



PUBLIC CONSULTATION PAPER

NO. 2/2010

**PROPOSED UPDATES TO GUIDELINES ON OFFER DOCUMENTATION
OF
THE MALAYSIAN CODE ON TAKE-OVERS AND MERGERS 1998**

The Securities Commission invites your written comments on the issues set out in this consultation paper. Comments are due by **8 April 2010** and should be sent to:

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This Public Consultation Paper is dated 19 March 2010

1.0 INTRODUCTION

- 1.1 A take-over offer or merger introduces new controlling shareholders who can change the direction of a company or its profile. In such a situation, shareholders will need to make a decision on whether they should dispose or retain their shares (i.e. accept or reject their offer). The Malaysian Code on Take-overs and Mergers 1998 (the Code), inter alia, aims to ensure that shareholders are given a fair and equal opportunity to exit their investments in the target company.
- 1.2 To ensure that the offeree shareholders have a fair opportunity in a take-over offer situation, they should be given reasonable time, information and advice in helping them make a decision on whether to accept or reject an offer. As such, the Code requires that the offeree appoints an independent adviser in relation to the take-over offer and that the independent adviser shall disclose in the independent advice circular all such information needed to make an informed assessment as to the merits of accepting or rejecting the take-over offer and the extent of the risks involved in doing so¹.
- 1.3 The independent advisers play an important role as they advise offeree shareholders who are now faced with the decision of whether to exit a company, and whether they are being compensated properly for such an exit. Independent advice is meant to give a balanced view of an offer as offeree shareholders need to be equipped to make well-informed decisions and have advice which is useful, relevant and adds value to their decision-making process in a take-over offer.
- 1.4 The Commission has been constantly assessing the current practice with regards to independent advice as well as the quality of advice given and is of the view that a review of these matters is timely. Currently, the Code² requires that the independent adviser comments and advise on the 'reasonableness' of the offer. There is no requirement to use the standard of 'fair and reasonable' in their conclusion although as a matter of convention, the market has used this standard. The Commission is concerned that in certain situations the term 'fair and reasonable' is not clearly defined and is interpreted in different ways. The Commission wants to ensure that independent advisers are undertaking sufficient analysis and synthesis in reaching a conclusion.

¹ Section 15(9) of the Code.

² Schedule 2 (1) (e) of the Code.

Furthermore, when there is no consistent guidance of what constitute 'fair and reasonable', the recommendations are less meaningful to offeree shareholders.

- 1.5 The Commission currently reviews independent advice circulars before they are sent to offeree shareholders to help ensure that offeree shareholders receive useful, value-added and balanced advice. In the course of such reviews, the Commission has noted that the quality of independent advice could be improved. The Commission has chosen to carry out such reviews to ensure that offeree shareholders receive proper advice in an offer. In reviewing independent advice circulars, the Commission does not influence the views of independent advisers.
- 1.6 The importance of a robust take-over framework in facilitating a credible capital market should not be underestimated and the protection of the offeree shareholders' interests is integral to such a framework. Hence, this consultation paper is published with a view to enhance offeree shareholders protection through the provision of better quality information for decision making.
- 1.7 This paper is intended to generate discussion and to obtain views from the public in respect of the amount of guidance that the Commission should provide on how the term fair and reasonable should be interpreted so that all parties involved in the independent advice process have a more consistent understanding of the term.
- 1.8 The proposals set out in this consultation paper are intended to ensure that certain matters are analysed and synthesised as a minimum in reaching a conclusion as whether a transaction is 'fair and reasonable'. It is not the intention of the Commission to prescribe an exhaustive criteria or methodology for providing independent advice. Independent advisers must exercise their discretion in ascertaining the approach they must take and the work to be carried out on a case-by-case basis.
- 1.9 The responses to the consultation questions posed in this paper will assist the SC in formulating guidelines that would support the continued growth of a vibrant capital market.

2.0 REVIEW OF INDEPENDENT ADVICE CIRCULARS

2.1 Background

2.1.1 It is the present practice of the Commission to review independent advice circulars before they are issued. Under the Code, the independent advice circular is required to be posted to offeree shareholders 10 days from the posting of the offer document³. During this time, the Commission processes the clearance of independent advice circulars. From our review, we note that the quality of independent advice circulars could be improved.

2.1.2 In administering the Code, the SC does not rule on the financial or commercial advantages of an offer. The SC's role is to see that shareholders are treated fairly and provided with an opportunity to decide on an offer. As part of this the SC ensures that shareholders are provided with adequate advice to help them make an informed decision. The Commission does not evaluate the financial or commercial advantages or disadvantages of a take-over or merger and does not intend to do so through its guidelines.

3.0 "FAIR AND REASONABLE"

3.1 Current framework

3.1.1 Currently, independent advisers are required to comply with the requirements under the Code, Schedule 2 of the Code and Part 3 of the Guidelines on Offer Documentation. Please refer to **Appendix I** and **II** for the requirements.

3.1.2 The Code requires that independent advisers comment and advice on the 'reasonableness' of an offer⁴. However, as a matter of market convention, independent advisers have evaluated the 'fairness and reasonableness' of offers. In view of this, and the consistency of such an approach in other jurisdictions, the Commission has allowed the adoption of this convention. In Malaysia, the term 'fair and reasonable' is taken as a

³ Section 15(7) of the Code.

⁴ Schedule 2 (1) (e) of the Code.

composite term. There is no precise definition to 'fair and reasonable' under the Code, nor has the market developed a definition.

3.2 Comparison with other jurisdictions

3.2.1 The Code is modelled after United Kingdom's City Code of Take-overs and Mergers (London City Code) which does not require that the independent adviser advice on whether a particular offer is 'fair and reasonable'. Only Hong Kong and Australia have specific provisions under their codes on takeovers and mergers which require that the independent adviser comments on whether an offer is 'fair and reasonable'. However, in all the jurisdictions reviewed, it is common market practice for the independent adviser to evaluate whether an offer is or is not 'fair and reasonable' when recommending whether to accept or reject an offer. Australia is the only jurisdiction which has published guidelines on what constitutes 'fair and reasonable'. In this case, the regulator requires that the terms 'fair' and 'reasonable' be evaluated on a separate basis and specifies how each term should be evaluated.

3.2.2 The requirements of an independent adviser's report in connection with an offer, in other jurisdictions, can be summarised as follows:

<p>United Kingdom</p>	<p>The London City Code does not define the terms 'fair' and 'reasonable'. However, such terms are commonly used by the independent adviser in their independent adviser's report.</p> <p>Rule 3.1 states that the board of the offeree company must obtain competent independent advice on any offer and the substance of such advice must be made known to its shareholders.</p> <p>Rule 25.1 (c) provides guidance that if any document published in connection with an offer includes a recommendation or an opinion of a financial adviser for or against acceptance of the offer, the document must, unless published by the financial adviser in question, include a statement that the financial adviser has given and not withdrawn its consent to the publication of the document with the inclusion of its recommendation or opinion in the form and context in which it is included.</p>
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Hong Kong	<p>Rule 2 of the Code on Takeovers and Mergers and Share Repurchases of Hong Kong requires that all transactions under the purview of the code be accompanied by competent independent advice.</p> <p>The requirements for contents of the independent advice circular is further explained under Rule 8 which states that the offeree board circular must include the views of the offeree company's board or its independent committee on the offer and the written advice of its financial adviser as to whether the offer is, or is not, fair and reasonable and the reasons therefore.</p>
New Zealand	<p>There is no specific requirement under the New Zealand Takeovers Code Approval Order 2000 that the independent adviser conclude whether an offer is fair and/or reasonable. Under Rule 21, the directors of a target company must obtain a report from an independent adviser on the merits of an offer.</p> <p>However, the 'fair and reasonable' standard is widely used by independent advisers in providing their recommendation to the shareholders of a target company.</p>
Singapore	<p>There is no specific requirement under the Singapore Code of Takeovers and Mergers for the independent adviser to provide an opinion as to whether an offer is fair and reasonable in their independent advice report to the shareholders.</p> <p>However, rule 7.1 states that states that the board of the offeree company must obtain competent independent advice on any offer and the sub stance of such advice must be made known to its shareholders.</p> <p>Further, rule 24.1 states that the offeree board circular should indicate whether or not the board of directors of the offeree company recommends to shareholders the acceptance or rejection of take-over offer(s) made, or to be made, by the offeror and that the board must obtain competent independent advice which must be made known to its shareholders.</p> <p>However, the 'fair and reasonable' benchmark is widely used in the independent advice circulars under the purview of their Code.</p>
Australia	<p>Section 640 of the Corporations Act 2001 states that a target's statement given in accordance with section 638 (Target's statement content) must include, or be accompanied by, a report by an expert that states whether, in the expert's opinion, the take-over offers are fair and reasonable and gives the reasons for forming that opinion.</p> <p>Regulatory Guide 111 issued by the ASIC provides guidance on how an</p>

expert can help security holders make informed decisions about transactions. It gives guidance to experts on how to draft an expert report that satisfies the requirements of the Corporations Act 2001 in which their law on Takeovers are contained.

The guide outlines the ASIC's views on the following:

- What constitutes 'fair and reasonable' and defined the word 'fair' and 'reasonable' as two distinct terms;
- How experts should analyse a proposed transaction;
- The different valuation methodologies used by experts and the treatment of assumptions;
- General requirements for all expert reports; and
- The regulatory action they might take against an expert.

3.2.3 As illustrated above, the standard of 'fair and reasonable' is used in most markets by independent advisers when evaluating an offer. The Commission is of the view that since the standard of 'fair and reasonable' is used to determine whether an offer should be accepted or rejected, it is important that such a standard be clearly defined and interpreted in a consistent manner. As such, the Commission proposes to provide guidance to independent advisers on the interpretation of what is 'fair and reasonable'. To add clarity to the current framework in place, the Commission intends to supplement Part 3 of the Guidelines on Offer Documentation on Independent Adviser's Recommendation with the proposals outlined in this consultation paper.

4.0 PROPOSALS ON UPDATING PART 3 OF THE GUIDELINES ON OFFER DOCUMENTATION

4.1 'Fair and Reasonable'

4.1.1 To ensure that independent advisers use the term 'fair and reasonable' in a justifiable, consistent and clear manner, the Commission proposes to enhance the Guidelines On Offer Documentation by requiring the following:

- (a) The independent adviser is to evaluate whether a proposal is 'fair and reasonable'; and
- (b) To define the term 'fair and reasonable' as two distinct criteria, being 'fair' and 'reasonable', as opposed to the composite term.

4.1.2 It is proposed that 'fair' and 'reasonable' be interpreted as distinct terms as this approach provides a simple and clear framework for analysis that can be easily understood by users.

4.1.3 The concept of 'fair'

The concept of 'fair' is **quantitative** and requires the independent adviser to consider the valuation of the securities that are the subject of the offer and the valuation of the consideration. An offer can be considered 'fair' if the offer price or value of consideration is equal to or greater than the value of the securities that are the subject of the offer / proposed transaction. In general, independent advisers should base their recommendations on, but not limit them to, the following:

- (a) If the offer price is based on the market price and the market price is at or above the value of the underlying securities of the offeree, the offer is considered as 'fair'; and
- (b) If the offer price is higher than the market price, but is below the value of securities that are the subject of the offer, the offer is considered as 'not fair'.

4.1.4 The concept of 'reasonable'

The concept of 'reasonable' takes into consideration matters other than the valuation of the securities that are the subject of the offer. Generally, an offer would be considered as 'reasonable' if it is 'fair'. Nevertheless, independent advisers could conclude that an offer is 'reasonable' despite being 'not fair' if there are sufficient reasons for offeree

shareholders to accept the offer even if the offer price is below the value of the securities which are the subject of the offer.

In evaluating the 'reasonableness' of an offer, the independent adviser should take into consideration all factors that contribute or diminish to such a conclusion. Factors that may need to be considered in the evaluation of the reasonableness of a proposal/ transaction include the following:

- (a) The existing control the offeror and persons acting in concert have in the offeree;
- (b) The liquidity of the market for the offeree's securities;
- (c) The possibility of the major shareholders accepting the offer which will result in the offer being successful;
- (d) Pre and post-offer performance of the market price of the offeree's securities;
- (e) The likelihood and value of alternative offers or competing offers before the close of the offer;
- (f) Any special value that the offeror will derive, including synergies that can be achieved;
- (g) Benefits accruing to the offeror from increasing control in particular, the ability to pass special resolutions or control the assets and cash flow of the offeree completely; and
- (h) Advantages and disadvantages of a scheme and if the advantage of approving a scheme or accepting an offer is greater to the offeror as compared to the offeree.

4.1.5 It is also proposed that in the event the independent adviser concludes that an offer is 'not fair but reasonable', the independent adviser must clearly explain the following:

- (a) What this opinion means;
- (b) Why the independent adviser has reached this conclusion; and
- (c) How this conclusion affects the course of action to be taken by the shareholders.

4.2 Exemption from mandatory offer obligations as a result of transactions involving the issuance of new securities and when a company purchases its own voting shares

4.2.1 For exemptions from mandatory take-over offers for transactions / proposals which result in changes in control as a result of the issuance of new securities and share buy-backs, the independent adviser is to consider whether the exemption is 'fair and reasonable' and whether non-interested shareholders should vote for or against the exemption.

4.2.2 As voting in favour of an exemption tantamounts to a rejection of an offer, such an exemption should be analysed as if it was an offer.

4.2.3 In determining whether an exemption is reasonable, the independent adviser should identify the advantages and disadvantages of the proposal to shareholders not associated with the transaction, for example, the premium for control paid.

4.2.4 Where there is a subscription of new issuance of securities by the offeror, there may be other benefits that the independent adviser should consider in deciding whether the exemption is reasonable. These benefits could include, but are not limited to, the following:

- (a) The utilisation of new capital by the offeree to expand the business;

- (b) Improved financial position of the offeree based on the reduction of debt and interest payments; or
- (c) Improved liquidity of the offeree as a result of the injection of working capital.

4.3 Scheme of Arrangement

- 4.3.1 As schemes of arrangement can result in substantially the same outcome as an offer, the analysis or evaluation of such proposals should be the same as for an offer. Where an offeror intends to privatise the offeree or is seeking an exemption via scheme of arrangement the independent adviser should evaluate whether the scheme of arrangement is 'fair and reasonable' as it would for an offer.
- 4.3.2 The independent adviser should also highlight the advantages and disadvantages of the scheme to the affected shareholders when it considers the 'reasonableness' of the scheme.

4.4 Selective Capital Reduction

- 4.4.1 A selective capital reduction scheme has the same impact as the acquisition of voting shares. An independent adviser should evaluate a proposal for a selective capital reduction which results in the acquisition of voting shares from shareholders or a dilution of their voting rights in a manner similar to an offer as mentioned in paragraph 4.1 of this paper.
- 4.4.2 If the independent adviser is of the view that the scheme is 'not fair but reasonable', the independent adviser should also comment on the consequences on the shareholders when they approve and reject the scheme.

4.5 Assessing consideration other than cash

- 4.5.1 If the offeror is offering listed or non listed securities as the consideration, the independent adviser should examine the value of that consideration and compare it with

the valuation of the offeree's securities, taking into account control premiums for the offeree where relevant.

4.5.2 The independent adviser may need to assess whether the offer is in effect a merger of entities of equivalent value when control of the merged entity will be shared equally between the offeror and the offeree. In this case, the independent adviser may use an equivalent approach to valuing the securities of the offeror and the offeree.

4.5.3 If the independent adviser uses the market price of offer shares as a measure of the value of the consideration offered, the independent adviser is to consider and comment on:

- (a) The depth of the market for those offer shares;
- (b) The volatility of the market price; and
- (c) Whether or not the market value is likely to represent the post transaction value if the take-over offer is successful.

4.6 Valuation methodology

4.6.1 The choice of methodology for the valuation is for the independent adviser to decide based on their skill and judgment. However, the independent adviser must undertake the following before reaching its conclusion and making a recommendation to the shareholders of the offeree as mentioned in paragraph 4.1:

- (a) use more than one valuation methodology and justify the choice;
- (b) compare and comment the differences between the results of the methodologies used;
- (c) base its valuation on reasonable assumptions and disclose all the assumptions used; and

- (d) Provide an opinion of value for the subject of the evaluation based on the evaluation.

4.6.2 An independent adviser needs to ensure that the choice of methodology is appropriate given the circumstances of the offer. The methodologies to be considered by the independent adviser may include, but are not limited to, the following:

- (a) The market price for listed securities, when there is a liquid and active market, and allowing for the fact that the said market price may not reflect their value;
- (b) The discounted cash flow method and the estimated realisable value of any surplus assets;
- (c) The application of an appropriate earnings multiple to the estimated future maintainable earnings of the offeree;
- (d) The amount that would be available for distribution to shareholders in an orderly realisation of assets; and
- (e) Any precedent offer undertaken by another company as a basis for valuation of the offeree.

4.7 Assumptions

4.7.1 An independent adviser should disclose all the material assumptions on which its advice is based and include a sensitivity analysis which sets out the impact of foreseeable material changes where relevant.

4.8 Value ranges

4.8.1 An independent adviser should give a range of values for the value of an offer. Such a range of values should be as narrow as possible. If an independent adviser cannot give a narrow range due to uncertainty, the independent adviser should justify in the circular:

- (a) What factors create the uncertainty; and
- (b) Justify how it has reached its findings despite the uncertainty.

4.9 Valuation of convertible securities

4.9.1 When valuing convertible securities, the independent adviser should apply paragraphs 4.1 – 4.8 of this paper.

4.9.2 In selecting a valuation approach, the independent adviser should use the most appropriate methodologies and justify its choice.

4.10 Additional information to be disclosed by the independent adviser

4.10.1 To facilitate further enquiries and to provide the information on the independent adviser to the shareholders, independent advisers should further disclose the following:

- (a) Background on the independent adviser including contact details, the entity it has been engaged by and the target audience of the circular;
- (b) The regulated activities that the independent adviser is licensed to provide;
- (c) Business or professional relationships with the offeree or any other interested party; and
- (d) Any financial or other interest that could reasonably be regarded as capable of affecting the independent adviser's ability to give an unbiased opinion on the matter being reported on.

The public's views and comments are sought with respect to:

- 1. From a shareholder's perspective, do the proposals above help clarify and explain the term 'fair and reasonable' sufficiently?**
- 2. From a shareholders perspective, would the proposals above better assist offeree shareholders in making more informed decisions?**
- 3. The proposals do not provide an exhaustive methodology for independent advisers to adopt in disclosing their obligations but rather serve to set a minimum requirement. Given this, do you think the proposed interpretation of 'fair' and 'reasonable' is:**
 - (i) Too constrictive?; or**
 - (ii) Insufficiently clear?**
- 4. In light of the expectation of a more rigorous evaluation by independent advisers, the offeree board should appoint independent advisers as soon as receiving the notice of a possible offer. What are your views on this?**
- 5. What issues would independent advisers face with regards to the proposals set out in paragraphs 4.2 – 4.10?**
- 6. What issues would offeror face with regards to the proposals set out in paragraphs 4.1 – 4.10?**
- 7. Do you have any other suggestions to address the issues outlined above making it more useful to users, both independent advisers and offeree shareholders?**

Appendix 1**SCHEDULE 2****INFORMATION AND STATEMENTS REQUIRED TO BE INCLUDED IN AN INDEPENDENT ADVICE CIRCULAR**

1. The independent advice circular, whether recommending acceptance or rejection of the take-over offer, must contain comments and advice on the following:
 - (a) the offeror's stated intentions regarding the continuation of the business of the offeree;
 - (b) the offeror's stated intentions regarding any major changes to be introduced in the business, including any plans to liquidate the offeree, sell its assets or re-deploy the fixed assets of the offeree or make any other major change in the structure of the offeree;
 - (c) the offeror's stated long-term commercial justification for the proposed take-over offer;
 - (d) the offeror's stated intentions with regard to the continued employment of the employees of the offeree and of its subsidiaries; and
 - (e) the reasonableness of the take-over offer, including the reasonableness and accuracy of profit forecasts for the offeree, if any, contained in the offer document.
2. The independent advice circular should also, in so far as is reasonable, comment on the following:
 - (a) the outlook, for the next twelve months, of the industry in which the offeree has its core or major business activities;
 - (b) the prospects, for the next twelve months, of the offeree in terms of financial

performance as well as positioning in the industry (including competitive advantage and threats and opportunities); and

(c) in the case of a securities exchange offer only-

(i) the outlook, for the next twelve months, of the industry in which the offeror has its core or major business activities;

(ii) the prospects for the next twelve months, of the offeror in terms of financial performance as well as positioning in the industry (including competitive advantage, threats and opportunities).

3. The independent advice circular shall also state the following:

(a) whether the offeree holds directly or indirectly, any voting shares or convertible securities in the offeror and if so, the number of and percentage holding of such voting shares and convertible securities so held;

(b) whether the directors of the offeree hold, directly or indirectly any voting shares or convertible securities in the offeror and/or the offeree and if so, the number of and percentage holding of such voting shares and convertible securities so held; and

(c) whether the directors of the offeree intend, in respect of their own beneficial holdings, to accept or reject the take-over offer.

4. If there are no holdings of the nature required to be stated under paragraph 3 then this fact should be so stated.

5. The independent advice circular must also contain a statement from the directors of the offeree stating any other interest held by them in the offeror and in the offeree.

6. If any party whose holdings are required to be disclosed pursuant to the Code has dealt in

the voting shares in question during the period commencing six months prior to the beginning of the offer period and ending with the latest practicable date prior to the sending of the offer document, the details, including the number of shares, dates and prices, must be stated. If no such deals have been made this fact should be so stated.

7. The independent advice circular must contain particulars of all service contracts of any director or proposed director with the offeree or any of its subsidiaries (unless expiring or determinable by the employing company without payment of compensation within twelve months from the date of the offer document) and if there are none, this fact shall be so stated. If such service contracts have been entered into or have been amended within six months of the date of the document, the particulars of the contracts or amendments shall be given. If there have been no new service contracts or amendments, this shall be so stated.

8. In the case of partial offers, the independent advice circular shall comment and contain advice on the significance of the percentage level of acceptances offered by the offeror as stated in the offer document.

Appendix 2**GUIDELINES ON OFFER DOCUMENTATION****Part 3****INDEPENDENT ADVICE CIRCULARS****Document Guidelines 3.1****Cover Page**

In addition to those items specified in Document Guidelines 2.1 (2), the cover page of the independent advice circular (IAC) should also confirm:

- (a) that the IAC should be read in conjunction with the offer document; and
- (b) the identity of the independent adviser to the offeree board.

Document Guidelines 3.2**Contents of Letter from Offeree Board of Directors**

The Commission is concerned that there is significant overlap and repetition between the contents of the letter from the offeree board and the letter from the independent adviser, even though these two letters are usually contained in the same document (the IAC) and the offeree board's letter explicitly refers to that of the independent adviser.

- (1) The Commission therefore recommends that the scope of the offeree board's letter be restricted to the following specific items:
 - (a) an introduction, giving brief details of the background to the transaction and the offer;

- (b) a detailed consideration and discussion of the rationale for the offer, as stated by the offeror in the offer document, including the future prospects of the enlarged group;
 - (c) details of the future management of the enlarged group and how the existing management of the offeree company will be involved (if at all);
 - (d) details of any offeree shareholders who have already accepted the offer or agreed to do so by way of an irrevocable undertaking;
 - (e) the recommendation by the offeree board as to acceptance or rejection of the offer, together with details of the intentions to accept or otherwise of the members of the offeree board; and
 - (f) a clear referral of the offeree shareholders to the letter from the independent adviser.
- (2) For the avoidance of doubt, the Commission confirms that the offeree board will be considered to have fulfilled its obligations under section 14 of the Code and Practice Note 4.2 to provide certain items of information to offeree shareholders if:
- (a) the information in question is set out in the letter from the independent adviser or in another part of the IAC; and
 - (b) the letter from the offeree board is set out in the IAC; and
 - (c) there is clear reference in the letter from the offeree board to the letter from the independent adviser.
- (3) In its shorter version, the letter from the offeree board could be usefully viewed as providing an executive summary of the offer and the views (including the recommendation) of the offeree board and the independent adviser. Nevertheless, the

Commission would strongly encourage offeree boards and independent advisers to consider including a specific "Executive Summary" section at the start of the IAC, the contents of which would be similar to the executive summary for offer documents considered in Document Guidelines 2.2 above.

Document Guidelines 3.3

Contents of Letter from Independent Adviser

The Commission believes that many of the comments made in Document Guidelines 2.3 above concerning the offer letter in offer documents are applicable to the independent adviser's letter in the IAC. As with offer letters, the Commission is concerned to ensure that the letter from the independent adviser is as informative and as straightforward as possible for the offeree shareholders. While the Commission is aware that, due to the complex nature of many take-over situations and the minimum information requirements set out in Schedule 2 to the Code, the letter from independent advisers will inevitably require to be framed in somewhat technical terms, nevertheless, the Commission believes that adherence to the following guidelines will be in the interests of offeree shareholders.

- (1) Unlike many of the information requirements set out in Schedule 2 of the Code, the comments required by sections 1(c)-(e) and section 2 of Schedule 2 of the Code are qualitative in nature. In the past, there has been a relatively low level of comment and advice in response to these sections. While the Commission accepts that the level of comment and advice achievable under sections 1(c)-(e) depends to some extent on the corresponding level of disclosure in the offer document, nevertheless the Commission believes this comment and advice is critical to an assessment of the merits of a transaction by the offeree shareholders.
- (2) The independent adviser letter should avoid:
 - (a) the inclusion of unnecessarily complex or regulatory terms or issues, including (without limitation) the use of the word "mandatory", which is not meaningful to

certain investors and adds nothing to their understanding of the offer situation and their position within it (although offeree shareholders should still be made aware of the percentage shareholding of the offeror and its concert parties in the offeree company);

- (b) wholesale quotation from the offer letter (a copy of which the offeree shareholders will already have received), particularly when included in the independent adviser's letter without any, or any significant or meaningful, comment or critique;
- (c) wholesale quotation from the offeree company's published annual reports (copies of which offeree shareholders will already have received), since presumably more up-to-date information concerning the business and prospects for the offeree company can be readily obtained from the offeree board direct;
- (d) inclusion of sections which are of a purely procedural nature and which are not directly relevant to the offeree shareholders' commercial or financial analysis of the offer. Such sections could usefully be removed to a later separate section of the IAC (to which the offeree shareholders would be referred in the offeree board's letter and the independent adviser's letter), and would include the following areas of information:
 - disclosure of offeree directors' and other interests;
 - confirmation of offeror's financial resources;
 - acceptance periods, including the timetable for unconditionality and duration of the offer;
 - announcements;
 - rights of withdrawal;

- revision of the offer;
- execution of, and other details concerning, the form of acceptance;
- settlement of offer consideration; and
- general matters such as governing law, responsibility for costs and expenses and delivery of documents and notices.

(3) The independent adviser's letter should include:

(a) the following sections:

- introduction;
- detailed background to the offer;
- principal terms and conditions of the offer;
- details of acceptances of the offer as at the latest available date before the date of the IAC;
- offeror's intentions regarding the listed status of the offeree company after the offer has closed;
- comment and advice on the offeror's plans (disclosed under section 1 of Schedule 1 of the Code) for the offeree company's business, employees etc. after the offer has closed;
- notification that (if it be the case) the offeror intends to use the compulsory acquisition rules, and the implications thereof for offeree shareholders; and

- the commercial and financial assessment and evaluation of the offer; and
- (b) the independent adviser's recommendation, which is considered in more detail in Document Guideline 3.4 below.

Document Guidelines 3.4

Independent Adviser's Recommendation

The Commission is concerned to ensure that the independent adviser's recommendation be as clear, understandable and reliable to offeree shareholders as possible, taking into account the acknowledged complexities of many public market transactions. The Commission would encourage independent advisers to take into account the following points when drafting recommendations:

- (a) they should aim to be as short as possible. Longer recommendations tend, by their nature, to be less meaningful and less clear than shorter ones.
- (b) they may contain a brief resume of the rationale underlying the recommendation, drawn from the commercial and financial assessment and evaluation of the offer set out in more detail in the body of the independent adviser's letter. This resume should not, however, be allowed to prejudice the overall target for the recommendation of brevity, clarity and certainty.
- (c) they should contain no restrictions on the reliability or applicability of the recommendation, except for those, which are absolutely necessary.
- (d) they should not contain so many alternative pieces of advice and, therefore, alternative courses of action for offeree shareholders that the overall recommendation is obscured or rendered less meaningful. An example of this would be to draw a distinction between, and therefore giving a separate recommendation for, "short term" and "long term" investors.