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[online version](http://www.charltonslaw.com/sfc-issues-takeovers-bulletin-on-dealing-disclosures-under-rule-22-and-the-exemption-from-rule-109-for-companies-with-dual-listing/)

# SFC Issues Takeovers Bulletin on Dealing Disclosures and Other Matters

## Introduction

The Securities and Futures Commission (**SFC**) has published, in its latest issue of the Takeovers Bulletin ([Issue No. 26](http://www.sfc.hk/web/EN/files/CF/pdf/Takeovers%20Bulletin/TB_Sept%2013_eng.pdf)) ([see archive](TB_Sept_13_eng.pdf)) in September 2013, information relating to:

* the requirements for dealings disclosures under Rule 22 of the Code on Takeovers and Mergers and Share Repurchases (**Takeovers Code**); and
* the application of Rule 10.9 of the Takeovers Code to unaudited quarterly results published during an offer period.

The purpose of this note is to provide a summary of the issues raised in the Takeovers Bulletin.

## Dealing disclosures under Rule 22 of the Takeovers Code

### Dealing disclosures to be posted on the HKExnews’ website

From 1 October 2013, disclosures of dealings in relevant securities under Rule 22 will be posted on the HKExnews’ website “Listed Company Information” under the relevant listed company ([www.hkex.com.hk](http://www.hkex.com.hk/)) as well as the [SFC website](http://www.sfc.hk/web/EN/regulatory-functions/listings-and-takeovers/takeovers-and-mergers/dealing-disclosures/).

### Notifications about offer periods

Subscribers to the SFC's Subscription Service on “Takeovers & mergers” will now receive email alerts when any of the Offer Period Tables is updated on the [SFC website](http://www.sfc.hk/web/EN/regulatory-functions/listings-and-takeovers/takeovers-and-mergers/offer-period-tables.html) ([see archive](offer_period_tables.pdf)).

There are three Offer Period Tables:

Table 1 - New offer periods that have commenced in the past 14 days

Table 2 - Offer periods that have closed in the past 14 days

Table 3 - All current offer periods under the Codes

The SFC encourages market participants, Exempt Principal Traders, Exempt Fund Managers and all interested investors (in particular those who hold 5% or more of any class of relevant securities (as defined in paragraphs (a) to (d) of [Note 4 to Rule 22](http://en-rules.sfc.hk/en/display/display_main.html?rbid=3527&element_id=2171) ([see archive](rule_22_notes.pdf)) of the Takeovers Code[[1]](#footnote-35)) to use its Subscription Service on “Takeovers & mergers” to stay informed and duly discharge their obligations under the Takeovers Code.

The SFC notes that the Offer Period Tables are compiled and kept updated on a best efforts basis. It therefore recommends that reference should also be made to announcements and documents issued by listed companies published on the HKEx website and to announcements and documents issued by unlisted entities which are published on the SFC website under “[Regulatory Functions – Listings and takeovers – Takeovers & Mergers – Transaction announcements and documents](http://www.sfc.hk/web/EN/regulatory-functions/listings-and-takeovers/takeovers-and-mergers/transactions-announcements-and-documents.html)”. It is important to be aware that information updates may be delayed during weekends and public holidays in Hong Kong.

### Reminder to “associates” and in particular fund managers about dealing disclosure obligations

The SFC reminds "associates” of their dealing disclosure obligations under Rule 22 of the Code. Rule 22 of the Takeovers Code requires parties to an offer and their respective associates to disclose dealings in relevant securities (as defined in [Note 4 to Rule 22](http://en-rules.sfc.hk/en/display/display_main.html?rbid=3527&element_id=2171)[[2]](#footnote-38) ([see archive](rule_22_notes.pdf))) of the offeree company and the offeror (in the case of a securities exchange offer) conducted for themselves or on behalf of discretionary clients during an offer period. For these purposes an “associate” is defined under the Takeovers Code as including, among others, any person who owns or controls 5% or more of any class of relevant securities.

The SFC highlights the importance of dealing disclosures being made in a timely and accurate manner by any associate or party who may have the ability to exercise a material influence over the outcome of an offer, including a 5% shareholder, once an offer period commences for a relevant company. This is in line with [General Principle 6](http://en-rules.sfc.hk/en/display/display_main.html?rbid=3527&element_id=1589)[[3]](#footnote-40) ([see archive](general_principles.pdf)) of the Takeovers Code.

The SFC attaches particular significance to the obligations of fund managers, who are “associates” under the Takeovers Code, to ensure compliance with the Takeovers Code, in line with the “Guidelines to fund managers on dealing disclosure obligations under Rule 22 of the Code on Takeovers and Mergers” (**Guideline**) issued on 29 December 2011. Relevant fund managers are advised to refer to the [Guideline](http://en-rules.sfc.hk/net_file_store/new_rulebooks/h/k/HKSFC3527_3638_VER20.pdf) ([see archive](HKSFC3527_3638_VER20.pdf)) on the SFC website. The SFC also advises fund managers to remind appropriate persons in their overseas offices, who are likely to deal in the relevant securities of Hong Kong-listed companies, of the relevant provisions of the Takeovers Code, including the obligations under Rule 22.

To this end, the SFC gives the following practical guidance:

1. *Identifying relevant companies in an offer period*
   1. Review regularly the Offer Period Tables on the SFC website for details of current offer periods on the SFC website, although not as the sole source of monitoring.
   2. Subscribe to the SFC’s Subscription Service on “Takeovers & mergers” to receive email alerts which will include updates on the Offer Period Tables.
   3. Monitor regularly HKEx news on the HKEx website to see whether an announcement has been issued by, or in relation to, a relevant company that has commenced an offer period.
   4. Subscribe to the News Alerts service on the HKEx website.
   5. Monitor regularly media sources to identify takeovers-related articles.
2. *On-going training of staff*
   1. All appropriate individuals should have proper training on a regular and on-going basis, including in particular as to the meaning of the term “associate” and its significance, and the rules relating to the disclosure of dealings under Rule 22 and Schedules I and II of the Takeovers Code. Practice Note 9 (see archive) and the Takeovers Bulletin provide a good source of information on dealing disclosure obligations and related recent developments.
   2. Compliance personnel should keep themselves fully up-to-date on changes to the Takeovers Code by subscribing to the SFC’s Subscription Service to receive notifications about the Takeovers Bulletin and market consultations.
3. *Proper compliance systems*

* A fund manager should ensure that adequate and proper compliance systems are in place to enable it to fully discharge its dealing disclosure obligations under Rule 22 and other obligations under the Takeovers Code.

## Application of Rule 10.9 of the Takeovers Code to unaudited quarterly results published during an offer period

[Rule 10](http://en-rules.sfc.hk/en/display/display_main.html?rbid=3527&element_id=1636) ([see archive](Rule_10.3.pdf)) of the Takeovers Code provides that if a party to an offer publishes a profit forecast during the course of an offer, or when an offer is in contemplation, the party issuing the forecast must obtain and publish an accountant’s report and financial adviser’s report on the forecast. An estimate of profit for a period which has already expired should be treated as a profit forecast (see [Rule 10.6(b)](http://en-rules.sfc.hk/en/display/display_main.html?rbid=3527&element_id=1639) ([see archive](Rule_10.6.pdf))).

[Rule 10.9](http://en-rules.sfc.hk/en/display/display_main.html?rbid=3527&element_id=1642) ([see archive](Rule_10.9.pdf)) requires any unaudited profit figures published during an offer period to be reported on except with the consent of the Executive or in the following instances:

1. unaudited statements of annual or interim results which have already been published;
2. unaudited statements of annual results which comply with the requirements for preliminary profits statements as set out in the Rules Governing the Listing of Securities on the Stock Exchange (**Listing Rules**);
3. unaudited statements of interim results which comply with the requirements for half-yearly reports as set out in the Listing Rules in cases where the board of the offeree company has not publicly advised its shareholders not to accept an offer; or
4. unaudited statements of interim results by offerors which comply with the requirements for half-yearly reports as set out in the Listing Rules, whether or not the offer has been publicly recommended by the board of the offeree company but provided the offer could not result in the issue of securities which would represent 10% or more of the enlarged voting share capital of the offeror.

The Note to Rule 10.9 extends the exemptions from the reporting requirements to unaudited quarterly results of companies listed on the Growth Enterprise Market (**GEM**) of The Stock Exchange of Hong Kong Ltd (**Stock Exchange**).

The SFC clarifies that if a company has a dual listing and is required by the relevant laws or regulations of the overseas jurisdiction to publish unaudited quarterly results, the exemption from the reporting requirements in Rule 10.9 should also apply.

Where a dual listed company wishes to rely on the exemptions from the reporting requirements in Rule 10.9, the SFC must be consulted at the earliest opportunity and the SFC may require the relevant party to apply for a formal ruling under section 8 of the Introduction to the Codes. Rule 10.9 also provides that the SFC should be consulted in advance if a company is not listed on the Stock Exchange but wishes to take advantage of the exemptions under this Rule.

[Practice Note 2](http://www.sfc.hk/web/EN/files/CF/pdf/Practice_Notes/Practice%20Note%2002_Eng_revised%20on%2030.09.2013.pdf) ([see archive](PN2.pdf)) has been revised to reflect the SFC’s clarifications, and for ease of reference Practice Note 14 (which explains the meaning of “reporting on”) has also been moved to form part of the revised Practice Note 2.

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1. The following are broadly defined as relevant securities:

   1. securities of the offeree company which are being offered for or which carry voting rights;
   2. equity share capital of the offeree company and an offeror;
   3. securities of an offeror which carry the same or substantially the same rights as any to be issued as consideration for the offer;
   4. securities carrying conversion or subscription rights into any of the foregoing; and
   5. options and derivatives in respect of any of the foregoing.

   [↑](#footnote-ref-35)
2. See footnote 1 above. [↑](#footnote-ref-38)
3. “All persons concerned with offers should make full and prompt disclosure of all relevant information and take every precaution to avoid the creation or continuance of a false market. Parties involved in offers must take care that statements are not made which may mislead shareholders or the market.” [↑](#footnote-ref-40)