

New Amendments to the Takeovers Code

Quick Read

On 23 March 2012, the Securities and Futures Commission (“SFC”) published its “*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 for payment of acceptances*” (“**Consultation Conclusions**”) in response to its consultation paper published on 24 August 2011 for the purpose of soliciting comments from the public to amend certain provisions of the Code on Takeovers and Mergers (“**Takeovers Code**”).

The corresponding amendments to the Takeovers Code became effective on 23 March 2012.

The Consultation Conclusions

The Consultation Conclusions adopted certain proposed amendments to the Takeovers Code which are 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

The previous Rule 11.1(f) of the Takeovers Code required 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 had significant property interests.

According to the Consultation Conclusions, a proposal has been adopted so that the property valuation requirements in the amended Rule 11.1(f) are limited to offers when the offeror is an “interested party”. Under the amended Rule 11.1(f), except with the consent of the Executive Director of the Corporate Finance Division of the SFC (“**Executive**”), when the offeror is an interested party, a valuation will be required of the properties of:

- a. the offeree company if it has significant property interests¹; and
- b. in the case of a securities exchange offer, the offeror if it has significant property interests.

An “interested party” refers to:

- a. 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 of the Takeovers Code, 30% or more of the voting rights of the offeree company;
- b. a director of the offeree company; or
- c. a party acting in concert with any of (a) or (b).

¹ As a general guide, a company has “significant property interests” if the book value of its consolidated property assets exceeds 15% of its consolidated total assets. When the company has significant property interests but the consolidated property assets represent less than 50% of the book value of the company’s consolidated total assets, a valuation of property assets held by its associated companies will not normally be required.

If the consolidated property assets represent 50% or more of the book value of the company’s consolidated total assets, 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.

The different situations where a property valuation is required under the amended Rule 11.1(f) are summarised below:

Situations	Is the Offeror an interested party of the Offeree?	Valuation Report		
		of the Offeree	of the Offeror	
			(listed)	(unlisted)
Cash offers	No	No	No	No
Cash offers	Yes	Yes	No	No
Securities exchange offers	No	No	No	Yes*
Securities exchange offers	Yes	Yes	Yes	Yes*

* Paragraph 30 of Schedule I of The Codes on Takeovers and Mergers and Share Repurchases requires that when the offer involves the issue of unlisted securities, an estimate of the value of such securities is required 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.

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

The previous Note 7 on dispensations from Rule 26 of the Takeovers Code provided that “[w]hen 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.”

According to the Consultation Conclusions, Note 7 has been amended in the following aspects:

- Clarifying that it is the responsibility of the relevant financial adviser, placing agent and acquirer of the voting rights, and not the Executive (or his delegate), to ensure and confirm that the acquirer is independent of, and not acting in concert with, the vendor of the voting rights.
- 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.

In relation to a placing and top-up transaction, 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, under the amended Note 7, the Executive is empowered to take the following actions:

- The Executive may enquire about the independence of the acquirer of the voting rights after the completion of the placing and top-up transaction.
- If 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. The Executive will take appropriate action including possibly requiring a general offer to be made in accordance with the requirements of Rule 26 of the Takeovers Code.
- The Executive may also enquire about the independence of the acquirer of the voting rights before granting a waiver if it considers it appropriate to do so.

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

The previous Rule 20.1 of the Takeovers Code required that acceptances of an offer which had become unconditional, must be paid for by the offeror as soon as possible but in any event within 10 days. According to the then existing practice, the 10-day payment period was calculated in calendar days.

The Federation of Share Registrars Limited was concerned that when any part of the 10-day payment period coincided with any of the public holidays of Hong Kong (such as Chinese New Year, Easter and Christmas), the available processing time before despatch of payment cheques would be significantly shortened causing practical difficulties. In response to this concern, the prescribed time period in Rule 20.1 has been amended from 10 days to 7 business days according to the Consultation Conclusions.

You can download copies of the Consultation Conclusions via the link below:

[http://www.sfc.hk/sfc/doc/EN/speeches/public/consult/CP_March_2012\(EN\).pdf](http://www.sfc.hk/sfc/doc/EN/speeches/public/consult/CP_March_2012(EN).pdf)

Contact Us

For inquiries related to this Legal Update, please contact the following persons or your usual contacts with our firm.

Jeckle Chiu

Partner

T: +852 2843 2245

E: jeckle.chiu@mayerbrownjms.com

Juliana Lee

Associate

T: +852 2843 2455

E: juliana.lee@mayerbrownjms.com

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