



Consultation Paper on Proposed Amendments to the Codes on Takeovers and Mergers and Share Buy-backs

The Law Society's Submissions

The Securities and Futures Commission (the "SFC") issued the "Consultation Paper on Proposed Amendments to the Codes on Takeovers and Mergers and Share Buy-backs" on 19 May 2023 ("Consultation Paper").

In response, the Law Society provides the following submissions. The same abbreviations and definitions appearing in the Consultation Paper are used in this paper.

Question 1: Do you agree with the proposal to delete Note 8 and introduce a new definition of "close relatives"? Please give reasons.

Law Society's response:

While we agree that the reference to "child" should be clarified in the new definition of "close relatives" to include natural child, adopted child or step-child (with corresponding clarification for "parent"), we do not agree with the other proposal to expand the definition of "close relative", especially to include the children, parents and siblings of the person's spouse or de facto spouse.

Such persons may not normally be regarded as one's "close relatives" (as against "relatives") in the literal sense and may well in fact not be persons acting in concert within the meaning of the Takeovers Code. We note the proposal to set a high bar for rebuttal of such presumption of acting in concert, where it is mentioned in the consultation paper that being not in regular contact would unlikely, without other corroborative evidence (litigation evidencing a breakdown of relationship is cited as an example of such evidence), be accepted as grounds to rebut a presumption. Taking into the account the foreseeable difficulty in rebutting the presumption in probably most circumstances, we are concerned that such expansion would create practical difficulties in the deal planning process and increase the risk of leakage of information (especially when such persons are in fact not acting in concert and are not involved in

the deal, but the presumption could not be rebutted), when the potential offeror would need to check with such persons to confirm their shareholding position and previous dealings in the relevant securities during the planning stage and before announcement of the offer.

Although they concern different regulatory regimes, we note that the definition of “associate” under Chapter 14A of the Listing Rules regulating connected transactions include individuals (referred to as “immediate family member” and “family member” under rule 14A.12(1)(a) and (2)(a)) who are similar to the existing definition of “close relatives” under the Takeovers Code. Under rule 14A.21 of the Listing Rules, the Stock Exchange has power to deem certain other more distant relatives such as grandparent, grandchildren, father/mother-in-law and brother/sister-in-law (referred to as a “relative”) as deemed connected persons if their association with the connected person is such that, in the Exchange’s opinion, the proposed transaction should be subject to the connected transaction requirements. As is pointed out in the consultation paper, the Executive has already treated such relatives as persons acting in concert in practice, it may be more appropriate to codify the power of the Executive to deem such relatives as “close relatives” in appropriate circumstances than to expand the definition and impose the burden of proof on the offeror to establish the non-existence of an acting in concert relationship which could not be achieved short of having engaged in a litigation with such relative or in situations of similar severity.

Question 2: Do you agree with the proposed amendment to the definition of “voting rights”? Please give reasons.

Law Society's response:

Agree.

Question 3: Do you agree with the proposed revision to Note (iii) to Rule 2.2? Please give reasons.

Law Society's response:

Agree.

Question 4: Do you agree with the proposed amendment to Rule 2.11? Please provide reasons.

Law Society's response:

Agree.

Question 5: Do you agree with the proposed amendments to Rules 2.10(a) and 2.2(a) and the addition of a new note 8 to Rule 2? Please provide reasons.

Law Society's response:

Agree.

Question 6: Do you agree with the proposed amendments to Note 4 to Rules 3.1, 3.2 and 3.3? Please provide reasons.

Law Society's response:

Agree. Since obtaining irrevocable commitments has become more common, it is agreed that now is a good time to review the requirements relating to them. With an increasingly sophisticated market, the proposed streamlining of requirements and, in particular, only requiring consultation with the Executive where shareholders without a material interest in the offer are to be approached.

Question 7: Do you agree with the proposed amendments to Note 8 to Rule 26.1? Please provide reasons.

Law Society's response:

Agree.

Question 8: Do you agree with the proposed amendments to the definition of “offer period”? Please provide reasons.

Law Society's response:

Agree. Giving the Executive the express power to end an offer period should avoid the problems associated with a prolonged offer period as noted in the Consultation Paper.

Question 9: Do you agree with the proposed amendments to Rule 15.5? Please provide reasons.

Law Society's response:

Agree.

Question 10: Do you agree with the addition of the new Rule 3.9? Please provide reasons.

Law Society's response:

Agree.

Question 11: Do you agree with the proposed amendments to Rules 17 and 20.2? Please provide reasons.

Law Society's response:

Agree.

Question 12: Do you agree with the proposed amendments for timing requirements set out in Appendix 2 and the amendments to Rule 7? Please provide reasons.

Law Society's response:

Agree.

Question 13: Do you agree with the proposed introduction of a new Note to Rule 15.7? Please provide reasons.

Law Society's response:

Agree.

Question 14: Do you agree with the proposed addition of the new Notes 3 and 4 to Rule 3.7? Please give reasons.

Law Society's response:

Agree, but we note that in the proposed Note 3 to Rule 3.7, the potential offeror would not be bound by a statement made where the right not to be so bound in certain circumstances was specifically reserved at the time the statement was made. It would be helpful to clarify whether the same would apply to the circumstances set out in the proposed Note 4 – i.e. whether an indicative offer price disclosed may not be bound to be the floor price if the potential offeror has reserved the right not to be so bound in certain circumstances at the time the indicative offer price is disclosed.

Question 15: Do you agree with the proposed changes to Note 11 to Rule 23.1 and Note 3 to Rule 26.3? Please give reasons.

Law Society's response:

Agree.

Question 16: Do you agree with the proposed amendment to Rule 28.4? Please give reasons.

Law Society's response:

Agree, since this will mitigate the risk of confusion which the consultation paper notes has arisen on occasions.

Question 17: Do you agree with the proposed addition of the new Rule 28.10? Please give reasons.

Law Society's response:

Agree. The fact that market practice is to include comparable offers for convertible securities etc. in partial offers indicates that making it an explicit requirement is unlikely to be problematic.

Question 18: Do you agree with the proposed change to Rule 28.5? Please give reasons.

Law Society's response:

Agree. Given the SFC's view that the approval condition would apply on a strict interpretation of the rule, it would be better to disapply it.

Question 19: Do you agree with the introduction of a new Note 3 to Rule 28? Please give reasons.

Law Society's response:

Agree.

Question 20: Do you agree with the proposal to introduce electronic dissemination under the Codes and the relating Code amendments? Please give reasons.

Law Society's response:

The Law Society agrees with this initiative to reduce the environmental impact of producing and distributing hard copy documents.

Question 21: Do you agree with the proposal to allow an issuer to send documents to shareholders in either Chinese or English? Please give reasons.

Law Society's response:

Agree. This proposal is likely aligned with shareholder preferences. Please also see below proposed amendments for the new Note 2 to Rule 8.6 for consideration:

“Issuers of documents are permitted to send copies of documents ~~in English or Chinese or~~ in both English and Chinese or, provided that arrangements are in place to ascertain the language preference of the recipient, in English or Chinese. [...]

Question 22: Do you agree with the proposal to simplify the publication of announcements relating to unlisted offeree companies by removing the requirement to publish in newspapers? Please give reasons.

Law Society's response:

Agree for the reasons given by the SFC at paragraphs 127 and 128 of the Consultation Paper. Please see below a minor drafting suggestion for the revised Rule 12.2 for consideration:

“All documents in respect of listed companies must be ~~made~~ published in accordance with the requirements of [...]”

Question 23: Do you agree with the proposal requiring submissions to the Executive to be made electronically by email? Please give reasons.

Law Society's response:

Agree.

Question 24: Do you agree with the amendment to the definition of derivative? Please give reasons.

Law Society's response:

Agree since the amendment merely corrects a typo in the existing definition.

Question 25: Do you agree with the proposed amendment to the definition of on-market share buy-back? Please give reasons

Law Society's response:

Agree that the definition should make explicit that the company buying back its shares and its directors should not be involved in the buy-back in terms of soliciting or identifying potential sellers, since that would be contrary to the general principle that all shareholders should be treated equally and offered the same opportunities.

Question 26: Do you agree with the amendments to Rule 3.5, Schedule I and Schedule II relating to special deal disclosure? Please give reasons.

Law Society's response:

Agree. Given that this is a routine requirement of the Executive, it is best that it is made explicit in the rules.

Question 27: Do you agree with the amendment to Rule 3.8 and the proposed addition of new Note 14 to Rule 22? Please give reasons.

Law Society's response:

Agree that Class 6 associates should not have to disclose dealings in the offeree's relevant securities.

Question 28: Do you agree with the proposed clarification to Rule 4 and Note 1 to Rule 4? Please give reasons.

Law Society's response:

We note that "poison pills" is identified in paragraph 152 of the Consultation Paper as an example of "special circumstances" in Rule 4 of the Takeovers Code. We suggest that this example be included in the text of the Code itself.

Question 29: Do you agree with the amendment to Note 6 to Rule 26.1? Please give reasons.

Law Society's response:

Disagree for the reasons set out in our response to Question 1 above. As suggested in that response, it would be preferable to codify the power of the Executive to deem the children, parents and siblings of a person's spouse or de facto spouse as "close relatives" in appropriate circumstances rather than expand the definition, which would only increase the burden on offerors to make enquiries and rebut the presumption where necessary.

Question 30: Do you agree with the proposed addition of a new note to paragraph 10 of Schedule I? Please provide reasons.

Law Society's response:

Agree. Since this is normally required in any event, the inclusion of a specific requirement to that effect is unlikely to prove problematic.

Question 31: Do you agree that Rule 31.1 should apply to whitewash transactions? Please give reasons.

Law Society's response:

Agree given that the aims of the proposed amendment are to prevent listed companies being subjected to repeated offers and ensure that offerors offer their best price first time around.

Question 32: Do you agree that Rules 3.8 and 3.9 should be added to Rule 5.1(c) of Share Buy-backs Code? Please give reasons.

Law Society's response:

Agree, given the importance of notifying class (6) associates of relevant securities so that they can comply with their obligations under Rule 22.

**The Law Society of Hong Kong
4 July 2023**