25. Class (2) also differs from its corresponding class (5) of the presumption of acting in concert in that class (2) includes banks. There is a concern that this is unnecessarily wide, given that class (5) of the presumption of acting in concert already covers any bank which acts as a financial or professional adviser and class (9) of such presumption already covers any 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 any person acting in concert with such a person) in connection with an acquisition of voting rights. As such, we believe that the reference to banks should be deleted.
26. We note that class (2) does not currently refer to exempt principal traders. It is important for exempt principal traders (and exempt fund managers, if the changes proposed in paragraph 80 are adopted) to continue to be subject to the dealing disclosure obligations and other provisions of the Codes which apply to associates as it provides market transparency about dealings by parties who may have an interest in the outcome of an offer in addition to their normal interests as shareholders.
27. We therefore propose to limit the scope of class (2) to cover financial advisers and other professional advisers of an offeror's or the offeree company's parents, subsidiaries and fellow subsidiaries and introduce a new class (5) (to replace the existing class (5) as discussed below) to cover exempt principal traders and exempt fund managers.
28. *Class (3) of the definition of associate (directors)* - In August 2004, class (2) of the presumption of acting in concert was amended to remove reference to directors of a company's subsidiaries and fellow subsidiaries on the basis that this was considered to



be unnecessarily wide. Similar amendments were, however, not made to class (3) of the definition of associate at the time.

29. We believe that covering directors of associated companies may be unnecessarily wide as it may not provide meaningful disclosure in the context of an offer. We continue to view disclosure of dealings in relevant securities by directors of a parent of an offeror or offeree company (who are covered by class (2) of the presumption of acting in concert) and directors of a subsidiary or fellow subsidiary of an offeror or offeree company as relevant information in the context of an offer, as it provides market transparency of dealings by parties who may have an interest in the outcome of the offer due to their close connection to the offeror or offeree company in addition to their normal interests as shareholders. It also helps to identify parties who may be dealing with a view to assisting a party to the offer and therefore may be acting in concert with the offeror or offeree company.
30. In the event that class (3) is amended to remove the reference to directors of associated companies, this raises the question of whether it is appropriate to draw the line at the subsidiary company level or whether class (3) should be amended to include directors of companies which are controlled by the offeror or offeree company or their parents (within the meaning of the Takeovers Code). It has been long accepted that 30% represents a realistic level at which effective control, both in shareholding and management terms, passes. Given this, there is an argument that directors of such companies should be considered as associates given their position within the corporate group.
31. The Executive proposes the following options:

Option 1 – class (3) is amended as follows:

“(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)~~ any subsidiary or fellow subsidiary of the first person;”*

Option 2 – class (3) is amended as follows:

“(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)~~ any subsidiary, fellow subsidiary of or companies controlled[#] by the first person or its parent;”*

32. *Class (4) of the definition of associate (pension funds etc.)* – We also believe that covering relationships of pensions funds, provident funds and employee share schemes with each class (1) company is unnecessarily wide and rarely provides meaningful disclosure in the context of an offer. As such, we propose to adopt a similar approach to Option 1 above so that class (4) associates will cover pension funds, provident funds and employee share schemes of parents, subsidiaries and fellow subsidiaries of an offeror and the offeree company.

Class (5) of the definition of associate (fund managers)

33. There is no meaningful difference between the current class (5) of the definition of associate and its corresponding class of presumption of acting in concert. As such, we



propose to replace class (5) with exempt principal trader and exempt fund manager as mentioned in paragraph 27 above.

Class (6) of the definition of associate (5%+ shareholders etc.)

34. Class (6) covers 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. We believe that disclosure of dealings by such persons is very important as it increases transparency and, among other things, is relevant to shareholders and the market's assessment of the possible outcome of an offer. As such, we propose to retain class (6).

Class (7) of the definition of associate (companies with a material trading arrangement)

35. Class (7) covers a company which has a material trading arrangement with an offeror or the offeree company. We believe that in practice the extension of the definition of associate to this wider group of persons is unnecessary as such disclosures would not normally provide meaningful information in the context of an offer. We therefore propose to delete class (7).

Proposed amendments

36. We propose to:
- (i) amend the definition of associate as shown in **Appendix 2**; and
 - (ii) make consequential amendments (where required) where the term associate is used in the Codes (the changes are highlighted in **Appendix 2**).

Question 5: Do you agree with the proposal to amend the definition of associate and the consequential amendments? If not, please give reasons.

Question 6: In respect of the proposed amendments to class (3) of associate, do you agree with Option 1 or Option 2? Please give reasons.



PART 3: VOTING THRESHOLD FOR WHITEWASH WAIVERS

37. The mandatory general offer requirement set out in Rule 26.1 is one of the fundamental aspects of the Takeovers Code and provides all shareholders with the opportunity to exit (through acceptance of an offer) in the event of a change of control of a company to which the Codes apply. Rule 26.1 codifies the principles set out in General Principle 1 (all shareholders to be treated even-handedly) and General Principle 2 (if control of a company changes or is acquired or is consolidated, a general offer to all other shareholders is normally required). In these cases a mandatory offer obligation is typically triggered as a result of a change or consolidation of control through, among other things, the sale and purchase of a controlling stake, the issue of new shares as consideration for an asset injection or cash subscription, or when new shares are taken up by an underwriter as a result of its underwriting a rights issues or open offer.
38. The mandatory offer obligation under Rule 26.1 is one of the central tenets of the Codes. Under Note 1 on dispensations from Rule 26 of the Takeovers Code the Executive may waive an obligation to make a general offer in a comparatively narrow set of circumstances. This is known as a “whitewash waiver”. A whitewash waiver should only be granted under stringent conditions because it results in a person obtaining or consolidating control without making a general offer and is therefore a derogation from General Principle 2. Once a person has obtained control of a company, shareholders have normally surrendered the choice of any future change of control of that company to the controlling shareholder. The protection that should be afforded to shareholders in the context of a whitewash transaction must not be underestimated. The philosophy behind the whitewash waiver dispensation is that independent shareholders are given an opportunity to approve or reject a change or consolidation of control of the company when that change of control is achieved as a result of the issue of new shares and hence a corporate action of the company they have invested in. In these cases as no other shareholder is permitted to sell their shares to the whitewash applicant or its concert parties, the fair and equal treatment of shareholders concept enshrined in General Principle 1 is adhered to. Nonetheless, a whitewash waiver is a dispensation from General Principle 2 in that if granted, shareholders will not receive a general offer to buy their shares.
39. Note 1 on dispensations from Rule 26 and Schedule VI (Whitewash Guidance Note) set out a number of procedures and provisions for obtaining a whitewash waiver from the Executive (or the Panel). This includes the requirement that a whitewash waiver be made conditional on the approval by an independent vote (as defined in Note 1 on dispensations from Rule 26) of a majority of the shareholders at a general meeting of the company.

Increasing the voting approval threshold

40. There is a concern that the independent shareholders voting requirement in whitewash transactions is not acting as the “gatekeeper” that it was intended to be, and in large part shareholders’ approval is regarded by both the whitewash applicant and shareholders as virtually inevitable. Between 2015 to 2017 all of the whitewash transactions that were voted on by shareholders (over 90 cases) were approved. This is possibly attributable to a number of factors (such as lack of awareness or incentive to vote) and may be exacerbated by the problem of warehousing of shares with friendly parties who vote in favour of the relevant transaction. The Stock Exchange has raised similar concerns with regards to capital raisings which involve a change of control of the



issuer and invited the SFC to look into the matter. This concern is echoed in the Consultation Paper on “Capital Raisings by Listed Issuers” issued by the Stock Exchange on 22 September 2017. Even in the absence of warehousing, the majority approval threshold makes it extremely difficult for dissenting shareholders to veto a transaction should they wish to do so and may be a factor in their decision not to vote at all.

41. We also note that in Code related transactions, the average shareholder turnout rate at general meetings appears to be appreciably higher in general meetings with higher voting thresholds such as privatisations and share buy-back transactions. While we appreciate that the different nature of the transaction will have an impact on this, it may suggest a level of shareholder apathy which could in part be explained by the high threshold required (50% independent shareholders’ approval plus one share) to vote down a whitewash waiver.
42. The high level of certainty of obtaining approval from shareholders of a whitewash waiver can lead to abuse by whitewash applicants looking to obtain or consolidate control. By way of example, recently concerns have been raised over fund raising transactions such as rights issues or open offers that materially dilute the voting rights (large scale issue of new shares) and value (issue price at a deep discount to the market price) of public shareholders’ investments (see the Consultation Paper on “Capital Raisings by Listed Issuers” mentioned above). These fund raising transactions may be oppressive as they result in a substantial or controlling shareholder of the listed company acquiring or consolidating control (as the case may be) of the listed company at a steep discount. Similar concerns arise with regards to other whitewash transactions where a conflict of interest may exist when the whitewash applicant is the controlling or substantial shareholder and may be driven by personal motives, raising questions whether the terms of the proposals are in the interest of the issuer and all shareholders as a whole. These transactions give rise to potential issues under General Principles 7 (no oppression of minority shareholders) and 8 (directors’ fiduciary duties).
43. Although the Executive may withhold the issue of a whitewash waiver thus requiring a general offer to be made to all shareholders, this may not adequately address the concern of abuse. In cases where new shares are issued at a steep discount, if the whitewash waiver applicant fails to obtain a whitewash waiver, it can still proceed with the underlying transaction coupled with an unattractively priced general offer which would be unlikely to attract acceptances.
44. Under paragraph 2(e) of Schedule VI, any grant of a whitewash waiver is subject to approval of the proposals by an independent vote. The independent shareholders’ approval threshold should provide an important measure to protect shareholders and ensure that their views are taken into account in relation to the underlying transaction and the whitewash waiver. However, as discussed above this does not appear to be the case. In order to help to address these concerns, we seek the market’s views on whether the approval voting threshold for a whitewash waiver proposal should be increased from a simple majority to 75% of the independent shareholders (i.e. shareholders who are not involved in, or interested in, the transaction in question – see Note 1 on the dispensations from Rule 26). This would be in line with the voting approval threshold applicable to off-market share buy-backs and privatisations.
45. The “Capital Raisings by Listed Issuers” Consultation Paper (mentioned above) notes that in 2013 to 2016 the vast majority of the highly dilutive pre-emptive offers cases



were approved by over 75% of shareholders that attended the general meetings. If the voting threshold were to be increased from 50% to 75%, 7 whitewash transactions that were voted on by shareholders in 2015 to 2017, (representing 7.4% of such cases) would not have obtained shareholders' approval.

Voting on single or separate resolutions

46. As mentioned in paragraph 44 above, paragraph 2(e) of Schedule VI requires the grant of whitewash waiver to be subject to the approval of the "*proposals*" by an independent vote. It is in our view clear from paragraph 2(e) that both the underlying transaction(s) and the whitewash waiver should be put to shareholders for approval.
47. Market practice varies as to whether resolutions on the underlying transaction(s) and the whitewash waiver are put to shareholders in separate resolutions or a combined resolution.
48. We invite the market's views as to whether an explicit requirement should be introduced to clarify that in a whitewash transaction a separate resolution should be put to shareholders to approve the underlying transaction(s) and the whitewash waiver. This would provide independent shareholders with the opportunity to disapprove the underlying transaction(s) as well as the whitewash waiver and should act as an additional safeguard for minority shareholders. If this approach is adopted, we invite the market's views as to whether the new 75% voting approval threshold should be applied to both the underlying transaction(s) and the whitewash waiver. This would mean that in transactions which are coupled with an application for a whitewash waiver, a whitewash applicant would be able to proceed to completion only if (i) the whitewash waiver is approved by 75% of independent shareholders; and (ii) the underlying transaction is also approved by the requisite 75%. In the event that the whitewash waiver was disapproved by shareholders and the whitewash condition was waivable, a whitewash applicant would be permitted to proceed with the underlying transaction (coupled with a general offer) if it had obtained separate shareholders' approval by 75% of the independent shareholders of the underlying transaction.

Proposed amendments to Note 1 on dispensations from Rule 26

49. If the above approach is adopted, we propose to amend Note 1 on dispensations from Rule 26 with consequential amendments to paragraphs 2(e) and 4(e) of Schedule VI as follows:

"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~~ the whitewash waiver and the underlying transaction(s) are separately approved by at least 75% of the 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 normally be waived, provided there has been an independent vote of



shareholders, in cases involving the underwriting of an issue of shares.” ...

“2. Specific grant of waiver required

...

(e) approval of the proposals by an independent vote at a meeting of the holders of any relevant class of securities in accordance with Note 1 on dispensations from Rule 26 of the Takeovers Code, whether or not any such meeting needs to be convened to approve the issue of the securities in question; and...”

“4. Circular to shareholders

...

(e) a statement that the Executive has agreed, subject to approval by independent shareholders in accordance with Note 1 on dispensations from Rule 26 of the Takeovers Code, to waive any obligations to make a general offer which might result from the transaction;...”

Question 7: Do you agree that the voting threshold for whitewash waivers should be increased from 50% to 75%? If not, please give reasons.

Question 8: Do you agree that separate resolutions should be required for each of the underlying whitewash transaction(s) and the whitewash waiver? If not, please give reasons.

Question 9: Do you agree that the 75% voting threshold should apply to each resolution for the underlying whitewash transaction(s) and the whitewash waiver? If not, please give reasons.

Additional amendment

50. Note 1 on dispensations from Rule 26 provides as follows (emphasis added):

*“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... 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...”*

51. The mandatory offer obligation under Rule 26.1 is one of the central rules of the Codes, providing all shareholders with an opportunity to exit their investment in the event of a change of control. Waivers from this obligation, including whitewash waivers, are granted in a comparatively narrow set of circumstances. The protection afforded to shareholders by General Principle 1 in a whitewash transaction should not be underestimated. As noted by the Panel in its decision on Alibaba Health Information Technology Limited (17 May 2016), “[a] fundamental principle of the Takeovers Code is the equality of treatment of shareholders in the context of a takeover or merger transaction, which for this purpose includes a whitewash waiver transaction. This is set out in General Principle 1 ...”.



52. Although there are provisions in the Takeovers Code which state that a whitewash waiver will “normally” be granted subject to an independent shareholders’ vote, there is no automatic right to a whitewash waiver; rather, each case is looked at on its facts to determine whether a waiver is appropriate in all the circumstances. This has been made clear in the Takeovers Bulletin, Issue No. 37 (June 2016), which states that the Executive may not grant a whitewash waiver if the subject transaction does not comply with other applicable rules and regulations (including the Listing Rules) notwithstanding that all relevant requirements under the Takeovers Code may have been complied with.
53. Consistent with this approach, the wording of Note 1 on dispensations from Rule 26 regarding cases involving the underwriting of an issue of shares should be read in the context of what precedes it, namely that a waiver will “normally” be granted if there has been an independent vote of shareholders but will not automatically be granted in such circumstances. There is a concern that, if read on a standalone basis, the current language could potentially be misconstrued to mean that a waiver will automatically be granted. To remove any uncertainty in this respect, we propose to amend the Note to include the word “normally”, so that the Note would read as follows:

“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 normally be waived, provided there has been an independent vote of shareholders, in cases involving the underwriting of an issue of shares. ...”

Question 10: Do you agree with the proposed amendment to Note 1 on dispensations from Rule 26 to include the word “normally”? If not, please give reasons.



PART 4: APPROVAL OF DELISTINGS BY INDEPENDENT SHAREHOLDERS

54. Rule 2.2 provides as follows:

“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.”*

55. Rule 2.2 was amended in February 2002 to include the two limbs in Rule 2.10 (i.e. at least 75% approval and not more than 10% disapproval by disinterested shareholders) and the third limb requiring any delisting resolution to be subject to the offeror being entitled to exercise, and exercising, its rights of compulsory acquisition.

56. The rationale for adding the three limbs to Rule 2.2 was to provide the same level of protection to minority shareholders as afforded by Rule 2.10 in respect of delisting applications and to alleviate concerns about use of the threat of delisting as part of the tactics of privatisation by general offer. The combined effect of the three limbs is to make it more difficult for an offeror to adopt the device of passing a delisting resolution in order to exert pressure on minority shareholders who have yet to accept a general offer to do so for fear that they would be left with illiquid shares with no "marketability". This is in line with General Principle 7 which states that *“the oppression of minority shareholders is always unacceptable”*.

57. In particular Rule 2.2(c) reinforces the protection of shareholders by requiring any delisting resolution passed during an offer period to take effect only from the time an offeror becomes entitled to exercise compulsory acquisition rights³. Therefore if an offeror fails to secure the requisite number of acceptances to enable it to exercise compulsory acquisition rights under the relevant laws of incorporation, the delisting resolution will be regarded as ineffective.

58. Companies listed in Hong Kong may be incorporated under the laws of various jurisdictions, including Hong Kong, Bermuda, the Cayman Islands and the Mainland. The relevant company law in many overseas jurisdictions, such as Bermuda and the Cayman Islands, is broadly similar to that in Hong Kong and compulsory acquisition

³ Offerors who wish to acquire 100% of an offeree company incorporated under Hong Kong law may do so either by making a general offer followed by compulsory acquisition pursuant to Part 13, Division 4 of the Companies Ordinance (Cap. 622) or by way of a scheme of arrangement pursuant to Part 13, Division 2 of the Companies Ordinance (Cap. 622). In the context of a general offer, the offeror may compulsorily acquire the remaining shares when it has acquired 90% of the shares for which the offer is made while at the same time, an independent shareholder may have the right to require the offeror to acquire his shares.



rights are available. However, there is no equivalent compulsory acquisition rights under the laws of certain other jurisdictions such as the Mainland.

59. In recent years we have granted a number of waivers from compliance with the requirement of Rule 2.2(c) to companies incorporated in the Mainland on the basis that it was technically impossible to comply under PRC law.
60. There is a concern that without the protection of Rule 2.2(c), passive minority shareholders may find themselves holding illiquid shares in an unlisted and potentially non-public company that is not protected by the Takeovers Code. We therefore believe that an offeror that wishes to make an offer for the shares of a company incorporated in the Mainland (or in any other jurisdiction that does not afford compulsory acquisition rights) with the view to privatising it should put in place a mechanism to help ensure that shareholders are afforded the greatest opportunity to exit should they wish to do so. We believe that appropriate measures include requiring the offer to remain open for acceptance for a longer period than normally mandated under Rule 15.3 and notices to be sent to all shareholders who have not yet accepted the offer to notify them of the closing date and the implications if they choose not to accept the offer (i.e. that these shareholders may end up holding an interest in an unlisted company). This is consistent with the approach adopted in respect of REITs where there are similarly no compulsory acquisition rights (see paragraph 3(k) of Schedule IX to the Codes).
61. There is a concern that if waivers from Rule 2.2(c) are normally granted as envisaged above, an uneven playing field may be created, as it effectively makes it easier for Mainland companies to delist through a general offer without achieving 90% acceptances. This raises the question of whether Mainland companies who wish to delist from Hong Kong should be required to include a specific condition that the delisting resolution is subject to the offeror receiving 90% acceptances from independent shareholders.
62. In light of the above, we propose to add the following note to Rule 2.2 to cater for these situations:

"Note to Rule 2.2:

In cases where the offeree company is incorporated in a jurisdiction that does not afford compulsory acquisition rights to an offeror, the Executive may be prepared to waive the requirement of Rule 2.2(c). In considering whether to grant such a waiver, the Executive will take into account, among other things, whether the offeror has or will put in place arrangements such that:-

- (i) where the offer becomes or is declared unconditional in all respects, the offer will remain open for acceptance for a longer period than normally required by Rule 15.3;
- (ii) shareholders who have not yet accepted the offer will be notified in writing of the extended closing date and the implications if they choose not to accept the offer; and
- (iii) the resolution to approve the delisting is subject to the offeror having received valid acceptances amounting to 90% of the disinterested shares."



Question 11: Do you agree with the proposal to add a Note to Rule 2.2 to clarify the matters above? If not, please give reasons.



PART 5: DISCLOSURE OF NUMBER OF, HOLDINGS OF AND DEALINGS IN, RELEVANT SECURITIES

Rule 3.8 – Announcement of number of relevant securities in issue

63. Rule 3.8 requires the offeree company and the offeror (or potential named offeror) to announce details of all classes of their respective relevant securities together with the numbers of such securities in issue when an offer period begins. Details of the relevant securities of the offeror are not required if the offer is likely to be solely in cash. Rule 3.8 also requires the offeree company and the offeror (or potential named offeror) to include in this announcement a reminder to their respective associates to disclose their dealings (in accordance with Rule 22) in any securities of the offeree company and, in the case of a securities exchange offer, any securities in the same class as the “*securities that are offered as consideration under an offer*”.
64. In securities exchange offers, we believe that associates should be required to disclose their dealings in all relevant securities of the offeror, rather than just the securities in the same class as the securities that are offered as consideration under an offer. This is consistent with the requirement for the offeree company and offeror (or potential named offeror) to announce details of all classes of relevant securities in Rule 3.8 and the requirement for associates of the offeree company and offeror to disclose dealings in all relevant securities in the offeree company (see Notes 2 and 4 to Rule 22).
65. In some cases, securities other than those issued by the offeror are offered as consideration for an offer. For the purpose of Rule 3.8, details of all relevant securities of the company the securities of which are to be offered as consideration for the offer should also be disclosed. Disclosure of such details in respect of relevant securities of the offeror would still be necessary to help a shareholder of the offeror ascertain whether he is an associate of the offeror by virtue of holding 5% or more of its relevant securities. For the purpose of Rule 22, only disclosure of dealings in the relevant securities of the company the securities of which are to be offered as consideration for the offer should be required since it would not be meaningful to require disclosure of dealings in the relevant securities of the offeror. For the purpose of shareholding and dealing disclosures under Schedules I and II, similar disclosures would be required.
66. We therefore propose to amend Rule 3.8 as follows:

“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 offeree 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 (and if relevant, the relevant securities of the company the securities of which are to be offered as consideration for the offer) following any announcement identifying it as an offeror or potential offeror, unless it has stated that its offer is or 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 relevant securities of the offeree company and, or in the case of a securities exchange offer only, any relevant securities of the offeror or potential



~~*named offeror (or of the company the securities of which are to be offered as consideration for the offer, as the case may be) 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.”

67. The Executive also proposes to amend Note 4 to Rule 22 as follows:

“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, in a securities exchange offer only, of an offeror or of a company the securities of which are to be offered as consideration for the offer (as the case may be);*
- (c) *securities of an offeror or of a company the securities of which are to be offered as consideration for the offer (as the case may be) 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).”

68. Consequential changes to Note 1 to paragraph 4 of Schedule I will be made and a new Note 4 to paragraph 12 of Schedule I will also be added as follows:



Note 1 to paragraph 4 of Schedule I:

"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); and*

(c) in the case of a securities exchange offer involving the offer as consideration of securities in a company other than the offeror, references to shareholdings in the offeror in this paragraph 4 should be taken to mean shareholdings in the company whose securities are being offered as consideration and (b) above should be construed accordingly.

New Note 4 to paragraph 12 of Schedule I:

"4. Where securities in a company other than the offeror are being offered as consideration

In the case of a securities exchange offer involving the offer as consideration of securities in a company other than the offeror, references to the offeror in this paragraph 12(a) should be taken to mean the company whose securities are being offered as consideration. In these cases the Executive should be consulted.

Question 12: Do you agree with the proposed amendments to Rules 3.8 and 22 and the consequential changes to Note 1 to paragraph 4 of Schedule I and paragraph 12 of Schedule I? If not, please give reasons.



Schedule IX (REIT Guidance Note) – Disclosure of shareholdings and dealings in the offeree board circular

69. Paragraph 4 of Schedule 1 and paragraph 2 of Schedule II set out the shareholding and dealing disclosure requirements in respect of documents to be sent to shareholders (**Shareholding and Dealing Disclosure Provisions**). The Shareholding and Dealing Disclosure Provisions make express reference to persons acting in concert with the offeror.
70. In the case of a REIT, on 25 June 2010 the definition of associate was extended to include two additional classes (8) (a REIT's trustee) and (9) (a REIT's management company)(to be renumbered classes (7) and (8) if the proposed amendments discussed in Part 2 of this paper are adopted). When the offeror is a REIT, the Shareholding and Dealing Disclosure Provisions in Schedule I paragraph 4 (i.e. for inclusion in the offer document) apply to among others, the trustee and management company of the offeror as a result of the extended definition of acting in concert under paragraph 2 of Schedule IX. However, paragraph 2 of Schedule II has not been extended explicitly to include these two classes of associate when the offeree company is a REIT.
71. The Executive believes that disclosure of the shareholdings of and dealings by the trustee and management company of the offeree (where the offeree company is a REIT) would provide relevant information in the context of an offer, as it provides market transparency of dealings by parties who may have an interest in the outcome of the offer in addition to their normal interests as shareholders. In practice the Executive requires such disclosure to be included in the offeree board circular notwithstanding the absence of any express disclosure requirement.
72. The Executive therefore proposes to include the following new paragraph 3(p) in Schedule IX (with such amendments to the class references as is necessary if the proposed amendments discussed in Part 2 of this paper above are adopted):

“(p) Shareholdings and dealings (paragraph 2 of Schedule II to the Codes)

In cases where the offeree company is a REIT, the disclosure obligations under paragraph 2 of Schedule II and Note 2 to such paragraph should also apply to any person who is an associate of the offeree company by virtue of classes (7) and (8) of the definition of associate.”

Question 13: Do you agree with the proposed new paragraph 3(p) in Schedule IX? If not, please give reasons.

Note 5 to Rule 22 – Timing of submission of dealing disclosures

73. Dealings in relevant securities by parties to an offer (including the offeror and the offeree company) and their respective associates during an offer period are required to be disclosed in accordance with Rule 22. Note 5 to Rule 22 provides as follows:

“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.”



74. Strictly speaking, Note 5 requires consultation to seek permission for an extended deadline for disclosure on a case-by-case basis. In practice, the Executive normally allows an additional business day for disclosure of dealings in time zones of the United States, i.e. disclosures of such dealings are expected to be made no later than 10:00 a.m. on the second business day (Hong Kong time) following the date of the transaction. This approach is set out in the Takeovers Bulletin, Issue No. 18 (September 2011) and paragraph 7.2 of Practice Note 9. We therefore propose to codify the existing practice so that consultation would not be required for the extended deadline.
75. We also understand that in practice some organisations (particularly large complex financial institutions which contain trading entities based in multiple jurisdictions) find it hard to comply with the requirement to file dealing disclosures by 10:00 a.m. given the internal administrative processes required to be undertaken before disclosure can be made. In order to facilitate the disclosure process and ensure accurate disclosure we therefore propose to extend the deadline for disclosure to 12.00 noon. We note that this is consistent with the London Code (see Note 2 on Rule 8 of the London Code).
76. We therefore propose to amend Note 5 to Rule 22 as follows, with corresponding changes being made to Practice Note 9:

“5. *Timing of disclosure*

Disclosure must be made no later than ~~10.00 a.m.~~ 12.00 noon on the business day following the date of the transaction ~~or, where—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~~ no later than 12.00 noon on the second business day following the date of the transaction. The Executive should be consulted at the earliest opportunity if there is difficulty in meeting the deadlines set.”

Question 14: Do you agree with the proposal to amend Note 5 to Rule 22? If not, please give reasons.

Note 6 to Rule 22 – Method of dealing disclosure

77. Note 6(a) to Rule 22 requires that all dealings should be disclosed in writing to (i) all offerors and the offeree company or their respective financial advisers, and (ii) at the same time the Executive using the prescribed forms available on the SFC’s website, who will arrange for the posting of the disclosure on the SFC’s website.
78. In practice, once the Executive receives the prescribed form of disclosure, following review it will arrange posting of the disclosure on both the SFC’s website and the Stock Exchange’s website. As such we believe it is not necessary to require parties to make separate disclosures to the offeror, offeree company or their financial advisers. We therefore propose to simplify the requirement as follows:

“(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.~~ ~~The Executive will arrange for the posting of the disclosure on the SFC’s website~~ and on the Stock Exchange’s 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 any person ~~parties to an offer and their associates~~ chooses to make announcements regarding dealings in addition to making formal disclosures, they must ensure that no confusion results.

Public disclosure may be made by the person ~~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.”

Question 15: Do you agree with the proposal to amend Note 6 to Rule 22? If not, please give reasons.



PART 6: MISCELLANEOUS AMENDMENTS

Class (5) of the presumption of acting in concert

79. Class (5) of the presumption of acting in concert, which covers financial and other professional advisers and other entities within their groups, currently expressly excludes group entities which are exempt principal traders. This position is supported by paragraph 3.1 of Practice Note 9, which states that “**Once exempt, an EFM or EPT is not normally regarded as acting in concert with the client of the group’s corporate finance department that is involved in an offer and hence the implications of concert party status under the Codes do not apply**” (emphasis added).
80. Class (5) does not, however, exclude group entities which are exempt fund managers (EFMs). As is clear from paragraph 3.1 of Practice Note 9, EFM entities should be treated similarly to EPT entities in this regard. Accordingly, we propose to amend class (5) by adding express reference to EFMs, so that the presumption would read as follows:

“(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 or exempt fund manager);”

This is consistent with the position under the London Code (see class (7) of the definition of acting in concert of the London Code).

Question 16: Do you agree with the amendment to class (5) of the presumption of acting in concert? If not, please give reasons.

Section 8.3 of the Introduction to the Codes – Certificates of truth, accuracy and completeness

81. On 15 September 2016, the Executive gazetted a new filing form for all applications for rulings made under section 8 of the Introduction to the Codes. Since 16 September 2016, all applications for rulings have been required to be submitted **together** with the duly completed filing form (See Takeovers Bulletin, Issue No. 38 (September 2016)).
82. The new filing form contains a statement warning applicants that it is an offence under section 384(3) of the Securities and Futures Ordinance to provide any record or document to the SFC (including any subsequent record or document provided in connection with the matter) which is false or misleading in a material particular.
83. Section 384(3) provides that a person commits an offence if, in connection with the performance of a function by the SFC, he knowingly or recklessly provides any record or document which is false or misleading in a material particular, and he has received prior written warning from the SFC, in relation to the record or document, to the effect that the provision of a record or document which is false or misleading in a material particular would constitute an offence. A person who commits an offence under section 384(3) is liable to a fine and imprisonment.

The new filing form also contains the requisite section 8.3 certificate. Section 8.3 of the Introduction to the Codes requires each submission to be signed by the applicant and



close with a statement certifying the truth, accuracy and completeness of the statements contained in the application.

84. Given the overlap between the requirements under section 8.3 and in the filing form itself, and to clarify the position, we propose to amend section 8.3 to include reference to the filing form as follows:

“8.3 Each ~~submission~~ application should be accompanied by a duly completed and signed prescribed filing form available on the SFC’s website. Such filing form contains signed by the applicant and should close with a statement by the applicant certifying the truth, accuracy and completeness of statements contained in the ~~submission~~ application. When the application is filed by an adviser, the filing form also contains ~~at~~ 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. Any subsequent submissions in respect of an application should also contain a statement by the applicant certifying the truth, accuracy and completeness of statements contained in the submission.”

Question 17: Do you agree with the proposal to amend section 8.3 of the Introduction to the Codes? If not, please give reasons.

Notes 2 and 3 to Rule 8.1 – Meetings and materials used in meetings

85. Rule 8.1 reflects General Principal 3 of the Codes which requires equal dissemination of information about companies involved in an offer to all shareholders.
86. The main purpose of Note 3 to Rule 8.1 is to prevent material new information being disclosed selectively to shareholders, analysts, brokers or other persons interested in the offer in private meetings by requiring the presence of a financial adviser at such meetings and a confirmation to the Executive thereafter as to whether any material new information had been disclosed.

Meetings that are relevant to Rule 8.1

87. The Executive views “meetings” quite broadly in practice and therefore proposes to amend Note 3 to Rule 8.1 to make clear that the term encompasses meetings held by telephone and other electronic means, as well as in-person meetings.

Meetings with the media

88. Parties involved in an offer may also take part in interviews or other discussions with the media (i.e. press, television or radio). Note 2 to Rule 8.1 provides that “Parties involved in an offer must take particular care not to release new material in interviews or discussions with the media”. To support this provision, we believe that the safeguards and disciplines in Note 3 to Rule 8.1 should also apply equally to information released to the media.



Materials distributed at meetings or with the media

89. It is also important to clarify that materials that are distributed at meetings with shareholders, analysts, brokers or other persons interested in the offer, or with the media, would not be regarded as “documents” for the purposes of Rule 12.1 and therefore would not need to be provided for our comment before release. However, to ensure that there are proper safeguards as to the contents of those documents, the financial adviser would need to confirm that the materials do not contain any material new information or significant new opinions and that the information therein is fairly presented.
90. To address the points outlined above, we propose to amend Notes 2 and 3 to Rule 8.1 as follows:

“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. The requirements regarding meetings and presentations or other documents set out in Note 3 below will also apply to any interviews and discussions and any written communication relating to an offer which is provided to the media.”

“3. *Meetings*

Subject always to Rule 34, meetings of representatives of the offeror or the offeree company or their respective advisers with any shareholders in, or other person interested in any relevant securities of, either ~~the~~ an offeror or the offeree company, investment analysts, stockbrokers or others engaged in investment management or advice may take place during the offer period, provided so long as that no material new information is ~~forthcoming~~provided, and no significant new opinions are expressed, by the relevant representative or adviser 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~~provided, and no significant new opinions were expressed, by the relevant representative or adviser at the meeting.

Materials such as press releases or printouts of slides which highlight the salient facts of the offer may be distributed at the meeting. Whilst the Executive would not normally regard these printed materials as documents for the purposes of Rule 12.1 and these are therefore not required to be submitted to the Executive for comment prior to distribution, an appropriate representative of the financial adviser must confirm to the Executive in the manner set out above that these printed materials do not contain any material new information or significant new opinions and the information therein is fairly presented.

~~Should there be any dispute as to whether the provisions of this Note have been complied with, the~~ The relevant financial adviser will be expected to satisfy the Executive that the provisions of this Note have been complied with in cases of doubt~~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, whether they are held in person or by telephone or other electronic means 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."

Question 18: Do you agree with the proposed amendments to Notes 2 and 3 to Rule 8.1? If not, please give reasons.

Rule 12 – Confirmation as to publication, no material change and translation

91. Rule 8.6 of the Takeovers Code provides that “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.” Rule 9.3 places the responsibility for ensuring the accuracy of the information contained in a document on directors of the company issuing the document. It follows that ensuring the accuracy of the translation is part of the directors’ responsibility to ensure accuracy of documents issued under the Codes as required by Rule 9.3.
92. As a matter of practice, we require the directors of the issuer of a Code document to confirm that the Chinese version of the document is a true and accurate translation of the English version (or vice versa). We also require written confirmation by the party issuing the document or its advisers that (a) the document has been published and the time and date of publication and (b) (where applicable) there has been no material change to the version of the document in respect of which the Executive has confirmed that it has no further comment. These requirements have been in place since early 2013 and are set out in Practice Note 20. Issuers and market practitioners have complied without difficulty.
93. We propose to codify the existing practice by adding the following new Notes 4 and 5 to Rule 12:

“4. Confirmation of publication and no material change

As soon as practicable following the publication of any document, the issuer(s) of that document or its respective advisers must confirm in writing to the Executive that (a) the document has been published and the time and date of publication and (b) save for where the document is one of the documents included in the list published under the Note to Rule 12.1, there has been no material change to the version of the document in respect of which the Executive has confirmed that it has no further comment. Such confirmation should be accompanied by a copy of the published version of the document (both English and Chinese versions) and a marked-up version of the document showing any changes (including deletions) made subsequent to the Executive’s confirmation.



5. Confirmation of translation

Following the publication of any document, the directors of the issuer(s) of that document must confirm that the Chinese version of the document is a true and accurate translation of the English version and that it is consistent with the English version (or vice versa). Such confirmation should be in the form prescribed by the Executive from time to time and should be provided to the Executive as soon as possible and in any event no later than 5:00 p.m. on the business day after the publication of the document. The confirmation should be signed by a director (on behalf of the board of directors) of the issuer of the document. If the document is jointly issued, a confirmation should be provided by each of the parties issuing that document.

Under Rules 8.6 and 9.3, the responsibility to ensure that the Chinese version of the document is a true and accurate translation of the English version (or vice versa) lies with the directors of the issuing party. The provision of the confirmation of translation to the Executive does not absolve the responsibility of the directors of the issuing party in this regard.”

94. As a consequential change, we also propose to add the following note as a new Note to Rule 8.6 and new Note 6 to Rules 9.3 and 9.4:

“Confirmation of translation

See Note 5 to Rule 12 regarding the confirmation of translation to be given to the Executive following the publication of any document.”

Question 19: Do you agree with the proposed new Notes 4 and 5 to Rule 12 and the consequential changes relating to the new Note to Rule 8.6 and the new Note 6 to Rules 9.3 and 9.4? If not, please give reasons.

Note 3 to Rule 15.5 and Note 4 to Rule 26.2 – References to the Telecommunications Ordinance

95. In October 2005 Note 3 to Rule 15.5 (*CA decisions*) and Note 4 to Rule 26.2 (*CA consent*) were introduced into the Codes to provide a framework for dealing with reviews relating to telecommunications companies. Increasingly regulatory approvals (under merger law and otherwise) are required for a broad range of companies and transactions under the Codes. We believe that the relevant provisions of the Codes should be amended to apply to such approvals.
96. The timetable for different regulatory approval processes differs significantly depending on the nature of the approval with some processes taking many months to complete. In the interests of certainty of an offer (in line with General Principle 4 of the Codes), we consider it is best practice for an offeror to structure a voluntary offer which is subject to regulatory approval(s) as a pre-conditional offer. In these circumstances, the pre-condition (i.e. the obtaining of the regulatory approval(s)) must be satisfied before the formal offer is made (by the issuance of an offer document to shareholders). In some cases however (this is fairly uncommon in Hong Kong) the offeror might announce a firm intention to make an offer that is conditional on regulatory approval(s). In this case, the offeror will be obliged to proceed with the offer and issue an offer document to shareholders. Once the offer document has been published the timetable requirements



set out in the Codes will apply. This includes various important deadlines such as Day 39 (Rule 15.4 - latest date for announcement of new information), Day 46 (Rule 16.1 – latest day for revisions to an offer) and Day 60 (Rule 15.5 – latest day for an offer to be declared or become unconditional as to acceptances). As a matter of practice the Executive’s consent is normally sought for an extension of Day 39, Day 46 and/or Day 60 if an offeror encounters delay in obtaining relevant regulatory consents. As regards mandatory offers, the only condition allowed to be included is the 50% acceptance condition (Rule 26.2). As such, an offeror must seek the relevant regulatory approval before a mandatory offer obligation is triggered under Rule 26.1.

97. We therefore propose to delete the definition of “CA” in the Definitions section of the Codes and to amend Note 3 to Rule 15.5 and Note 4 to Rule 26.2 as follows:

“Notes to Rule 15.5:

...

3. ~~CA decisions~~ Regulatory approvals

~~If an offer requires approval from a regulatory body (in relation to merger control or otherwise) the expected timetable for the relevant regulatory approval process should be set out in the offer document. Where there is a delay in a decision of the CA under section 7P of the Telecommunications Ordinance (Cap. 106) to the relevant approval process after posting publication of the offer document, the Executive should be consulted at the earliest opportunity. In appropriate cases, the Executive may will normally extend “Day 39” (see Rule 15.4) to the second day following the announcement of such approval 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 CA’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.”~~

“Notes to Rule 26.2:

...

4. ~~CA consent~~ Regulatory approvals

~~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 require prior approval from a regulatory body (in relation to merger control or otherwise) 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 an offer conditional upon any such regulatory approval CA decision. A potential offeror under this Rule 26 must seek the relevant regulatory approval consent of the CA 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 CA's consent relevant regulatory approval he will be in breach of this Note 4 and subject to possible disciplinary action."

Question 20: Do you agree with the proposed deletion of the definition of "CA" and the proposed amendments to Note 3 to Rule 15.5 and Note 4 to Rule 26.2? If not, please give reasons.

Rule 18 – Setting aside "no extension" and "no increase" statements

98. During the course of an offer, an offeror may make a statement that it will not extend the period for acceptance of its offer (a "no extension statement") or that it will not increase its offer (a "no increase statement").
99. In order to preserve an orderly market, no extension and no increase statements must be capable of being relied upon by offeree company shareholders and the market as an accurate statement of the offeror's intentions as regards the conduct of the offer. This is consistent with General Principle 6 which requires all persons who are concerned with offers to take every precaution to avoid the creation of a false market. The overriding concern is that statements are not made which may mislead shareholders or the market or create uncertainty.
100. Rules 18.2 and 18.3 and Note 4 to Rule 18 provide that an offeror should be bound by any no extension or no increase statement, other than in "wholly exceptional circumstances" or to the extent that the offeror has specifically reserved the right in the relevant statement not to be bound in certain circumstances. Those circumstances are limited to a competitive situation arising or the offeree company board recommending the offer (Notes 2 and 3 to Rule 18).

Competitive situations (Note 2 to Rule 18)

101. If a competitive situation arises, Note 2 to Rule 18 provides that the offeror is free to "extend" its offer. We propose to clarify that in such circumstances the offeror is also free to amend or increase its offer as contemplated in Rule 18.3. We therefore propose to amend Note 2 to Rule 18 as follows:

"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 or increase its offer provided that:– ..."

Question 21: Do you agree with the proposed clarification to Note 2 to Rule 18? If not, please give reasons.

Circumstances in which statements may be set aside (Note 4 to Rule 18)

102. As noted in paragraph 100 above, the circumstances in which an offeror may choose not to be bound by a no extension or no increase statement are limited to those set out in Notes 2 and 3 to Rule 18 (namely, a competitive situation arising or the offeree company board recommending the offer), in each case only if the offeror has specifically reserved the right not to be so bound.



103. We consider that an offeror's right to set aside a statement should not be limited to the circumstances set out in Notes 2 and 3 to Rule 18, but rather should be extended to any situation which cannot be determined or controlled by the offeror. We believe that an orderly market could be preserved as long as the reservation of the right to set aside any no increase or no extension statement is promptly made and prominently displayed in the document containing the statement. This is consistent with the position under the London Code (see Note 1 on Rule 31.5 and Note 1 on Rule 32.2).
104. We therefore propose to amend Note 4 to Rule 18 as follows, which is consistent with the equivalent provisions in the London Code:

"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. Notes 2 and 3 to this Rule 18 describe examples of specific types of reservation to set aside a no extension or no increase statement. However, other types of reservation may also be made, provided that the reservation does not depend solely on subjective judgements by the offeror or its directors or the fulfilment of which is in their hands. 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."

Question 22: Do you agree with the proposal to amend Note 4 to Rule 18? If not, please give reasons.

Rule 19.1 – Results announcements

105. Rule 19.1 requires an announcement to be released by 7:00 p.m. on each closing date setting out, among other things, details of the total number of shares for which acceptances of the offer have been received. In the context of a scheme of arrangement (**scheme**), this Rule is in practice modified to require the announcement to include the information prescribed in Rule 2.9 (i.e. the number of shares voted for and against the resolution and the number of shareholders voting for and against the resolution). Disclosure of the number of shareholders voting for and against the resolution is consistent with the requirement in certain jurisdictions (e.g. the Cayman Islands and Bermuda) that a scheme must be subject to approval by "a majority in number" representing 75% in value of the shareholders present and voting (**Headcount Test**). In such cases, details of the number of shareholders voting for and against are clearly relevant. In addition, as a matter of practice, such announcements typically



include the percentage of the numbers of shares voted, and of shareholders who voted for and against the resolution.

106. In the case of a scheme, disclosure of the number of shareholders voting for and against is only relevant if the scheme is subject to the Headcount Test. This information would not be relevant if the scheme is not subject to the Headcount Test such as a scheme to privatise a company incorporated in Hong Kong where the Headcount Test has been abolished. We therefore believe that the requirement to disclose the number of shareholders voting for and against should not apply to schemes which are not subject to the Headcount Test.
107. In respect of schemes which are subject to the Headcount Test, we believe that additional disclosures should be made to facilitate greater transparency and to reflect the number of shares typically held within the Central Clearing and Settlement System established and operated by Hong Kong Securities Clearing Company Limited (**CCASS**). In this regard, announcements of the results of any court or shareholder meeting to approve a scheme should disclose, in addition to the details required under Rule 2.9, the number of CCASS Participants (as defined under the General Rules of CCASS) instructing HKSCC Nominees Limited to vote for and against the resolution and the number of shares voted by such CCASS Participants.
108. In light of the above, we propose to amend Rule 2.9 and add a new Note to Rule 19.1 as follows:

“2.9 Shareholder votes to be conducted by way of 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:

(a) _____ the number of shares of each class voted for and against the resolution and the percentage of the relevant class of share capital which those numbers represent; and

(b) _____ in the case of a scheme of arrangement which is subject to an approval by “a majority in number” requirement, the number of shareholders voting for and against the resolution and the percentage of the shareholders voting which that number represents and, among them, the number of CCASS Participants (as defined under the General Rules of the Central Clearing and Settlement System established and operated by Hong Kong Securities Clearing Company Limited) instructing HKSCC Nominees Limited to vote for and against the resolution and the number of shares voted by such CCASS Participants.

must be announced.”



“Note to Rule 19.1

Schemes of arrangement

In the case of a scheme of arrangement, an announcement must be published in accordance with the requirements of Rule 19.1 on the date on which any shareholder meeting to approve the scheme of arrangement is held. See Rule 2.9 for the disclosure requirements applicable to such announcements.”

Question 23: Do you agree with the proposed amendments to Rule 2.9 and the proposed new Note to Rule 19.1? If not, please give reasons.

Rule 30.1 – conditions should not be subjective

109. Rule 30.1 provides that:

“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.”

110. In its decision in relation to Zhongyu Gas Holdings Limited (2010), the Panel made clear that:

“With regard to the interpretation of Note 2 to Rule 30.1, notwithstanding the heading to the Rule which refers to subjective conditions only, its natural meaning must include, as it states, all conditions, whether subjective or objective, except the acceptance condition. It simply does not make sense to read the words “all conditions” to mean “all subjective conditions”, when the excluded condition is manifestly an objective one. We would also add that the Note applies to all conditions, other than the acceptance condition which is not permitted to be waived [Rule 30.2], whether or not they are waivable by the offeror.” (paragraph 24)

111. This position was consistent with the Executive’s interpretation of Note 2. To avoid any confusion, we therefore propose to amend the heading to Rule 30.1 to remove reference to “Subjective”.

112. There is also a concern that offerors sometimes seek to make their offers subject to conditions the fulfilment of which is in the hands of the offeree company or its directors. For example, there have been a number of cases where the offeror has sought to include a condition regarding the offeree company maintaining a certain cash balance. These conditions are not acceptable and should be treated in the same way as conditions which depend on judgements by the offeror or the fulfilment of which is in its hands.

113. We therefore propose to amend Rule 30.1 as follows, consistent with Rule 13.1 of the London Code:



“30.1 ~~Subjective conditions~~Conditions to an offer

An offer must not normally be made subject to conditions which depend on judgements by the offeror or the offeree company or the fulfilment of which is in ~~its~~ their respective hands.”

Question 24: Do you agree with the proposed amendments to Rule 30.1? If not, please give reasons.

Rule 31.3 – Six-month delay before acquisition above offer price

114. Rule 31.3 prohibits an offeror and its concert parties from paying a price higher than the offer price for shares in the offeree company in the six-month period after the close of the offer. Rule 31.3 therefore allows an offeree shareholder to accept the offer under the assurance that the offeror will not offer a higher price shortly after the offer closes, thereby preserving equality of treatment of shareholders in an offer in accordance with General Principle 1. Rule 31.3 is an extension of the discipline imposed on the offeror under Rule 31.1 and also ensures that an offeror puts its best price forward in the first instance. We have been consulted on a number of occasions about whether Rule 31.3 applies only to offers that have become or been declared unconditional after the posting of the offer document and not to those which are unconditional at the time they are made. We wish to clarify that Rule 31.3 applies equally to offers that are unconditional at the outset. Given the primary purpose of the Codes is to afford fair treatment for shareholders who are affected by takeovers, mergers and share buy-backs, no distinction should be made between offers that commence as unconditional offers and those that become or are declared unconditional subsequently. This interpretation is set out in Practice Note 18.

115. We therefore propose to amend Rule 31.3 to clarify the position as follows:

“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 was unconditional at the time of publication of the offer document or became or was declared unconditional after the publication of the offer document, 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 later of the date of day the offer document or the date the offer became, or was declared, unconditional.”

Question 25: Do you agree with the proposed amendments to Rule 31.3? If not, please give reasons.

Paragraph 1 of Schedule II – Views of offeree board

116. Paragraph 1 of Schedule II provides that the offeree board circular must include “*The names of the directors of the offeree company and whether they recommend that the*



shareholders should accept or reject the offer ... A copy of the written advice of the offeree company's financial advisers must also be given".

117. In practice, this provision requires the inclusion in the offeree board circular of (a) the advice of the independent committee of the offeree company board established in accordance with Rules 2.1 and 2.8; and (b) the advice of the independent financial adviser appointed in accordance with Rule 2.1. To clarify the position, we propose to amend paragraph 1 of Schedule II and the related Note 4 as follows:

"1. The names of the directors of the offeree company and of the directors comprising the independent committee of the board of the offeree company established in accordance with Rules 2.1 and 2.8 and whether they recommend that the shareholders should accept or reject the offer, and the recommendation of the independent committee of the board given in accordance with Rule 2.1, or a statement that the directors are independent committee of the board is 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 independent financial advisers appointed in accordance with Rule 2.1 must also be given.

Notes:

...

4. Independent financial~~Financial~~ adviser's consent

~~The circular must, unless issued by the financial adviser in question, include a statement that the independent 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.~~

Question 26: Do you agree with the proposal to amend paragraph 1 of Schedule II and the related Note 4? If not, please give reasons.

Paragraph 12(a) of Schedule I, Paragraph 6(a) of Schedule II and Paragraph 16(a) of Schedule III – Financial information

Historical Financial information

118. Paragraph 6(a) of Schedule II provides that the offeree board circular (or composite document, as the case may be) must include, among other things:

"The following information about the offeree company:-

...

- (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;*



...

- (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;*
- (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...*

119. In practice, this typically means that offeree companies reproduce the most recent published annual financial statements (including the notes thereto), as well as the most recent published interim financial statements (including the notes thereto) if published before the date of the offeree board circular (together, **Historical Financial Statements**).

120. Some offeree companies consider that strict compliance with these disclosure requirements is burdensome as it increases the size of the offeree board circular (or composite document, as the case may be) and therefore the printing costs. Given that the information required is extracted from published accounts or an accountants' report in a published circular, which are available on the websites of both the Stock Exchange and the offeree company, we consider that it would be acceptable for offeree companies to refer in the offeree board circular (or composite document, as the case may be) to the published financial information instead of reproducing the same information.

121. We propose to amend Schedule II to allow offeree companies to make reference in the offeree board circular (or composite document, as the case may be) to published documents which contain the Historical Financial Statements instead of reproducing the same information, by including the following new note to paragraph 6 of Schedule II:

"Note:

For the purpose of paragraphs 6(a)(ii), (iii), (iv), (vi) and (vii), if the offeree company is listed on the Stock Exchange, the information may be incorporated in the offeree board circular by reference to the offeree company's other documents published in accordance with the Listing Rules."

122. This is consistent with changes made to Appendix IB to the Listing Rules following a consultation exercise in 2009/2010 to allow historical financial statements to be incorporated by reference in listing documents and circulars, and is also consistent with the position under Rule 24.3(e) (by reference to Rules 24.3(a)(iii) and (iv)) and Rule 25.3 of the London Code.

123. The same disclosure requirements apply to the information required to be disclosed in the offer document (or composite document, as the case may be) with respect to offerors in the case of a securities exchange offer under paragraph 12(a) of Schedule I, and the offerors in the case of a share buy-backs transaction under paragraph 16(a) of Schedule III. Where the offeror is also a company listed on the Stock Exchange, we propose allowing the offeror similarly to make reference in the offer document (or composite document, as the case may be) to published documents which contain the Historical Financial Statements instead of reproducing the same information, by



including the following new Note 5 to paragraph 12 of Schedule I (the numbering assumes the proposed amendments discussed in Part 4 paragraph 68 is adopted) and a new Note to paragraph 16 of Schedule III:

New Note 5 to paragraph 12 of Schedule I

“5. Where the offeror is a company listed on the Stock Exchange

For the purpose of paragraphs 12(a)(ii), (iii), (iv), (vi) and (vii), if the offeror is listed on the Stock Exchange, the information may be incorporated in the offer document by reference to the offeror’s other documents published in accordance with the Listing Rules.”

New Note to paragraph 16 of Schedule III

“Note:

For the purpose of paragraphs 16(a)(ii), (iii), (iv), (vi) and (vii), if the offeror is listed on the Stock Exchange, the information may be incorporated in the offer document by reference to the offeror’s other documents published in accordance with the Listing Rules.”

This is consistent with the position under Rules 24.3(a)(iii) and (iv) of the London Code with respect to an offeror’s financial information.

Question 27: Do you agree with the proposal to add a new Note 5 to paragraph 12 of Schedule I and a new note to paragraph 16 of Schedule III? If not, please give reasons.

Alignment with latest terminology commonly used in accounting standards and certain provisions of the Listing Rules

124. We propose to bring the relevant accounting terminology used in the Schedules to the Codes in line with the latest accounting standards and conform to certain amended requirements of the Listing Rules. The proposed amendments are set out in **Appendix 3** and we do not believe this to be controversial.

Question 28: Do you agree with the proposal amendments as set out in Appendix 3? If not, please give reasons.



APPENDIX 1: CONSOLIDATED PROPOSED AMENDMENTS

Definition of Acting in concert

Acting in concert: Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), actively cooperate 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:–

...

- (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 or exempt fund manager);

...

Definition of Associate

~~**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.~~

With respect to an offeror or potential offeror or the offeree company (the “first person”), 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; any person acting in concert with the first person;~~
- (2) ~~any bank and financial and other professional adviser (including a stockbroker)* of the parent, subsidiaries and fellow subsidiaries of the first person 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) **Option (1) –**

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)~~ any subsidiary or fellow subsidiary of the first person;



Option (2) –

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)~~ any subsidiary, fellow subsidiary of or companies controlled# by the first person or its parent;

- (4) ~~the pension funds, provident funds and employee share schemes of an offeror, the offeree company or any company in class (1)~~ the parent, subsidiaries and fellow subsidiaries of the first person;
- (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; any exempt principal trader or exempt fund manager which is connected with the first person; and~~
- (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~~ the first person, 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.

Definition of CA

~~CA: means the Communications Authority established under section 3 of the Communications Authority Ordinance (Cap. 616).~~

New section 5.2 to the Introduction to the Codes

Dealings with the Executive

5.2 Any person dealing with the Executive must do so in an open and co-operative way. Prompt co-operation and assistance is expected from persons dealing with the Executive and those to whom enquiries and other requests are directed. In such dealings, a person must disclose any information known to him and relevant to the matter being considered (and correct or update that information if it changes). A person dealing with the Executive or to whom enquiries or requests are directed must provide true, accurate and complete information.



Where a matter has been determined by the Executive and a person becomes aware that information supplied to the Executive was not true, accurate or complete, that person must promptly contact the Executive to correct the position. In addition, where a determination of the Executive has continuing effect (such as the grant of exempt status or a concert party ruling), the party or parties to that determination must promptly notify the Executive of any new information relevant to that determination.

For the avoidance of doubt, nothing in this section limits the general application of General Principle 10.

Section 7 to the Introduction to the Codes

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. Particular attention should be paid to the obligations under section 5.2 of this Introduction.

Compliance rulings

7.2 If the Executive is satisfied that:

(a) there is a reasonable likelihood that a person will contravene a requirement imposed by or under the Codes; or

(b) a person has contravened a requirement imposed by or under the Codes,

the Executive may give any direction that appears to it to be necessary in order to:

(i) restrain a person from acting (or continuing to act) in breach of a relevant requirement under the Codes; or

(ii) restrain a person from doing (or continuing to do) a particular thing, pending determination of whether that or any other conduct of his is or would be a breach of a relevant requirement under the Codes; or

(iii) otherwise secure compliance with a relevant requirement under the Codes.

Section 8.3 of the Introduction to the Codes

8.3 *Each ~~submission~~ application should be accompanied by a duly completed and signed prescribed filing form available on the SFC's website. Such filing form contains ~~signed by the applicant and should close with a statement by the applicant~~ certifying the truth, accuracy and completeness of statements contained in the ~~submission~~ application. When the application is filed by an adviser, the filing form also contains ~~at~~ 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. Any subsequent submissions in respect of an application should also contain a statement by the applicant certifying the truth, accuracy and completeness of statements contained in the submission.

Section 11 of the Introduction to the Codes

Dealings with the Panel

11.18 The obligations set out in section 5.2 of this Introduction apply equally to a person dealing with the Panel.

Section 12 of the Introduction to the Codes

~~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) issuance of a public statement which involves criticism;
- (b) public censure;
- (c) requiring 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;
- (d) banning advisers from appearing before the Executive or the Panel for a stated period; and/or
- (e) requiring further action to be taken as the Panel thinks fit.

The Executive or the Panel may report a person to other regulatory authorities or professional bodies even though there has been no finding of 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.

Section 13 of the Introduction to the Codes

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13.10 The Chairman of the hearing may give any preliminary or procedural direction (including a compliance ruling of the nature described in section 7.2 of this Introduction) as he considers appropriate for the determination of a matter without the need for a hearing. Any ruling made by the Chairman is a ruling of the Panel.



13.12 The Panel may also give directions of the nature described in section 7.2 of this Introduction.

13.13 Where a person has breached the requirements of Rules 13, 14, 16, 23, 24, 25, 26, 28, 30 or 31.3 of the Takeovers Code, the Panel may make a ruling requiring the person concerned to pay, within such period as is specified, to the holders, or former holders, of securities of the offeree company such amount as the Panel thinks just and reasonable so as to ensure that such holders receive what they would have been entitled to receive if the relevant Rule had been complied with. In addition, the Panel may make a ruling requiring simple or compound interest to be paid at a rate and for a period (including in respect of any period prior to the date of the ruling and until payment) to be determined. The Panel's power to make a ruling under this section may be exercised irrespective of whether any sanction referred to in section 12.2 is imposed.

New section 14.9 of the Introduction to the Codes

14.9 The obligations set out in section 5.2 of this Introduction apply equally to a person dealing with the Takeovers Appeal Committee.

New Note to Rule 2.2 of the Takeovers Code

2.2 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.

Note to Rule 2.2:

In cases where the offeree company is incorporated in a jurisdiction that does not afford compulsory acquisition rights to an offeror, the Executive may be prepared to waive the requirement of Rule 2.2(c). In considering whether to grant such a waiver, the Executive will take into account, among other things, whether the offeror has or will put in place arrangements such that:–

- (i) where the offer becomes or is declared unconditional in all respects, the offer will remain open for acceptance for a longer period than normally required by Rule 15.3;
- (ii) shareholders who have not yet accepted the offer will be notified in writing of the extended closing date and the implications if they choose not to accept the offer; and



(iii) the resolution to approve the delisting is subject to the offeror having received valid acceptances amounting to 90% of the disinterested shares.

Rule 2.9 of the Takeovers Code

2.9 Shareholder votes to be conducted by way of 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:

(a) the number of shares of each class voted for and against the resolution and the percentage of the relevant class of share capital which those numbers represent; and

(b) in the case of a scheme of arrangement which is subject to an approval by “a majority in number” requirement, the number of shareholders voting for and against the resolution and the percentage of the shareholders voting which that number represents and, among them, the number of CCASS Participants (as defined under the General Rules of the Central Clearing and Settlement System established and operated by Hong Kong Securities Clearing Company Limited) instructing HKSCC Nominees Limited to vote for and against the resolution and the number of shares voted by such CCASS Participants.)

must be announced.

Rule 3.8 of the Takeovers Code

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 offeree 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 (and if relevant, the relevant securities of the company the securities of which are to be offered as consideration for the offer) following any announcement identifying it as an offeror or potential offeror, unless it has stated that its offer is or 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 relevant securities of the offeree company and, or in the case of a securities exchange offer only, any relevant securities of the offeror or potential named offeror (or of the company the securities of which are to be offered as consideration for the offer, as the case may be) ~~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.

Notes to Rule 8.1 of the Takeovers Code

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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. The requirements regarding meetings and presentations or other documents set out in Note 3 below will also apply to any interviews and discussions and any written communication relating to an offer which is provided to the media.

3. Meetings

Subject always to Rule 34, meetings of representatives of the offeror or the offeree company or their respective advisers with any shareholders in, or other person interested in any relevant securities of, either the an offeror or the offeree company, investment analysts, stockbrokers or others engaged in investment management or advice may take place during the offer period, provided so long as that no material new information is forthcoming provided, and no significant new opinions are expressed, by the relevant representative or adviser 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 provided, and no significant new opinions were expressed, by the relevant representative or adviser at the meeting.

Materials such as press releases or printouts of slides which highlight the salient facts of the offer may be distributed at the meeting. Whilst the Executive would not normally regard these printed materials as documents for the purposes of Rule 12.1 and these are therefore not required to be submitted to the Executive for comment prior to distribution, an appropriate representative of the financial adviser must confirm to the Executive in the manner set out above that these printed materials do not contain any material new information or significant new opinions and the information therein is fairly presented.

~~Should there be any dispute as to whether the provisions of this Note have been complied with, the~~ The relevant financial adviser will be expected to satisfy the Executive that the provisions of this Note have been complied with in cases of doubtthey 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, whether they are held in person or by telephone or other electronic means 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 of an offeror or the offeree company 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 (5) of the definition of acting in concert and 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, all entities within the same group as any 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 (or procure its group entities 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".

New Note to Rule 8.6 of the Takeovers Code

- 8.6 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.



Note to Rule 8.6:

Confirmation of translation

See Note 5 to Rule 12 regarding the confirmation of translation to be given to the Executive following the publication of any document.

New Note 6 to Rule 9.3 and 9.4 of the Takeovers Code

6. Confirmation of translation

See Note 5 to Rule 12 regarding the confirmation of translation to be given to the Executive following the publication of any document.

New Notes 4 and 5 to Rule 12 of the Takeovers Code

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4. Confirmation of publication and no material change

As soon as practicable following the publication of any document, the issuer(s) of that document or its respective advisers must confirm in writing to the Executive that (a) the document has been published and the time and date of publication and (b) save for where the document is one of the documents included in the list published under the Note to Rule 12.1, there has been no material change to the version of the document in respect of which the Executive has confirmed that it has no further comment. Such confirmation should be accompanied by a copy of the published version of the document (both English and Chinese versions) and a marked-up version of the document showing any changes (including deletions) made subsequent to the Executive's confirmation.

5. Confirmation of translation

Following the publication of any document, the directors of the issuer(s) of that document must confirm that the Chinese version of the document is a true and accurate translation of the English version and that it is consistent with the English version (or vice versa). Such confirmation should be in the form prescribed by the Executive from time to time and should be provided to the Executive as soon as possible and in any event no later than 5:00 p.m. on the business day after the publication of the document. The confirmation should be signed by a director (on behalf of the board of directors) of the issuer of the document. If the document is jointly issued, a confirmation should be provided by each of the parties issuing that document.

Under Rules 8.6 and 9.3, the responsibility to ensure that the Chinese version of the document is a true and accurate translation of the English version (or vice versa) lies with the directors of the issuing party. The provision of the confirmation of translation to the Executive does not absolve the responsibility of the directors of the issuing party in this regard.



Note 3 to Rule 15.5 of the Takeovers Code

3. *CA decisions Regulatory approvals*

If an offer requires approval from a regulatory body (in relation to merger control or otherwise) the expected timetable for the relevant regulatory approval process should be set out in the offer document. Where there is a delay in a decision of the CA under section 7P of the Telecommunications Ordinance (Cap. 106) to the relevant approval process after posting publication of the offer document, the Executive should be consulted at the earliest opportunity. In appropriate cases, the Executive may will normally extend "Day 39" (see Rule 15.4) to the second day following the announcement of such approval 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 CA'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.

Notes to Rule 18 of the Takeovers Code

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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 or increase 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.*

...

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. Notes 2 and 3 to this Rule 18 describe examples of specific types of reservation to set aside a no extension or no increase statement. However, other types of reservation may also be made, provided that the reservation does not depend solely on subjective judgements by the offeror or its directors or the fulfilment of which is in their hands. 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.

New Note to Rule 19.1 of the Takeovers Code

Note to Rule 19.1:

Schemes of arrangement

In the case of a scheme of arrangement, an announcement must be published in accordance with the requirements of Rule 19.1 on the date on which any shareholder meeting to approve the scheme of arrangement is held. See Rule 2.9 for the disclosure requirements applicable to such announcements.

Rule 21.7 of the Takeovers Code

21.7 Restriction on securities borrowing and lending transactions by offerors, the offeree company and certain other parties

During the offer period, none of the following persons may, except with the consent of the Executive, enter into or take action to unwind a securities borrowing or lending transaction in respect of relevant securities of the offeree company and, in the case of securities exchange offers, the offeror:

- (a) the offeror;
- (b) the offeree company;
- ~~(c) a company which is an associate of the offeror or the offeree company by virtue of paragraph (1) of the definition of associate;~~
- ~~(cd) a financial or professional adviser to the offeror or the offeree company, to a company which is an associate of the offeror or offeree company by virtue of paragraph (1) of the definition of associate or to a person acting in concert with an offeror or with the directors of the offeree company, and persons controlling[#], controlled by or under the same control as any such adviser (except for an exempt principal trader or an exempt fund manager); and~~
- (de) any other person acting in concert with the offeror or the offeree company.

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



Rule 22.1 of the Takeovers Code

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 of either of them, 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 of either of them, 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 of an offeror or the offeree company which is an exempt fund manager connected with an offeror or the offeree company (as the case may be) 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 of an offeror or the offeree company by virtue of class (6) of the definition of associate, the exempt fund manager must disclose publicly under Rule 22.1.

Rule 22.2 of the Takeovers Code

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 of either of them, for the account of non-discretionary investment clients (other than an offeror, the offeree company, ~~and~~ or any associates of either of them) must be privately disclosed in accordance with Notes 5, 6 and 7 to this Rule 22.

Notes to Rule 22 of the Takeovers Code

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3. Offer period

This Rule 22 applies only during an offer period. Dealings by any associates of an offeror or the offeree company (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, in a securities exchange offer only, of an offeror or of a company the securities of which are to be offered as consideration for the offer (as the case may be);
- (c) securities of an offeror or of a company the securities of which are to be offered as consideration for the offer (as the case may be) 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.~~ 12.00 noon on the business day following the date of the transaction ~~or, where~~ ~~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~~ no later than 12.00 noon on the second business day following the date of the transaction. The Executive should be consulted at the earliest opportunity if there is difficulty in meeting the deadlines set.

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. The Executive will arrange for the posting of the disclosure on the SFC's website and on the Stock Exchange's 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 ~~any person parties to an offer and their associates~~ chooses to make announcements regarding dealings in addition to making formal disclosures, they must ensure that no confusion results.

Public disclosure may be made by the ~~person 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.

7. *Details to be included in disclosures*

(a) *Public disclosure (Rules 21.7, 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 bought back 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 of an offeror or the offeree company, 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~~ dealing 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 (65) and (76) of the definition of associate), all the reasons must be specified.

Where a disclosure of a securities borrowing and lending transaction (including the unwinding of such a transaction) is made pursuant to Notes 2 and 3 to Rule 21.7, all relevant details should be given as specified in the specimen disclosure form.

Where a person to whom Rule 21.7 applies discloses a dealing in relevant securities and has previously borrowed relevant securities from, or lent such securities to, another person, the disclosure must be made in a form agreed by the Executive.

(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 person dealing, the total number 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 or the SFC website. 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.

...

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 of an offeror or the offeree company 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.

...

Note 4 to Rule 26.2 of the Takeovers Code

4. ~~CA consent~~Regulatory approvals

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 require prior approval from a regulatory body (in relation to merger control or otherwise) 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 an~~ offer conditional upon any such regulatory approval ~~CA decision~~. A potential offeror under this Rule 26 must seek the relevant regulatory approval ~~consent of the CA 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 ~~CA’s consent~~ relevant regulatory approval he will be in breach of this Note 4 and subject to possible disciplinary action.

Note 1 on dispensations from Rule 26 of the Takeovers Code

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 the whitewash waiver and the underlying transaction(s) are separately approved by at least 75% of the 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 normally be waived, provided there has been an independent vote of shareholders, in cases involving the underwriting of an issue of shares. ...



Rule 30.1 of the Takeovers Code

30.1 ~~Subjective conditions~~ Conditions to an offer

An offer must not normally be made subject to conditions which depend on judgements by the offeror or the offeree company or the fulfilment of which is in ~~its~~ their respective hands.

Rule 31.3 of the Takeovers Code

31.3 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 was unconditional at the time of publication of the offer document or became or was declared unconditional after the publication of the offer document, 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 later of the date of day the offer document or the date the offer became, or was declared, unconditional.

Note 1 to paragraph 4 of Schedule I to the Codes

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); and*

(c) in the case of a securities exchange offer involving the offer as consideration of securities in a company other than the offeror, references to shareholdings in the offeror in this paragraph 4 should be taken to mean shareholdings in the company whose securities are being offered as consideration and (b) above should be construed accordingly.



Paragraph 12 of Schedule I to the Codes

- 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~~ revenue, ~~net~~ profit or loss before taxation, ~~net~~ profit or loss attributable to ~~shareholders~~ owners of the company, ~~net~~ profit or loss attributable to ~~minority interests~~ non-controlling interests, comprehensive income attributable to owners of the company, comprehensive income attributable to non-controlling interests, ~~the charge for tax~~ expense, items which are exceptional because of size, nature or incidence any income or expense which are material, the amount ~~absorbed by~~ of dividends distributed to owners, and earnings and dividends per share;
 - (ii) a statement of ~~the assets and liabilities~~ financial position as shown in the last published audited accounts;
 - (iii) a ~~cash flow~~ statement of cash flows 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;
 - (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~~ modified opinion, emphasis of matter or material uncertainty related to going concern contained in the auditors' report in respect of each of the last 3 financial years, or an appropriate negative 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) 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.

4. *Where securities in a company other than the offeror are being offered as consideration*

In the case of a securities exchange offer involving the offer as consideration of securities in a company other than the offeror, references to the offeror in this paragraph 12(a) should be taken to mean the company whose securities are being offered as consideration. In these cases the Executive should be consulted.

5. *Where the offeror is a company listed on the Stock Exchange*

For the purpose of paragraphs 12(a)(ii), (iii), (iv), (vi) and (vii), if the offeror is listed on the Stock Exchange, the information may be incorporated in the offer document by reference to the offeror's other documents published in accordance with the Listing Rules.

Paragraph 1 of Schedule II to the Codes

1. The names of the directors of the offeree company and of the directors comprising the independent committee of the board of the offeree company established in accordance with Rules 2.1 and 2.8 and whether they recommend that the shareholders should accept or reject the offer, and the recommendation of the independent committee of the board given in accordance with Rule 2.1, or a statement that the directors are



independent committee of the board is 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 independent financial advisers appointed in accordance with Rule 2.1 must also be given.

Notes:

...

4. Independent financial ~~Financial~~ adviser's consent

The circular must, ~~unless issued by the financial adviser in question,~~ include a statement that the independent 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.

Paragraph 2 of Schedule II to the Codes

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 a person who is presumed to be acting in concert with an adviser to the offeree company by virtue of class (5) of the definition of acting in concert or who is an associate of the offeree company by virtue of as specified in class (2) of the definition of associate but excluding exempt principal traders and exempt fund managers;
- (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 presumed to be acting in concert with an associate of the offeree company by virtue of classes (1), (2), (3) and (54) of the definition of acting in concert or who is an associate of the offeree company by virtue of classes (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);
- (vi) whether the directors of the offeree company intend, in respect of their own beneficial shareholdings, to accept or reject the offer; and
- (vii) the shareholdings in the offeree company and (in the case of a securities exchange offer only) the offeror which the offeree company or any directors of



the offeree company has borrowed or lent, save for any borrowed shares which have been either on-lent or sold.

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 presumed to be acting in concert with an associate of the offeree company by virtue of classes (1), (2), (3) or ~~(5)~~ (4) of the definition of acting in concert or who is an associate of the offeree company by virtue of classes (2), (3) and (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.



Paragraph 6 of Schedule II to the Codes

6. (a) The following information about the offeree company:–
- (i) for the last 3 financial years for which the information has been published, ~~turnover~~ revenue, ~~net~~ profit or loss before taxation, ~~net~~ profit or loss attributable to ~~shareholders~~ owners of the company, ~~net~~ profit or loss attributable to ~~minority interests~~ non-controlling interests, comprehensive income attributable to owners of the company, comprehensive income attributable to non-controlling interests, ~~the~~ charge for tax expense, ~~items which are exceptional because of size, nature or incidence~~ any income or expense which are material, the amount ~~absorbed by~~ of dividends distributed to owners, and earnings and dividends per share;
 - (ii) a statement of ~~the assets and liabilities~~ financial position as shown in the last published audited accounts;
 - (iii) a ~~cash flow~~ statement of cash flows 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 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;
 - (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~~ modified opinion, emphasis of matter or material uncertainty related to going concern contained in the auditors' report in respect of each of the last 3 financial years, or an appropriate negative 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.

Note:

For the purpose of paragraphs 6(a)(ii), (iii), (iv), (vi) and (vii), if the offeree company is listed on the Stock Exchange, the information may be incorporated in the offeree board circular by reference to the offeree company's other documents published in accordance with the Listing Rules.



Paragraph 16 of Schedule III to the Codes

16. (a) The following information about the offeror:–
- (i) for the last 3 financial years for which the information has been published, ~~turnover~~ revenue, ~~net profit or loss before taxation,~~ ~~net profit or loss attributable to shareholders~~ owners of the company, ~~net profit or loss attributable to minority interests~~ non-controlling interests, comprehensive income attributable to owners of the company, comprehensive income attributable to non-controlling interests, ~~the charge for tax~~ expense, ~~items which are exceptional because of size, nature or incidence~~ any income or expense which are material, the amount ~~absorbed by~~ of dividends distributed to owners, and earnings and dividends per share;
 - (ii) a statement of ~~the assets and liabilities~~ financial position as shown in the last published audited accounts;
 - (iii) a ~~cash flow~~ statement of cash flows 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;
 - (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~~ modified opinion, emphasis of matter or material uncertainty related to going concern contained in the auditors' report in respect of each of the last 3 financial years, or an appropriate negative 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.

Note:

For the purpose of paragraphs 16(a)(ii), (iii), (iv), (vi) and (vii), if the offeror is listed on the Stock Exchange, the information may be incorporated in the offer document by reference to the offeror's other documents published in accordance with the Listing Rules.



Paragraph 2 of Schedule VI to the Codes

2. Specific grant of waiver required

...

- (e) approval of the proposals by an independent vote at a meeting of the holders of any relevant class of securities in accordance with Note 1 on dispensations from Rule 26 of the Takeovers Code, whether or not any such meeting needs to be convened to approve the issue of the securities in question; and...

Paragraph 4 of Schedule VI to the Codes

4. Circular to shareholders

...

- (e) a statement that the Executive has agreed, subject to approval by independent shareholders in accordance with Note 1 on dispensations from Rule 26 of the Takeovers Code, to waive any obligations to make a general offer which might result from the transaction;...

Paragraph 2 of Schedule IX to the Codes

“Associate”: In addition to the persons listed under the definition of “associate” in the Definitions section of the Codes, with respect to an offeror or potential offeror or the offeree company (the “first person”), the term “associate” normally includes the following:–

- (~~87~~) any trustee (in its capacity as trustee of a REIT) of an offeror, the offeree REIT or any company in class (1) of the definition of acting in concert; and
- (~~98~~) any management company (together with persons controlling#, controlled by or under the same control as the management company) of an offeror, the offeree REIT or any company in class (1) of the definition of acting in concert.

Paragraph 3 of Schedule IX to the Codes

...

- (f) Availability of information – information issued by associates (Note 4 to Rule 8.1 of the Takeovers Code)**

With respect to Note 4 to Rule 8.1 of the Takeovers Code, attention should also be drawn to classes (~~87~~) and (~~98~~) of the definition of “associates” under this Guidance Note.

...

- (p) Shareholdings and dealings (paragraph 2 of Schedule II to the Codes)**

In cases where the offeree company is a REIT, the disclosure obligations under paragraph 2 of Schedule II and Note 2 to such paragraph should also



apply to any person who is an associate of the offeree company by virtue of classes (7) and (8) of the definition of associate.



APPENDIX 2: PROPOSED AMENDMENTS TO THE DEFINITION OF AND PROVISIONS WHICH USE THE DEFINED TERM “ASSOCIATE”

Definition of Associate

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.~~

With respect to an offeror or potential offeror or the offeree company (the “first person”), 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;~~ any person acting in concert with the first person;
- (2) ~~any bank and financial and other professional adviser (including a stockbroker)* of the parent, subsidiaries and fellow subsidiaries of the first person 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) **Option (1) –**
~~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)~~ any subsidiary or fellow subsidiary of the first person;
- Option (2) –**
~~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)~~ any subsidiary, fellow subsidiary of or companies controlled[#] by the first person or its parent;
- (4) ~~the pension funds, provident funds and employee share schemes of an offeror, the offeree company or any company in class (1)~~ the parent, subsidiaries and fellow subsidiaries of the first person;
- (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;~~ any exempt principal trader or exempt fund manager which is connected with the first person; and
- (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~~ the first person, 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.

Note 4 to Rule 8.1 of the Takeovers Code

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 of an offeror or the offeree company 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 (5) of the definition of acting in concert and 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, all entities within the same group as any 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 (or procure its group entities 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".



Rule 21.7 of the Takeovers Code

21.7 Restriction on securities borrowing and lending transactions by offerors, the offeree company and certain other parties

During the offer period, none of the following persons may, except with the consent of the Executive, enter into or take action to unwind a securities borrowing or lending transaction in respect of relevant securities of the offeree company and, in the case of securities exchange offers, the offeror:

- (a) the offeror;
- (b) the offeree company;
- ~~(c) a company which is an associate of the offeror or the offeree company by virtue of paragraph (1) of the definition of associate;~~
- ~~(cd) a financial or professional adviser to the offeror or the offeree company, to a company which is an associate of the offeror or offeree company by virtue of paragraph (1) of the definition of associate or to a person acting in concert with an offeror or with the directors of the offeree company, and persons controlling[#], controlled by or under the same control as any such adviser (except for an exempt principal trader or an exempt fund manager); and~~
- ~~(de) any other person acting in concert with the offeror or the offeree company.~~

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

Rule 22.1 of the Takeovers Code

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 of either of them, 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 of either of them, 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 of an offeror or the offeree company which is an exempt fund manager connected with an offeror



or the offeree company (as the case may be) 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 of an offeror or the offeree company by virtue of class (6) of the definition of associate, the exempt fund manager must disclose publicly under Rule 22.1.

Rule 22.2 of the Takeovers Code

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 of either of them, for the account of non-discretionary investment clients (other than an offeror, the offeree company, ~~and~~ or any associates of either of them) must be privately disclosed in accordance with Notes 5, 6 and 7 to this Rule 22.

Note 3 to Rule 22 of the Takeovers Code

3. Offer period

This Rule 22 applies only during an offer period. Dealings by any associates of an offeror or the offeree company (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.

Note 6(a) to Rule 22 of the Takeovers Code

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. The Executive will arrange for the posting of the disclosure on the SFC's 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 any person parties to an offer and their associates chooses to make announcements regarding dealings in addition to making formal disclosures, they must ensure that no confusion results.

Public disclosure may be made by the person 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.



Note 7 to Rule 22 of the Takeovers Code

7. Details to be included in disclosures

(a) Public disclosure (Rules 21.7, 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 bought back 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 of an offeror or the offeree company, 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 dealing 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 (65) and (76) of the definition of associate), all the reasons must be specified.

Where a disclosure of a securities borrowing and lending transaction (including the unwinding of such a transaction) is made pursuant to Notes 2 and 3 to Rule 21.7, all relevant details should be given as specified in the specimen disclosure form.

Where a person to whom Rule 21.7 applies discloses a dealing in relevant securities and has previously borrowed relevant securities from, or lent such securities to, another person, the disclosure must be made in a form agreed by the Executive.

(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 person dealing, the total number 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 or the SFC website. 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.

Note 11 to Rule 22 of the Takeovers Code

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 of an offeror or the offeree company 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.



Paragraph 2 of Schedule II to the Codes

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 a person who is presumed to be acting in concert with an adviser to the offeree company by virtue of class (5) of the definition of acting in concert or who is an associate of the offeree company by virtue of as specified in class (2) of the definition of associate but excluding exempt principal traders and exempt fund managers;
- (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 presumed to be acting in concert with an associate of the offeree company by virtue of classes (1), (2), (3) and (54) of the definition of acting in concert or who is an associate of the offeree company by virtue of classes (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);
- (vi) whether the directors of the offeree company intend, in respect of their own beneficial shareholdings, to accept or reject the offer; and
- (vii) the shareholdings in the offeree company and (in the case of a securities exchange offer only) the offeror which the offeree company or any directors of the offeree company has borrowed or lent, save for any borrowed shares which have been either on-lent or sold.

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 presumed to be acting in concert with an associate of the offeree company by virtue of classes (1), (2), (3) or (54) of the definition of acting in concert or who is an associate of the offeree company by virtue of classes (2), (3) and (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.

Paragraph 2 of Schedule IX to the Codes

“Associate”: In addition to the persons listed under the definition of “associate” in the Definitions section of the Codes, with respect to an offeror or potential offeror or the offeree company (the “first person”), the term “associate” normally includes the following:–

- (87) any trustee (in its capacity as trustee of a REIT) of an offeror, the offeree REIT or any company in class (1) of the definition of acting in concert; and
- (98) any management company (together with persons controlling[#], controlled by or under the same control as the management company) of an offeror, the offeree REIT or any company in class (1) of the definition of acting in concert.



Paragraph 3 of Schedule IX to the Codes

(f) Availability of information – information issued by associates (Note 4 to Rule 8.1 of the Takeovers Code)

With respect to Note 4 to Rule 8.1 of the Takeovers Code, attention should also be drawn to classes (87) and (98) of the definition of “associates” under this Guidance Note.



APPENDIX 3: PROPOSED AMENDMENTS TO PROVISIONS RELATING TO DISCLOSURE OF FINANCIAL INFORMATION

Paragraph 12 of Schedule I to the Codes

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~~ revenue, ~~net profit or loss before taxation,~~ ~~net profit or loss attributable to shareholders~~ owners of the company, ~~net profit or loss attributable to minority interests~~ non-controlling interests, comprehensive income attributable to owners of the company, comprehensive income attributable to non-controlling interests, ~~the charge for tax~~ expense, ~~items which are exceptional because of size, nature or incidence~~ any income or expense which are material, ~~the amount absorbed by~~ of dividends distributed to owners, and earnings and dividends per share;
 - (ii) a statement of ~~the assets and liabilities~~ financial position as shown in the last published audited accounts;
 - (iii) a ~~cash flow~~ statement of cash flows 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;
 - (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~~ modified opinion, emphasis of matter or material uncertainty related to going concern contained in the auditors' report in respect of each of the last 3 financial years, or an appropriate negative 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) 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.

Paragraph 6 of Schedule II to the Codes

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~~ revenue, ~~net profit or loss before taxation,~~ ~~net profit or loss attributable to shareholders~~ owners of the company, ~~net profit or loss attributable to minority interests~~ non-controlling interests, comprehensive income attributable to owners of the company, comprehensive income attributable to non-controlling interests, ~~the charge for tax~~ expense, ~~items which are exceptional because of size, nature or incidence~~ any income or expense which are material, the amount ~~absorbed by~~ of dividends distributed to owners, and earnings and dividends per share;



- (ii) a statement of ~~the assets and liabilities~~ financial position as shown in the last published audited accounts;
 - (iii) a ~~cash flow~~ statement of cash flows 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 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;
 - (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~~ modified opinion, emphasis of matter or material uncertainty related to going concern contained in the auditors' report in respect of each of the last 3 financial years, or an appropriate negative 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.

Paragraph 16 of Schedule III to the Codes

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~~ revenue, ~~net~~ profit or loss before taxation, ~~net~~ profit or loss attributable to ~~shareholders~~ owners of the company, ~~net~~ profit or loss attributable to ~~minority interests~~ non-controlling interests, comprehensive income attributable to owners of the company, comprehensive income attributable to non-controlling interests, ~~the charge for tax~~ expense, items which are exceptional because of size, nature or incidence any income or expense which are material, the amount ~~absorbed by~~ of dividends distributed to owners, and earnings and dividends per share;
 - (ii) a statement of ~~the assets and liabilities~~ financial position as shown in the last published audited accounts;
 - (iii) a ~~cash flow~~ statement of cash flows 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;
 - (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~~ modified opinion, emphasis of matter or material uncertainty related to going concern contained in the auditors' report in respect of each of the last 3 financial years, or an appropriate negative 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.