

Practice Note 20 (PN20) - Guidance note on announcements and documents under the Codes on Takeovers and Mergers and Share Buy-Backs (Codes)

Purpose

1. The purpose of this Guidance Note and Checklist (see Appendix 1) is to provide informal and non-exhaustive guidance to parties and their advisers. The Guidance Note consolidates a number of previous guidance letters and reminders issued by the Executive during the course of an offer or whitewash transaction and refers to Practice Notes¹ issued by the Executive from time to time. **It remains the sole responsibility of the issuer of a document (and its directors and advisers) to ensure that the Codes and any other applicable laws and regulations are fully complied with.** As always when there is any doubt as to whether a proposed course of conduct is in accordance with the Codes, parties or their advisers should consult the Executive in advance.

Vetting of documents

2. Rule 12.1 of the Takeovers Code requires all documents (other than those referred to in the Post-Vet List (see paragraph 5 below)) to be “filed with the Executive for comment prior to release or publication and must not be released or published until the Executive has confirmed that it has no further comments thereon.”
- 2.3. ‘Document’ is defined in the Codes to include “*any announcement, advertisement or document issued or published by any party to an offer or possible offer in connection with such offer or possible offer, other than documents which are required to be put on display for inspection under Notes 1 and 2 to Rule 8 of the Takeovers Code.*”
4. At the outset of a transaction, issuers and advisers should carefully consider whether an announcement is a “document” for the purpose of the Codes and if so, comply with Rule 12.1 and other disclosure requirements. The Executive should be given reasonable time to review a document when it is

¹ <http://www.sfc.hk/web/EN/regulatory-functions/listings-and-takeovers/takeovers-and-mergers/practice-notes.html>

submitted for comment. The first draft of the document submitted should be in advanced form and points of difficulty or any unusual aspects should be drawn to the attention of the Executive as early as possible.

Post-vetting

3.5. Since 25 June 2010, certain routine announcements are no longer required to be submitted to the Executive for comment prior to release or publication under Rule 12.1 of the Takeovers Code. A published version of the announcement (both English and Chinese version) and the translation confirmation must be filed with the Executive immediately after the announcement is published. Practice Note 5² provides practical and prescriptive guidance in respect of announcements appearing in the Post-Vet List. If there is any doubt as to whether an announcement qualifies for post-vetting please consult the Executive at the earliest opportunity.

Changes subsequent to “no further comment” confirmation

4.6. A document should be resubmitted to the Executive for further comment prior to release or publication if any material change is made to the document after the Executive has issued the “no further comment” confirmation (other than changes made to address the comments attached to the “no further comment” confirmation). If there is any doubt as to whether or not a change is material please consult the Executive as soon as possible.

Publication and confirmations

5.7. All documents in respect of listed offeree companies must be published on the HKEx website in accordance with the Listing Rules. All announcements in respect of unlisted offeree companies must be published as a paid announcement in at least one leading English language newspaper and one leading Chinese language newspaper published daily and circulating generally in Hong Kong. All documents published in

2

respect of unlisted offeree companies must be delivered to the Executive in electronic form for publication on the SFC's website (see Rule 12 of the Takeovers Code). In addition, announcements made under Rule 19.1 must also be published no later than 7:00 p.m. on the closing date.

~~6.8.~~ Following publication of any document, the following should be submitted to the Executive as soon as practicable:

- (i) a copy of the published version of the announcement/document (both English and Chinese versions);
- (ii) a marked-up version of the announcement/document showing all changes (including deletions) made subsequent to the Executive's "no further comment" confirmation;
- (iii) written confirmation by the issuing party or its advisers that:
 - (a) the announcement/document has been published and the time and date of publication; and
 - (b) there has been no material change to the version of the announcement/document in respect of which the Executive has confirmed that it has no further comment; and
- (iv) written confirmation by the directors of the issuer of the announcement/document that the Chinese version of the announcement/document is a true and accurate translation of the English version (or vice versa). The provision of the confirmation does not absolve the responsibility of the directors of the issuing party in this regard.
 - (a) The translation confirmation should be signed by a director (on behalf of the board of directors) of the issuer of the announcement/document. If the announcement/document is jointly issued, a confirmation should be provided by each of the parties issuing that announcement/document.

- (b) The confirmation should be provided as soon as possible after the issue of the “no further comment” confirmation and in any event no later than 5:00 p.m. on the business day after the publication or posting of the announcement/document. If the announcement falls within the Post-Vet List (see paragraph 5 above),⁵ the confirmation should be provided no later than 5:00 p.m. on the business day after publication.
- (c) The confirmation should contain the following wording or wording of similar effect:

“We, [name of issuer], refer to the [description of the general offer/whitewash transaction/special deal/share buy-back/privatisation] and hereby confirm that the Chinese translation of the English version of the [description of the Document] issued by [name of issuer] on [date of Document] in relation to [description of the general offer/whitewash transaction/special deal/share buy-back/privatisation] (the “Document”) is a true and accurate translation of the English version of the Document, and that it is consistent with the English version of the Document. A copy of the published versions of each of the English and Chinese version of the Document dated [date] is enclosed for identification purposes.”

Stage 1 - Announcements of a proposed or possible offer, share buy-back, privatisation or whitewash transaction

Identity of potential offeror

7.9. In the case of an announcement made under Rule 3.7 of the Takeovers Code, where the identity of the potential offeror is not disclosed in the announcement, the Executive should be informed of the identity of the potential offeror including its ultimate shareholders.

Blackout period

8.10. In the case of an offer by the directors of the offeree company, the directors are reminded that they should not make an offer or trigger a mandatory general offer obligation

during a blackout period (see Rule A3(a) of the Model Code for Securities Transactions by Directors of Listed Issuers, Appendix 10 to the Listing Rules and Rule 5.56(a) of the GEM Listing Rules). It is solely the duty of the director concerned to apprise himself of all applicable rules and regulations before proceeding with an offer or triggering a mandatory general offer for the securities of the offeree company or otherwise dealing in any securities of the offeree company. This is in line with General Principle 4 of the Takeovers Code that an offeror should announce an offer only after careful and responsible consideration. Directors are reminded that if they announce a firm intention to make an offer or trigger a mandatory general offer obligation for the securities of the offeree company during a blackout period, they will be required to proceed with the offer in accordance with the Takeovers Code. Please refer to the Frequently Asked Questions Series 14 to the Rules and Guidance on Listing Matters as set out on the website of HKEx³ for further information.

Appointment of Independent Financial Advisers (IFA)

~~9.11.~~ Rule 2.1 requires that “[t]he board must announce the appointment of the independent financial adviser in the initial announcement of the offer or possible offer, or as soon thereafter as the appointment is made.” Rule 2.6 further sets out persons not regarded to be suitable to give independence advice.

~~10.12.~~ The Executive should be informed about the appointment or proposed appointment of an IFA. The IFA should as soon as possible send to the Executive a confirmation of independence. The confirmation should address the questions set out in the standard questionnaire in Appendix 2 to assist the Executive’s consideration of whether the financial adviser is suited to give independent advice.

~~11.13.~~ If there is any doubt regarding compliance with Rules 2.1 and 2.6, parties are encouraged to consult the Executive before the appointment is made and announced.

³ http://www.hkex.com.hk/eng/rulesreg/listrules/listrulesfaq/Documents/FAQ_14.pdf

Previous 6 months dealings

14. An offeror should check carefully against its trading records to confirm whether it has dealt in any relevant securities of the offeree company (and of the offeror in the case of a securities exchange offer) in the 6 months prior to (i) the date of submission of the first draft of the Rule 3.5 announcement; or (ii) the commencement of the offer period, whichever is earlier. The offeror should also make similar enquiries with its concert parties for this purpose. This should assist parties to ensure that relevant requirements of the Codes are met including those that arise under Rules 23, 24 and 26.3.
15. Likewise a whitewash applicant should also check its trading records in the 6 months prior to (i) the date of the submission of the first draft of the Rule 3.5 announcement; or (ii) the date of the first announcement of the whitewash proposal, whichever is earlier, to ensure there is no disqualifying transaction that may prevent the Executive from granting a whitewash waiver or invalidate any whitewash waiver granted (see Note 1 on dispensation from Rule 26 and paragraph 3 of Schedule VI to the Codes).

Financial resources confirmation

- 42.16. The financial adviser to the offeror should provide the Executive with a confirmation of sufficiency of financial resources at the same time as the submission of the first draft of a firm intention to make an offer announcement (see Note 3 to Rule 3.5 and Practice Note 15).
- 43.17. Financial advisers should note that whilst their confirmations constitute evidence to support their statement that sufficient financial resources are available to satisfy the offeror's obligations in respect of the offer, it remains the responsibility of the financial adviser, and not the Executive, to ensure that sufficient resources are available to satisfy the offeror's obligations. Financial advisers should observe the highest standard of care to satisfy themselves of the adequacy of resources. The provision to the Executive of a letter of confirmation will not absolve the financial adviser's responsibility in this respect.

Offer period

18. An offer period commences when an announcement of a proposed offer or possible offer is made, i.e. announcements made under Rule 3.5 or Rule 3.7 of the Takeovers Code. It ends at the latest of:
- (i) the date when the offer closes for acceptances;
 - (ii) the date when the offer lapses;
 - (iii) the time when a possible offeror announces that the possible offer will not proceed;
 - (iv) the date when an announcement is made of the withdrawal of a proposed offer; and
 - (v) where the offer contains a possibility to elect for alternative forms of consideration, the latest date for making such election.
19. In the case of a whitewash, if the whitewash applicant reserves the right to waive the whitewash condition, the possibility of shareholders receiving a general offer as a result of completion of the transaction cannot be ruled out. An offer period will therefore commence on the date the transaction is first announced. If the whitewash applicant does not reserve its right to waive the whitewash condition an offer period will not commence.
20. Once an offer period commences a number of Code disciplines will start to apply to relevant parties, including dealing disclosure obligations (Rule 22 and see paragraphs 21 to 23 below) and the rule against frustrating action by offeree company directors (Rule 4). This is not an exhaustive list and the Executive should be consulted when in doubt.

Dealing Disclosures

- 14.21. An offer period commences upon an announcement of a proposed or possible offer. Rule 22 of the Takeovers Code requires certain persons to make dealing disclosures during an offer period if they deal in “relevant securities” (as defined

in Note 4 to Rule 22). Potential offerors (if named in announcements), offerors and offeree companies should remind their associates (including persons holding 5% or more of a class of relevant securities of the offeror or the offeree company) of the dealing disclosure obligations under the Takeovers Code.

~~15.22.~~ 15.22. Persons who are required to make dealing disclosures include a potential offeror (if it has been the subject of an announcement that talks are taking place and irrespective of whether it has been named, ~~as set out in -- see~~ see Note 13 to Rule 22), an offeror, an offeree company or any of their associates as defined in the ~~Takeovers Code~~ Codes. Associates include a person who owns or controls 5% or more of any class of relevant securities of an offeror or offeree company (see class (6) of the definition of “associate”) or certain advisers to the parties to an offer.

~~16.23.~~ 16.23. As soon as possible and in any event within 3 business days after publication of the announcement which commences an offer period, each of the potential offeror, the offeror and the offeree company should provide the Executive with:

(i) a list of their class (6) associates;

Note: To identify their class (6) associates, during an offer period the board of the offeree company, the offeror or potential offeror should consult all available sources including the following:

(a) the shareholder register;

(b) notifications received under Part XV of the Securities and Futures Ordinance (Cap. 571);

(c) any ~~analysis~~ information previously received, or readily available, from the offeree company’s stockbroker or other advisers.

(ii) details of any financial or other professional adviser (including a stockbroker) who is advising it or any of its group companies in relation to the current offer; and

(iii) details of any financial adviser or stockbroker that is

currently retained by it, or any of its group companies, in relation to any advisory projects (other than the current offer) which are significant in size or nature.

In the event there is no such person in any of paragraphs (i) to (iii) above, a negative statement to this effect should be provided. __

During the offer period, the potential offeror, the offeror and the offeree company should notify the Executive immediately of any changes or updates to the information previously submitted under this paragraph.

~~Financial resources confirmation~~

- ~~15. The financial advisor to the offeror should provide the Executive with a confirmation of sufficiency of financial resources at the same time as the submission of the first draft of a firm intention to make an offer announcement (see Note 3 to Rule 3.5 and Practice Note 15).~~
- ~~16. Financial advisers should note that whilst their confirmations constitute evidence to support their statement that sufficient financial resources are available to satisfy the offeror's obligations in respect of the offer, it remains the responsibility of the financial adviser, and not the Executive, to ensure that sufficient resources are available to satisfy the offeror's obligations. Financial advisers should observe the highest standard of care to satisfy themselves of the adequacy of resources. The provision to the Executive of a letter of confirmation will not absolve the financial adviser's responsibility in this respect.~~

Stage 2 – Document vetting

~~17.24.~~ This section provides guidance about the vetting process of a document that is to be despatched to shareholders i.e. an offer document, offeree board circular, composite document, whitewash circular, share buy-back circular or scheme document.

~~18.25.~~ The **Schedule disclosure requirements** - the Executive will no longer raise comments about compliance with the Schedule disclosure requirements during the commenting

process unless they also relate to substantive Code issues. Every effort should be made to ensure that the draft document fully complies with the relevant Schedule requirements before it is submitted. Where the issuer of a document (or its directors or advisers) foresees any difficulty in meeting a Schedule disclosure requirement or has any doubt whether the disclosure fully meets a Schedule disclosure requirements, the Executive must be consulted at the earliest opportunity and be given a reasonable time to consider the matter before the due date for despatch of the document.

19.26. The Executive should be provided with the following for vetting:

- (i) four hard copies (including the acceptance forms, where applicable) and one electronic version (sent to T&Mdocuments@sfc.hk) of the draft document which should be in advanced form and each subsequent draft;
- (ii) document fees and statement of calculation in accordance with Schedule IV of the Takeovers Code;
- (iii) draft confirmation of no material change as required by Rule 10.11 of the Takeovers Code to be dated as at the LPD (as defined below) addressing all the points set out in the Note to Rule 10.11; and
- (iv) draft update of the confirmation from the financial adviser to the offeror confirming the sufficient resources remain available to the offeror to satisfy full acceptance of the offer (see December 2012 Issue No. 23 of the Takeovers Bulletin).

20.27. The following should be noted:

- (i) **Latest Practicable Date (LPD)** – the LPD of the document should not be more than 3 days from the date of despatch of the relevant document. When the LPD falls on a day which is not a “business day” (defined under the Codes), the LPD can be set on the preceding business day. If the LPD is set on a date which is more than 3 days before despatch, the Executive should be consulted prior to release or publication of the document.

- (ii) **Property valuation report** – where a property valuation report is included in the document (under Rule 11.1(f) of the Takeovers Code or otherwise) the requirements in Rule 11 (including but not limited to Rules 11.2(d) and 11.3 and Rule 10 in the case of valuations involving DCF or projections of profits) must be complied with. The valuation should clearly state the relationship between the property owner and the offeree company.
- (iii) Prior to clearance of the document and as close to the LPD as possible, the Executive must be provided with the following:
 - (a) signed confirmation by the board of directors of the offeree company/offeree confirming matters required under Rule 10.11 which should be dated as at the LPD.
 - (b) signed letter by the financial advisers to the offeror reconfirming sufficient resources remain available to the offeror to satisfy full acceptance of the offer.
- (iv) **Documents on Display (DoD)** - Notes 1 and 2 to Rule 8 set out the requirements in relation to documents being made available for inspection on websites. The DoD Submission Form and the “How to use” guide can be downloaded in the “Forms – Listings & Takeovers” section of the SFC website (www.sfc.hk):
 - (a) The electronic version of the DoDs together with the Submission Form should normally be provided to the Executive by 5:00 p.m. one business day before the date on which the document is to be despatched. Please consult the Executive as soon as possible if you foresee difficulties in meeting the deadline.
 - (b) The DoDs shall be accompanied by a confirmation which should contain wording along the following lines:

“We, [name of Issuer], refer to the [description of the general offer/whitewash transaction/privatisation/share buy-back by general

offer/off-market share buy-back] and the requirement to provide to the SFC in electronic format copies of documents for display on the SFC's website imposed under Note 2 to Rule 8 of the Code on Takeovers and Mergers (the "DoDs"). This confirmation is now submitted together with the DoD Submission Form dated [date] (the "Form").

We confirm that:

- 1. [name], [position] of [Issuer] has reviewed the Form and the information in the DoDs submitted together with this confirmation;*
- 2. the DoDs listed on the Form match the soft copies of the documents submitted; and*
- 3. we take full responsibility for the description and information in the DoDs.*

We are aware that the provisions of section 384 of the Securities and Futures Ordinance (Cap. 571) will apply to this submission."

24-28. Following despatch of the document, in addition to the items specified in paragraph 68(ii) to (iv) above, the Executive should be provided with the following immediately after the document is posted:

- (i) Two hard copies and one electronic version of the published version of the document (both English and Chinese versions);
- (ii) posting certificate for the document (see Note 4 to Rule 8); and
- (iii) checklists of compliance with Schedules I, II, III and VI of the Codes as appropriate. The checklists must clearly mark the page number of the **published version** of the document against the relevant schedule requirement evidencing compliance. If any requirement is not applicable because no such matter or arrangement exists, an appropriate negative statement should then be clearly marked against the relevant schedule

requirement. Every effort should be made to ensure that the document fully complies with the relevant Schedule disclosure requirements before the document is posted to shareholders.

22-29. The Executive will review the relevant document primarily for Schedule compliance after publication and make appropriate enquiries where necessary. Parties and their advisers are expected to respond promptly to any follow-up enquiries made by the Executive and provide all necessary information (see General Principle 10). A party and/or its advisers should make every effort to resolve an issue once it has been raised which may include the need to publish a clarification announcement or a supplementary document.

23-30. Notwithstanding the above, the Executive may, where it considers it necessary or appropriate, require a party and/or its advisers to submit checklists of Schedule disclosure compliance prior to publication of the shareholder's document.

Stage 3 – First closing date of general offer or general meeting for whitewash transactions

24-31. **Close of offer announcements/announcements declaring offer unconditional as to acceptances** - the Executive should be provided with a copy of the receiving agent's certificate evidencing acceptance (see Note 2 to Rule 30.2).

25-32. **Announcements of results of a general meeting for approving a whitewash transaction** - the Executive should be provided with a copy of the scrutineer's certificate.

Stage 4 – Restrictions following offers, possible offers and whitewash transactions

26-33. Rule 31.3 of the Takeovers Code provides that, except with the Executive's consent, if the offeror and parties acting in concert with it hold more than 50% of the voting rights of the offeree company, then the offeror and any person acting in concert with it, may not within 6 months of the close of the offer:

- make a second offer to, or
- acquire any shares from

any shareholder in the offeree company at a price higher than the offer price. Practice Note 18 further clarifies that Rule 31.3 also applies to general offers that are unconditional at the outset.

27.34. Special deals - Rule 25 of the Takeovers Code provides that, except with the Executive's consent, the offeror and parties acting in concert with it or in the case of whitewash transactions, the whitewash applicant and its concert parties, may not make or enter into any arrangements with shareholders of the offeree company (including persons acting in concert with the offeror or the whitewash applicant, as the case may be) which have favourable conditions not extended to all shareholders of the offeree company within six months after the close of the offer.

28.35. The offeror should confirm in writing within 3 business days of the expiry of 6 months from the end of the offer period that it and all persons acting in concert with it have complied with Rule 31.3 and Rule 25.

29.36. In the case of a whitewash transaction, the whitewash applicant should confirm in writing within 3 business days of the expiry of 6 months from the shareholders' meeting that it and all persons acting in concert with it have complied with Rule 25. If the whitewash applicant or its concert party acquires shares in the 6 months period after the shareholders' meeting from a person who was a director or substantial shareholder of the offeree company at the time of the whitewash, such acquisition will be deemed to be a special deal prohibited under Rule 25 of the Takeovers Code (see Note 2 to paragraph 3(b) of Schedule VI of the Takeovers Code).

30.37. Final completion announcement for whitewash transaction – Once the issue of the new securities has completed, an announcement relating to the completion should be issued. In a transaction which involves a subscription for new shares by a whitewash waiver applicant, completion will be taken as the time the new shares are

issued to the whitewash waiver applicant. In a transaction which involves an issue of convertible securities to a whitewash waiver applicant, completion will be taken as the time the convertible securities are issued to the whitewash waiver applicant, and not when the conversion rights are exercised (see September 2010 Issue No. 14 of the Takeovers Bulletin).

| 2429 June 20142015

Appendix 1 – Checklist of items for submission to the Executive

	Items required	Check/Date
I	Rule 3.7 announcements	
	<ul style="list-style-type: none"> (i) identity of potential offeror if not otherwise disclosed in the announcement, including its ultimate shareholders (ii) publication confirmation (iii) translation confirmation (iv) list of class (6) associates and financial advisers of offeree company (v) list of class (6) associates and financial advisers of potential offeror <p>Note: Offeree company/potential offeror should send dealing disclosure reminders to their respective associates.</p>	
II	Rule 3.5 announcements – offers/whitewash transactions	
	<ul style="list-style-type: none"> (i) confirmation of sufficiency of financial resources by offeror’s financial adviser (ii) IFA independence confirmation (iii) publication confirmation (iv) translation confirmation (v) list of class (6) associates and financial advisers of offeree company (vi) list of class (6) associates and financial advisers of offeror <p>Note: Offeree company/potential offeror should send dealing disclosure reminders to their respective associates.</p>	

	Items required	Check/Date
III	Offer documents/response documents/composite documents/share buy-back documents/scheme documents – offers/share buy-backs	
	<ul style="list-style-type: none"> (i) 4 copies of advanced draft (ii) submission of soft copies of first draft (and each subsequent drafts) to “T&Mdocuments@sfc.hk” (iii) document fees and schedule of calculation (iv) signed reconfirmation of sufficiency of financial resources by offeror’s financial adviser (v) signed Rule 10.11 confirmation by directors of offeree company/offeror (vi) DoD disc and submission form (vii) DoD confirmation (viii) publication confirmation (ix) checklists of Schedules I, II and III as appropriate (x) posting certificate (xi) translation confirmation 	
IV	Circulars – whitewash transactions	
	<ul style="list-style-type: none"> (i) 4 copies of advanced draft (ii) submission of soft copies of first draft (and each subsequent drafts) to “T&Mdocuments@sfc.hk” (iii) document fees and schedule of calculation (iv) signed Rule 10.11 confirmation by directors of offeree company (v) DoD disc and submission form (vi) DoD confirmation (vii) publication confirmation (viii) checklists of Schedules I, II and VI (ix) posting certificate 	

	Items required	Check/Date
	(x) translation confirmation	
V	Closing announcements - offers	
	(i) receiving agent's certificate (if applicable) (ii) publication confirmation (iii) translation confirmation (iv) confirmation of compliance with Rules 31.3 and 25 six months after closing date	
VI	Announcements of results of general meetings – whitewash transactions and court meetings – privatisations by way of scheme of arrangement	
	(i) scrutineer's certificate (ii) publication confirmation (iii) translation confirmation	
VII	Announcements of final completion – whitewash transactions	
	(i) confirmation of compliance with Rule 25 after six months after general meeting (ii) final completion announcement publication confirmation (iii) final completion announcement translation confirmation	

Appendix 2 – Independence of IFA

To assess the IFA's independence, the Executive needs information about the IFA's group and the employees in the division handling the relevant transaction ("relevant employees").

1. Has the IFA group or any of its relevant employees in the past two years acted as financial adviser to or agent for:

- *the Offeror;*
- *the Offeror's controlling shareholder(s);*
- *the Company;*
- *the Company's controlling shareholder(s);*
- *parties to the specials deal transactions (if any);*

[In cases of whitewash/share buy-back with whitewash/off-market share buy-back with whitewash:

- *the party seeking whitewash waiver (if not the existing controlling shareholder(s) of the Company);]*

[In cases of off-market share buy-back:

- *the vendor of shares;*
- *the vendor's controlling shareholder(s);]*
- *any party acting, or presumed to be acting, in concert with any of the above; or*
- *any company controlled by any of it/them?*

2. Has the IFA group or any of its relevant employees in the past two years had any financial or other connection with anyone listed in question 1?

3. Is the IFA group or any of its relevant employees contemplating any business dealings with anyone listed in question 1?

4. Does the IFA group or any of its relevant employees hold, directly or indirectly, any shares, options, warrants or other equity related interests in any party listed in question 1?

5. Details of any inducement fee, break fee or any other special fee arrangements between the IFA and the Company.

6. Details of any other matters which may mean the IFA has a conflict of interest.
7. If the answers to any of questions 1, 2, 3, 4 or 6 is “yes”, please give details, and state the reasons why the IFA considers it can give objective advice to the independent board committee.