SECURITIES AND
FUTURES COMMISSION
證券及期貨事務監察委員會

Consultation Paper on proposed amendments to the Codes on Takeovers and Mergers and Share Repurchases

Hong Kong
September 2007

CONSULTATION PAPER

Introduction

The Securities and Futures Commission (the "**SFC**") invites market participants and interested parties to submit written comments on this Consultation Paper on proposed amendments to the Codes on Takeovers and Mergers and Share Repurchases ("**Codes**").

The Codes are kept under regular review to ensure that they take account of market developments and developing international practice. The current proposals result from a review by the Executive in consultation with the Takeovers Panel and reflect issues identified by both the Executive and market practitioners. The Executive has also considered the requirements of the City Code on Takeovers and Mergers ("**London Code**") where appropriate.

This paper is set out in three parts.

Part 1 proposes to introduce a new Rule 21.7 to the Takeovers Code to deal with securities borrowing and lending activity involving parties connected to an offer. It also proposes a number of amendments to the Takeovers Code to clarify the treatment of borrowed or lent shares in respect of the mandatory offer obligation and the acceptance condition in general offers.

Part 2 proposes to amend Rule 21.6 of the Takeovers Code to provide increased guidance regarding dealings by connected discretionary fund managers and principal traders before and during an offer period.

Part 3 proposes to introduce a new Note to Rule 2 to clarify that the Takeovers Code may apply to transactions involving the disposal by a company of its assets and/or operations and the possibility of delisting of the trading in the shares of that company.

Throughout this paper short explanatory notes have been added in order to assist the reader to consider the proposed amendments.

The consultation will last until 9 November 2007. A Consultation Conclusions Paper will be published after the end of the consultation period.

The proposed amendments discussed in this paper are marked up against the current version of the Codes in **Appendix 1**. All changes to the Codes will be set out in full in the Consultation Conclusions Paper to be published after the end of the consultation period.

Any person wishing to submit comments on behalf of an organisation should provide details of that organisation. In addition, any respondents who wish to suggest alternative approaches are encouraged to submit the proposed text of possible amendments that would be necessary to incorporate their suggestions into the Codes.

Comments may be submitted as follows:

By mail to:	Corporate Finance Division The Securities and Futures Commission 8/F Chater House 8 Connaught Road Central Hong Kong
By fax to:	(852) 2810-5385
By online submission at:	http://www.sfc.hk
By e-mail to:	cfdconsult@sfc.hk

Please note that the names of respondents and the contents of their submissions may be published on the SFC website and in other documents published by the SFC. In this connection, please read the Personal Information Collection Statement.

Please state if you wish your name to be withheld from publication when you make your submission.

PART 1

SECURITIES BORROWING AND LENDING

Introduction

1. Following the conclusion of the last Code amendment exercise on 1 October 2005 the Executive has given further consideration to the position of securities borrowing and lending in the context of the Codes. This exercise has included a detailed review of a number of changes which were effected to the London Code in April 2005. Now that this exercise is complete the Executive proposes a number of amendments to the Codes as outlined in this part of the paper. In summary these changes are as follows:

   - during the offer period, **parties connected to an offer** may not, without the consent of the Executive, carry out securities borrowing and lending transactions in relevant securities (namely offeree securities and, in the case of securities exchange offers, offeror securities) – see paragraphs 4 to 8;

   - various disclosure requirements apply where the Executive consents to the unwinding of a securities borrowing and lending transaction by **parties connected to an offer** – see paragraph 9 and **Appendix 1**;

   - for the purposes of the mandatory offer requirement under Rule 26 of the Takeovers Code the person lending and the person borrowing securities will both be treated as holding the voting rights in those securities (unless the borrowed securities have been on-lent or sold) – see paragraphs 10 to 12; and

   - shares which have been borrowed by an offeror may not normally be counted towards an acceptance condition – see paragraphs 13 to 20.

The nature of securities borrowing and lending transactions – transfer of voting rights

2. Securities borrowing and lending transactions are temporary loans of securities from one party (the lender) to another party (the borrower) in return for a lending fee. However the term "lending" is rather misleading as in law a securities borrowing and lending transaction involves an **absolute transfer of title** in the "lent" securities against an undertaking to return equivalent securities. The **right to vote passes** together with legal ownership of the "lent" securities to the borrower.

3. Typically lenders reserve the right to recall equivalent securities and may exercise this right if, for example, they wish to vote. Nevertheless during the loan period, unless the securities are on-lent or sold, a borrower, as the registered owner of the borrowed securities, is entitled to exercise the voting rights attached to the securities or to accept such securities to an offer. The

Executive believes that the Codes should be amended to reflect this position and recommends the changes outlined below.

Proposed restrictions on persons connected to the offer

4. The Executive proposes to add a new Rule 21.7 to the Takeovers Codes to prohibit offerors, offeree companies and certain of their associates, including their advisers and concert parties, from entering into or taking action to unwind securities borrowing and lending transactions during an offer period unless the Executive otherwise consents.

5. This proposal recognises possible concerns that such transactions may give rise to a risk of potential abuse insofar as the underlying purpose of the transaction may be to secure a tactical advantage (for example, the borrower may be in a position to vote the shares on a resolution to approve possible frustrating action which could not otherwise be voted if they were returned to the lender) or to manipulate the price or location of relevant securities.

6. Although the Executive believes that it is rare for persons connected to offers to enter into securities borrowing and lending transactions during an offer period it remains the case that such activity poses a potential risk of abuse.

7. The Executive considers the proposed restrictions in new Rule 21.7 to be a pragmatic and reasonable response to the potential risk of abuse. As regards the operation of this new Rule 21.7 in practice, the Executive would emphasise that the prime concern in respect of any securities borrowing and lending transaction, is whether the purpose of the transaction is manipulative or otherwise abusive. On this basis it is likely that the Executive would consent to certain securities borrowing and lending transactions during an offer period by connected persons, such as where a person wishes to recall his lent securities in order to exercise the voting rights in them, where it is satisfied that the activity is not manipulative or otherwise abusive.

8. Given the above, the Executive recommends introducing a new Rule 21.7 (which is consistent with Rule 4.6 of the London Code) to the Takeovers Code as follows:

"21.7 Restriction on securities borrowing and lending transactions by offerors, the offeree company and certain other parties

During the offer period, none of the following persons may, except with the consent of the Executive, enter into or take action to unwind a securities borrowing or lending transaction in respect of relevant securities of the offeree company and, in the case of securities exchange offers, the offeror:

(a) the offeror;

(b) the offeree company;

(c) a company which is an associate of the offeror or the offeree company by virtue of paragraph (1) of the definition of associate;

(d) a financial or professional adviser to the offeror or the offeree company, to a company which is an associate of the offeror or offeree company by virtue of paragraph (1) of the definition of associate or to a person acting in concert with an offeror or with the directors of the offeree company, and persons controlling#, controlled by or under the same control as any such adviser (except for an exempt principal trader (only in respect of the specified activities for which it has obtained exempt status) or an exempt fund manager); and

(e) any other person acting in concert with the offeror or the offeree company.

#See Note 1 at the end of the definitions.

Notes to Rule 21.7:

1. Relevant securities

See Note 4 to Rule 22.

2. Return of borrowed relevant securities

The Executive's consent will not normally be required under Rule 21.7 by a borrower taking action to redeliver relevant securities (or equivalent securities) which have been recalled, or a lender taking action to accept the redelivery of relevant securities (or equivalent securities) which have not been recalled, in each case in accordance with an existing securities borrowing or lending agreement. However, the Executive will normally require the redelivery or the accepting of the redelivery of such relevant securities to be disclosed.

> **Explanatory Note**: Note 2 is intended to clarify that a passive borrower or a passive lender (i.e. a person who does not initiate the unwinding of a securities borrowing and lending transaction) would not require the Executive's consent under Rule 21.7 to carry out the relevant transaction. He would however normally be required to disclose details of the transaction.

3. Disclosure or notice where consent is given

Where the Executive consents to a person to whom Rule 21.7 applies entering into or taking action to unwind a securities borrowing or lending transaction in respect of relevant securities, the Executive will normally require the transaction to be disclosed by that person as if it were a dealing in the relevant securities. Where a person wishes to enter into or take action to unwind more than one lending transaction in respect of relevant securities, the Executive may instead require that person to give public notice that he might do so.

> **Explanatory Note:** Note 3 is intended to enhance transparency by requiring disclosure of every securities borrowing and lending transaction which has been consented to by the Executive as if it were a dealing in the relevant securities (i.e. a disclosure made in accordance with Rule 22 of the Takeovers Code). The second part of Note 3 is designed to facilitate a connected lender (but not a connected borrower)

to obtain a single consent from the Executive to lend securities in the course of an offer period and to make a single public disclosure of this intention. This would reduce the burden on the lender of having to make separate disclosures for each lending transaction and would give the Executive the flexibility to consent to such lending (and a single disclosure) where it was satisfied that the purpose of the proposed lending was not manipulative or otherwise abusive. In such circumstances the Executive believes that requiring the lender to disclose each lending transaction separately would be too onerous.

4. Discretionary fund managers and principal traders

Securities borrowing or lending transactions by discretionary fund managers and principal traders which are subject to Rule 21.7(d) will be treated in accordance with Rule 21.6.

Explanatory Note: The Executive proposes to amend Rule 21.6 of the Takeovers Code to clarify, amongst other things, the treatment of securities borrowing and lending transactions carried out by discretionary fund managers and principal traders who are connected to the offer (see Part 2 of this Consultation Paper).

5. The Executive will normally waive the restrictions in this Rule 21.7 where an offer has been declared unconditional in all respects."

Explanatory Note: In the circumstances envisaged by Note 5 the Executive considers the risk of abuse to be minimal.

Question 1: Do you agree with the introduction of new Rule 21.7?

9. In light of the proposed introduction of new Rule 21.7, a number of consequential amendments arise for the Takeovers Code (namely, Rule 3.5, Note 1 to Rule 3.5, Rule 19.1 and Note 7(a) to Rule 22), the Share Repurchase Code (namely, Rule 5.1(j)) and the Schedules to the Codes (namely, paragraph 4 of Schedule I, paragraph 2 of Schedule II and paragraph 5 of Schedule III). These consequential changes mainly concern disclosure of securities borrowing and lending transactions entered into by connected persons such as in announcements and offer documents. The amendment to Rule 5.1(j) of the Share Repurchase Code is to reflect that the new Rule 21.7 also applies to share repurchases. The full text of these proposed amendments is set out in **Appendix 1**.

Question 2: Do you agree with the consequential amendments as a result of new Rule 21.7? If not, which of the consequential amendments do you not agree with? Please give reasons.

Treatment of borrowed or lent shares in the context of a mandatory offer obligation

10. The Executive proposes, for the purposes of Rule 26 of the Takeovers Code, to treat a person who has borrowed or lent shares as himself holding the voting rights in respect of those shares **unless** those shares have been on-lent or sold. In other words the **original lender** and the **end borrower** will each be treated as holding the voting rights attaching to the borrowed or lent shares. The reason for this is that the borrower acquires voting rights within the meaning of the Takeovers Code which he can exercise at any time unless he on-lends or sells the shares or returns them to the lender. In these circumstances it is appropriate that, for the purposes of Rule 26 of the Takeovers Code, the borrower is treated as holding the voting rights in the borrowed shares. This remains the case irrespective of the contractual right that exists for the lender to recall the shares or the borrower to return them as whilst the borrower holds the shares he is the de facto registered owner of the shares and the attached voting rights.

11. By the same token it is only fair and reasonable that the initial lender is also counted as holding the voting rights attached to the borrowed shares as ultimately he has a contractual right to recall them. If this was not the case each time a lender lent shares he would risk triggering a mandatory offer obligation on recalling those shares (or receiving them back from the borrower if the borrower chose to return them) if it had the effect of increasing his shareholding past the relevant trigger levels in Rule 26. This would not only cause confusion but could result in a shareholder structuring his shareholdings (through lending) in order to avoid triggering a mandatory offer obligation.

12. In view of the above, the Executive recommends introducing a new Note 21 to Rule 26.1 (this proposed Note is consistent with Note 17 on Rule 9.1 of the London Code) as follows:

"21. Borrowed or lent shares

For the purpose of this Rule, if a person has borrowed or lent shares he will be treated as holding the voting rights in respect of such shares save for any borrowed shares which the borrower has either on-lent or sold. A person must consult the Executive before acquiring or borrowing shares which, when taken together with shares in which he or any person acting in concert with him is already interested, and shares already borrowed or lent by him or any person acting in concert with him, would result in this Rule being triggered. In such circumstances, the Executive will then decide, inter alia, how the borrowed or lent shares should be treated for the purpose of the acceptance condition."

Explanatory Note: A discussion of the position of borrowed or lent shares in the context of the acceptance condition in mandatory and voluntary offers is set out in paragraphs 13 to 20 below.

Question 3: Do you agree with the introduction of new Note 21 to Rule 26.1?

Treatment of borrowed or lent shares in the context of the acceptance condition

13. Rule 30.2 of the Takeovers Code provides that an offeror must achieve a clear and undisputed majority before it can declare an offer unconditional as to acceptances. This is to ensure that:

- an offeror is only able (or, in the case of a mandatory offer, required) to acquire shares via a general offer for a public company in circumstances where it and persons acting in concert with it will together hold more than 50% of the voting rights of the company; and

- in a competitive situation, there can be only one successful offeror.

14. **Voluntary offers** – The Executive is of the view that an offeror should not count borrowed shares towards the satisfaction of an acceptance condition. Although the offeror (or its concert parties, if the shares were borrowed by the offeror's concert parties) would be the registered owner of the borrowed shares, it would be obliged to return the shares to the lender in due course. As such, if an offeror is permitted to count borrowed shares in declaring an offer unconditional as to acceptances, the aggregate holding of the offeror and persons acting in concert with it could fall below 50% before the offer closes in the event that the borrowed shares are returned to the lender before then. A situation in which an offeror is able to close an offer with less than 50% control would not be a satisfactory outcome and would contravene the spirit of Rule 30.2. For similar reasons an offeror should not be allowed to count shares that it has lent (or shares lent by its concert parties) towards an acceptance condition as it will not be the registered owner of the shares and there is no guarantee that the shares will be returned when called upon (for example, the borrower may fail to return the shares in breach of the lending agreement).

15. In this respect the Executive proposes to introduce the following new Note 8 to Rule 30.2 of the Takeovers Code (which is consistent with Note 8 on Rule 10 of the London Code) as follows:

"8. Borrowed shares

Except with the consent of the Executive, shares which have been borrowed by the offeror may not be counted towards fulfilling an acceptance condition."

16. For the purpose of the proposed new Note 8 to Rule 30.2, the Executive does not believe that it is necessary for the Note to refer to shares lent by the offeror (or its concert parties) since the borrower would be the registered owner of such shares and not the offeror (or its concert parties).

17. In practice, the Executive expects the application of the proposed new Note 8 to Rule 30.2 to be fairly limited as an offeror and its concert parties would be prohibited from carrying out securities borrowing and lending

transactions during the offer period assuming that the proposed new Rule 21.7 of the Takeovers Code is adopted. Effectively the issue therefore would only arise in respect of shares which had been borrowed before the commencement of the offer period and not subsequently returned to the lender before the offer is declared to be unconditional.

Question 4: Do you agree with the introduction of new Note 8 to Rule 30.2?

18. In light of the proposed introduction of the new Note 8, a number of consequential amendments arise for the Takeovers Code (namely, Notes 2 and 7 to Rule 30.2) and the Schedules to the Codes (namely, the Note at the beginning of Schedule VIII and paragraphs 8 and 9 of Schedule VIII). These consequential changes mainly concern the addition of references to the new Note 8. Of particular note is the proposed amendment to paragraph 9 of Schedule VIII which requires an offeror's receiving agent to have received a confirmation from the offeror of the validity of shares recorded as registered holdings and purchases in the context of the new Note 8 before issuing its certificate. The full text of these proposed amendments is set out in **Appendix 1**.

Question 5: Do you agree with the consequential amendments as a result of new Note 8 to Rule 30.2? If not, which of the consequential amendments do you not agree with? Please give reasons.

19. **Mandatory offers** – If the proposed new Note 21 to Rule 26.1 of the Takeovers Code is adopted borrowed shares would be taken into account in calculating the mandatory offer threshold in Rule 26.1. The new Note also provides that the Executive must be consulted as to whether borrowed or lent shares should be counted towards an acceptance condition and if they are not to be counted what action should be taken. If an offer lapses as a result of insufficient acceptances but would not have lapsed if the borrowed or lent shares had been counted towards the acceptance condition it may be appropriate for an offeror or its concert parties who have lent the shares not to unwind the transaction for a specified period or, if the lending is unwound (and as a result the shares are returned to the offeror or its concert parties) for the offeror to be required to make a new offer or to reduce its shareholding.

20. The above approach is consistent with Note 17 to Rule 9.1 of the London Code. The Executive believes that this approach is logical and that early consultation will ensure certainty as to whether an offeror has achieved the required acceptance level.

"Whitewash" transactions

21. The provisions relating to disqualifying transactions in paragraph 3 of Schedule VI to the Codes are driven primarily by General Principle 1 of the

Codes and the fundamental concern that all shareholders are treated equally in takeovers situations. The question arises as to whether these provisions should apply to securities borrowing and lending.

22. **Restrictions on acquisitions in paragraphs 3(a) and (b) of Schedule VI to the Codes** – If a whitewash applicant or its concert parties acquire shares from another shareholder during the whitewash period this offends the principle of equal treatment of shareholders as such acquisitions provide an exit to one shareholder which is not equally available to other shareholders.

23. **Restrictions on disposals (paragraph 3(b) of Schedule VI to the Codes)** – The restrictions in paragraph 3(b) reflect General Principle 5 of the Codes which provides that "*Shareholders should be given sufficient information, advice and time to reach an informed decision on an offer. No relevant information should be withheld ...*". The restrictions on disposals (in addition to the restrictions on acquisitions) after the announcement of the whitewash help to ensure that information provided to shareholders in the whitewash announcement (and subsequent circular) regarding the shareholdings of the whitewash applicant remains as accurate as possible up until the time of the issue of the new securities which shareholders are being asked to approve. This also helps to avoid any confusion that might arise as a result of a whitewash applicant disposing of shares at a time when shareholders are being asked to approve his acquisition of control.

24. If the Codes were to be amended to provide that provisions relating to disqualifying transactions should apply to securities borrowing and lending, the Executive would recommend introducing the following new Note 3 to paragraph 3 of Schedule VI to clarify that securities borrowing and lending transactions will be treated as disqualifying transactions in respect of all whitewash applications:

"3. For the purpose of paragraph 3 of Schedule VI if the person to whom the new securities are to be issued or any person acting in concert with him borrows shares during the relevant period those borrowings will be deemed to be an acquisition of voting rights. Similarly for the purpose of paragraph 3(b) of Schedule VI if such persons lend shares during the relevant period these will be deemed to be a disposal of voting rights."

Question 6: Do you agree with the introduction of new Note 3 to paragraph 3 of Schedule VI to the Codes?

PART 2

DEALINGS BY CONNECTED DISCRETIONARY FUND MANAGERS AND PRINCIPAL TRADERS

25. As a result of recent concerns raised by market participants it has become apparent that Rule 21.6 of the Takeovers Code should provide increased guidance regarding dealings by connected discretionary fund managers and principal traders before and during an offer period. In this regard the Executive recommends that Rule 21.6 is amended as discussed below. The proposed amendments are broadly consistent with Rule 7.2 of the London Code. The Executive agrees with the London Panel's rationale for adopting Rule 7.2 as discussed below. [1]

26. By way of background, class (5) of the definition of "acting in concert", presumes a financial or other professional adviser (including a stockbroker) to be acting in concert with its client in respect of the shareholdings of the adviser and persons controlling, controlled by or under the same control as the adviser.

27. The definition of "connected fund manager and connected principal trader" provides that a fund manager or principal trader which controls, is controlled by or is under the same control as any bank or financial or other professional advisers (including stockbrokers) to an offeror or the offeree company is treated as connected with the offeror or the offeree company, as the case may be. Fund managers and principal traders that are so connected fall within class (5) of the definition of "acting in concert" and therefore they are presumed to be acting in concert with such offeror or offeree company.

28. As a result of being presumed to be acting in concert, any shareholdings and dealings in relevant securities by a connected fund manager or principal trader, whether on behalf of discretionary clients or as principal, could have important consequences for the offeror or offeree company with which the person is connected, unless the fund manager or principal trader benefits from exempt status. For example, an offeror could have to make its offer in cash if a non-exempt fund manager connected with it acquires offeree company shares for cash during the offer period.

29. The class (5) presumption of acting in concert does not apply to fund managers or principal traders who have been granted exempt status under the Codes. Such exempt entities may continue to conduct the relevant group's normal trading (within the parameters of the Codes)[2] and fund management activities without Code consequences for the group's corporate finance clients, and without the Codes being breached, when they are involved in offers. However not all relevant fund managers or principal traders have such status. Moreover, exempt status is not relevant where the

[1] See paragraphs 2.1 to 2.11 of the London Panel's Consultation Paper - PCP 2004/3.
[2] See definition of "exempt principal trader" in the Codes.

entity is in the same group as an offeror or the offeree company itself, or is in the same group as an investor in an offer consortium.

30. Recognising this issue, Rule 21.6 of the Code currently provides that connected non-exempt fund managers who manage accounts on a discretionary basis will not normally be presumed to be acting in concert before the identity of the offeror or the offeree company, as the case may be, is publicly known. This is on the basis that, before the nature of the connection is made public, the fund manager should not be aware of the fact that the party with which it is connected might be involved in a takeover. If in fact the fund manager had been aware of the possible transaction before the relevant public announcement, the relaxation of the presumption of concertedness provided by Rule 21.6 would not apply. Once the connection between the fund manager and the offeror or offeree company is publicly known, the presumption of concertedness will apply as normal.

31. However Rule 21.6 makes no specific reference to connected principal traders. The Executive believes that it is appropriate to extend the scope of Rule 21.6 to cover connected principal traders. The Executive therefore proposes to amend Rule 21.6 to clarify the following:

- that a connected discretionary fund manager or principal trader would only be presumed to be acting in concert with an **offeror** or **potential offeror** once the identity of the person with which it is connected is made public or if prior to that, the connected party had actual knowledge of the possibility of an offer being made by a person with whom it is connected;

- that a connected discretionary fund manager or principal trader would only be presumed to be acting in concert with an **offeree company** once the offer period has commenced or if prior to that, the connected party had actual knowledge of the possibility of an offer being made for the offeree company and that it was connected with the offeree company;

- the treatment and significance of dealings, in respect of Rule 26 and other relevant rules of the Takeovers Code, by connected discretionary fund managers and principal traders **prior to** and **after** a concert party relationship arises; and

- the treatment of securities borrowing and lending transactions entered into by non-exempt discretionary fund managers and principal traders connected to an offeror or the offeree company **prior to** and **after** a concert party relationship arises.

32. The Executive proposes to amend Rule 21.6 as follows (the proposed changes (including deletions) to Rule 21.6 are set out in **Appendix 1**):

"21.6 Dealings by connected discretionary fund managers and principal traders

NB Rule 21.6 and the Notes thereto address the position of connected fund managers and connected principal traders who either do not have exempt status or whose exempt status is not relevant by virtue of the operation of Note 2 to the definitions of exempt fund manager and exempt principal trader. They also address the position of exempt principal traders in respect of dealing activities which are not covered by their exempt status.

(a) Discretionary fund managers and principal traders who, in either case, are connected with an offeror or potential offeror, will not normally be presumed to be acting in concert with that person until its identity as an offeror or potential offeror is publicly announced or, if prior to that, the time at which the connected party had actual knowledge of the possibility of an offer being made by a person with whom it is connected. Rules 23, 24, 25, 26 and 28 will then be relevant to purchases of offeree company securities and Rule 21.2 to sales of offeree company securities by such persons. Rule 21.7 will be relevant to securities borrowing and lending transactions. (See also the definitions of connected fund manager and connected principal trader.)

(b) Similarly, discretionary fund managers and principal traders who, in either case, are connected with the offeree company, will not normally be presumed to be acting in concert with the offeree company until the commencement of the offer period or, if prior to that, the time at which the connected party had actual knowledge of the possibility of an offer being made for the offeree company and that it was connected with the offeree company. Rules 21.5 and 26 may then be relevant to purchases of offeree company securities. Rule 21.7 will be relevant to securities borrowing and lending transactions. (See also the definitions of connected fund manager and connected principal trader.)

(c) An exempt fund manager or exempt principal trader which is connected for the sole reason that it controls#, is controlled by or is under the same control as a financial or other professional adviser (including a stockbroker) to the offeror or the offeree company will not be presumed to be acting in concert even after the commencement of the offer period or the identity of the offeror being publicly announced (as the case may be). (See Note 2 to the definitions of exempt fund manager and exempt principal trader.)

 # See Note 1 at the end of the definitions.

Notes to Rule 21.6:

1. Dealings prior to a concert party relationship arising

(a) As a result of Rule 21.6(a) and notwithstanding the usual application of the presumptions of acting in concert, dealings and securities borrowing and lending transactions by discretionary fund managers and principal traders connected with an offeror or potential offeror will not normally be relevant for the purposes of Rules 21.2, 21.7, 23, 24, 25, 26 and 28 before

the identity of the offeror or potential offeror has been publicly announced or, if prior to that, the time at which the connected party had actual knowledge of the possibility of an offer being made by a person with whom it is connected.

(b) Similarly, as a result of Rule 21.6(b) and notwithstanding the usual application of the presumptions of acting in concert, dealings and securities borrowing and lending transactions by discretionary fund managers and principal traders connected with the offeree company will not normally be relevant for the purposes of Rule 26 before the commencement of the offer period or, if prior to that, the time at which the connected party had actual knowledge of the possibility of an offer being made for the offeree company.

2. Qualifications

(a) If a connected discretionary fund manager or principal trader is in fact acting in concert with an offeror or with the offeree company, the usual concert party consequences will apply irrespective of whether the offeree company is in an offer period or the identity of the offeror or potential offeror has been publicly announced.

(b) If an offeror or potential offeror, or any company in its group, has funds managed on a discretionary basis by an exempt fund manager, Rule 21.6 may be relevant. If, for example, any securities of the offeree company are managed by such exempt fund manager for an offeror or potential offeror, the exception in Rule 21.6(c) in relation to exempt fund managers may not apply in respect of those securities. The Executive should be consulted in such cases.

(c) Where a fund manager or principal trader is connected with an offeror by reason of class (4) of the definitions of connected fund manager and connected principal trader, the Executive may, in appropriate circumstances, waive the acting in concert presumption in Rule 21.6(a), for example where the investment in a consortium is insignificant.

3. Dealings by exempt principal traders not covered by their exempt status

An exempt principal trader who is connected with an offeror or potential offeror may stand down from its dealing activities after the identity of the offeror or potential offeror is publicly announced or, if prior to that, the time at which the exempt principal trader had actual knowledge of the possibility of an offer being made by the offeror or potential offeror with whom it is connected. In such circumstances, with the prior consent of the Executive, the exempt principal trader may reduce its interest in offeree company securities or offeror securities, or may acquire interests in such securities with a view to reducing any short position, without such dealings being relevant for the purposes of Rules 21.2, 21.5, 23, 24, 25, 26 and 28. The Executive will also normally, pursuant to Rule 21.7, consent to connected exempt principal traders taking action to unwind a securities borrowing or lending transaction in such circumstances. The Executive will not normally require such dealings to be disclosed under Rules 21.7 and 22.4. Any such dealings must take place within a time period agreed in advance by the Executive.

The above will also apply to an exempt principal trader (in respect of dealing activities not covered by their exempt status) who is connected with the offeree company after the commencement of the offer period or, if prior to that, the time at which the exempt principal trader had actual knowledge of the possibility of an offer being made for the offeree company.

Explanatory Note: Note 3 clarifies that the Executive may consent to a connected exempt principal trader carrying out dealings which are not covered by its exempt status for the purpose of standing down from its dealing activities. Note 3 also clarifies that such dealings would not normally be required to be disclosed. It should be noted that dealings by a connected exempt principal trader which do not fall within Note 3 must be disclosed in accordance with the requirements of the Codes (see Rule 22.4 of the Takeovers Code).

4. Rule 26

The Executive should be consulted if, once the identity of the offeror or potential offeror is publicly known, it becomes apparent that the number of shares in which the offeror or potential offeror and persons acting in concert with it, including any connected discretionary fund managers and principal traders to which Rule 21.6(a) applies, are interested carry in aggregate 30% or more of the voting rights of the offeree company.

5. Disclosure of dealings in offer documentation

Holdings of relevant securities and dealings (whether before or after the presumptions in Rules 21.6(a) and 21.6(b) apply) by connected discretionary fund managers and principal traders (unless exempt) must be disclosed in any offer document in accordance with paragraph 4 of Schedule I and in any offeree board circular in accordance with paragraph 2 of Schedule II, as the case may be."

Question 7: Do you agree with the proposed amendments to Rule 21.6?

33. In light of the proposed amendment to Rule 21.6, a number of consequential amendments arise for the Takeovers Code (namely, Note 5 to Rules 21.1 and 21.2, Note 9 to Rule 23.1, Note 8 to Rule 24, Note 19 to Rule 26.1 and Note to Rule 28.3) and other parts of the Codes (namely, Note 4 to the definition of acting in concert and Note 6 to paragraph 4 of Schedule I). These consequential changes mainly concerns adding references to principal traders in relevant places of the Codes where only fund managers are currently referred to and also adding references to Rule 21.6. The full text of these proposed amendments is set out in **Appendix 1**.

Question 8: Do you agree with the consequential amendments as a result of the amended Rule 21.6? If not, which of the consequential amendments do you not agree with? Please give reasons.

PART 3

PRIVATISATIONS AND DELISTINGS

34. The Executive has recently identified a potential gap which arises as a result of certain inconsistencies between the shareholder approval thresholds in relation to significant asset disposals and withdrawal of listings (under The Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Ltd ("**Listing Rules**")) and the shareholder approval thresholds that apply to privatisations and delistings (under the Takeovers Code). There is a concern that these inconsistencies give rise to a regulatory loophole which may need to be addressed. The relevant voting requirements are set out below.

Takeovers Code – privatisations and delistings

35. Rule 2.10 of the Takeovers Code requires a scheme of arrangement or capital reorganisation to privatise a company to:

    (i) be approved by 75% of the votes attaching to the disinterested shares that are cast at the shareholders' meeting; and

    (ii) no more than 10% of the votes attaching to all the disinterested shares are voted against it ("**75%/10% Voting Requirement**").

36. Rule 2.2 of the Takeovers Code provides for similar shareholder approval if after a proposed offer the shares of the offeree company are to be delisted. The 75%/10% Voting Requirement in Rule 6.12 of the Listing Rules also applies to delistings as discussed in paragraph 39 below.

37. The main purpose of Rules 2.2 and 2.10 is to enhance minority shareholders protection in privatisations. In particular when Rule 2.2 was introduced in its current form in 2002 a number of concerns had been raised by the market about the use of the threat of delisting as part of the tactics of privatisation by general offer. Rule 2.2 was not intended to regulate delistings more generally as they clearly fall within the remit of the Listing Rules.

Listing Rules – very substantial disposals and voluntary withdrawal of listing

38. Under Rule 14.49 of the Listing Rules a "very substantial disposal" (which is defined as "*a disposal or a series of disposals ... of assets ... by a listed issuer where any percentage ratio is 75% or more*" under Rule 14.06(4) of the Listing Rules) is required to be approved by a simple majority (i.e. 50%) of independent shareholders voting at the meeting.

39. Rule 6.12 of the Listing Rules mirrors the 75%/10% Voting Requirement in Rules 2.2 and 2.10 of the Takeovers Code for any delisting resolution.

40. Notwithstanding the requirements of Rule 6.12, an offeree company is permitted under Rule 6.15 of the Main Board Listing Rules to withdraw its listing voluntarily after (i) a general offer followed by compulsory acquisition or (ii) a privatisation by way of a scheme of arrangement or

capital reorganisation which has complied with the requirements of the Takeovers Code.

Proposed amendment to the Codes

41. The regulatory loophole mentioned above arises if a company disposes of substantially all of its assets and/or operations and then proceeds to withdraw its listing from the Stock Exchange and make a cash distribution to shareholders. Under the Listing Rules the disposal of the assets only requires approval by a simple majority (i.e. 50%) of the independent shareholders voting at the shareholders' meeting.

42. If the disposal is approved this would result in the company being a cash company (within the meaning of the Listing Rules) which would not be regarded by the Stock Exchange as suitable for listing under Rule 14.82 of the Listing Rules and would be suspended from trading.[3] This leaves shareholders with little choice other than to approve the cash distribution and delisting as the only alternative for them is to be left with a cash company which would be suspended for an indefinite period.

43. There is a concern that a transaction that is structured in this way enables a company effectively to privatise and delist in a manner which circumvents the provisions of the Takeovers Code thereby depriving shareholders of the voting requirements in Rules 2.2 and 2.10 and other applicable disciplines of the Codes. In recent months the Executive has, on more than one occasion, been approached by parties to a proposed privatisation who have suggested that they might adopt a similar structure to the one described above, if certain issues under the Takeovers Codes could not be resolved in a way acceptable to them.

44. The Executive believes that these concerns should be addressed by clarifying that transactions involving significant asset disposals and delistings may fall within the jurisdiction of the Codes. Therefore the Executive proposes to introduce a new Note 7 to Rule 2 of the Takeovers Code as follows:

"*7. Clarification of the application of Rule 2.2 and Rule 2.10 and other requirements of the Takeovers Code*

The purpose of Rule 2.2 is to apply similar requirements as those set out in Rule 2.10 to a delisting proposal which is related to a proposed offer. This prevents the delisting proposal from being used to coerce independent shareholders into accepting the offer.

If a person or group of persons proposes to acquire or acquires the assets and/or operations of a company; and

Either
(i) as a result of such proposal the company may not be regarded as suitable for listing for the purpose of the Listing Rules;

[3] Under Rule 14.84 of the Listing Rules a cash company may apply to the Stock Exchange for resumption only once it has a suitable business for listing.

Or

(ii) there is a proposal to withdraw the company's listing on the Stock Exchange;

the Executive must be consulted at the earliest opportunity and in such circumstances would normally apply Rule 2.10 and other requirements of the Takeovers Code. In such cases the Executive may aggregate any series of transactions if they are all completed within a 12 month period or are otherwise related."

Explanatory Note:

- This Note 7 applies to any proposed transaction or series of transactions over a 12 month period involving a disposal or disposals which may lead to a company becoming unsuitable for listing under the Listing Rules or where the disposal(s) is coupled with a delisting proposal.
- This Note 7 should ensure that disposals would not fall within the jurisdiction of the Codes unless coupled with the possibility of delisting. As the application of the note is linked with delisting, it would only apply to listed companies and not other unlisted public companies.
- As to the application of other Code provisions to transactions which fall within this new Note 7, the Executive expects to determine this question on a case by case basis depending on the particular facts and circumstances of the case.

Question 9: Do you agree with the introduction of new Note 7 to Rule 2? If not, why not?

Appendix 1

PROPOSED AMENDMENTS TO THE CODES

Note 4 to the definition of acting in concert:

Notes to the definition of acting in concert:

...

4. Consortium offers

Investors in a consortium formed for the purpose of making an offer (e.g. through a vehicle company) will normally be treated as acting in concert with the offeror. Where such an investor is part of a larger organisation, the Executive should be consulted to establish which other parts of the organisation will also be regarded as acting in concert. (See also the definitions of connected fund manager and connected principal trader and Rule 21.6 regarding discretionary fund managers and principal traders.)

...

New Note 7 to Rule 2 of the Takeovers Code:

Notes to Rule 2:

...

7. Clarification of the application of Rule 2.2 and Rule 2.10 and other requirements of the Takeovers Code

The purpose of Rule 2.2 is to apply similar requirements as those set out in Rule 2.10 to a delisting proposal which is related to a proposed offer. This prevents the delisting proposal from being used to coerce independent shareholders into accepting the offer.

If a person or group of persons proposes to acquire or acquires the assets and/or operations of a company; and

Either

(i) as a result of such proposal the company may not be regarded as suitable for listing for the purpose of the Listing Rules;

Or

(ii) there is a proposal to withdraw the company's listing on the Stock Exchange;

the Executive must be consulted at the earliest opportunity and in such circumstances would normally apply Rule 2.10 and other requirements of the Takeovers Code. In such cases the Executive may aggregate any series of transactions if they are all completed within a 12 month period or are otherwise related.

Rule 3.5 of the Takeovers Code:

3.5 Announcement of firm intention to make an offer

The announcement of a firm intention to make an offer should be made only when an offeror has every reason to believe that it can and will continue to be able to implement the offer. Responsibility in this connection also rests on the financial adviser to the offeror.

When a firm intention to make an offer is announced, the announcement must contain:-

(a) the terms of the offer;

(b) the identity of the offeror and, where the offeror is a company, the identity of its ultimate controlling shareholder and the identity of its ultimate parent company or, where there is a listed company in the chain between such company and its ultimate parent company, the identity of such listed company;

(c) details of any existing holding of voting rights and rights over shares in the offeree company:-

(i) which the offeror owns or over which it has control or direction;

(ii) which is owned or controlled or directed by any person acting in concert with the offeror;

(iii) in respect of which the offeror or any person acting in concert with it has received an irrevocable commitment to accept the offer; and

(iv) in respect of which the offeror or any person acting in concert with it holds convertible securities, warrants or options;

(d) details of any outstanding derivative in respect of securities in the offeree company entered into by the offeror or any person acting in concert with it;

(e) all conditions (including normal conditions relating to acceptance, listing and increase of capital) to which the offer is subject;

(f) details of any arrangement (whether by way of option, indemnity or otherwise) in relation to shares of the offeror or the offeree company and which might be material to the offer (see Note 8 to Rule 22); ~~and~~

(g) details of any agreements or arrangements to which the offeror is party which relate to the circumstances in which it may or may not invoke or seek to invoke a pre-condition or a condition to its offer and the consequences of its doing so, including details of any break fees payable as a result~~.~~; and

(h) details of any relevant securities (as defined in Note 4 to Rule 22) in the offeree company which the offeror or any person acting in concert with it has borrowed or lent, save for any borrowed shares which have been either on-lent or sold.

The announcement of an offer should include confirmation by the financial adviser or by another appropriate third party that resources are available to the offeror sufficient to satisfy full acceptance of the offer.

Notes to Rule 3.5:

1. Holdings by a group of which an adviser is a member

It is accepted that, for reasons of secrecy, it would not be prudent to make enquiries so as to include in an announcement details of any holdings or borrowings of offeree company shares or options or derivatives in respect of them held by or entered into by other parts of an adviser's group (see class (5) of definition of acting in concert). In such circumstances, details should be obtained as soon as possible after the announcement has been made and the Executive consulted. If the holdings or borrowings are significant, a further announcement will be required.

...

Rule 19.1 of the Takeovers Code:

19.1 Nature of announcement

By 6.00 p.m. (or such later time as the Executive may in exceptional circumstances permit) on a closing date the offeror must inform the Executive and the Stock Exchange of its decision in relation to the revision, extension, expiry or unconditionality of the offer. The offeror must publish an announcement on the Stock Exchange's website by 7.00 p.m. on the closing date stating whether the offer has been revised or extended, has expired or has become or been declared unconditional (and, in such case, whether as to acceptances or in all respects). A draft of such announcement must be submitted to the Executive and the Stock Exchange by 6.00 p.m. for comment. Such announcement must be republished in accordance with Rule 12.2 on the next business day thereafter and must state the total number of shares and rights over shares:–

(a) for which acceptances of the offer have been received;

(b) held, controlled or directed by the offeror or persons acting in concert with it before the offer period; and

(c) acquired or agreed to be acquired during the offer period by the offeror or any persons acting in concert with it.

The announcement must include details of any relevant securities (as defined in Note 4 to Rule 22) in the offeree company which the offeror or any person acting in concert with the offeror has borrowed or lent, save for any borrowed shares which have been either on-lent or sold.

The announcement must specify the percentages of the relevant classes of share capital, and the percentages of voting rights, represented by these numbers (see also Rule 2.9, Rule 15.1 and the Note to Rule 15.3).

Note 5 to Rules 21.1 and 21.2 of the Takeovers Code:

Notes to Rules 21.1 and 21.2:

...

5. Discretionary ~~clients~~ fund managers and principal traders

~~Sales of~~ Dealings in securities of the offeree company ~~for discretionary clients~~ by discretionary fund managers and principal traders which are connected with an offeror~~, unless they are exempt fund managers, may be relevant (see~~ will be treated in accordance with Rule 21.6~~).~~

...

Rule 21.6 of the Takeovers Code:

21.6 Dealings ~~for discretionary clients during an offer period~~ by connected discretionary fund managers and principal traders

NB Rule 21.6 and the Notes thereto address the position of connected fund managers and connected principal traders who either do not have exempt status or whose exempt status is not relevant by virtue of the operation of Note 2 to the definitions of exempt fund manager and exempt principal trader. They also address the position of exempt principal traders in respect of dealing activities which are not covered by their exempt status.

~~(a) After the identity of an offeror or potential offeror is publicly known, fund managers who manage investment accounts on a discretionary basis and who are connected with the offeror will, subject to paragraph (b) below, be presumed to be acting in concert with the offeror in respect of those investment accounts. Rules 23, 24, 25 and 26 will then be relevant to purchases of offeree company securities and Rule 21.2 to sales of offeree company securities.~~

~~Similarly, fund managers who manage investment accounts on a discretionary basis and who are connected with the offeree company will, subject to paragraph (b) below, be presumed to be acting in concert with, for example, directors of the offeree company, who are also shareholders, in respect of those investment accounts. Rule 26 may be relevant.~~

~~When obligations under, or infringements of, the abovementioned Rules could arise, the relevant fund managers should consult the Executive before dealing in securities of an offeror or the offeree company as appropriate.~~

~~(b) The presumptions in paragraph (a) will not apply to an exempt fund manager which is connected to an offeror or the offeree company where the sole reason for that connection is that the fund manager controls#, is controlled by or is under the same control as a financial or other professional adviser (including a stockbroker) to the offeror or the offeree company. (See Note 2 to the definitions of exempt fund manager and exempt principal trader.)~~

(a) Discretionary fund managers and principal traders who, in either case, are connected with an offeror or potential offeror, will not normally be presumed to be acting in concert with that person until its identity as an offeror or potential offeror is publicly announced or, if prior to that, the time at which the connected party had actual knowledge of the possibility of an offer being made by a person with whom it is connected. Rules 23, 24, 25, 26 and 28 will then be relevant to purchases of offeree company securities and Rule 21.2 to sales of offeree company securities by such persons. Rule 21.7 will be relevant to securities borrowing and lending transactions. (See also the definitions of connected fund manager and connected principal trader.)

(b) Similarly, discretionary fund managers and principal traders who, in either case, are connected with the offeree company, will not normally be presumed to be acting in concert with the offeree company until the commencement of the offer period or, if prior to that, the time at which the connected party had actual knowledge of the possibility of an offer being made for the offeree company and that it was connected with the offeree company. Rules 21.5 and 26 may then be relevant to purchases of offeree company securities. Rule 21.7 will be relevant to securities borrowing and lending transactions. (See also the definitions of connected fund manager and connected principal trader.)

(c) An exempt fund manager or exempt principal trader which is connected for the sole reason that it controls#, is controlled by or is under the same control as a financial or other professional adviser (including a stockbroker) to the offeror or the offeree company will not be presumed to be acting in concert even after the commencement of the offer period or the identity of the offeror being publicly announced (as the case may be). (See Note 2 to the definitions of exempt fund manager and exempt principal trader.)

 # See Note 1 at the end of the definitions.

Notes to Rule 21.6:

1. Dealings prior to a concert party relationship arising

(a) As a result of Rule 21.6(a) and notwithstanding the usual application of the presumptions of acting in concert, dealings and securities borrowing and lending transactions by discretionary fund managers and principal traders connected with an offeror or potential offeror will not normally be relevant for the purposes of Rules 21.2, 21.7, 23, 24, 25, 26 and 28 before the identity of the offeror or potential offeror has been publicly announced or, if prior to that, the time at which the connected party had actual knowledge of the possibility of an offer being made by a person with whom it is connected.

(b) Similarly, as a result of Rule 21.6(b) and notwithstanding the usual application of the presumptions of acting in concert, dealings and securities borrowing and lending transactions by

discretionary fund managers and principal traders connected with the offeree company will not normally be relevant for the purposes of Rule 26 before the commencement of the offer period or, if prior to that, the time at which the connected party had actual knowledge of the possibility of an offer being made for the offeree company.

~~1~~2. Qualifications

~~(a) The presumptions in Rules 21.6(a) may be rebutted in appropriate circumstances and the Executive should be consulted in advance.~~

(~~b~~a) If ~~an exempt fund manager~~ a connected discretionary fund manager or principal trader is in fact acting in concert with an offeror or with the offeree company, the usual concert party consequences will ~~follow~~ apply irrespective of whether the offeree company is in an offer period or the identity of the offeror or potential offeror has been publicly announced.

(~~c~~b) If an offeror or potential offeror, or any company in its group, has funds managed on a discretionary basis by an exempt fund manager, Rule 21.6 may be relevant. If, for example, any securities of the offeree company are ~~owned by the offeror through~~ managed by such exempt fund manager for an offeror or potential offeror, the exception in Rule 21.6(~~b~~c) in relation to exempt fund managers may not apply in respect of those securities. The Executive should be consulted in such cases.

(~~d~~c) Where a fund manager or principal trader is connected with an offeror by reason of class (4) of the definitions of connected fund manager and connected principal trader, the Executive may, in appropriate circumstances, waive the acting in concert presumption in Rule 21.6(a), for example where the investment in a consortium is insignificant.

~~2 Dealings before an offeror's identity is publicly known~~

~~Dealings for discretionary clients by fund managers connected with an offeror, before its identity is publicly known, will not normally be relevant for the purpose of Rule 21.6. However, if, once that identity is publicly known, it becomes apparent that the shares in the offeree company held by the offeror and persons acting in concert with it, including shares held on behalf of discretionary clients by fund managers to which the presumption in Rule 21.6(a) applies, carry 30% or more of the voting rights of the offeree company, the Executive should be consulted.~~

3. Dealings by exempt principal traders not covered by their exempt status

An exempt principal trader who is connected with an offeror or potential offeror may stand down from its dealing activities after the identity of the offeror or potential offeror is publicly announced or, if prior to that, the time at which the exempt principal trader had

actual knowledge of the possibility of an offer being made by the offeror or potential offeror with whom it is connected. In such circumstances, with the prior consent of the Executive, the exempt principal trader may reduce its interest in offeree company securities or offeror securities, or may acquire interests in such securities with a view to reducing any short position, without such dealings being relevant for the purposes of Rules 21.2, 21.5, 23, 24, 25, 26 and 28. The Executive will also normally, pursuant to Rule 21.7, consent to connected exempt principal traders taking action to unwind a securities borrowing or lending transaction in such circumstances. The Executive will not normally require such dealings to be disclosed under Rules 21.7 and 22.4. Any such dealings must take place within a time period agreed in advance by the Executive.

The above will also apply to an exempt principal trader (in respect of dealing activities not covered by their exempt status) who is connected with the offeree company after the commencement of the offer period or, if prior to that, the time at which the exempt principal trader had actual knowledge of the possibility of an offer being made for the offeree company.

4. Rule 26

The Executive should be consulted if, once the identity of the offeror or potential offeror is publicly known, it becomes apparent that the number of shares in which the offeror or potential offeror and persons acting in concert with it, including any connected discretionary fund managers and principal traders to which Rule 21.6(a) applies, are interested carry in aggregate 30% or more of the voting rights of the offeree company.

5. Disclosure of dealings in offer documentation

Holdings of relevant securities and dealings (whether before or after the presumptions in Rules 21.6(a) and 21.6(b) apply) by connected discretionary fund managers and principal traders (unless exempt) must be disclosed in any offer document in accordance with paragraph 4 of Schedule I and in any offeree board circular in accordance with paragraph 2 of Schedule II, as the case may be.

New Rule 21.7 of the Takeovers Code:

21.7 Restriction on securities borrowing and lending transactions by offerors, the offeree company and certain other parties

During the offer period, none of the following persons may, except with the consent of the Executive, enter into or take action to unwind a securities borrowing or lending transaction in respect of relevant securities of the offeree company and, in the case of securities exchange offers, the offeror:

(a) the offeror;

(b) the offeree company;

(c) a company which is an associate of the offeror or the offeree company by virtue of paragraph (1) of the definition of associate;

(d) a financial or professional adviser to the offeror or the offeree company, to a company which is an associate of the offeror or offeree company by virtue of paragraph (1) of the definition of associate or to a person acting in concert with an offeror or with the directors of the offeree company, and persons controlling#, controlled by or under the same control as any such adviser (except for an exempt principal trader (only in respect of the specified activities for which it has obtained exempt status) or an exempt fund manager); and

(e) any other person acting in concert with the offeror or the offeree company.

#See Note 1 at the end of the definitions.

Notes to Rule 21.7:

1. Relevant securities

See Note 4 to Rule 22.

2. Return of borrowed relevant securities

The Executive's consent will not normally be required under Rule 21.7 by a borrower taking action to redeliver relevant securities (or equivalent securities) which have been recalled, or a lender taking action to accept the redelivery of relevant securities (or equivalent securities) which have not been recalled, in each case in accordance with an existing securities borrowing or lending agreement. However, the Executive will normally require the redelivery or the accepting of the redelivery of such relevant securities to be disclosed.

3. Disclosure or notice where consent is given

Where the Executive consents to a person to whom Rule 21.7 applies entering into or taking action to unwind a securities borrowing or lending transaction in respect of relevant securities, the Executive will normally require the transaction to be disclosed by that person as if it were a dealing in the relevant securities. Where a person wishes to enter into or take action to unwind more than one lending transaction in respect of relevant securities, the Executive may instead require that person to give public notice that he might do so.

4. Discretionary fund managers and principal traders

Securities borrowing or lending transactions by discretionary fund managers and principal traders which are subject to Rule 21.7(d) will be treated in accordance with Rule 21.6.

5. The Executive will normally waive the restrictions in this Rule 21.7 where an offer has been declared unconditional in all respects.

Note 7(a) to Rule 22 of the Takeovers Code:

Notes to Rule 22:

...

7. Details to be included in disclosures

(a) Public disclosure (Rules 22.1(a) and 22.1(b))

A specimen disclosure form may be obtained from the Executive or the SFC's website. Disclosures should follow that format.

A disclosure of dealings must include the following information:–

(i) the total of the relevant securities in question purchased or sold, or redeemed or purchased by the company;

(ii) the prices paid or received (in the case of an average price bargain, each underlying trade should be disclosed);

(iii) the identity of the associate or other person dealing and, if different, the owner or controller;

(iv) if the dealing is by an associate, an explanation of how that status arises;

(v) if the disclosure is made by a 5% shareholder or group of shareholders, a statement to that effect;

(vi) the resultant total amount of relevant securities owned or controlled by the associate or other person in question (including those of any person with whom there is an agreement or understanding) and the percentage which it represents; and

(vii) if relevant, details of any arrangements required by Note 8 to this Rule 22.

For the purpose of disclosing identity, the ultimate beneficial owner or controller must be specified, in addition to the person dealing. The naming of nominees or vehicle companies is insufficient. The Executive may require additional information to be disclosed when it appears to be appropriate, for example to identify other persons who have an interest in the securities in question. Subject to Note 10 to this Rule 22, in the case of disclosure of dealings by fund managers on behalf of discretionary clients, the clients need not be named.

In the case of option business or dealings in options or derivatives full details should be given so that the nature of the dealings can be fully understood. For options this should include the number of securities under option, the exercise period (or in the case of exercise, the exercise date), the exercise price and any option money paid or received. For derivatives this should include, at least, the number of reference securities to which they relate (when relevant), the maturity date (or if applicable the closing out date) and the reference price.

If an associate is an associate for more than one reason (for example because he falls within classes (6) and (7) of the definition of associate), all the reasons must be specified.

Where a disclosure of a securities borrowing and lending transaction is made pursuant to Note 3 to Rule 21.7, all relevant details should be given.

Where a person to whom Rule 21.7 applies discloses a dealing in relevant securities and has previously borrowed relevant securities from, or lent such securities to, another person, the disclosure must be made in a form agreed by the Executive.

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Note 9 to Rule 23.1 of the Takeovers Code:

Notes to Rule 23.1:

...

9. Discretionary ~~clients~~ fund managers and principal traders

Dealings ~~for discretionary clients~~ by discretionary fund managers and principal traders which are connected with an offeror~~, unless they are exempt fund managers, may be relevant (see~~ will be treated in accordance with Rule 21.6~~).~~

...

Note 8 to Rule 24 of the Takeovers Code:

Notes to Rule 24:

...

8. Discretionary ~~clients~~ fund managers and principal traders

Dealings ~~for discretionary clients~~ by discretionary fund managers and principal traders which are connected with an offeror~~, unless they are exempt fund managers, may be relevant (see~~ will be treated in accordance with Rule 21.6~~).~~

...

Note 19 and new Note 21 to Rule 26.1 of the Takeovers Code:

Notes to Rule 26.1:

...

19. Discretionary ~~clients~~ fund managers and principal traders

Dealings ~~for discretionary clients~~ by discretionary fund managers and principal traders which are connected with an offeror or the offeree company~~, unless they are exempt fund managers, may be relevant (see~~ will be treated in accordance with Rule 21.6~~).~~

...

21. Borrowed or lent shares

For the purpose of this Rule, if a person has borrowed or lent shares he will be treated as holding the voting rights in respect of such shares save for any borrowed shares which the borrower has either on-lent or sold. A person must consult the Executive before acquiring or borrowing shares which, when taken together with shares in which he or any person acting in concert with him is already interested, and shares already borrowed or lent by him or any person acting in concert with him, would result in this Rule being triggered. In such circumstances, the Executive will then decide, inter alia, how the borrowed or lent shares should be treated for the purpose of the acceptance condition.

Note to Rule 28.3 of the Takeovers Code:

Note to Rule 28.3:

Discretionary ~~clients~~ fund managers and principal traders

Dealings ~~for discretionary clients~~ by discretionary fund managers and principal traders which are connected with an offeror~~, unless they are exempt fund managers, may be relevant (see~~ will be treated in accordance with Rule 21.6~~).~~

Note 2, Note 7 and new Note 8 to Rule 30.2 of the Takeovers Code:

Notes to Rule 30.2:

...

2. Offeror's receiving agent's certificate

Before an offer may become or be declared unconditional as to acceptances, the offeror's receiving agent must have issued a certificate to the offeror or its financial adviser which states the number of acceptances which have been received which comply with Note 1 to this Rule 30.2 and the number of shares otherwise acquired, whether before or during an offer period, but which do not fall within Note 8 to this Rule 30.2.

Copies of the receiving agent's certificate must be sent to the Executive and the offeree company's financial adviser by the offeror or his financial adviser as soon as possible after it is issued.

…

7. Purchases

A purchase of shares by an offeror or a person acting in concert with the offeror may be counted towards fulfilling an acceptance condition. For this purpose, a purchase made through the Stock Exchange in the normal course of trading securities on the Stock Exchange and with no prearrangement or collusion between the parties to such transaction or their agents may be counted from the time of such dealing on the Stock Exchange. In all other cases, the purchase may be counted if and when the purchase is fully completed and settled. In the event that a purchase made

through the Stock Exchange is not fully settled in accordance with the rules of the Stock Exchange, the Executive may require the offeror and/or its concert parties to take such action as the Executive may determine is appropriate in the circumstances, which may include the issue of a correcting announcement.

Note 8 below will also be relevant if the offeror or a person acting in concert with the offeror has borrowed any offeree company shares.

8. Borrowed shares

Except with the consent of the Executive, shares which have been borrowed by the offeror may not be counted towards fulfilling an acceptance condition.

Rule 5.1 of the Share Repurchase Code:

5.1 Application of Takeovers Code

…

(j) Rules 21.1, 21.3, 21.4, ~~and~~ 21.6 and 21.7;

…

Paragraph 4 of Schedule I:

Shareholdings and dealings

4. (i) The shareholdings of the offeror in the offeree company;

(ii) the shareholdings in the offeror (in the case of a securities exchange offer only) and in the offeree company in which directors of the offeror are interested;

(iii) the shareholdings in the offeror (in the case of a securities exchange offer only) and in the offeree company which any persons acting in concert with the offeror own or control (with the names of such persons acting in concert);

(iv) the shareholdings in the offeror (in the case of a securities exchange offer only) and in the offeree company owned or controlled by any persons who, prior to the posting of the offer document, have irrevocably committed themselves to accept or reject the offer, together with the names of such persons; ~~and~~

(v) the shareholdings in the offeror (in the case of a securities exchange offer only) and in the offeree company owned or controlled by a person with whom the offeror or any person acting in concert with the offeror has any arrangement of the kind referred to in Note 8 to Rule 22 of the Takeovers Code~~.~~; and

(vi) the shareholdings in the offeror (in the case of a securities exchange offer only) and in the offeree company which the offeror or any person acting in concert with the offeror has borrowed or

lent, save for any borrowed shares which have been either on-lent or sold.

If in any of the above categories there are no shareholdings, this fact should be stated. This will not apply to categories (iv) or (v) if there are no such irrevocable commitments or arrangements.

If any party whose shareholdings are required by this paragraph 4 to be disclosed, including a party who has no shareholdings, has dealt for value in the shares in question during the period beginning 6 months prior to the offer period and ending with the latest practicable date prior to the posting of the offer document, the details, including dates and prices, must be stated. If no such dealings have taken place, this fact should be stated.

Notes:

...

6. Discretionary ~~clients~~ fund managers and principal traders

Shareholdings of non-exempt ~~the~~ discretionary ~~clients of~~ fund managers and principal traders connected with an offeror~~, unless they are exempt fund managers, and their dealings since the commencement of the offer period may be relevant and the Executive should be consulted~~ should be disclosed under category (iii) of this paragraph 4. Their dealings should also be disclosed in accordance with this paragraph 4.

Paragraph 2 of Schedule II:

Shareholdings and dealings

2. (i) The shareholdings of the offeree company in the offeror;

(ii) the shareholdings in the offeree company and in the offeror in which directors of the offeree company are interested;

(iii) the shareholdings in the offeree company and (in the case of a securities exchange offer only) in the offeror owned or controlled by a subsidiary of the offeree company, by a pension fund of the offeree company or of a subsidiary of the offeree company, or by an adviser to the offeree company as specified in class (2) of the definition of associate but excluding exempt principal traders;

(iv) the shareholdings in the offeree company and (in the case of a securities exchange offer only) in the offeror owned or controlled by a person who has an arrangement of the kind referred to in Note 8 to Rule 22 of the Takeovers Code with the offeree company or with any person who is an associate of the offeree company by virtue of classes (1), (2), (3) and (4) of the definition of associate;

(v) except with the consent of the Executive, the shareholdings in the offeree company and (in the case of a securities exchange offer only) in the offeror which are managed on a discretionary basis by fund managers (other than exempt fund managers) connected with the offeree company (the beneficial owner need not be named);

~~and~~

(vi) whether the directors of the offeree company intend, in respect of their own beneficial shareholdings, to accept or reject the offer~~.~~; and

(vii) the shareholdings in the offeree company and (in the case of a securities exchange offer only) the offeror which the offeree company or any directors of the offeree company has borrowed or lent, save for any borrowed shares which have been either on-lent or sold.

If in any of the above categories, other than category (v), there are no shareholdings, then this fact should be stated. This will not apply to category (iv) above if there are no such arrangements.

If any person whose shareholdings are required by categories (i) or (ii) above to be disclosed (whether there is an existing holding or not) has dealt for value in the shares in question during the period beginning 6 months prior to the offer period and ending with the latest practicable date prior to the posting of the offeree board circular, the details, including dates and prices, must be stated.

If any person whose shareholdings are required by categories (iii), (iv) or (v) above to be disclosed (whether there is an existing holding or not) has dealt for value in the shares in question during the offer period and ending with the latest practicable date prior to the posting of the offeree board circular, the details, including dates and prices, must be stated.

In all cases, if no such dealings have taken place this fact should be stated.

Notes:

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Paragraph 5 of Schedule III:

Shareholdings and dealings

5. (i) The shareholdings in the offeror in which directors of the offeror are interested;

(ii) the shareholdings in the offeror in which any persons acting in concert with the directors of the offeror are interested (with the names of such persons acting in concert);

(iii) the shareholdings in the offeror in which any persons who, prior to the posting of the offer document, have irrevocably committed themselves to accept or reject the offer are interested, together with the names of such persons; ~~and~~

(iv) the shareholdings of each shareholder of the offeror which holds 10% or more of the voting rights of the offeror; and

(v) the shareholdings in the offeror which the directors of the offeror or any person acting in concert with them has borrowed or lent, save for any borrowed shares which have been either on-lent or

sold;

and the percentage which such numbers represent of the offeror's outstanding share capital and the identity of each such person.

If in any of the above categories there are no shareholdings, this fact should be stated. This will not apply to categories (iii) or (iv) if there are no such irrevocable commitments or shareholders.

If any party whose shareholdings are required by this paragraph 5 to be disclosed, including a party who has no shareholdings, has dealt for value in the shares in question during the period beginning 6 months prior to the offer period and ending with the latest practicable date prior to the posting of the offer document, the details, including dates and prices, must be stated. If no such dealings have taken place, this fact should be stated. This will not apply to category (iv) above.

Notes:

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New Note 3 to paragraph 3 of Schedule VI:

3. Disqualifying Transactions

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Notes:

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3. For the purpose of paragraph 3 of Schedule VI if the person to whom the new securities are to be issued or any person acting in concert with him borrows shares during the relevant period those borrowings will be deemed to be an acquisition of voting rights. Similarly for the purpose of paragraph 3(b) of Schedule VI if such persons lend shares during the relevant period these will be deemed to be a disposal of voting rights.

Note at the beginning of Schedule VIII:

Note: This Schedule VIII should be read in conjunction with Rules 26.2 and 30.2 of the Takeovers Code and, in particular, Notes 1, 2, ~~and~~ 7 and 8 to Rule 30.2.

Paragraph 8 of Schedule VIII:

COUNTING OF PURCHASES

8. The offeror's receiving agent must ensure that all purchases counted as valid meet the requirements (subject to Note 8 to Rule 30.2) set out in Note 7 to Rule 30.2.

Paragraph 9 of Schedule VIII:

DISCLAIMERS IN RECEIVING AGENTS' CERTIFICATES

9. Certificates issued by the offeror's receiving agent should be unqualified, save for a disclaimer (if necessary) as to limitations on the responsibility of the receiving agent for the errors of third parties which are not evident from the documents available to the receiving agent. A disclaimer in the following form would normally be acceptable; any variation should be agreed specifically by the Executive in advance:–

"In issuing this certificate we have, where necessary relied on the following matters:

(i) certifications of acceptance forms by the offeree company's registrar;

(ii) certifications by the offeree company's registrar that a transfer of shares has been executed by or on behalf of the registered holder in favour of the offeror company or its nominees~~.~~;

(iii) confirmation from the offeror of the validity of shares recorded as registered holdings and purchases in the context of Note 8 to Rule 30.2.

As the offeror company's receiving agent, we have examined with due care and attention the information provided to us, and as appropriate, made due and careful enquiry of relevant persons, in order that we may issue this certificate and have no reason to believe that the information contained in it cannot be relied upon but, subject thereto, we accept no responsibility or liability whatsoever in respect of any error of the offeree company's registrar or the offeror company's buying broker for the matters set out above to the extent that we have relied upon them in issuing this certificate."