



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

Consultation Conclusions on (1) the proposal to amend the requirements for property valuation in the Codes on Takeovers and Mergers and Share Repurchases, (2) the proposed amendment relating to confirmations of independence in placing and top-up transactions and (3) the timing of payment for acceptances

23 March 2012



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Introduction

On 24 August 2011 the Securities and Futures Commission (**SFC**) issued a Consultation Paper inviting public comment on a number of proposed amendments to the Hong Kong Codes on Takeovers and Mergers and Share Repurchases (**Codes**). These proposals were formulated in consultation with the Takeovers Panel (**Panel**).

Proposals

The Consultation Paper was set out in three parts:

Part 1 - proposal to amend Rule 11.1(f) of the Takeovers Code in relation to the requirements for property valuation

Part 2 - proposal to amend Note 7 on dispensations from Rule 26 of the Takeovers Code relating to confirmations of independence in placing and top-up transactions

Part 3 - proposal to amend the 10 day payment period for the settlement of consideration set out in Rule 20.1 of the Takeovers Code

Market consultation

The consultation period ended on 26 September 2011. The SFC received 18 responses including one respondent who represented 15 financial institutions. The list of respondents is set out in **Appendix 1**. The Panel and the SFC welcome these responses and are grateful to those who have participated. Their comments and the SFC's responses to those comments are discussed in this paper.

The SFC has carefully analysed the comments received together with the views of the Panel. The SFC proposes to adopt the proposal to amend Rule 11.1(f) so that it only applies to offers where the offeror is a related party as outlined in the Consultation Paper with certain modifications as set out in this paper.

The marked up text of the amendments to the Codes arising from the consultation is set out in **Appendix 2**. All the amendments will become effective on 23 March 2012.

The Consultation Paper, the responses, and this Conclusion Paper are available on the SFC website at www.sfc.hk.



Part 1

Proposal to amend the requirements for property valuation

1. Rule 11.1(f) requires a valuation of properties in the case of an offer for a company with significant property interests, or in the case of a securities exchange offer, where the offeror company has significant property interests.
2. In Part 1 of the Consultation Paper the SFC proposed to amend Rule 11.1(f) so that it only applies to offers where the offeror is a related party or which involve a special deal that requires shareholder approval under Rule 25 of the Takeovers Code.
3. The SFC has carefully analysed the comments received and the views of the Panel and has decided to limit the property valuation requirements in Rule 11.1(f) to offers when the offeror is a “related party” (the term “related party” will be replaced by “interested party” as explained in paragraph 21 below). In this context an interested party refers to (i) a party holding, or together with parties acting in concert with it holding, immediately before either the commencement of an offer period or an obligation arises to make a mandatory offer under Rule 26.1, 30% or more of the voting rights of the offeree company; (ii) a director of the offeree company; or (iii) a party acting in concert with any of (i) or (ii).
4. The SFC does not propose to adopt the proposal to apply Rule 11.1(f) to special deals that fall within Rule 25 of the Takeovers Code. Rule 25 provides the following:

“Special deals with favourable conditions

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

5. Rule 25 of the Takeovers Code reflects the fundamental principle set out in General Principle 1 that all shareholders should be treated equally. Special deals are prohibited by Rule 25 unless the Executive provides the requisite consent. The notes to Rule 25 provide examples of arrangements which might be permissible subject to various safeguards which include the requirement that the special deal is approved by independent shareholders and that an independent financial adviser publicly stating that in his opinion the terms of the special deal transaction are fair and reasonable.
6. As a matter of practice the Executive requires a valuation of the assets being disposed of or acquired to be included in the special deal circular. This is consistent with the guiding principle contained in General Principle 5 that shareholders should be given sufficient information to enable them to reach an



informed decision on an offer and that no relevant information should be withheld. Given the safeguards offered by Rule 25 and General Principle 5, the SFC does not consider it to be appropriate to apply the property valuation requirements in Rule 11.1(f) to special deals. Given this, respondents' specific comments on the application of Rule 11.1(f) to special deals will not be considered in this paper.

7. The various scenarios where a property valuation will be required under the amended Rule 11.1(f) are highlighted in the following table.

Scenario	Is the Offeror an interested party of the Offeree?	Valuation report		
		of the Offeree	of the Offeror	
			(listed)	(unlisted)
1. Cash offers	No	X	X	X
2. Cash offers	Yes	√	X	X
3. Securities exchange offers	No	X	X	√ *
4. Securities exchange offers	Yes	√	√	√ *

* Paragraph 30 of Schedule I of the Codes requires an estimate of the value of unlisted securities to be disclosed in the offer document. The Executive envisages that any estimation would inherently include an up to date valuation of the underlying properties.

8. The amendments to Rule 11.1(f) are set out in **Appendix 2**.

<p>Question 1: Do you agree that Rule 11.1(f) should be amended? If not, please give reasons.</p> <p>Question 2: If your answer to Question 1 is yes, do you agree with the proposal that Rule 11.1(f) should only apply if the offeror is a related party or if the transaction involves a special deal that requires shareholder approval pursuant to Rule 25? If not, please give reasons.</p> <p>Question 3: Do you agree with the proposed amendments to Rule 11.1(f)? If not, please give reasons.</p>
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9. 17 respondents commented on this part of the Consultation Paper. Their comments and the SFC's response are considered below.



Reasons for the proposed amendments

10. One respondent questioned the rationale for the proposal to limit Rule 11.1(f) to interested party transactions. This respondent sought clarification of why property valuations would necessarily constitute relevant information for shareholders if the offeror or whitewash applicant is an interested party rather than if an independent party is involved.
11. The same respondent also asked whether the SFC would consider following other jurisdictions such as Australia, the UK, New Zealand, Singapore, South Africa and Malaysia by dispensing with the current requirements in Rule 11.1(f) altogether. Two respondents suggested that the SFC might consider raising the 15% threshold currently set out in Rule 11.1(f).

SFC's response

12. As mentioned in the Consultation Paper, the proposal to limit Rule 11.1(f) to interested party transactions recognises that in some circumstances the continued full application of Rule 11.1(f) may be unduly burdensome for the relevant company both in terms of cost and time involved in obtaining an independent valuation. This is especially the case when the need for a valuation arises from the action of an unsolicited unrelated party and in consequence the offeree company is required to obtain the valuations within a very tight timeframe.
13. This proposal would retain the safeguards in Rule 11.1(f) in transactions where the offeror is an interested party. The SFC believes that the more stringent requirements in Rule 11.1(f) should continue to apply to such transactions where greater safeguards are considered appropriate.
14. The SFC considers the 15% threshold in Rule 11.1(f) to represent a significant percentage of the value of a company's consolidated total assets. Given this the SFC does not consider it appropriate to raise the threshold to above 15%. The SFC will continue to monitor the property valuation requirements in Rule 11.1(f) and those of other jurisdictions.

Respondents' comments

15. One respondent suggested that the omission of an independent property valuation in some circumstances would prevent shareholders from receiving sufficient information to enable them to reach an informed decision on an offer especially when the property interests represent a significant portion of a company's total assets. The same respondent was also concerned that if the proposed changes were implemented it would result in the exclusion of valuations in all unrelated party offers. Another respondent believed that it is not the appropriate time to revise Rule 11.1(f) in view of the current economic downturn in the US and in Europe and the relative volatility of the Hong Kong property market compared to a year ago.

SFC's response

16. As mentioned in the Consultation Paper, the continued full application of Rule



11.1(f) in some circumstances may be unduly burdensome particularly in the context of unsolicited offers. The SFC believes the proposed amendments are appropriate irrespective of market conditions. The amendments are expected to reduce the cost and time incurred by an offeree company in complying with the property valuation requirements whilst retaining safeguards in cases where an interested party is involved.

17. Finally, the SFC believes that the respondents' comments regarding the omission of an independent property valuation in all unrelated offers appear to overlook the overriding nature of General Principle 5 (as discussed in paragraphs 25 and 27 below).

Definition of "interested party"

18. One respondent who agreed with the proposals questioned whether the first limb of the proposed definition should apply only to an offeror who is an incumbent interested party rather than an independent third party who acquires 30% or more of the voting rights, and thereby triggers a mandatory offer obligation and subsequently proceeds with an offer or a whitewash application. This respondent also queried whether this would make the application of Rule 11.1(f) rather limited and asked why a 30% holding is considered appropriate when defining "interested party" as opposed to a lower threshold of say, 20%.
19. Another respondent suggested that the term "related party" should be renamed in order to avoid confusion with the same term that is used by professional accountants (see HKSA 24).

SFC's response

20. The SFC believes that it is appropriate to restrict the ambit of Rule 11.1(f) to transactions that involve incumbent controlling shareholders (meaning parties holding 30% or more of the voting rights), directors of the offeree company and their concert parties because of the likely involvement and influence of such parties in the underlying transactions and/or the decision making process. In this regard the SFC considers 30% to be an appropriate threshold for the definition of "interested party" as this reflects the threshold for "control" under the Codes. The SFC proposes to clarify the definition of "interested party" as follows:

"...*(i) a party holding, or together with parties acting in concert with it holding, immediately before either the commencement of an offer period or an obligation arises to make a mandatory offer under Rule 26.1, 30% or more of the voting rights of the offeree company; (ii)...*"

21. The SFC also agrees that the term "related party" should be renamed in order to avoid any misunderstanding arising. We propose therefore that the term "related party" is replaced by "interested party". The SFC agrees that some of the drafting suggestions put forward by respondents would add clarity to Rule 11.1(f) and proposes to make various additional changes as set out in **Appendix 2**.



Properties of mining companies

22. One respondent who had no objection to the proposal to amend Rule 11.1(f) noted that the Executive has already relaxed its approach to the strict application of Rule 11.1(f) in certain circumstances where strict application may be unduly burdensome. This respondent requested clarification of how the Executive draws the line in reaching a decision to exclude certain assets given that such assets are considered to be part and parcel of a mine or a mining site.

SFC's response

23. As mentioned in paragraph 9 of the Consultation Paper, the Executive has already relaxed its approach to the strict application of Rule 11.1(f) in certain circumstances in recognition of some practitioners' concerns that the Rule may at times be unduly burdensome. This approach is reflected in Practice Note 7 which explains that the Executive may request to see a list of the assets including a detailed description of their nature, location, size, book value and any other characteristics or relevant information which would assist in its consideration of the matter. If parties or their advisers are in doubt as to whether certain assets should be taken into account for the purpose of calculating the 15% threshold, they should consult the Executive at the outset of the transaction. Practice Note 7 is issued by the Executive and can be found under "Prospectuses, Takeovers & Mergers – Takeovers and Mergers – Practice Notes" on the SFC website (www.sfc.hk).

Application of General Principle 5

24. One respondent who welcomed the proposed changes to Rule 11.1(f) asked for clarification as to when General Principle 5 would, in practice, override the amended version of Rule 11.1(f). Two other respondents made similar comments with one respondent suggesting that an additional note should be added to Rule 11.1(f) to clarify that the Executive has discretion to require property valuations in cases where it considers, with some basis, that there is a suspected but undeclared interested party interest in a transaction and consequently potential for minority shareholders' interests to be otherwise prejudiced by the lack of such disclosure.

SFC's response

25. As mentioned in the Consultation Paper the guiding principle contained in General Principle 5 is that shareholders should be given sufficient information to enable them to reach an informed decision on an offer and that no relevant information should be withheld (see also Rule 8.1). The obligation to disclose relevant information in accordance with General Principle 5 overrides the prescriptive disclosure requirements in the Codes. In other words all relevant information should be disclosed to shareholders in the context of an offer or relevant Code transaction irrespective of whether disclosure of the relevant information is explicitly covered by a rule.
26. It is clear that the Executive has a general discretion under General Principle 5 to require property valuations in appropriate cases. In reaching a decision the Executive would take into account all relevant factors which would include, but



not be limited to, the nature of the business and principal assets of the target company, the structure and terms of the proposed transaction including the basis upon which the consideration was determined and the relationship between the parties involved. The Executive might also seek the views of the independent financial adviser to the offeree company.

27. As each case rests on its own facts and circumstances the SFC does not believe that it is appropriate to provide prescriptive guidance in Rule 11.1(f) on the relevant factors that might be taken into account in reaching a decision of whether a valuation might be required.

General comments

28. One respondent suggested that the property valuation requirements for takeovers should be consistent with those set down in the Listing Rules which apply to initial public offering (IPO) prospectuses and issuers' circulars.

SFC's response

29. Given the different nature of an IPO and a takeover transaction the SFC does not propose to adopt the suggestion. Furthermore, Rule 11.1(e) provides that "[v]aluations of assets must not be prepared or presented on a selective basis unless the Executive accepts that special circumstances justify it."

Whitewash transactions

30. One respondent who supported the proposal suggested that a reference should be added to the first paragraph of Rule 11.1(f) in order to clarify that Rule 11.1(f) applies to whitewash transactions.

SFC's response

31. The Whitewash Guidance Note (Schedule VI) provides that the whitewash circular to shareholders must contain, among other things, information required under Rule 11. It is already clear therefore that a valuation of properties in accordance with Rule 11.1(f) is required for whitewash circulars. The SFC has not therefore adopted this suggestion.

Effective date

32. One respondent suggested that properties which have not been revalued within 3 months of the date of the relevant document should be revalued.

SFC's response

33. Rule 11.4 requires that a valuation must state the effective date when the assets were valued. If a valuation is not current, the valuer must state that a current valuation would not be materially different. The Note to Rule 11.4 further states that the Executive will normally regard any valuation that is more than 3 months old as not current. The SFC considers the respondent's comment is already addressed sufficiently and therefore that no clarification amendment is needed.



Part 2

Proposed amendment relating to confirmations of independence in placing and top-up transactions

34. In this part of the Consultation Paper, the SFC proposed to amend Note 7 of the Notes on dispensations from Rule 26 to clarify the following:
- (a) in a placing and top-up transaction it is the responsibility of the financial adviser and placing agent to confirm the independence of placees and not the Executive; and
 - (b) the Executive may make enquiries about the independence of the acquirer of the voting rights after the completion of the placing and top-up transaction. In the event that the acquirer of the voting rights is found to have acted in concert with the vendor of the voting rights any waiver which has been granted will be invalidated and the Executive will take appropriate action including possibly requiring a general offer to be made in accordance with the requirements of Rule 26.

Question 4: Do you agree with the proposed amendment to Note 7 on dispensations from Rule 26? If not, please give reasons.
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35. Nine respondents commented on this part of the Consultation Paper. Six respondents supported the proposal to amend Note 7 on dispensations from Rule 26. Three respondents did not fully agree with the proposal.

Responsibility for providing confirmations of independence

36. One respondent who represented a group of 15 financial institutions considered that the vendor of the voting rights is primarily responsible for confirming to the SFC that it is not seeking to consolidate control through connected persons. The independence confirmations, the group suggested, are a secondary check on the vendor's confirmation and the placing agents are merely placed to act as a conduit for these confirmations from the placees to the SFC. The group commented that the proposed amendments elevate the responsibility of placing agents and placees to above that of the vendor and that this is the wrong way round.
37. Another respondent asked for prescriptive guidance on the documents and evidence required to prove the independence of placees.

SFC's response

38. The SFC does not agree with the suggestion that independence confirmations provided by the financial adviser and placing agent should be secondary to the vendor's confirmation of independence of the placees nor does it agree with the comment that placing agents are merely placed to act as a conduit for the confirmations from the placees to the SFC. Financial advisers and placing agents (who are required to be licensed by or registered with the SFC) play a pivotal role in arranging placements and procuring placees. Given this the SFC



believes that they should be in the best position to provide the confirmation of independence. As mentioned in paragraph 18 of the Consultation Paper this is consistent with the “know-your-client” rule in paragraph 6.1 of the Corporate Finance Adviser Code and paragraph 5.1 of the Code of Conduct for Persons Licensed by or Registered with the SFC.

39. The SFC notes that in practice financial advisers and placing agents invariably provide the confirmation to the Executive that the placees procured by them are independent of, and not acting in concert with, the vendor of the voting rights, and the vendor of the voting rights was not involved in the selection or identification of the placees. The proposed amendments to Note 7 reflect this long standing practice.
40. The SFC does not consider it to be appropriate to set out prescriptive guidance in Note 7 on the documents and evidence required to prove the independence of placees. The Executive would expect financial advisers, placing agents and acquirers of voting rights to exercise their professional judgment in considering what steps are sufficient in verifying and ensuring the independence of placees. Ultimately this would depend on, amongst other things, how the placees were procured or introduced, the extent of involvement of the vendor of the voting rights and the “know-your-client” rule.

Specific comments on the drafting of Note 7

41. One respondent suggested that the Note should be amended to clarify that the vendor of the voting rights should not be involved in the selection of placees. This respondent also suggested that the Executive should preserve its right to make enquiries about the independence of the placees before (as well as after) granting a waiver.

SFC’s response

42. The SFC agrees that Note 7 should be amended to clarify that the vendor of the voting rights should not be involved in the selection process unless that involvement relates to due diligence enquiries by the placing agents and financial advisers regarding the independence of placees. The SFC therefore proposes to amend the first paragraph of Note 7 as set out in paragraph 50 below.
43. The SFC also agrees with the suggestion that Note 7 should be amended to clarify that under Note 7 the Executive may make enquiries about the independence of the placees before granting a waiver as well as after completion of the placing and top-up transaction. Accordingly a final paragraph has been added to Note 7 as set out in paragraph 50 below.

Invalidation of waiver and possible consequences

44. A number of respondents raised concerns about the possible consequences of enquiries by the Executive into the independence of placees. Two respondents sought clarification of the circumstances in which the Executive would make post-transaction enquiries and the timing of those enquiries.



45. These respondents also asked how an invalidation of a waiver and requirement for a general offer would work in practice and mentioned a concern about market disruption. They commented that shareholders who receive an offer subsequently may not be the same group of shareholders to whom an offer should have been made at the time of the relevant change in control. This raised the question of how long the exposure to a subsequent general offer obligation should last and how the offer price would be calculated. Other than invalidating a waiver and requiring a general offer, as specified in the revised Note 7, these respondents also asked what alternative remedies or sanctions could be invoked. One respondent suggested that Note 7 should be amended to clarify that any waiver which has been granted “may” as opposed to “will” be invalidated to take into account the fact that it may not be appropriate to invalidate a previously granted waiver in all circumstances.

SFC’s response

46. In its administration of the amended Note 7 the Executive intends routinely to review confirmations of independence and relevant announcements and to make appropriate enquiries in a timely manner. The length of these enquiries will depend on the particular facts and circumstances of each case. In this regard parties and their advisers are expected to respond promptly to any follow-up enquiries made by the Executive and provide all necessary information (see General Principle 10).
47. The SFC agrees with the suggestion that Note 7 should be amended to clarify that a waiver may not be invalidated in all cases (the SFC notes that this would only be in exceptional circumstances) and proposes to add the word “normally” to the last sentence of the second paragraph of Note 7 to provide a degree of flexibility in this regard.
48. The SFC continues to believe that the implications of the acquirer of the voting rights being found to have acted in concert with the vendor of such voting rights should be referred to in Note 7. This provides clarity about the likely consequences of such action and also conveys a strong deterrent message to the market.
49. The practical implications of the invalidation of a waiver and other appropriate action including the possible imposition of a general offer obligation would need to be determined in light of all the circumstances of a case and the relevant provisions of the Codes. The SFC believes that the Executive should maintain a high degree of flexibility in this regard and therefore does not consider it to be prudent to include prescriptive guidance in Note 7. This is consistent with the Executive’s approach to the administration of other provisions in the Codes where it is provided that a waiver will be invalidated in certain situations. By way of example see paragraph 3(b) of Schedule VI (Whitewash Guidance Note) in relation to disqualifying transactions and paragraph 11 of Schedule VI (Whitewash Guidance Note) regarding the issue of new shares and off-market share repurchases during a whitewash transaction.



50. The SFC has also considered a number of drafting suggestions put forward by respondents and proposes to make the following further amendments (which are highlighted in bold) to Note 7:

“7. *Verification of independence of placees*

*When compliance with a Rule or granting of a waiver is dependent upon a disposition or placement of voting rights to independent persons, the vendor of the voting rights must not make arrangements to dispose of or place the voting rights with persons acting in concert with him. **The vendor of the voting rights should not be involved in screening or selecting the placees unless such involvement is strictly limited to due diligence enquiries by the placing agents and financial advisers regarding the independence of placees.** It is the responsibility of the relevant financial adviser, placing agent and acquirer of the voting rights to ensure and confirm that the acquirer is independent of, and not acting in concert with, the vendor of the voting rights. The Executive would expect the relevant financial adviser, placing agent and acquirer of the voting rights to take all appropriate and reasonable steps to ascertain and verify whether the acquirer is independent of, and not acting in concert with, the vendor of the voting rights and then to provide appropriate confirmations to the Executive. **The relevant confirmations should provide full details of any involvement of the vendor of the voting rights in the placing process.** The relevant placee list setting out the identities of the placees should also be provided to the Executive.*

*In placing and top-up transactions where the Executive is often requested to process a waiver application promptly in order to facilitate the vendor of the voting rights to top-up as soon as practicable, the Executive will normally place significant reliance on the confirmations provided by the financial adviser, placing agent and acquirer of the voting rights when granting such a waiver. However, despite having granted the waiver, the Executive may make enquiries about the independence of the acquirer of the voting rights after the completion of the placing and top-up transaction. In the event that the acquirer of the voting rights is found to have acted in concert with the vendor of such voting rights, any waiver which has been granted will **normally** be invalidated and the Executive will take appropriate action including possibly requiring a general offer to be made in accordance with the requirements of Rule 26.*

Notwithstanding the above the Executive may also make enquiries about the independence of the acquirer of the voting rights before granting a waiver if it considers it appropriate to do so.



Part 3

Timing of payment for acceptances

51. Rule 20.1 of the Takeovers Code provides that once an offer has become unconditional the offeror must pay for any acceptances of the offer as soon as possible and in any event within 10 days. Under the current practice the 10 day payment period is calculated by reference to calendar days.
52. In response to a suggestion received from the Federation of Share Registrars Limited the SFC proposed to change the prescribed time period from “10 days” to “7 business days” in order to afford share registrars and receiving agents a more manageable timeframe to process payments without compromising the interests of accepting shareholders.

Question 5: Do you agree with the proposed amendment to Rule 20.1? If not, please give reasons.

53. All respondents agreed with the proposed amendment.
54. One respondent suggested lengthening the period for payment to 8 business days as 7 business days appeared too short. This respondent also suggested that for mandatory unconditional offers, it might be administratively more manageable if the deadline for payment is computed by reference to the date the unconditional offer closes (i.e. similar to the position with partial offers) as opposed to the date of receipt of valid acceptances.
55. Another respondent suggested that all references to “day(s)” in the Codes should be changed to “business day(s)”. One respondent suggested that Rule 20.1(a) should be amended to clarify that the payment will be made within 7 business days following the later of the date on which the offer becomes, or is declared, unconditional and the date of receipt of a duly completed acceptance.

SFC’s response

56. As stated in the Consultation Paper, the purpose of this proposed amendment is to provide a more manageable timeframe to process payments without compromising the interests of accepting shareholders. The SFC has consulted the Federation of Share Registrars who endorses the proposed change of the prescribed time period from “10 days” to “7 business days”. In the circumstances the SFC does not propose to adopt the suggestion of 8 business days.
57. The different time periods for payment of acceptances in general offers and partial offers (see Rule 28) set out in Rule 20.1 reflect the difference in the structure of these two types of offer and the point in time in which they can be declared unconditional in all respects. The SFC does not therefore propose to accept the suggestion.



58. The SFC agrees with the respondent's suggestion to make it clear in Rule 20.1(a) that the payment for acceptances will be made within 7 business days "following" the later of the date on which the offer becomes, or is declared, unconditional and the date of receipt of a duly completed acceptance. The amended version of Rule 20.1(a) is set out in **Appendix 2**.
59. Finally as stated in the Consultation Paper, the SFC will keep other references to "days" in the Codes under review and take into account market feedback in considering whether other amendments are appropriate.



Appendix 1

List of Respondents

(in alphabetical order)

Respondents whose comments are published on the SFC's website in full

1. American Appraisal China Limited
2. Baker & McKenzie
3. CB Richard Ellis Limited
4. Chan Chak Wa
5. Chan Wai Man
6. CIMB Securities (HK) Limited
7. Computershare Hong Kong Investor Services Limited
8. Hong Kong Institute of Certified Public Accountants
9. Hutchison Whampoa Limited
10. Linklaters (on behalf of 15 financial institutions)
11. SBI E2-Capital (HK) Limited
12. Suen Chi Wai
13. The Hong Kong Institute of Surveyors
14. The Law Society of Hong Kong

Respondents who requested their comments to be published on the SFC's website on a "no name" basis

Four submissions



Marked up text of the amendments to the Codes on Takeovers and Mergers and Share Repurchases

11.1 Disclosure of valuations

...

- (f) Companies with significant property interests when the offeror is an interested party

Except with the consent of the Executive, when the offeror is an interested party, a valuation will be required of the properties of (i) the offeree company if it has significant property interests; a valuation of properties will be required in the case of an offer for a company with significant property interests and, (ii) in the case of a securities exchange offer, the offeror if it has significant property interests where the offeror company has significant property interests.

For the purpose of Rule 11.1(f) an interested party refers to (i) a party holding, or together with parties acting in concert with it holding, immediately before either the commencement of an offer period or an obligation arises to make a mandatory offer under Rule 26.1, 30% or more of the voting rights of the offeree company; (ii) a director of the offeree company; or (iii) a party acting in concert with any of (i) or (ii).

As a general guide, a company has "significant property interests" this should be taken to refer to a company or group of companies, if the book value of its whose property assets or consolidated property assets, respectively, exceeds 15% of its the book value of consolidated total assets or total group assets, as the case may be.

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

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

...



Note 7 of the Notes on dispensations from Rule 26 of the Takeovers Code

Notes on dispensations from Rule 26:

...

7. Verification of independence of placees

~~When compliance with a Rule or a waiver is dependent upon a disposition or placement of voting rights to independent persons the Executive will normally require the financial adviser, placement agent or acquirer of the voting rights to verify and/or confirm that the purchaser is independent of, and does not act in concert with, the vendor of the voting rights, and such verification or confirmation shall be provided in such manner as the Executive may reasonably require to satisfy itself of the acquirer's independence. In the case of a single placee the Executive will be particularly concerned with verifying the independence of the placee.~~

When compliance with a Rule or granting of a waiver is dependent upon a disposition or placement of voting rights to independent persons, the vendor of the voting rights must not make arrangements to dispose of or place the voting rights with persons acting in concert with him. The vendor of the voting rights should not be involved in screening or selecting the placees unless such involvement is strictly limited to due diligence enquiries by the placing agents and financial advisers regarding the independence of placees. It is the responsibility of the relevant financial adviser, placing agent and acquirer of the voting rights to ensure and confirm that the acquirer is independent of, and not acting in concert with, the vendor of the voting rights. The Executive would expect the relevant financial adviser, placing agent and acquirer of the voting rights to take all appropriate and reasonable steps to ascertain and verify whether the acquirer is independent of, and not acting in concert with, the vendor of the voting rights and then to provide appropriate confirmations to the Executive. The relevant confirmations should provide full details of any involvement of the vendor of the voting rights in the placing process. The relevant placee list setting out the identities of the placees should also be provided to the Executive.

In placing and top-up transactions where the Executive is often requested to process a waiver application promptly in order to facilitate the vendor of the voting rights to top-up as soon as practicable, the Executive will normally place significant reliance on the confirmations provided by the financial adviser, placing agent and acquirer of the voting rights when granting such a waiver. However, despite having granted the waiver, the Executive may make enquiries about the independence of the acquirer of the voting rights after the completion of the placing and top-up transaction. In the event that the acquirer of the voting rights is found to have acted in concert with the vendor of such voting rights, any waiver which has been granted will normally be invalidated and the Executive will take appropriate action including possibly requiring a general offer to be made in accordance with the requirements of Rule 26.



Notwithstanding the above the Executive may also make enquiries about the independence of the acquirer of the voting rights before granting a waiver if it considers it appropriate to do so.



Rule 20.1 of the Takeovers Code

20.1 Timing of acquisition and payment

(a) General

Shares represented by acceptances in any offer other than a partial offer shall not be acquired by the offeror until the offer has become, or has been declared, unconditional. Such shares shall be paid for by the offeror as soon as possible but in any event within 40 7 business days ~~of following~~ the later of the date on which the offer becomes, or is declared, unconditional and the date of receipt of a duly completed acceptance. In the case of an offer which is unconditional from the start (see Rule 30.2), the consideration must be posted or delivered within 40 7 business days ~~from following~~ the receipt of duly completed acceptances.

(b) Partial offer

Shares represented by acceptances in a partial offer shall not be acquired by the offeror before the close of the partial offer. Such shares must be paid for by the offeror as soon as possible but in any event within 40 7 business days following the close of the partial offer.