

REGULATION UPDATE

8 July 2015

CONSULTATION ON AMENDMENTS TO THE SINGAPORE CODE ON TAKE- OVERS AND MERGERS

INTRODUCTION

On 6 July 2015, the Securities Industry Council (“SIC”) published a consultation paper on proposed amendments to the Singapore Code on Take-overs and Mergers (“Code”). The Code was last reviewed by the SIC in 2012, and many of the proposed amendments discussed in the consultation paper are on account of market and practice developments that have occurred since then.

The key proposed changes to the Code discussed in the consultation paper include:

- (a) clarification that in a competitive offer scenario, all offerors will be bound by the timetable established by the despatch of the last competing offer document;
- (b) adoption of a default auction procedure in a competitive offer scenario if a competitive situation still exists in the later stages of the offer;
- (c) guidance on when a potential competing offeror has to clarify its intentions;

- (d) clarifications regarding the conduct of the board of the offeree company that:
 - (i) soliciting a competing offer or running a sale process does not amount to frustration of an existing offer; and
 - (ii) an offeree board may consider sharing available management projections and forecasts with the independent financial adviser;
- (e) requiring the prompt disclosure of any material change to information previously published in an offer;
- (f) clarifications regarding the standards that pre-conditions have to meet with respect to pre-conditional voluntary offers;
- (g) allowing an offeree company to seek approval from the SIC for the posting of the offeror’s offer document at an earlier date in a pre-conditional offer scenario; and
- (h) clarifications regarding how the consideration payable for different classes of shares (such as preference shares) should be determined.

The closing date for submission of comments on the consultation paper to the SIC is **6 August 2015**.

ALIGNMENT OF OFFER TIMETABLES

Rule 22.9 of the Code provides that the final day on which an offer can become unconditional as to acceptances is usually 60 days after the posting of the offer document (“Day 60”). This 60 day time limit is to prevent the offeree company from being under a prolonged “siege”. In the case of competing offers, the offeree company would also be under “siege” from the second offeror. It has been the SIC’s practice to allow the first offeror to align its offer timetable with that of the second offeror in a competitive offer scenario.

The SIC now proposes to codify this in a new Note on Rule 22.9 of the Code which will provide that all offerors will be bound by the timetable established

by the despatch of the last competing offer document.

NEW AUCTION PROCEDURE

The consultation paper proposes a new default auction procedure to be introduced into the Code. This auction procedure is to apply where a competitive situation still persists at the later stages of an offer period (*ie* competing offerors have not declared their respective final offers). The auction procedure will apply if such a stalemate persists till the 46th day following the posting of the offer document ("**Day 46**") (this being usually the final date which an offer can be revised).

The key features of the auction procedure include the following:

- (a) the auction will comprise five rounds of bidding, with one round of bidding taking place each day over five business days immediately following Day 46;
- (b) either or both of the competing offerors may announce a revised offer in the 1st round of the auction;
- (c) in the 2nd, 3rd and 4th rounds of the auction, a competing offeror may only announce a revised offer if the other offeror has announced a revised offer in the previous round;
- (d) if the auction enters the 5th (*ie* final) round, both competing offerors may announce a revised offer in this last round;
- (e) in the 5th (*ie* final) round of the auction, an offeror may submit a revised offer subject to the condition that such revised offer will be announced only if the other competing offeror also submits a revised offer;
- (f) if on any day of the auction there are no revised offers announced, the auction will end;
- (g) a revised offer need not be an increment over the last offer made by the other competing offeror; and

- (h) formula offers (*ie* where the consideration is calculated by reference to a formula that is determinable by reference to the value of a revised offer by the other competing offeror) are prohibited, but new forms of consideration (*eg* shares in an offeror) will be allowed.

The competing offerors and their concert parties also cannot:

- (a) during the auction period:
 - (i) make any announcement which could reasonably be expected to affect the orderly operation of the auction procedure; or
 - (ii) deal in the relevant securities of the offeree company or take any steps to procure an irrevocable commitment or letter of intent from the shareholders of the offeree company (in relation to either competing offeror's offer), or to amend, vary, update or replace any irrevocable commitment or letter of intent previously procured; or
- (b) between the end of the auction procedure and the end of the offer period, acquire interests in shares of the offeree company, if such acquisitions would cause it to have to revise its offer.

The new auction procedure is also to apply where an alternative procedure cannot be agreed between the competing offerors and the offeree company.

It should be noted that the auction procedure is intended to achieve finality and an orderly conclusion to the competitive situation in an open and transparent manner. It is not designed to necessarily identify a winner with the highest bid (since a competing offeror need not make a revised offer that is higher than that of the other offeror). Instead the consultation paper mentions that its goal is to ensure that shareholders can decide on the outcome of competitive situation with the benefit of knowing each competing offeror's final bids.

POTENTIAL OFFEROR TO CLARIFY INTENTIONS

The consultation paper mentions that under General Principal 10 of the Code (which requires sufficient information be provided to offeree company shareholders for them to reach an informed decision on an offer), and also in order not to disturb the existing tactical balance between an offeror who has made an offer (“Offeror 1”) and a potential competing offeror (“Offeror 2”), the SIC may require Offeror 2 to clarify its intention by either:

- (a) announcing a firm intention to make an offer; or
- (b) making a no intention to bid statement, (ie “put up or shut up”).

The above would apply if Offeror 2 becomes the subject of a possible offer announcement.

The SIC now proposes that Offeror 2 must clarify its intention by the 53rd day from the date Offeror 1 posts its offer document (“Day 53”). The final day by which Offeror 1 may revise its offer is Day 46, and if it does so, Offeror 2 will then have seven days to consider Offeror 1’s final offer and finalise the terms of its own offer. Nevertheless, the SIC will retain flexibility to impose an earlier or later deadline where appropriate. The SIC mentioned that this may increase the prospects of the offeree company shareholders receiving a competing offer.

OFFEREE BOARD CONDUCT DURING OFFER

The following changes have been proposed with the aim of encouraging offeree boards to be more pro-active in safeguarding shareholders’ interests.

The SIC proposes to clarify that Rule 5 of the Code (which prohibits actions that may frustrate a *bone fide* offer) should not prevent the solicitation by an offeree company’s board of a competing offer or the running of a sale process as the original offer would still be available for shareholders’ consideration.

The SIC also proposes that the Code be amended to provide that the offeree board may consider sharing available management projections and forecasts with the offeree company’s independent financial adviser (“IFA”) for the purpose of the IFA’s advice on the offer. This is so such information can be taken into account in the IFA’s advice on the offer.

MATERIAL CHANGES IN INFORMATION

Currently Note 1 on Rule 8.1 of the Code requires that any material changes to information published previously by the relevant company must be included in the next document published. However it was noted that this may leave a time gap between the occurrence of the material change and its disclosure. Accordingly, the SIC is proposing to amend Note 1 on Rule 8.1 to require the prompt announcement of material changes to information previously published. Any new material information is also to be promptly announced.

The SIC may require a document setting out such information to be sent to shareholders of the offeree company. A paid press notice may also be needed, and the SIC is proposing to clarify that “paid press notice” for the purposes of the Code refers to a paid advertisement in two leading English-language national newspapers published daily and circulating generally.

STANDARDS REGARDING PRE-CONDITIONS IN PRE-CONDITIONAL OFFERS

The Code currently does not prescribe requirements with respect to pre-conditions to a voluntary offer, the satisfaction of which would then oblige an offeror to announce a firm intention to make a voluntary offer. However in practice, the SIC requires such pre-conditions to meet the standards set-out in Note 1 on Rule 14.2 relating to conditional agreements and put-call option agreements.

The SIC now proposes to codify its practice by imposing similar standards on pre-conditions in a pre-conditional voluntary offer. Such standards would require that:

- (a) the pre-conditions should be stated clearly in the announcement of the pre-conditional offer;
- (b) the pre-conditions should be objective and reasonable;
- (c) the announcement of the pre-conditional offer must specify a reasonable period for the fulfilment of the pre-conditions failing which the offer will lapse; and
- (d) no pre-condition should be relied upon to cause the offer to lapse unless:
 - (i) the offeror has demonstrated reasonable efforts to fulfil the conditions within the time period specified; and
 - (ii) the circumstances that give rise to the right to rely upon the conditions are material in the context of the proposed transaction.

POSTING OF OFFER DOCUMENT FOR PRE-CONDITIONAL OFFERS

Rule 22.1 of the Code provides that an offeror may only post its offer document containing its offer between 14 to 21 days following the date of the offeror's announcement of its firm intention to make an offer. The prohibition against the offeror posting the offer document earlier ("**14 Day Prohibition**") is to provide sufficient time for the preparation of the offeree circular (containing the offeree board's recommendation and the IFA's advice). The offeree circular has to be despatched within 14 days from the date of posting of the offer document.

However in a pre-conditional offer scenario, there may be a long time gap between: (a) the date the offeror announces the pre-conditional offer; and (b) the date the offeror announces its firm intention to make an offer (*ie* the date all the relevant pre-conditions have been satisfied). In such a case, the offeree company would have notice of the offer and its terms for some time, and the SIC noted that the 14 Day Prohibition may unnecessarily prolong the offer period. The SIC therefore proposes to introduce a new Note on Rule 22.1 to

allow the offeree company to seek approval for the posting of the offer document at an earlier date in the case of pre-conditional offers.

COMPARABLE OFFERS FOR DIFFERENT CLASSES OF SHARES

Rule 18 of the Code provides that where a company has different classes of shares, a comparable offer must be made for each class. Note 1 on Rule 18 currently provide that the offeror has to justify the ratio of the offer values to the SIC in advance. The SIC is now proposing to adopt the approach taken in the UK's Takeover Code that reference be made to market prices in determining the ratio of offer values as this provides certainty to market participants as to the appropriate comparable offer price.

Accordingly, the SIC proposes to amend Note 1 on Rule 18 to include statements to the effect that:

- (a) the SIC will normally accept the ratio of the offer values to be equal to the ratio of the simple average of daily volume weighted average traded prices of the relevant equity shares over the course of six months (three months in the case of voluntary offers) preceding the start of the offer period; and
- (b) with respect to cases where traded prices are not available, the SIC will have regard to all relevant circumstances including the rights attached to each class of shares.

OTHER AMENDMENTS AND CONCLUSION

Aside from the amendments highlighted above, the SIC's consultation paper also proposes other changes to the Code, including amendments to streamline or clarify certain practices or provisions. For example, the SIC is proposing to replace the ten-calendar day period currently provided under Rule 30 of the Code for an offeror to make payment and settle acceptances, with a seven business day payment period (which is in line with the practice in Hong Kong).

As alluded to above, many of the various changes proposed in the consultation paper are on account

of recent market developments as well as developments in international practice. The proposed changes can therefore be considered timely and helpful in ensuring a well regulated takeover market in Singapore that is also aligned to current market and international regulatory practice.

REFERENCES

Please click on the following link to access the document.

Consultation Paper on Revision of the Singapore Code on Take-overs and Mergers

If you have any questions or comments on this article, please contact:



Gary Pryke
Managing Director, Corporate & Finance
T: +65 6531 4104
E: gary.pryke@drewnapier.com



Ralph Lim
Co-Head, Mergers & Acquisitions
T: +65 6531 2362
E: ralph.lim@drewnapier.com



Sandy Foo
Director, Corporate & Finance
T: +65 6531 4118
E: sandy.foo@drewnapier.com



Farhana Siddiqui
Director, Corporate & Finance
T: +65 6531 2258
E: farhana.siddiqui@drewnapier.com



Lam Shiao Ning
Director, Corporate & Finance
T: +65 6531 2278
E: shiaoning.lam@drewnapier.com



Benedict Teo
Director, Corporate & Finance
T: +65 6531 2380
E: benedict_lip.teo@drewnapier.com



Sean Ng
Director, Corporate & Finance
T: +65 6531 2724
E: sean.ng@drewnapier.com



Maryam Menon
Director, Corporate & Finance
T: +65 6531 2239
E: maryam.menon@drewnapier.com

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Drew & Napier LLC
10 Collyer Quay
#10-01 Ocean Financial Centre
Singapore 049315

www.drewnapier.com

T : +65 6535 0733
T : +65 9726 0573 (After Hours)
F : +65 6535 4906