

# SECURITIES INDUSTRY COUNCIL

(“SIC” OR THE “COUNCIL”)

## PRACTICE STATEMENT ON

### DIRECTORS MAKING RECOMMENDATIONS ON AN OFFER

#### Introduction

In a take-over situation, where announcements or documents, such as recommendations on an offer, are to be issued by the offeree company to its shareholders the directors of the offeree company under the Singapore Code on Take-overs and Mergers (“the Code”) have certain responsibilities.

#### The Relevant Rules

2 Rule 8.3 requires each document or advertisement addressed to shareholders and each announcement issued in connection with an offer to state that the directors of the company issuing the document or advertisement (including any who may have delegated detailed supervision of the document, advertisement or announcement) have taken all reasonable care to ensure that the facts stated and all opinions expressed therein are fair and accurate and, where appropriate, no material facts have been omitted and also state that they jointly and severally accept responsibility accordingly. If it is proposed that any director should be excluded from such statement, Council’s consent is required. Under Note 1 on Rule 8.3, an application for such consent may be made to the Council by or on behalf of the director concerned, stating clearly the reasons for the application.

3 Rule 24.1(a) states that the circular issued by the board of directors of the offeree company should indicate whether or not the board recommends to shareholders the acceptance or rejection of take-over offer(s) made, or to be made, by the offeror, and Rule 24.1(b) states that the board of the offeree company must obtain competent independent advice on any offer and the substance of such advice must be made known to its shareholders in the offeree board circular.

4 Note 3 on Rule 24.1<sup>1</sup> states that directors who have an irreconcilable conflict of interests and those who have been exempted by the Council from making recommendations to shareholders on an offer should not join with the remainder of the board in the expression of its views on the offer. Note 1 on Rule 8.3<sup>1</sup> provides guidance on when Council would normally exempt a director from the requirement to make a recommendation on an offer. Rule 6.2<sup>1</sup> states that directors who believe that they may face conflicts of interests in situations other than those set out in Note 1 on Rule 8.3 should consult the Council on whether it is appropriate for them to assume responsibility for any recommendations on the offer that the board may make to shareholders.

#### **Purpose of the Rules**

5 The rules are intended to ensure that offeree company shareholders receive unbiased advice from directors who do not face any conflict of interests. This is particularly important where the offer is a management buy-out or similar transaction or is being made by or with the co-operation of the existing controlling shareholder or group of shareholders.

### **Application of the Rules**

6 In an offer situation, it is the responsibility of every offeree company director to satisfy himself whether or not he faces a conflict of interests that would render it inappropriate for him to join the remainder of the board in making a recommendation on the offer.

7 If an offeree company director is of the view that he faces a conflict of interest, an application should be made to the Council to be exempted from the requirement to make a recommendation on the offer. Council will consider such applications and decide whether to allow the exemptions applied for.

8 From time to time, where applications were made or even where no applications were made, Council received requests from directors, either through their solicitors or otherwise, seeking confirmations from Council that it agrees with their views that they are independent for the purpose of making a recommendation on the offer. Council wishes to clarify that it is not the role of Council to provide such confirmations. Assessments on independence should be made by offeree company directors themselves.

9 However, under Rule 6.2 where an offeree company director believes that he may face conflict of interests in a situation other than those set out in Note 1 of Rule 8.3, he should consult Council on whether it is appropriate for him to assume responsibility for any recommendation that the board may make to shareholders. In that event, Council will consider his situation and express its views to the director. But, here again, the assessment of the

director's independence remains with him alone. Hence, after the consultation, if he still considers that he faces a conflict of interests he may apply to Council for exemption and Council will decide on his application.

10 In addition, there could be instances where Council becomes aware of certain concerns on an offeree company director making a recommendation on the offer. In such situations, Council may forward such concerns to the offeree company for the director concerned to make an assessment and consider whether he should submit an application to be exempted from making a recommendation.

*Practice Statements are issued by the SIC to provide informal guidance to companies involved in take-overs and practitioners as to how the SIC normally interprets and applies relevant provisions of the Code in certain circumstances. Practice Statements do not form part of the Code. Accordingly, they are not binding on the SIC or the SIC Secretariat and are not a substitute for consulting the SIC Secretariat to establish how the Code applies in a particular case.*

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## Relevant Rules

Rule 6.2 states that directors who believe that they may face conflicts of interests in situations other than those set out in Note 1 on Rule 8.3 should consult the Council on whether it is appropriate for them to assume responsibility for any recommendations on the offer that the board may make to shareholders.

Rule 8.3 states that each document or advertisement addressed to shareholders and each announcement issued in connection with an offer must state that the directors of the company issuing the document or advertisement (including any who may have delegated detailed supervision of the document, advertisement or announcement) have taken all reasonable care to ensure that the facts stated and all opinions expressed therein are fair and accurate and, where appropriate, no material facts have been omitted and also state that they jointly and severally accept responsibility accordingly.

Note 1 on Rule 8.3 states that where it is proposed that any director be excluded from a directors' responsibility statement, an application for the Council's consent should be made by or on behalf of the director concerned, stating clearly the reasons for the application. If it is expected that the director concerned will be away during the material period of time, arrangements should be made to ensure that the Council's consent is sought in good time.

The Council will normally exempt a director of the offeree company who is, or has entered into an agreement to become, a director, employee or nominee of the offeror or a person acting in concert with the offeror from assuming responsibility for any recommendations on the offer that the board of the offeree company may make to its shareholders. Such director of the offeree company must, however, still assume responsibility for the accuracy of facts stated in documents which the offeree company sends to its shareholders in connection with the offer.

Directors of the offeree company who have sold offeree company shares to the offeror or persons acting in concert with the offeror are not deemed to have an irreconcilable conflict of interests. The same holds true for directors of the offeree company who are directors, employees or nominees of the vendor company which has sold offeree company shares to the offeror or persons acting in concert with the offeror. The Council will not normally exempt these directors from assuming responsibility for any recommendations on the offer that the offeree board may make to shareholders.

Rule 24.1(a) states that the offeree board circular should indicate whether or not the board of directors of the offeree company recommends to shareholders the acceptance or rejection of take-over offer(s) made, or to be made, by the offeror.

Note 3 on Rule 24.1 states that directors who have an irreconcilable conflict of interests and those who have been exempted by the Council from making recommendations to shareholders on an offer should not join with the remainder of the board in the expression of its views on the offer. In such cases, the reasons for their exclusion should be clearly explained to shareholders.