

October 2023

Amendments to the Hong Kong Takeovers Code



Introduction

The Securities and Futures Commission (the "**SFC**") released a [consultation paper](#) on proposed amendments to the Codes on Takeovers and Mergers and Share Buy-backs ("**Takeovers Code**") on 19 May 2023. After receiving general support for the proposed amendments, the [consultation conclusions](#) released on 21 September 2023 revealed that all proposals were adopted with a few minor modifications.

This client briefing summarises the key amendments to the Takeovers Code, which became effective on 29 September 2023.

Issue	Previous practice	New changes
Shareholders' meeting to consider a privatisation scheme	Recent court cases demonstrated two alternative views as to whether Rule 2.10 prohibits offeror and concert parties from attending and voting at scheme meetings.	A new note to clarify whether a shareholders' meeting is duly convened depends on the company's constitutional documents and applicable laws. An offeror and its concert parties will be allowed to vote at the scheme meeting, but their votes will not be counted in determining whether the voting thresholds are met for the purposes of Rules 2.2 and 2.10.
Disclosure of offer price in talks announcement	Disclosure of an indicative offer price before an announcement of a firm intention is not normally permitted unless there are exceptional circumstances.	The practice has been codified. This provides flexibility for exceptional circumstances including where overseas regulations require overseas or dual-listed offerors to disclose an offer price, or disclosure to mitigate false market rumours. If an indicative offer price is disclosed in exceptional circumstances, it will be treated as a price floor for any offer that materialises.
Deduction of dividends from offer price	A recent Panel decision ruled that an offeror may not deduct dividends or other distributions from the offer price unless the right was specifically reserved.	The amendment codifies the Panel decision. Offerors are not permitted to deduct dividends or other distributions from the offer price unless the right is specifically reserved. For situations where the payment of dividends is subject to a withholding tax, the Executive will only permit a reduction to the offer price based on the gross amount of dividends received by shareholders.
Irrevocable commitments	Offerors often approach shareholders to obtain irrevocable commitments for the acceptance (or non-acceptance) of an offer or voting on related resolutions. There were no explicit rules on the process for gathering irrevocable commitments.	There is now a more streamlined process of obtaining irrevocable commitments. An offeror only needs to consult the Executive when approaching shareholders without a material interest in the offeree company (i.e. a shareholder and their concert parties directly or indirectly controlling less than 5% of the voting rights of the offeree). The offeror can approach a maximum of six shareholders, irrespective of whether they have a material interest or not.

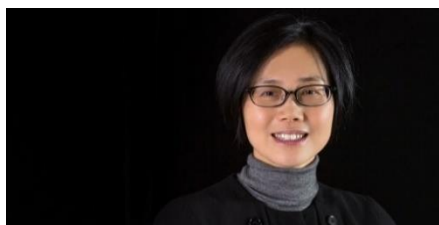
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"Put up or shut up" (PUSU) order	The Executive has issued PUSU orders, upon application by offeree companies to require a potential offeror to announce its firm intention to make an offer (put up), or that it will no longer proceed with the offer (shut up).	The Executive now has express powers to make a PUSU order, rather than having to wait for offeree companies to apply.
Definition of "close relatives"	The Executive's practice was to treat certain family members, such as grandparents and grandchildren, as concert parties.	This practice has been codified.
Chain principle	Substantiality Test is used to determine whether a mandatory general offer for a subsidiary company is required when the parent company is obtained or consolidated.	Market capitalisation has been added as a parameter for comparison in applying the Substantiality Test. The practice of "looking back" at the three most recent financial periods has also been codified. Practice Note 19 will be updated to provide further guidance on the Substantiality Test.
Compulsory acquisition rights and the 90% threshold	An offeror may be permitted to take into account purchases made by an offeror and its concert parties after the date of the announcement of a firm intention to make an offer to meet the 90% disinterested shares threshold.	The codification of this existing practice clarifies requirements for offerees incorporated jurisdictions without compulsory acquisition procedures.
Explicit power to end the offer period	The Executive had an implicit power to end offer period when it was clear that there is no real prospect of a change of control of the offeree company.	The Executive now has the explicit power to end an offer period.
Definition of "voting rights"	There was some uncertainty over whether shares that were subject to voting restrictions, and hence not exercisable, are to be treated as voting rights.	"Voting rights" has been clarified to include rights subject to any restrictions on their exercise, except for voting rights attached to treasury shares.
Partial offers	Some rules on partial offers differ to general offers as there are generally more onerous requirements.	While partial offers are still generally subject to more onerous requirements, certain rules for partial offers are now aligned with general offers.

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Miscellaneous amendments	There was some uncertainty in the application of certain rules, including confusion on different timing requirements.	<p>The clarification of housekeeping rules and codification of certain practices include but are not limited to:</p> <ul style="list-style-type: none"> • the maximum four-month extension of the offer period; • timing of directors' resignations from offeree companies; and • whitewash transactions are now subject to the 12-month restriction on subsequent offers after the withdrawal or lapse of an offer.
Green initiatives		The amendments require the electronic dissemination and submission of documents, unless otherwise directed by the Executive.

Conclusion

The amendments to the Takeovers Code codifies the existing practices of the Executive and clarifies uncertainty on the interpretation of rules. Through providing clearer guidance, aligning similar rules, and streamlining certain procedures, the SFC public consultation has resulted in greater certainty for public companies in using the Takeovers Code in their corporate and business activities.

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