

Guidance Note

CREEPING ACQUISITIONS

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**TAKEOVERS
PANEL**

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This Guidance Note provides information on the ability of a holder or controller of between 50% and 90% of the voting rights in a Code company to increase its control percentage by "creeping" under rule 7(e) of the Code.

1 Introduction

1.1 Rule 7 of the Code provides a number of mechanisms that enable a person, who would otherwise be prevented by rule 6 from doing so, to increase their control percentage. This Guidance Note addresses the mechanism in rule 7(e), the "creep" rule in the Code. The Guidance Note explains the effect of the rule and discusses its application to two special situations:

- (a) where voting rights are jointly held or controlled by two or more persons; and
- (b) where a group of associates each hold or control voting rights.

1.2 A holder or controller of between 50% and 90% of the voting rights in a Code company can increase its control percentage by "creeping" under rule 7(e) of the Code. [To be clear, it is only the person holding or controlling more than 50% \(and less than 90%\) of the voting rights that may rely on rule 7\(e\). Associates of that person cannot rely on rule 7\(e\) to increase their control percentage.](#)

1.3 Rule 6(1) sets of the fundamental rule of the Code. It states:

Except as provided in rule 7, a person who holds or controls—

- (a) *no voting rights, or less than 20% of the voting rights, in a code company may not become the holder or controller of an increased percentage of the voting rights in the code company unless, after that event, that person and that person's associates hold or control in total not more than 20% of the voting rights in the code company;*
- (b) *20% or more of the voting rights in a code company may not become the holder or controller of an increased percentage of the voting rights in the code company.*

1.4 Rule 7(e) provides that:

A person may become the holder or controller of an increased percentage of the voting rights in a code company

–

...

- (e) *if –*
 - (i) *the person holds or controls more than 50%, but less than 90% of the voting rights in a code company; and*
 - (ii) *the resulting percentage of the total voting rights in the code company that is held or controlled by the person does not exceed by more than 5 the lowest percentage of the total voting rights in the code company that was held or controlled by the person in the 12-month period ending on, and inclusive of, the date of the increase.*

1.5 Accordingly, this rule allows a person to increase their holding by no more than 5% of the Code company's total voting rights in a 12-month period. The increase is to be calculated by reference to the lowest holding during the last 12 months.



- 1.6 The effect is that a person cannot take advantage of rule 7(e) if their control percentage has already increased by 5% or more from its lowest point over the last year, regardless of how that increase in control percentage came about.
- 1.7 For example, if a shareholder's control percentage of a Code company went from 0% to 75% by a shareholder-approved allotment made on 31 March 2013, that shareholder is not able to increase its control percentage again until after 31 March 2014 (unless it made a Code offer or obtained shareholder approval). The shareholder could then move up to 80%.
- 1.8 It is worth noting that if a person has become (by means of creeping under rule 7(e) or by any other of the exceptions in rule 7) the holder or controller of 90% or more of the voting rights in a Code company, that person may compulsorily acquire (or may be required by the remaining security holders to purchase) the remaining voting rights under Part 7 of the Code.

2 Special scenarios: joint holders or controllers and associates

Joint holders or controllers

- 2.1 The Panel considers that where more than 50% (but less than 90%) of the voting rights in a Code company are jointly held or controlled by two or more persons, those persons may together rely on rule 7(e) in respect of an increase in the percentage of voting rights that they hold or control jointly in a Code company. However, it is only in respect of their jointly held or controlled shares that they can together creep under rule 7(e).

Example 1

Person A and person B jointly hold as trustees of a family trust 51% of the voting rights in XYZ Ltd (a Code company).

A and B may jointly acquire a further 5% of shares in XYZ Ltd (following the expiry of a period of 12 months from the date on which they acquired 51% of the voting rights).

However, if A acquired any further shares on its own account, A would breach the fundamental rule by virtue of being an associate with B (i.e. because B holds or controls 51% of the XYZ shares). A cannot alone rely on rule 7(e) because A does not alone hold or control more than 50% of the voting rights in XYZ Ltd.

Example 2

Person C and person D form a company (HoldCo), which acquires (in compliance with the Code) 51% of the shares in FGH Limited, a Code company. C and D control HoldCo through their each holding 50% of HoldCo's shares and both being HoldCo's directors.

HoldCo may acquire a further 5% of shares in FGH Ltd under the creep rule (following the expiry of a period of 12 months from the date of acquisition of the 51% of the voting rights) because it holds the relevant percentage of voting rights in FGH Ltd. As a result of HoldCo's creeping, C and D also increase their control of voting rights in FGH Ltd. Rule 7(e) allows them to do so.

Alternatively, C and D, as the joint controllers (through HoldCo) of the 51% of the voting rights in FGH Ltd may jointly acquire a further 5% of shares directly, as holders. However, neither C nor D can increase their holding or controlling of FGH Ltd voting rights under rule 7(e) alone, because they are associates of each other and, as joint controllers of 51% of FGH Ltd, they are each considered to control 51% of the FGH Ltd voting rights."



2.2 Where joint controllers of voting rights in a Code company wish to rely on rule 7(e) to increase their joint control percentage, they would be expected to be able to demonstrate effective joint control of the voting rights that constitute more than 50% for the purposes of rule 7(e).

Associates

2.3 Although a person may have influence over the voting rights held or controlled by that person's associate, the situation is not the same as where those voting rights are jointly held or controlled by two or more persons. Accordingly, rule 7(e) does not enable permit associates to "pool" aggregate their respective interests in a Code company in order to take advantage of the "creep" exception. If Person A and Person B are associates, but only Person A holds or controls more than 50%, only Person A (and not Person B) may rely on rule 7(e). This is illustrated in the following example.

Rural Equities Limited

2.3.4 H&G Limited (**H&G**) was the majority shareholder in Rural Equities Limited (**REL**), an unlisted Code company. At all relevant times H&G held or controlled more than 50% of the voting rights in REL. H&G was associated with certain REL shareholders, each of which held or controlled less than 1% of the voting rights in REL.

2.5 Between September 2011 to March 2019, REL carried out a number of share buybacks (the **Buybacks**) in which H&G and its associates did not participate, resulting in their control percentages increasing after each buyback.¹ As the aggregate control percentage of H&G and its associates increased by less than 5% in any 12-month period, H&G and its associates believed that they could rely on rule 7(e) of the Code in respect of their individual increases.

2.4 H&G, which held or controlled more than 50% of the voting rights in REL, was permitted to rely on rule 7(e) to increase its voting rights by up to 5% over each 12-month period.

2.6 However, each of H&G's associates neither held nor controlled more than 50% of the voting rights of REL. H&G's associates were not permitted to aggregate their holdings with H&G's holding in order to rely on rule 7(e), and had breached the Code by increasing their individual voting control as a result of the Buybacks.²

2.5

This means that care should be taken to avoid a breach of rule 6(1)(a), as associates' voting rights are aggregated for the purpose of rule 6(1)(a).

¹ H&G and its associates had not reduced their voting control following each of the Historic Buybacks, as would be required to comply with clause 5 of the Takeovers Code (Class Exemptions) Notice (No 2) 2001 (the **Class Exemptions Notice**). Nor had shareholder approval been obtained as would be required to comply with clause 4 of the Class Exemptions Notice.

² H&G's associates accepted that they had inadvertently breached the fundamental rule by increasing their individual voting control. After reducing their control percentage, they ultimately sought exemption relief, which was granted under the See Takeovers Code (Rural Equities Limited) Exemption Notice 2020. For further guidance on this exemptions, see the *Guidance Note on Exemptions*.



Example 3

Person Y holds or controls 10% of the voting rights in a Code company, ABC Limited. Person Z holds or controls 52% of the voting rights in ABC Limited. Y and Z are associates under the Code. Another shareholder wishes to sell voting securities equivalent to 2% of ABC Limited.

Y cannot acquire the 2% without breaching rule 6(1)(a) absent an exemption, or unless one of the other exceptions in rule 7 applies. This is because, after the increase, Y and their associate, Z, will hold or control 64% in aggregate. This is in excess of the 20% limit set out in rule 6(1)(a).

Y cannot aggregate their voting rights with Z (to reach a pre-increase figure of 62%) to acquire the 2% in reliance on rule 7(e). Y alone holds or controls 10% of the voting rights prior to the increase, which does not meet the requirements of rule 7(e)(i).

Assuming that there has been no change in the percentage of voting rights in ABC Limited held or controlled by Z over the previous 12 months, Z may rely on rule 7(e) to acquire up to 5%. Accordingly, Z alone can acquire the 2%. This is because:

(a) — Z (with 52%) holds or controls more than 50% but less than 90% of the voting rights prior to the increase; and

(b) — after the increase, Z will hold or control 54%, which is within the 5% creep limit allowed under rule 7(e).