

## 《公司條例草案》委員會

### 政府當局對各團體／代表就第 664 條 有關人數驗證的條文所提意見的回應 及建議方案

#### 目的

早前各團體／代表就《公司條例草案》第 664 條有關保留人數驗證的條文提出意見，本文件載述政府當局的回應及建議方案。

#### 各團體／代表的意見

2. 法案委員會早前邀請各團體／代表就第 664 條有關保留成員計劃的人數驗證的條文提出意見。在二零一二年三月二十三日的會議上，各團體／代表透過提交意見書或即席申述表達意見，他們的意見撮述如下。

#### 成員計劃

3. 大部分團體／代表都支持廢除成員計劃的人數驗證(合共 23 個團體／代表，包括香港律師會、香港大律師公會、香港會計師公會、香港董事學會、香港特許秘書公會、經濟動力、香港總商會、香港工業總會、香港中華廠商聯合會、香港上市公司商會、香港加拿大商會、一些律師事務所、數名學者，以及 David Webb 先生)。

4. 廢除人數驗證的主要論據包括：

- (a) 人數驗證抵觸“一股一票”的原則，少數股東在公司的投資可能很少，卻因此而取得不相稱的控制權；
- (b) 人數驗證造成操控投票結果的漏洞，例如一羣股東(不論是大股東還是小股東)可藉分拆股份不公平地影響投票結果；
- (c) 建議賦權法院可酌情不施行人數驗證，這會帶來不明朗的因素；
- (d) 若保留人數驗證，監管機構、司法機關、發行人及股東很有可能須投入大量資源，以調查有沒有分拆股份或以其他方式操縱股份的情況；

- (e) 建議保留《公司條例草案》所訂的人數驗證，與早前進行諮詢所得的大多數意見背道而馳；
- (f) 施行人數驗證並無必要，因為少數股東的權益可透過其他方式獲得充分保障，包括法院可酌情決定不批准某項計劃，以及《公司收購及合併守則》（《收購守則》）第 2.10(b)條規定，反對決議的票數不得超過附於所有無利害關係股份的表決權的 10%；
- (g) 就上市公司而言，人數驗證未能反映中央結算及交收系統（“中央結算系統”）內絕大部分上市股份的實益擁有人的意向。即使證券市場無紙化付諸實施，大多數股東也可能仍然屬意以代理人及保管人的名義持有股份，以便進行買賣和減省費用；
- (h) 現時施行人數驗證的做法及所帶來的不明朗因素，有礙公司進行協議安排。由於這些計劃通常讓少數股東以高於當時市價的價格退股，當有關股份的買賣流動性不足，而計劃推行受阻，將不符合少數股東的利益；以及
- (i) 其他司法管轄區正逐步廢除人數驗證，例子包括開曼羣島及新西蘭。英國及澳洲的專責政府諮詢委員會也建議廢除人數驗證。再者，許多仍然施行人數驗證的司法管轄區，例如英國及澳洲，並沒有訂定類似《收購守則》第 2.10(b)條的條文。此外，英國及澳洲設立了中央證券存管處，讓個別股東可登記成為所持有上市股份的法定擁有人。因此，因中央結算系統而引伸出來的關注，在這些司法管轄區並非問題。

5. 另一方面，共有 10 個團體／代表（包括證券及期貨事務監察委員會（證監會<sup>1</sup>）、香港華人會計師公會、公認會計師公會香港分會、香港證券業協會、香港銀行公會、一些中小企協會及電訊盈科小股東大聯盟代表）贊成保留人數驗證，主要論據包括：

- (a) 人數驗證對價值驗證可發揮重要的制衡作用。在投票通過私有化或收購計劃時，人數驗證對少數股東至為重要，因為有關計劃一旦獲得批准，便對反對的股東具有約束力，他們的股份可被強制收購；

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<sup>1</sup> 請同時參閱第 17 及 22 段。

- (b) 現行《公司條例》第 166 條的人數驗證規定即使有所偏頗，《公司條例草案》第 664 條新增的法院可不施行人數驗證的酌情權後，問題似乎已解決；
- (c) 推行證券無紙化，有助解決與股份實益擁有權相關的問題；
- (d) 沒有可信的證據證明人數驗證引起操控投票結果的問題，或合理的私有化計劃會因人數驗證而受阻；
- (e) 香港的個人投資者比例較海外為高。如廢除人數驗證，主要股東便可輕易控制投票結果，少數股東的權益便會受到影響；以及
- (f) 保留人數驗證，香港與其他普通法適用地區(例如新加坡、英國及澳洲)保持一致。

6. 除上述意見外，還有一個團體／代表建議廢除上市公司成員計劃的人數驗證，但非上市公司成員計劃的人數驗證則應予保留，因為《收購守則》的規定不適用於非上市公司。

7. 證監會在意見書中重申其早前提出應保留人數驗證的意見。不過，證監會也認為，值得研究若《公司條例》採納與《收購守則》第 2.10(b)條相類的驗證準則，是否可更有效保障少數股東的權益。該條規則主要訂明，當一項決議是關於通過成員計劃，而反對決議的票數超過附於全部無利害關係股份的表決權的 10%，則該決議遭否決(下稱“10%反對規則”)。

8. 一些團體／代表也提出類似意見。David Webb 先生提議，除了廢除人數驗證，還應把 10%反對規則納入《公司條例草案》；同時，基於《收購守則》適用於在香港或其他地方成立為法團的上市公司，故應保留該項規則。香港理工大學的麥偉年博士和林棟樑先生也提出類似建議。

9. 另有少數團體／代表(包括香港總商會和香港上市公司商會)不贊成把 10%反對規則納入《公司條例草案》，主要原因包括：

- (a) 該項規則並不適合私人公司採用。以私人公司的情況來說，採用 10%反對規則或會給予小部分股東過大的否決權；

- (b) 不必賦予 10%反對規則法定地位。沒有證據顯示，有上市公司即使未能符合《收購守則》第 2.10(b)條的規定，也繼續進行有關計劃。換言之，現時的《收購守則》行之有效；
- (c) 以證監會所執行的《收購守則》來處理保障少數股東權益的問題，遠較其他方法靈活和合適。證監會緊貼市場，若發現任何程序須因應情況轉變而予以修訂，便可透過《收購守則》實施修訂，較立法簡易；以及
- (d) 法定規則並非由證監會執行，難以界定何謂無利害關係股份。

### 債權人計劃

10. 一些團體／代表也就債權人計劃提出意見。香港董事學會和 David Webb 先生都支持廢除債權人計劃的人數驗證。另一方面，有團體／代表(包括香港華人會計師公會及一些中小企協會)認為，債權人計劃的人數驗證應予保留。香港銀行公會建議，將法院可不施行人數驗證的新酌情權擴及債權人計劃，因為就這類計劃而言，也可能會出現類似分拆股份的情況。

### **法案委員會的意見**

11. 經考慮各團體／代表的意見後，法案委員會要求政府當局：

- (a) 就《公司條例草案》中旨在保障少數股東權益的措施提供資料；
- (b) 就通過或未能通過人數驗證的私有化計劃提供統計數字；
- (c) 就海外司法管轄區人數驗證的存廢情況提供最新資料；以及
- (d) 如廢除人數驗證，便須研究其他保障少數股東權益的可行方案，並向法案委員會匯報擬議未來路向。

## 政府當局的回應

### 保障少數股東的權益

12. 加強保障少數股東的權益，是《公司條例草案》的重點之一。較顯著的例子包括：

- (a) 第 14 部(保障公司或成員的權益的補救) — 這部分載有關於成員查閱公司紀錄的權利及成員權益受損時的補救的條文，其中包括對不公平地損害成員權益的補救、對於其他人就公司從事的行為作出的補救，以及就對公司所作的不當行為提出的衍生訴訟。
- (b) 第 11 部(董事的公平交易) — 載有具體規則，規定董事須進行公平交易，以避免利益衝突。
- (c) 第 12 部(公司管理及議事程序) — 處理股東參與主要決策過程的事宜。新措施包括賦予公司成員在會議上提出決議的權利；規定公司須把成員的陳述書或就周年成員大會提出的決議分發給成員傳閱，費用由公司支付；降低有權要求以投票方式表決的門檻；以及加強成員委任代表的權利。
- (d) 至於較重要的交易／行動，則訂立更嚴格的規定，以保障少數股東的權益。舉例來說，在收購要約的情況下，要約人必須已收購該要約所關乎的股份中的 90%，才可強制餘下的少數股東出售股份。

### 私有化計劃的統計數字

13. 據證監會表示，在二零零五年一月一日至二零一一年年底期間，上市公司建議以協議安排方式進行私有化的計劃共有 42 項。在這 42 項計劃之中，有兩項未能通過人數驗證，而這兩項計劃也未能符合《公司條例》的另一規定，即須獲佔股份價值最少 75% 的大多數批准。

### 海外司法管轄區施行人數驗證的情況

14. 在英國和澳洲，一直有建議要廢除人數驗證，但暫時未有具體計劃。新加坡仍然保留人數驗證。開曼羣島則廢除合併計劃的人數驗證，但並未廢除安排和重組計劃的人數驗證。不過，上述司法管轄區

並沒有類似《收購守則》所訂的 10%反對規則，人數驗證為少數股東的權益提供了重要保障。至於新西蘭，施行人數驗證的規定見於已廢除的《1955 年公司法》第 205 條，但現行的《1993 年公司法》則已沒有這項規定。

## 建議方案

15. 大多數團體／代表都認為，人數驗證應予廢除。他們的主要關注是，人數驗證牴觸“一股一票”的原則，而且本身存在不少問題，例如讓股東可藉分拆股份操控投票結果，以及難以反映絕大部分上市股份的實益擁有人的意願，因為這些股份是以代理人或保管人的名義持有。這些關注有其理據。

16. 另一方面，各團體／代表也有普遍的共識，由於有關計劃對成員具有約束力，就應提供足夠措施，以保障少數股東的權益。單純廢除人數驗證而又不制訂任何替代的保障措施，則《公司條例草案》餘下的唯一驗證準則，便是計劃須獲佔出席會議投票的成員的表決權最少 75% 批准。這項準則為少數股東提供的法例保障，相對於有關計劃所具有的約束力，並不足夠。

17. 少數團體／代表(David Webb 先生和一些學者)建議，以《收購守則》所訂的 10%反對規則取代人數驗證。證監會也認為，值得研究採納 10%反對規則會否更有效地保障少數股東。我們認為，該規則如經適當變通以切合《公司條例草案》的情況，會是公平合理的替代方案。第一，該規則既符合“一股一票”的原則，又同時提供額外措施，以保障少數股東的權益。第二，人數驗證在點票時並不區分有利益關係的股東和無利益關係的股東；相比之下，10%反對規則把否決權只賦予無利益關係的股東。這個 9：1 的比例也訂定一個高的準則，體現絕大多數無利益關係的股東的意願，唯有達到這個水平，建議的計劃才會對反對的股東具有約束力。第三，如採用該規則，便可避免很多論者所指人數驗證本身的欠妥之處。第四，該規則提供更加明確和可以預期的框架，讓擬提出計劃的人士可評估是否提出計劃。

### 擬議的 10%反對規則

18. 我們建議採用證監會《收購守則》所訂的 10%反對規則的概念，並加以適當變通，以取代人數驗證。在制訂這項建議時，我們考慮到

《公司條例草案》的驗證準則適用於公眾公司和私人公司<sup>2</sup>，也適用於大型公司和中小型公司。因此，驗證準則應相對簡單，易於執行，以提供明確的法律依據，利便各方人士遵行。此外，考慮到草案第 13 部在處理公司擁有權變更事宜時，已訂有區分“有利益關係”和“無利益關係”成員的條文，因此，準則應與第 13 部其他條文所採用的概念和定義保持一定的連貫性。

19. 簡而言之，我們建議以新規定取代第 664 條所訂的人數驗證。新規定述明，反對通過某項協議安排的決議的票數，不得超過附於所有無利害關係股份的表決權的 10%。這項規定適用於以下兩類協議安排：

- (a) 第 678 條所界定的收購要約，並作出適當修改；以及
- (b) 第 696 條所界定為回購股份而作出的公開要約。

在計算“有利害關係股份”時可涵蓋以下各方：(a)作出回購股份要約的公司及不售股成員，以及與其有聯繫者和代名人；及(b)要約人及與其有聯繫者和代名人。“有聯繫者”一詞採用第 658 條的定義<sup>3</sup>。

20. 反映上述建議的委員會審議階段修正案載於附件(只有英文版)。

21. 在作出上述修訂後，有關計劃仍必須得到原訟法庭的認許才可以實施。換言之，現行《公司條例》由原訟法庭擔任最終把關者的安排將維持不變。

22. 我們在制訂這項建議及修正案時，已徵詢證監會的意見。證監會在審視後認為，該建議與為保障少數股東而設的《收購守則》第 2.10(b)條基本一致。<sup>4</sup> 證監會相信，在《公司條例草案》中引入第

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<sup>2</sup> 在收購要約的情況適用於該兩種公司，在回購股份而作出公開要約的情況只適用於上市公司。

<sup>3</sup> 我們已提出委員會審議階段修正案，把“非婚生子女”納入該定義，並闡明第 658(2)(b)條中有關 30%表決權的條文，包括透過法人團體控制行使的表決權。

<sup>4</sup> 《收購守則》第 2.10(b)條在 2001 年引入，以加強保障少數股東，並與《公司條例》的法定的 90%“強制出售”門檻一致。有關“強制出售”的條文，在有人對少數股東的股份作出一般要約，而要約人希望強制收購不接受要約成員的股份的特定情況下，保障少數股東。第 2.10(b)條對以協議安排形式進行，並涉及強制收購少數股東股份的私有化計劃施加類似的驗證準則。

2.10(b)條的原則，對少數股東有利，並回應了證監會對於廢除人數驗證的主要關注。

#### 其他計劃

23. 至於債權人計劃等其他類別的計劃，我們建議保留人數驗證，因為對人數驗證的主要反對與這些計劃無關，而“無利益關係成員”的概念亦不適用於這些計劃。

**財經事務及庫務局**  
**公司註冊處**  
**二零一二年五月二十八日**



**CSAs in relation to the proposal on Headcount Test  
與人數驗證建議有關的修正案**

**657. Interpretation**

In this Part—

child (子女) includes a step-child, an illegitimate child and a child adopted in any manner recognized by the law of Hong Kong;

cohabitation relationship (同居關係) means a relationship between 2 persons (whether of the same sex or of the opposite sex) who live together as a couple in an intimate relationship;

*offer period* (要約期), in relation to an offer, means the period within which the offer can be accepted.

**658. Associate**

(1) In this Part, a reference to an associate of an offeror or member, is—

(a) if the offeror or member is a natural person, a reference to—

(i) the offeror's or member's spouse;

(ii) a person who is in a cohabitation relationship with the offeror or member; any other person (whether of a different sex or the same sex) with whom the offeror or member lives as a couple in an enduring family relationship;

(iii) a child, ~~step-child or adopted child~~ of the offeror or member;

(iv) a child, ~~step-child or adopted child~~ of a person falling within subparagraph (ii) who—

(A) is not a child, ~~step-child or adopted child~~ of the offeror or member;

(B) lives with the offeror or member; and

(C) has not attained the age of 18;

(v) a parent of the offeror or member;

(vi) a body corporate in which the offeror or member is substantially interested; or

(vii) a person who is a party, or a nominee of a party, to an acquisition agreement with the offeror or member; or

(b) if the offeror or member is a body corporate, a reference to—

(i) a body corporate in the same group of companies as the offeror or member;

(ii) a body corporate in which the offeror or member is substantially interested; or

(iii) a person who is a party, or a nominee of a party, to an acquisition agreement with the offeror or member.

(1A) In this Part, a reference to an associate of a repurchasing company is a reference to—

(a) a body corporate in the same group of companies as the repurchasing company;

- (b) a body corporate in which the repurchasing company is substantially interested; or
  - (c) a person who is a party, or a nominee of a party, to an acquisition agreement with the repurchasing company.
- (2) For the purposes of subsections (1) and (1A), an offeror ~~or~~ member or repurchasing company is substantially interested in a body corporate if—
- (a) the body corporate, or its directors or a majority of its directors, are accustomed to act in accordance with the directions or instructions of the offeror ~~or~~ member or repurchasing company; or
  - (b) the offeror ~~or~~ member or repurchasing company is entitled to exercise, or control the exercise of, more than 30% of the voting power at any general meeting of the body corporate.
- (2A) In subsection (2), a reference to voting power the exercise of which is controlled by an offeror, member or repurchasing company includes voting power the exercise of which is controlled by another body corporate if the offeror, member or repurchasing company is entitled to exercise, or control the exercise of, more than 50% of the voting power at any general meeting of that other body corporate.
- (3) For the purposes of subsections (1) and (1A), an agreement is an acquisition agreement if—
- (a) it is an agreement for the acquisition of—
    - (i) any of the shares to which the takeover offer or general offer relates; or
    - (ii) an interest in those shares; and
  - (b) it includes provisions imposing obligations or restrictions on any of the parties to it with respect to the use, retention or disposal of the party's interests in the shares acquired pursuant to the agreement.

**661. Court may order meeting of creditors or members to be summoned**

- (1) The Court may, on application made for the purposes of this subsection—
- (a) order a meeting specified in subsection (2)(a), or a meeting specified in subsection (2)(b), or both (as the case may be) to be summoned in any manner that the Court directs; and
  - for the purposes of section 664A(4), declare a person to be a person specified under that section.
- (2) The meeting is—
- (a) if the arrangement or compromise is proposed to be entered into—
    - (i) with the creditors of the company, a meeting of those creditors; or
    - (ii) with a class of the creditors of the company, a meeting of that class of creditors; and
  - (b) if the arrangement or compromise is proposed to be entered into—
    - (i) with the members of the company, a meeting of those members; or
    - (ii) with a class of the members of the company, a meeting of that class of members.
- (3) Subject to subsection (4), an application for the purposes of subsection (1) may be made only by—
- (a) in the case of a meeting of creditors, the company or any of the creditors;
  - (b) in the case of a meeting of a class of creditors, the company or any creditor of that class;
  - (c) in the case of a meeting of members, the company or any of the members; or

- (d) in the case of a meeting of a class of members, the company or any member of that class.
- (4) If the company is being wound up, an application for the purposes of subsection (1) may be made only by the liquidator or provisional liquidator.
- (5) An application for the purposes of subsection (1) must be made in a summary way.

**664. Court may sanction arrangement or compromise**

- (1) This section applies if the creditors or the class of creditors, or the members or the class of members, or both, with whom the arrangement or compromise is proposed to be entered into, agree or agrees to the arrangement or compromise.

~~(2) For the purposes of subsection (1) —~~

~~(a) the creditors agree to the arrangement or compromise if, at a meeting of the creditors summoned under section 661, a majority in number representing at least 75% in value of the creditors present and voting, in person or by proxy, agree to the arrangement or compromise;~~

~~(b) a class of creditors agrees to the arrangement or compromise if, at a meeting of the class of creditors summoned under section 661, a majority in number representing at least 75% in value of the class of creditors present and voting, in person or by proxy, agree to the arrangement or compromise;~~

~~(c) the members agree to the arrangement or compromise if, at a meeting of the members summoned under section 661 —~~

~~(i) members representing at least 75% of the voting rights of the members present and voting, in person or by proxy, agree to the arrangement or compromise; and~~

~~(ii) unless the Court orders otherwise, a majority in number of the members present and voting, in person or by proxy, agree to the arrangement or compromise; and~~

~~(d) a class of members agrees to the arrangement or compromise if, at a meeting of the class of members summoned under section 661 —~~

~~(i) members representing at least 75% of the voting rights of the class of members present and voting, in person or by proxy, agree to the arrangement or compromise; and~~

~~(ii) unless the Court orders otherwise, a majority in number of the class of members present and voting, in person or by proxy, agree to the arrangement or compromise.~~

- (3) The Court may, on application made for the purposes of this subsection, sanction the arrangement or compromise.

- (4) Subject to subsection (5), an application for the purposes of subsection (3) may be made only by—

- (a) in the case of an arrangement or compromise proposed to be entered into with the creditors of a company, the company or any of the creditors;

- (b) in the case of an arrangement or compromise proposed to be entered into with a class of creditors of a company, the company or any creditor of that class;

- (c) in the case of an arrangement or compromise proposed to be entered into with the members of a company, the company or any of the members; or

- (d) in the case of an arrangement or compromise proposed to be entered into with a class of members of a company, the company or any member of that class.

- (5) If the company is being wound up, an application for the purposes of subsection (3) may be made only by the liquidator or provisional liquidator.
- (6) An arrangement or compromise sanctioned by the Court under subsection (3) is binding—
  - (a) on the company or, if the company is being wound up, on the liquidator or provisional liquidator and contributories of the company; and
  - (b) on the creditors or the class of creditors, or the members or the class of members, or both, with whom the arrangement or compromise is proposed to be entered into.
- (7) An order made by the Court under subsection (3) has no effect until an office copy of the order is registered by the Registrar under Part 2.
- (8) If the order of the Court amends the company's articles, or any resolution or agreement to which section 612 applies, the office copy of that order delivered to the Registrar for registration for the purposes of subsection (7) must be accompanied by a copy of those articles, or the resolution or agreement, as amended.
- (9) If subsection (8) is contravened, the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3.

**664A. Provision supplementary to section 664(1): agreement to arrangement or compromise**

(1) For the purposes of section 664(1)—

(a) the creditors agree to the arrangement or compromise if, at a meeting of the creditors summoned under section 661, a majority in number representing at least 75% in value of the creditors present and voting, in person or by proxy, agree to the arrangement or compromise;

(b) a class of creditors agrees to the arrangement or compromise if, at a meeting of the class of creditors summoned under section 661, a majority in number representing at least 75% in value of the class of creditors present and voting, in person or by proxy, agree to the arrangement or compromise;

(c) subject to subsection (2)(a), the members agree to the arrangement or compromise if, at a meeting of the members summoned under section 661—

(i) members representing at least 75% of the voting rights of the members present and voting, in person or by proxy, agree to the arrangement or compromise; and

(ii) unless the Court orders otherwise, a majority in number of the members present and voting, in person or by proxy, agree to the arrangement or compromise; and

(d) subject to subsection (2)(b), a class of members agrees to the arrangement or compromise if, at a meeting of the class of members summoned under section 661—

(i) members representing at least 75% of the voting rights of the class of members present and voting, in person or by proxy, agree to the arrangement or compromise; and

(ii) unless the Court orders otherwise, a majority in number of the class of members present and voting, in person or by proxy, agree to the arrangement or compromise.

(2) However, where the arrangement involves a takeover offer or a general offer—

(a) the members agree to the arrangement if—

(i) at a meeting of the members summoned under section 661, members representing at least 75% of the voting rights of the members present and voting, in person or by proxy, agree to the arrangement; and

(ii) the votes cast against the arrangement at the meeting do not exceed 10% of the total voting rights attached to all disinterested shares in the company;

(b) a class of members agrees to the arrangement if—

(i) at a meeting of the class of members summoned under section 661, members representing at least 75% of the voting rights of the class of members present and voting, in person or by proxy, agree to the arrangement; and

(ii) the votes cast against the arrangement at the meeting do not exceed 10% of the total voting rights attached to all disinterested shares of the class in the company.

(3) In subsection (2)—

**acquisition agreement** ( ) means an agreement within the meaning of section 658(3);

**disinterested shares** ( ) means—

(a) in the case of a takeover offer, shares in the company other than those held—

(i) by the offeror, or by a nominee on behalf of the offeror;

(ii) by an associate of the offeror (except a person who falls within section 658(1)(a)(vii) or (b)(iii) or a person specified in subsection (4)); or

(iii) by a person who is a party to an acquisition agreement with the offeror (except a person specified in subsection (4)), or by a nominee on behalf of the person under the acquisition agreement;

(b) in the case of a general offer, shares in the company other than those held—

(i) by a non-tendering member as defined by section 694(1), or by a nominee on behalf of the member;

(ii) by an associate of such a non-tendering member (except a person who falls within section 658(1)(a)(vii) or (b)(iii) or a person specified in subsection (4));

(iii) by a nominee on behalf of the repurchasing company as defined by section 694(1);

(iv) by an associate of such a repurchasing company (except a person who falls within section 658(1A)(c) or a person specified in subsection (4)); or

(v) by a person who is a party to an acquisition agreement with such a non-tendering member or repurchasing company (except a person specified in subsection (4)), or by a nominee on behalf of the person under the acquisition agreement;

**general offer** ( ) means an offer within the meaning of section 696.

(4) The person specified for the purposes of paragraph (a)(ii) and (iii) and (b)(ii), (iv) and (v) of the definition of **disinterested shares** in subsection (3) is a person declared under section 661(1)(b) to be a person specified under this section.

(5) For the purposes of subsections (2), (3) and (4)—

(a) an offer to acquire shares in a company is a takeover offer if—

(i) it is an offer to acquire all the shares, or all the shares of any class, in the company, except those that, at the date of the offer, are held by the offeror; and

(ii) the terms of the offer are the same—

- (A) where the offer does not relate to shares of different classes, in relation to all the shares to which the offer relates; or
    - (B) where the offer relates to shares of different classes, in relation to all the shares of each class to which the offer relates; and
  - (b) an offer under which consideration is provided for the cancellation of shares in a company is also a takeover offer if—
    - (i) it is an offer under which consideration is provided for the cancellation of all the shares, or all the shares of any class, in the company, except—
      - (A) those that, at the date of the offer, are held by the offeror;
      - (B) those that are specified in the offer document as shares that are not to be cancelled under the offer; and
      - (C) those that, at the date of the offer, are held by a member residing in a place where such an offer is contrary to the law of the place; and
    - (ii) the terms of the offer are the same—
      - (A) where the offer does not relate to shares of different classes, in relation to all the shares to which the offer relates; or
      - (B) where the offer relates to shares of different classes, in relation to all the shares of each class to which the offer relates.
- (6) In subsection (5)—
  - shares* ( ) means shares that have been allotted on the date of the offer.
- (7) In subsection (5)(a)(i) and (b)(i), a reference to shares that are held by an offeror—
  - (a) includes shares that the offeror has contracted, unconditionally or subject to conditions being satisfied, to acquire; but
  - (b) excludes shares that are the subject of a contract—
    - (i) entered into by the offeror with a holder of shares in the company in order to secure that the holder will accept the offer when it is made; and
    - (ii) entered into for no consideration and by deed, for consideration of negligible value, or for consideration consisting of a promise by the offeror to make the offer.
- (8) For the purposes of subsection (5)(a)(ii) and (b)(ii), even though, in relation to all the shares, or all the shares of a class of shares, to which an offer relates, there is a difference in the value of consideration offered for the shares allotted earlier as against the value of consideration offered for those allotted later, the terms of the offer are to be regarded as the same in relation to all the shares concerned if—
  - (a) shares carry an entitlement to a particular dividend that other shares of the same class, by reason of being allotted at a different time, do not carry;
  - (b) the difference in value of consideration merely reflects that difference in entitlement to dividend; and
  - (c) but for the difference in the value of consideration, the terms of the offer would be the same in relation to all the shares concerned.
- (9) For the purposes of subsection (5)(a)(ii) and (b)(ii), even though, in relation to all the shares, or all the shares of a class of shares, to which an offer relates, there is a difference in the form of consideration offered, the terms of the offer are to be regarded as the same in relation to all the shares concerned if—
  - (a) the law of a place outside Hong Kong precludes an offer of consideration in the form specified in the terms of the offer, or precludes it except after compliance by the offeror with conditions with which the offeror is unable to comply or that the offeror regards as unduly onerous;

(b) consideration in another form is offered to a person to whom an offer of consideration in the specified form is so precluded;

(c) the person is able to receive consideration in that other form that is of substantially equivalent value; and

(d) but for the difference in the form of consideration, the terms of the offer would be the same in relation to all the shares concerned.

(10) Despite subsection (5), a takeover offer may include, among the shares to which it relates, shares that will be allotted after the date of the offer but before a date specified in the offer.

(11) In subsections (2) to (10), a reference to shares in a company includes—

(a) debentures that are convertible into shares in the company; and

(b) securities of the company that are convertible into, or entitle the holder to subscribe for, shares in the company.

Those subsections apply to those debentures or securities as if they were shares of a separate class of the company, and a reference to a member or a holder of shares in those subsections is to be read accordingly.