

## HKCGI Mergers and Acquisitions Guidance Note (Ninth Issue) - Takeovers Executive practice change on appointment of receiver or liquidator over a controlling stake

### Takeovers Executive practice change on appointment of receiver or liquidator over a controlling stake

The primary purpose of the Code on Takeovers and Mergers<sup>1</sup> (Takeovers Code), applicable to public companies, companies with a primary listing of their equity securities in Hong Kong and real estate investment trusts (REITs) with a primary listing of their units in Hong Kong and in certain instances, elsewhere, is to achieve fair treatment by requiring equality of treatment of shareholders, mandating disclosure of timely and adequate information to enable shareholders to make an informed decision as to the merits of an offer and ensuring that there is a fair and

informed market in the shares of companies affected by takeovers and mergers<sup>2</sup>.

While the Code does not have the force of law, those that do not comply with the Takeovers Code may find, by way of sanction, that the facilities of securities markets are withheld to protect the interests of those who participate in Hong Kong's securities markets<sup>3</sup>. The Listing Rules expressly require compliance with the Takeovers Code. In practice, the governance professional must advise that compliance with the Takeovers Code is mandatory for all intent and purposes for access to the securities market<sup>4</sup>.

The governance professional will know that Takeovers

1 <https://www.sfc.hk/-/media/EN/assets/components/codes/files-current/web/codes/the-codes-on-takeovers-and-mergers-and-share-buy-backs/the-codes-on-takeovers-and-mergers-and-share-buy-backs.pdf?rev=64b15447c2aa4132a0f301286cb6f2e1>

2 Section 1.2, Introduction, Takeovers Code.

3 Sections 1.3 and 1.4, Takeovers Code.

4 Section 1.5, Introduction, Takeovers Code.

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Code requirements may change from time to time, and it is necessary to keep abreast of the latest developments. This guidance note is intended to bring to the attention of the governance professional the new Practice Note 24<sup>5</sup> (PN24) on 'Receivers, liquidators and when to commence offer period(s)' issued in November 2022 by the Takeovers Executive of the Securities and Futures Commission (the **Executive**).

Basically, before this new PN24, where an 'independent' receiver or liquidator is appointed over a controlling stake of a public company (i.e., 30% or more of the voting rights) because of the previous view that there is a 'possible offer', this triggered a 'talks' announcement under Rule 3.7 of the Takeovers Code and other compliance requirements that apply during an offer period<sup>6</sup>.

However, after the issue of PN24, there is no longer a default requirement to issue an announcement under the Takeovers Code and to trigger an offer period upon the appointment of an independent receiver or liquidator over a controlling interest. The timing for issuing a Rule 3.7 'talks' announcement or Rule 3.5 'firm intention' announcement and commencing an offer period will depend on the circumstances as elaborated below.

### The previous position

Under Takeovers Bulletin No. 52 (March 2020), the Executive clarified that where an independent receiver or liquidator is appointed over a controlling interest in a Hong Kong public company (i.e., 30% or more of the voting rights), this will give rise to a possible offer on the expectation that the receiver or liquidator would act swiftly to sell the shares and accordingly, an announcement under Rule 3.7 of the Takeovers Code should be published.

The rationale, as then articulated, is that in cases where

an independent receiver or liquidator is appointed, it will normally be looking to dispose of the secured assets, which may or may not ultimately lead to a change of control of the relevant offeree company, and this will give rise to a possible offer. Therefore, an offer period will commence as soon as the independent receiver or liquidator takes control of 30% or more of the voting rights of a company. An announcement under Rule 3.7 of the Takeovers Code is also expected to be published when this happens.

### Rationale for change

The Executive noted the following observations since the publication of Takeovers Bulletin No. 52:

- While receivers, liquidators and offeree companies generally comply with the initial requirement to announce Rule 3.7 of the Takeovers Code, a number of these cases did not result in any offer or change of control. In some cases, there had been little, if any, developments for over two years since the appointment of the relevant receiver or liquidator, in contrast to the expectation that the secured assets would be disposed of shortly after the appointment.
- In many instances, the relevant receiver or liquidator may not actively seek or negotiate with a potential purchaser (this could be due to market factors or a lack of interest in the relevant assets). In other instances, there may be settlement talks between the lender and the borrower.
- Under the Takeovers Code, offeree companies are subject to a range of restrictions (such as the rules relating to frustrating actions) to their normal operations and additional compliance requirements (such as reporting on profit

5 [https://www.sfc.hk/-/media/EN/files/CF/pdf/Practice\\_Notes/Practice-Note-24\\_EN\\_20221118.pdf?rev=0237b606a5154c7086713aac1869148a&hash=77B9C064D325F7988E81C89BE2D59BFF](https://www.sfc.hk/-/media/EN/files/CF/pdf/Practice_Notes/Practice-Note-24_EN_20221118.pdf?rev=0237b606a5154c7086713aac1869148a&hash=77B9C064D325F7988E81C89BE2D59BFF)

6 Takeovers Bulletin, Issue No. 52, March 2020, <https://www.sfc.hk/-/media/EN/files/CF/pdf/Takeovers-Bulletin/20200331-SFC-Takeover-Bulletine.pdf?rev=47fe5968bbd9422b9ff258d226b83194&hash=89F3A2A095D953F9042B6868C5E84ADF>

forecasts) during an offer period. A prolonged offer period with no substantive developments on a possible offer, and no real prospect of an offer, while subjecting the offeree companies to such restrictions and obligations may be unduly burdensome on the offeree company and may not be in the best interests of its shareholders.

In view of the above observations, the Executive considers it inappropriate to keep an offer period open or to commence an offer period when there is unlikely to be an imminent offer. There may also be possible false market concerns for an offeree company to be in an offer period when, in reality, there is unlikely to be an imminent offer.

### The current position

The Executive will treat the appointment of an independent receiver or liquidator over a controlling interest in a Hong Kong public company as follows:

- The Executive will no longer expect an offer period to commence upon the appointment of a receiver or liquidator, even if this may result in a possible change of control unless the receiver or liquidator indicates that: (i) it is actively looking for a potential purchaser for the controlling stake, or (ii) it is already in discussion with a potential purchaser over the controlling stake.
- An offeree company should make appropriate enquiries with the receiver or liquidator and submit a draft Rule 3.7 announcement to the Executive for vetting if the case falls under (i) or (ii) above. In the draft announcement, the offeree company should disclose the appointment of a receiver or liquidator and the reason(s) for commencing an offer period. Following the commencement of the offer period, the offeree company will be required to publish monthly update announcements in line

with existing practice and as required under Rule 3.7.

- In cases where the appointment of a receiver or liquidator did not initially result in the commencement of an offer period, the receiver or liquidator and any future potential purchaser should take all necessary steps to maintain the confidentiality of information relating to a possible offer (such as negotiations on the disposal of the controlling stake) and to ensure there is no leakage of such information. An offer period would only commence upon the issue of a Rule 3.5 firm intention announcement, or a Rule 3.7 "talks" announcement, which should only be made if an obligation to announce Rule 3.1, Rule 3.2 or Rule 3.3 arises (for example, where there is a rumour or speculation about a possible offer or an undue movement in share price). This treatment is analogous to the Executive's approach to talks between a controlling shareholder and a potential purchaser over the sale of a controlling stake, and the same principles would apply.
- In respect of an offeree company which is in an offer period and has been so over an extended period following the appointment of a receiver or liquidator, if there is a reason to believe that an offer is unlikely to be imminent, the relevant offeree company is encouraged to consult with the Executive to end the offer period.

PN24 does not affect a party's disclosure obligations in relation to Inside Information under Part XIVA of the Securities and Futures Ordinance (SFO) and disclosure of interest under Part XV of the SFO.

The governance professional, where involved in a potential situation with takeovers implication should advise on the need for professional advice, including the availability to consult the Executive in an open and co-operative way<sup>7</sup>.