

THE SINGAPORE CODE ON TAKE-OVERS AND MERGERS (“CODE”)

On 9 April 2012, the amended Singapore Code on Take-overs and Mergers came into force. Below is a summary of the key changes to the Code:

1. ENFORCEMENT POWER OF THE SECURITIES

INDUSTRY COUNCIL

Prior to the amendments to the Code, if the Securities Industry Council (“SIC”) finds that there has been a breach of the Code, the SIC may have recourse to private reprimand or public censure or, in a flagrant case, to further action designed to deprive the offender temporarily or permanently of its ability to enjoy the facilities of the securities market. If SIC finds evidence to show that a criminal offence has taken place whether under the Companies Act (Cap 50), the Securities and Futures Act (Cap 289) or under the criminal law, the SIC will refer the matter to the appropriate authority.

On this aspect, the Code was amended to achieve the following:

- (a) clarify that SIC has the discretion to impose the sanctions stated above;
- (b) empower the SIC to require offending advisers to abstain from taking on Code-related work for a stated period;
- (c) empower the SIC to make a ruling for monetary compensation against a person who is found to have been in breach of certain rules under the Code. Such rules include but not limited to the following:
 - (i) Rule 10 – No special deals
 - (ii) Rule 14 – Mandatory offer
 - (iii) Rule 15 – Voluntary offer
 - (iv) Rule 16.4(g) – Partial offer for a company with more than one class of equity share capital
 - (v) Rule 16.4(h) – Partial Offer for outstanding instruments convertible into, rights to subscribe for and options in respect of, securities which carry voting rights.
 - (vi) Rule 17 – Type of consideration required

(vii) Rule 18 – Comparable offers for difference classes of capital

(viii) Rule 19 – Appropriate offers to holders of convertibles, etc

(ix) Rule 20.4 – Entitlement to revised consideration

(x) Rule 21 – Purchases at above offer price

(xi) Rule 33.2 – 6 months delay before acquisition at above offer price

2. REITS AND BUSINESS TRUSTS

SIC had previously issued practice statements to extend the Code to accommodate investment structures such as REITS and Business Trusts.

The Amended Code codifies the practice statements concerning REITS and Business Trusts issued previously and clarifies the wordings used in the Code to address the relationships of the parties in a REIT or Business Trusts.

Further, the amended Code also provides that a dividend forecast of a REIT would normally be regarded as a profit forecast.

3. DISCLOSURE OF INTERESTS

The amended Code provides that, apart from the items in Rule 3.5 (a) to (e) of the Code, when a firm’s intention to make an offer is announced, the announcement must also disclose the number and percentage of any relevant securities in the offeree company which the offeror or any person acting in concert with it has:

- (a) granted a security interest to another person, whether through a charge, pledge or otherwise;
- (b) borrowed from another person (excluding borrowed securities which have been on-lent or sold); or
- (c) lent to another person.

4. LONG OPTIONS AND DERIVATIVES

For the purpose of Rule 14 (Mandatory Offer), a person who has acquired or written any option or derivative which causes him to have a long economic exposure, whether absolutely or conditional, to changes in the price of securities will normally be regarded as having acquired those securities.

5. DISCLOSURE BY "ASSOCIATES"

The definition of "associates" is amended to include a holder of 5% or more of the equity share capital of the offeror or offeree company.

6. DISCLOSURE OF DEALINGS DURING THE OFFER

The amended Code provides that, in respect of disclosure of dealings pursuant to Rule 12, a disclosure of dealings is only required, if the person dealing in convertible securities, warrants, options and derivatives, owns or control 5% or more of the class of securities which is the subject of the instruments.

Disclosure of dealings in such instruments is limited to those which cause the holder to have a long economic exposure to the underlying securities. A person who has a long economic exposure to changes in the price of a security would benefit economically if the price of the security goes up and will suffer economically if the price of that security goes down.

7. SHARE BUY BACK

Section 3(a) of Appendix 2 of the amended Code provides that where a listed company buy back shares via market acquisition under Section 76E of the Companies Act or an off market acquisition on an equal access scheme under Section 76C of the Companies Act, directors and persons acting in concert with them will be exempted from the requirement to make a mandatory offer under Rule 14.

8. JOINT OFFERORS

A new note 6 to Rule 10 was incorporated into the amended Code.

The new Note 6 provides that Rule 10 (No Special Deals) is not breached when two or more persons come together to form a consortium on such terms and in such circumstances that each of them can be considered to be a joint offeror, if one (or more) of them is already a shareholder of the offeree company. Subject to that, joint offerors may make arrangements between themselves regarding the future membership, control and management of the business being acquired.

The new Note 6 also lays down factors that SIC will take into consideration in determining whether a person is a joint offeror.

9. COLLECTIVE SHAREHOLDERS ACTION

A new note 3 to Rule 14.1 has been incorporated into the amended Code. The new note 3 provides that SIC will normally presume shareholders who requisite or threaten to requisite a board control-seeking proposal at a general meeting, together with their supporters as at the date of requisition or threat, to be acting in concert with each other and with the proposed directors. Subsequent acquisitions of interest in shares by any member of the group could give rise to an obligation to make a general offer.

The new Note 3 also lays down factors that SIC will take into consideration in determining whether a proposal is board control-seeking.

10. MERGER PROCEDURES OF THE COMPETITION

COMMISSION OF SINGAPORE

The amended Code introduces a new Appendix 3 to provide guidance on an offer which is subject to the merger provisions of the Competition Act as well as the Code. In such cases, parties to the take-over offer will have to comply with the requirements under both the Code and the Competition Act.

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