

ACUMINOUS

2023 THIRD ISSUE

SFC AMENDMENTS TO THE CODES ON TAKEOVERS AND MERGERS AND SHARE BUY-BACKS

On 21 September 2023, The Hong Kong Securities and Futures Commission (the “SFC”) published its conclusion on the proposed amendments to the Codes on Takeovers and Mergers (the “Takeovers Code”) and Share Buy-backs (collectively the “Codes”) which took effect from 29 September 2023. In this issue, we will go through the key amendments of the Codes.

Voting, Acceptances and Concert Party

(i) Definition of “close relatives” and “voting rights”

Definition of “close relatives” has been amended as follows:

- (1) a person’s spouse or de facto spouse, parents, children, grandparents and grandchildren;
- (2) a person’s siblings, their spouse or de facto spouse and their children; and
- (3) the parents and siblings of a person’s spouse or de facto spouse.

The revised definition also clarifies that “children” include natural, adopted and step-children.

Definition of “voting rights” has been amended to clarify that voting rights that are subject to any restrictions to their exercise by agreement, by operation of law and regulations or pursuant to a court order will still be regarded as voting rights exercisable at a general meeting except for the voting rights attached to treasury shares (if any) which will not be treated as voting rights for the purpose of this definition.

(ii) Shareholders’ approval and acceptance

Rules 2.2 and 2.11 have been aligned and amended to allow shares acquired by an offeror and its concert parties from the date of the Rule 3.5 announcement be counted towards the 90% disinterested shares threshold.

Rules 2.2 and 2.10 have been amended to clarify that an offeror and its concert parties may attend and vote at meetings held to consider a scheme, capital reorganisation or a delisting proposal, as long as their votes are not included in determining whether the requirements under Rules 2.2 and 2.10 are met.

Note 8 to Rule 2 has also been added, stating that a “duly convened meeting of shareholders” refers to a shareholders’ meeting duly convened in accordance with the offeree company’s constitutional documents and the company law of its place of incorporation.

(iii) Irrevocable Commitments

Note 4 to Rules 3.1, 3.2 and 3.3 has been amended to allow

an offeror to approach a shareholder with a material interest in an offeree company without prior consultation with the Executive Director of the Corporate Finance Division of the SFC or any delegate of the Executive Director (the “Executive”). A shareholder has a material interest if it or its concert parties have direct or indirect control of 5% or more of an offeree company’s voting rights. In all other cases, the Executive must be consulted before any approach is made to a shareholder to obtain an irrevocable commitment in connection with an offer. Besides, Practice Note 12 has been updated to provide guidance that an offeror is restricted to approaching up to six shareholders in an offer, whether with or without a material interest, and the offeror is required to provide to the Executive a list of shareholders that it has approached.

The Chain Principle

In assessing whether a chain principle offer is required, the substantiality test in Note 8 to Rule 26.1 has been amended to provide further clarity and guidance:

- (1) adding market capitalisation as one of the parameters for comparison where both companies are listed when determining the substantiality test; and
- (2) codifying the Executive’s practice to “look-back” at least the three most recent financial periods when calculations of the substantiality test produce an anomalous result.

Offer Period and Timetable

(i) Amending the definition of “offer period”

To address concerns on protracted offer periods, the definition of “offer period” has been amended to give the Executive the explicit power to end an offer period.

The Executive will only exercise such power in limited circumstances (e.g. when there is no real prospect of any change of control of offeree or offers being made in the foreseeable future).

(ii) Amending the final day rule

To align with the spirit of Rule 2.11, Rule 15.5 has been

amended so that Day 60 (the last day on which an offer must be declared unconditional as to acceptances) cannot be extended beyond the date that is four months after the despatch of the initial offer document.

(iii) Put up or shut up (“PUSU”)

A new Rule 3.9 has been added to the Takeovers Code to give the Executive explicit power to issue PUSU orders upon application by an offeree company or on its own initiative. If a time limit for clarification is imposed by the Executive, the potential offeror must within the set time period announce its firm intention to make an offer (“Put up”), or it does not intend to make an offer (“Shut up”).

(iv) Settlement of consideration and return of share certificates

Rules 17 and 20.2 have been amended to align the timing for the return of share certificates with the timing for settlement of consideration for an offer to within seven business days after the relevant event.

Offer Requirements

(i) Disclosure of offer price in talks announcements

New Notes 3 and 4 to Rule 3.7 have been introduced to give effect that, among other things, (i) potential offeror will be bound by statement made in relation to the terms of the possible offer prior to an announcement of a firm intention to make an offer if an offer for the offeree company is subsequently made; and (ii) the disclosure of an indicative offer price is not normally permitted before an announcement of a firm intention to make an offer unless under exceptional circumstances.

(ii) Deduction of dividends from offer price

Note 11 to Rule 23.1 and Note 3 to Rule 26.3 have been amended to clarify that no deduction of dividends or other distributions from the offer price would be allowed unless that right is specifically reserved. It also covers the consequential implication when a no increase statement about the offer consideration has been made by an offeror. In cases where the payment of dividends is subject to a withholding tax, the Executive will only allow a reduction to the offer price based on the gross amount.

Partial Offers

(i) Offer periods relating to partial offers

Rule 28.4 has been amended to clarify the rule restricting the extension of offer period in a partial offer. In particular, once the acceptance condition has been met, the partial offer must close on the 14th day thereafter (subject to a minimum offer period of 21 days).

(ii) Comparable offer in a partial offer

Rule 28.10 has been added to the Takeovers Code requiring the offeror must make a comparable offer or proposal to the holders of convertible securities, warrants, options or subscription rights outstanding, in the event that an offer is made for a company which could result in the offeror holding shares carrying 30% or more of the voting rights.

(iii) Tick-box approval

Rule 28.5 has been amended to clarify that tick-box approval condition is not required for partial offers where the offeror and its concert parties is already holding more than 50% of the voting rights of the offeree company.

Whitewash Transaction

Rule 31.1 will be included in the list of Takeovers Code requirements applicable to whitewash transactions in paragraph 2(d) of Schedule VI such that a transaction that is conditional on a whitewash waiver being granted will not be treated differently from a transaction that is conditional upon no mandatory general offer being required after it is completed.

Conclusion

The key amendments to the Codes as mentioned above are not meant to be exhaustive. For full details of the amendments to the Codes, please refer to the consultation conclusion dated 29 September 2023 or the amended Codes and guidance letters as published on the SFC’s website. Issuers who have been approached by potential offeror(s) or investors who are planning to make an offer pursuant to the Codes should take note of the latest amendments in the Codes and seek professional advice if in doubt.

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