

Guidance Note

# COMPULSORY ACQUISITION

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**TAKEOVERS  
PANEL**  
TE PAE WHITIMANA

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This Guidance Note sets out information explaining the compulsory acquisition process, when it applies and how it operates. In particular, this Guidance Note contains details of the various notices that must be sent in accordance with the compulsory acquisition process, the consideration payable for the outstanding securities and the objection rights that may apply for outstanding security holders.

In addition, Appendix A of this Guidance Note includes a flowchart depicting how the consideration payable for outstanding securities is determined.

## 1 Introduction

- 1.1 This Guidance Note explains the compulsory acquisition process in Part 7 of the Code. A compulsory acquisition is triggered when a shareholder becomes a “dominant owner” of a Code company, and is entitled to acquire all of the remaining shares in that company. Part 7 sets out:
- (a) the circumstances that trigger compulsory acquisition;
  - (b) the information to be contained in the notices the dominant owner must send, and the parties they are to be sent to;
  - (c) how the consideration payable to the remaining shareholders should be determined; and
  - (d) the rights of challenge available to the remaining shareholders, and the process for such challenges.

## 2 Dominant ownership

- 2.1 The Code defines a dominant owner (see rule 50) as a person, or persons acting jointly or in concert, who becomes the holder or controller of 90% or more of the voting rights in a Code company. Compulsory acquisition applies when this threshold is met. Typically, the compulsory acquisition threshold will be reached through acceptances of an offer, but the Code allows for other means – for example, through a “creeping” acquisition under rule 7(e). All routes to dominant ownership must be Code-compliant.
- 2.2 Once dominant ownership is reached, the dominant owner must:
- (a) require the outstanding security holders to sell their securities to the dominant owner; or
  - (b) provide the outstanding securities holders with the right to require the dominant owner to purchase their security holdings in entirety.

## 3 Notices

- 3.1 A dominant owner must send a dominant ownership notice (rule 51) and a compulsory acquisition notice (rule 54).

### **Dominant ownership notice**

- 3.2 Immediately on reaching dominant ownership, the dominant owner must send written notification of that fact to:
- (a) the outstanding security holders;
  - (b) the Code company;
  - (c) the Panel; and
  - (d) the licensed market operator (if applicable).<sup>1</sup>

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<sup>1</sup> Generally speaking, this means making an announcement via the NZX Market Announcement Platform.



3.3 The only requirement for the form of the dominant ownership notice is that it is in writing.<sup>2</sup>

### Compulsory acquisition notice

3.4 The dominant owner must send a compulsory acquisition notice to the outstanding securities holders (rules 54(2) and 54(3)) within 20 working days of:

- (a) the close of the offer, if dominant ownership was achieved by way of acceptances;<sup>3</sup> and
- (b) becoming the dominant owner, if this was achieved by another route – for example, through a “creeping” acquisition.

3.5 The dominant owner must deliver a copy of the notice immediately to:

- (a) the Registrar of Companies;
- (b) the Code company;
- (c) the licensed market operator (if applicable); and
- (d) the Panel.

3.6 The compulsory acquisition notice (rule 55) must:

- (a) state that the dominant owner holds or controls 90% or more of the voting rights in the Code company;
- (b) specify whether the dominant owner will either:
  - (i) acquire the outstanding securities; or
  - (ii) grant security holders the right to sell their securities to the dominant owner,(see paragraph 2.2 above);
- (c) specify the consideration to be provided to the outstanding security holders for the outstanding securities, or, if the offer by which dominant ownership was reached provided for alternative consideration options (rule 56A):
  - (i) the procedure for nominating an alternative consideration option; and
  - (ii) what happens if an outstanding security holder does not nominate an alternative consideration option;
- (d) set out the outstanding security holders’ rights under Part 7 of the Code, including any challenge rights (see paragraphs 6.1 to 6.6 below);
- (e) specify the date the acquisition notice is sent to the outstanding security holders;
- (f) provide an instrument of transfer for the outstanding securities;<sup>4</sup> and
- (g) specify the return address for the instrument of transfer.

## 4 Consideration

4.1 The consideration (the **Final Consideration**) that must be provided for the outstanding securities is either:

- (a) the consideration specified in the acquisition notice (the **Specified Consideration**); or
- (b) if challenge rights apply, the consideration determined by that process.

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<sup>2</sup> Written notices under the Code can, and in some cases must, be sent electronically – see rules 5A and 5B.

<sup>3</sup> This applies whether or not the dominant owner has also acquired equity securities under rule 36 of the Code (rule 54(2)).

<sup>4</sup> If the offer by which dominant ownership was reached provided for alternative consideration options (rule 56A), the instrument of transfer must provide a means for the outstanding security holder to nominate an alternative consideration option.



- 4.2 If challenge rights do not exist, or are not exercised, the Specified Consideration will become the Final Consideration.
- 4.3 When determining the Specified Consideration, the key threshold questions to consider are:
- (a) Has dominant ownership been obtained through a takeover offer, or by another route (such as using the Code's "creep" provisions)?
  - (b) Did the offeror receive acceptances for at least 50% of the relevant class of securities, not including any which were already held or controlled by the offeror or its associates (the **50% Acceptance Threshold**)?
  - (c) Did the offer include alternative consideration options?
  - (d) Did the offer include cash or a cash alternative?
- 4.4 The flowchart in **Appendix A** sets out how the Specified Consideration should be determined and whether it is capable of challenge.

## 5 Certified Fair and Reasonable Amount

- 5.1 In certain circumstances the Specified Consideration must be a cash sum which has been certified as fair and reasonable by an independent adviser (a **Certified Fair and Reasonable Amount**). See the flowchart attached as Appendix A for more information.
- 5.2 No minority discount can be applied when determining a Certified Fair and Reasonable Amount. In certifying a cash sum as fair and reasonable, the independent adviser must decide the aggregate value of all of the outstanding securities in the relevant class and then allocate that value pro rata across all the securities of that class (rule 57(4)).
- 5.3 For further information regarding a Certified Fair and Reasonable Amount, see paragraphs 5.3 to 5.7 of the [Guidance Note on Independent Advisers](#).

## 6 Challenge to the Specified Consideration

### General

- 6.1 Outstanding security holders have the right to challenge the Specified Consideration where the Specified Consideration was set as either:
- (a) a Certified Fair and Reasonable Amount (rule 57(1)(a)); or
  - (b) the cash sum, or cash alternative, under the preceding offer and the 50% Acceptance Threshold was not met (rule 57(1)(b)).
- 6.2 These challenge rights can be exercised only where, within 10 working days of the acquisition notice being sent, written objections are received by the dominant owner from outstanding security holders holding the lesser of:
- (a) 2% or more of the equity securities in the relevant class; or
  - (b) 10% or more of the outstanding securities in the relevant class.
- 6.3 If this threshold is met, the dominant owner must immediately engage an independent expert appointed by the Panel to determine the Final Consideration to be provided to the outstanding security holders.
- 6.4 The independent expert is required to specify a point valuation for the cash sum that is equal to the fair and reasonable value for the relevant security. This differs from the independent adviser's task of certifying a cash sum as fair and reasonable under rule 57(1)(a).
- 6.5 See paragraph 5.11 of the [Guidance Note on Independent Advisers](#) for further information regarding independent experts.



- 6.6 For the avoidance of doubt, the compulsory acquisition notice should clearly state whether the outstanding security holders have the right to challenge the Specified Consideration, and how these rights must be exercised.

### **Relevance of multiple classes (where rule 8(4) applies to an offer)**

- 6.7 If a full offer is made for both voting and non-voting securities, and there is a challenge by outstanding security holders to the specified consideration for non-voting securities, the determination should be made as prescribed by rules 57(1)(a) and (b) – i.e., by setting a fair and reasonable value for each applicable class of securities. This is the case despite the fact that rule 8(4) will have applied when the offer prices were initially set.
- 6.8 However, the offer price of the underlying securities may nonetheless be relevant for determining the fair and reasonable value of the other equity securities (for example, where the other equity securities derive their value from the voting securities as a result of conversion rights and the offer price is, in all the circumstances, an appropriate benchmark). In any event, it will be for the independent expert to assess what relevance, if any, it ascribes to any offer price in light of all relevant facts.
- 6.9 This approach may also apply in relation to a Certified Fair and Reasonable Amount.

## **7 Payment of Specified Consideration/Final Consideration**

### **Return of instrument transfer**

- 7.1 As noted at paragraph 3.6(f) above, the acquisition notice must be accompanied by an instrument of transfer for the outstanding securities. Whether the outstanding security holder returns the completed documents within the 15 working day deadline or not makes little difference to the outcome beyond timing:
- (a) If they are returned, the dominant owner has 5 working days to send the outstanding security holder the Specified Consideration or, if rule 56A applies, the consideration payable under that rule.
  - (b) If they are not returned, and the acquisition notice provides for a compulsory purchase by the dominant owner, the dominant owner must, within 5 working days of the expiry of the timeframe for returning the completed documents:
    - (i) execute the instrument of transfer and send it to the Code company;<sup>5</sup>
    - (ii) pay to the Code company any cash component of the Specified Consideration; and
    - (iii) where the Specified Consideration is, or includes, financial products:
      - (A) vest the financial products in the outstanding security holder; and
      - (B) send written confirmation that this has been done to the outstanding security holder and the Code company.
- 7.2 Where the Code company receives cash consideration (see paragraph 7.1(b)(ii) above), the Code company must:
- (a) deposit the cash in an interest-bearing trust account with a registered bank; and
  - (b) hold the cash on trust for the outstanding security holder.
- 7.3 The Code does not specify a timeframe at the expiry of which the Code company may stop holding the funds on trust but the Panel considers that the relevant provisions of the Unclaimed Money Act 1971 would apply. These allow the Code company to pay the money to the Inland Revenue Department (IRD) on behalf of the Crown. The former shareholder can then claim the funds from the **IRD**.

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<sup>5</sup> The instrument of transfer can be executed by the dominant owner or its agent (rule 61(1)(b)).



### Payment adjustments when the Final Consideration is fixed by independent expert

- 7.4 The Code requires payment of the Specified Consideration in the usual course, irrespective of whether there has been a challenge and an independent expert has been appointed with a mandate to revise the price, creating a difference between the Specified Consideration and the Final Consideration.
- 7.5 In this scenario, rule 62 of Code applies. This provides that:
- (a) where the Final Consideration exceeds the Specified Consideration, the dominant owner must immediately pay the balance to the outstanding security holders or the Code company,<sup>6</sup> and
  - (b) where the Final Consideration is lower than the Specified Consideration, the dominant owner may recover the excess paid from the outstanding security holders or the Code company.

## 8 Registration of dominant owner as holder of outstanding securities

- 8.1 The directors of the Code company must register the dominant owner or its nominee as the holder of the outstanding securities (rule 63) when:
- (a) **in a compulsory sale**, the Code company receives the instruments of transfer (and any other related documents) and is reasonably satisfied that the consideration:
    - (i) has been sent to the outstanding security holders in accordance with rule 60; or
    - (ii) has been dealt with in accordance with rule 61(2) or (3) (whichever applies); and
  - (b) **in a voluntary sale**, the Code company receives the instrument of transfer (and any other related documents) in accordance with rule 59, and is reasonably satisfied that the consideration has been sent to the outstanding security holders in accordance with rule 60.

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<sup>6</sup> Payment must be made in the same manner as the Specified Consideration stated in the acquisition notice (rule 62(1)).



## APPENDIX A Compulsory Acquisition Flowchart

Apply this flowchart independently to each class of equity securities to determine the Final Consideration for that class.

