

Hong Kong Takeovers - Gathering of Irrevocable Undertakings

October 2017

1. Summary

- 1.1 The Hong Kong Securities and Futures Commission has clarified in its latest [Takeovers Bulletin](#), and by way of revision to [Practice Note 12](#) to the Takeovers Code (the **Code**), that consent of the Takeovers Executive (and therefore, consultation with the Takeovers Executive) is not required in cases where an offeror - for the purpose of obtaining Irrevocable Undertakings (**IUs**) - approaches no more than six “sophisticated” shareholders who have a controlling shareholding (which for the purposes of the Code is set at 30 percent). However, consent is required in all other cases.
- 1.2 The Takeovers Executive has not provided clarity as to what it means by “sophisticated” shareholders, which means that a judgment call may be required and consultation may nevertheless be necessary in some cases.
- 1.3 It is also a little unclear as to whether the “Rule of Six” as applied to sophisticated shareholders can be used in conjunction with the “Rule of Six” as it applies to all other cases. In other words, does Hong Kong now have a “Rule of Twelve”? Given the overriding principle of secrecy before an offer, we think it must be the case that the “Rule of Six” means six. However, the Takeovers Executive may in practice be prepared to be flexible in certain cases, provided confidentiality is maintained and processes are in place to ensure that it is.

2. Revisions to Practice Note 12

- 2.1 The existing Note 4 to Rules 3.1, 3.2 and 3.3 of the Code provides that an “offeror may approach a very restricted number of sophisticated investors who have a controlling shareholding to obtain an irrevocable commitment... In all other cases the Executive must be consulted before any approach is made to a shareholder to obtain an irrevocable commitment in connection with an offer”. This is in line with the principles of preserving secrecy before an offer announcement and the equal dissemination of information to shareholders.
- 2.2 The revised Practice Note 12 clarifies that:
- (A) the Executive’s consent is not required where an offeror wishes to approach a very restricted number of “sophisticated investors” who have a controlling shareholding (**Sophisticated Controlling Shareholders**);
 - (B) a “very restricted number” for the above purposes means no more than six;
 - (C) in all other cases, the Executive’s consent would be required and conditions would normally be imposed for any approach to such shareholders (**Other Shareholders**);
 - (D) the conditions normally imposed on approaches to Other Shareholders include:

- (i) shareholders may only be approached within a limited period (to be agreed in advance with the Executive) before the firm intention announcement (with the old requirement to approach within one day or (in the case of an overseas shareholder) two days removed - indicating a higher degree of flexibility); and
 - (ii) no more than six shareholders may be approached if the approach is made before a possible offer announcement or in a hostile bid. After the commencement of an offer period, there would be no restrictions on the number; and
- (E) the conditions normally imposed in each case where any shareholders (whether Sophisticated Controlling Shareholders or Other Shareholders) are approached include:
- (i) the information provided to them should be confined to information that is public or that will eventually be made public in the firm intention announcement; and
 - (ii) if approached before the firm intention announcement, the relevant shareholders will have to

agree to be insiders and sign appropriate confidentiality agreements.

Implications and Uncertainties

- 2.3 It is now clear that offerors do not need to consult the Takeovers Executive if it intends to approach no more than six Sophisticated Controlling Shareholders.
- 2.4 This clarification is welcomed, although some colour around the meaning of “sophisticated” would have been helpful. Generally, “sophisticated” can be understood to mean professional investors, as well as director shareholders and controlling shareholders of the target.
- 2.5 It is also a little unclear whether the approach to six Sophisticated Controlling Shareholders and six Other Shareholders is mutually exclusive or cumulative. Given the paramount importance of secrecy ahead of announcing an offer, the better view would be that the Takeovers Executive intends to keep the “Rule of Six” as six pre-announcement. In other words, regardless of which category shareholders fall into - once the offeror intends to broaden its approach to more than six shareholders, consultation will be necessary and consent will be required.



David Watkins

T +852 2901 7278

E david.watkins@slaughterandmay.com

© Slaughter and May 2017

This material is for general information only and is not intended to provide legal advice.

For further information, please speak to your usual Slaughter and May contact.