

**Guidelines on conflict of interest of members and chairmen of the Takeovers and Mergers Panel (“Panel”) and the Takeovers Appeal Committee (“Appeal Committee”)  
(collectively referred to as the “Panels”)**

**Introduction**

1. The Securities and Futures Commission (“**Commission**”) has adopted these guidelines on conflict of interest to ensure that the Panels and their members and chairmen carry out their functions and are seen to carry out their functions in an independent and impartial manner. Where the context allows or requires, references in these guidelines to “member” includes the Chairman. However, the guidelines contain different procedures for dealing with conflict depending on whether the conflict relates to the Chairman or a member.
2. Members will also be aware of the avoidance of conflict of interest obligations in section 379(3) of the Securities and Futures Ordinance (Cap 571).
3. A conflict of interest may be regarded as being either a “*presumed conflict of interest*” or an “*apparent conflict of interest*”.

**Presumed conflict of interest**

4. A “*presumed conflict of interest*” occurs when a member has a **direct** pecuniary or proprietary interest in proceedings to which he is assigned that is presumed to influence the exercise of his judgment in relation to those proceedings. Typically this will arise where a member is a shareholder in one of the parties to the proceedings. However, the member will not be disqualified if one of the exceptions outlined in paragraph 5 below applies or all the parties confirm they do not object to the member’s participation. In determining whether any of the exceptions in paragraph 5 below applies, the Chairman will ascertain the relevant facts and, if necessary, make enquiries of that member.
5. A member will not be disqualified by his pecuniary or proprietary interest if, in the Chairman’s opinion:
  - (a) the connection between the member’s interest and the outcome of the proceedings is remote or tenuous;
  - (b) the pecuniary interest will only arise upon the occurrence of an uncertain sequence of events; or
  - (c) the interest is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member.

**Apparent conflict of interest**

6. In assessing whether or not an “*apparent conflict of interest*” exists, the test is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a **real possibility** that the member was biased. The observer is taken to be a reasonable person who is neither complacent nor unduly sensitive or suspicious. The crucial matter is not what is in the mind of the relevant member but the *appearance* that the facts give rise to.

7. The question of whether an “*apparent conflict of interest*” exists is a matter for the Chairman to determine. Before he applies the test outlined in paragraph 6, the Chairman will ascertain the relevant facts and, if necessary, make enquiries of that member. The member’s explanation is merely one matter to be considered by the Chairman to determine from the view-point of the fair-minded observer whether an “*apparent conflict of interest*” exists. The facts to be considered may include, but are not limited to, the following:
  - (a) the existence, significance and value of any financial interest of the member’s spouse, family members or any company controlled by any of them in the outcome of the proceedings;
  - (b) the existence of a professional, business or close personal relationship between the member or his firm and any person appearing before the Panels and whether that relationship is relevant to the subject matter of the proceedings; or
  - (c) the existence, significance and value of any financial interest of the member’s firm or employer in the outcome of the proceedings.

### **Conflict of interest procedures for members and parties**

8. If a member has an interest or relationship which can arguably be said to give rise to a “*presumed conflict of interest*” or an “*apparent conflict of interest*” in relation to proceedings to which he is assigned, he must inform the Chairman and Secretary at the earliest possible opportunity.
9. A member’s duty of disclosure is a continuing obligation throughout the proceedings. A member should make further disclosure if new circumstances arise after his previous disclosure.
10. If a party to proceedings has any conflict of interest concern relating to the participation of a member or the Chairman, he must inform the Secretary at the earliest possible opportunity and provide the Secretary with details of the potential conflict. The Secretary will pass all relevant information to the Chairman for his consideration.
11. Where the conflict of interest concern relates to the Chairman, the procedures in paragraphs 17 to 20 below will be followed.
12. When he considers any conflict of interest concern, the Chairman may make any enquiries he considers necessary and consult members participating in the proceedings.
13. Where conflict concerns have been raised or facts disclosed pursuant to paragraphs 8 to 10, the Chairman will either (i) direct the member to cease participating with immediate effect and the Secretary will inform the parties and members accordingly; or (ii) disclose the concerns or relevant facts to the parties and enquire whether they object to the member’s participation.
14. If, in the case of paragraph 13(ii), all the parties confirm in writing that they do not object to the member’s participation, the member may continue to participate in the proceedings.
15. In any case where the Chairman has disclosed the concerns or relevant facts to the parties and objections have been raised, the Chairman will proceed to determine

whether there is a “*presumed conflict of interest*” or an “*apparent conflict of interest*”. He will take the objections raised into consideration when making the determination.

16. If, pursuant to paragraph 15, the Chairman determines there is no “*presumed conflict of interest*” or that an exception in paragraph 5 applies and/or that there is no “*apparent conflict of interest*”, the member may continue to participate. If the Chairman determines there is a “*presumed conflict of interest*” or an “*apparent conflict of interest*”, the Chairman will direct the member to cease participating with immediate effect. The Secretary will notify the members and parties of the Chairman’s determination.

#### **Conflict of interest procedures for Chairman**

17. Where conflict concerns have been raised or facts disclosed regarding the Chairman pursuant to paragraphs 8 to 10, the Chairman will either (i) cease participating with immediate effect; or (ii) direct the Secretary to disclose the concerns or relevant facts to the parties and enquire whether they object to the Chairman’s participation.
18. If, in the case of paragraph 17(ii), all the parties confirm in writing that they do not object to the Chairman’s participation, he may continue to participate in the proceedings.
19. In any case where the Secretary has disclosed the concerns or relevant facts to the parties and objections have been raised, a member of the Disciplinary Chair Committee (“**DCC Member**”) will proceed to determine whether there is a “*presumed conflict of interest*” or an “*apparent conflict of interest*”. The DCC Member will take the objections raised into consideration when making the determination. The DCC Member may make any enquiries he considers necessary and may consult members participating in the proceedings.
20. If, pursuant to paragraph 19, the DCC Member determines there is no “*presumed conflict of interest*” or that an exception in paragraph 5 applies and/or that there is no “*apparent conflict of interest*”, the Chairman may continue to participate. If the DCC Member determines there is a “*presumed conflict of interest*” or an “*apparent conflict of interest*”, he will direct the Chairman to cease participating with immediate effect. The Secretary will notify the members and the parties of the DCC Member’s determination.

#### **Conflict of interest procedures for the DCC Member who is determining whether the Chairman has a conflict**

21. If the DCC Member has an interest or relationship which can reasonably be said to give rise to a “*presumed conflict of interest*” or an “*apparent conflict of interest*” in determining whether the Chairman has a conflict he will either (i) cease participating with immediate effect; or (ii) inform the Secretary at the earliest possible opportunity. In the case of paragraph (i) another DCC Member (“**second DCC Member**”) will be asked to determine whether the Chairman has a conflict in accordance with the procedure set down at paragraphs 19 and 20. In the case of paragraph (ii), the Secretary will pass all relevant information to the second DCC Member for his consideration.
22. If a party to proceedings has any conflict of interest concern relating to the DCC Member determining whether the Chairman has a conflict, he must inform the Secretary at the earliest possible opportunity and provide the Secretary with details of the potential conflict. The Secretary will pass all relevant information to the second DCC Member for his consideration.

23. When he considers any conflict of interest concern, the second DCC Member may make any enquiries he considers necessary and consult members participating in the proceedings.
24. Where conflict concerns have been raised or facts disclosed pursuant to paragraphs 21 to 23, the second DCC Member will either (i) direct the DCC Member to cease determining whether the Chairman has a conflict, with immediate effect and the Secretary will inform the parties and members accordingly; or (ii) disclose the concerns or relevant facts to the parties and enquire whether they object to the DCC Member's determination of the matter.
25. If, in the case of paragraph 24(ii), all the parties confirm in writing that they do not object to the DCC Member's determination, the DCC Member may continue to determine whether the Chairman has a conflict.
26. In any case where the second DCC Member has disclosed the concerns or relevant facts to the parties and objections have been raised, the second DCC Member will proceed to determine whether there is a "*presumed conflict of interest*" or an "*apparent conflict of interest*". He will take the objections raised into consideration when making the determination.
27. A DCC Member will not be disqualified by having a pecuniary or proprietary interest in determining whether the Chairman has a conflict if, in the second DCC Member's opinion:
  - (a) the connection between the DCC Member's interest and the outcome of the proceedings is remote or tenuous;
  - (b) the pecuniary interest will only arise upon the occurrence of an uncertain sequence of events; or
  - (c) the interest is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the DCC Member.
28. If, pursuant to paragraph 26, the second DCC Member determines there is no "*presumed conflict of interest*" or that an exception in paragraph 27 applies and/or that there is no "*apparent conflict of interest*", the DCC Member may continue to determine whether the Chairman has a conflict. If the second DCC Member determines there is a "*presumed conflict of interest*" or an "*apparent conflict of interest*", the second DCC Member will direct the DCC Member to cease to determine whether the Chairman has a conflict with immediate effect. The Secretary will notify the members and parties of the second DCC Member's determination. The second DCC Member will then proceed to determine the question of whether the Chairman has a conflict in accordance with the procedure set down at paragraphs 19 and 20.