

**CONSULTATION CONCLUSIONS ON  
REVISION  
OF THE SINGAPORE CODE ON  
TAKE-OVERS AND MERGERS**

**SECURITIES INDUSTRY COUNCIL**

25 February 2016

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## **ANNEXES**

*Annex 1: List of respondents*

*Annex 2: Marked up text of the amended Singapore Code on Take-overs and Mergers*

## INTRODUCTION

On 6 July 2015, the Securities Industry Council (“SIC” or the “Council”) issued a consultation paper on Revision of the Singapore Code on Take-overs and Mergers (the “Singapore Code”). The consultation ended on 6 August 2015.

2 A total of 24 respondents, including two which represented 16 financial institutions, provided feedback on the amendments proposed in the consultation paper. The list of respondents is at Annex 1. The Council thanks all who have participated. The feedback was generally supportive of the proposals. Some suggestions have been taken on board and resulted in adjustments to the proposed amendments.

3 The Monetary Authority of Singapore, on the advice of the Council, has made amendments to the Singapore Code which will come into effect on 25 March 2016. Where parties have doubts as to the consequences of any of the rule changes, in particular the impact on any transaction which is in existence or contemplation, they should consult the Council prior to 25 March 2016 to obtain a ruling or guidance.

## **PART I: CHANGES CONSULTED ON**

### **4 Alignment of offer timetable in competing offers**

4.1 SIC had proposed to state in the Singapore Code that all offerors will be bound by the timetable established by the despatch of the latest competing offer document in competitive situations<sup>1</sup>.

#### *Public comments*

4.2 All respondents supported the proposal.

#### *SIC's response*

4.3 The new Note on Rule 22.9 is introduced as proposed.

*[Please see Annex 2: page 130, new Note on Rule 22.9.]*

### **5 The auction procedure**

5.1 SIC had proposed a default auction procedure to obtain a final offer price from each competing offeror, if neither has declared its final offer price in the later stages of the offer period. Before discussing the feedback in relation to the proposed auction procedure, it is useful to re-emphasise:

- (a) the rationale behind and objective of imposing an auction procedure; and
- (b) the approach taken in the proposed Modified Auction Procedure.

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<sup>1</sup> Consultation 1 of the consultation paper.

### ***Rationale and objective of imposing an auction procedure***

#### ***“Siege” of offeree company***

5.2 Rule 22.9 of the Singapore Code (the “Day 60 Rule”) prescribes a 60 day timetable for the prosecution of a take-over offer. The rationale behind the Day 60 Rule is to protect the offeree company from being under siege for an excessive period of time. While the offeror should have sufficient time in which to prosecute its offer (and to seek to persuade the offeree company’s shareholders of its merits), the offeree company should not be exposed to an excessive period of siege. An offer creates uncertainty (not only for shareholders but also for the current and potential management, employees and business partners of the offeree company) which may lead to the offeree company’s business being damaged and the interests of its shareholders being prejudiced through a corresponding fall in the value of the offeree company.

5.3 In this regard, the position of an offeree company faced with competing offers is even worse than that of an offeree company which is in receipt of a bid from a single offeror. This is because the offeree company would have seen the offer timetable reset by the emergence of the second offeror. By Day 46 of the new timetable (the last day on which each competing offeror can unilaterally revise their offers<sup>2</sup>), the company might have been under offer for well over four months. In these circumstances the offeree company and its shareholders would have experienced an extended period of uncertainty.

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<sup>2</sup> An offer can remain open for acceptances up to the 60<sup>th</sup> day (Day 60) following the posting of the offer document. As the offer must be kept open for acceptances for at least 14 days following any revision, the final day on which the offer can be revised is therefore the 46<sup>th</sup> day (Day 46) following the posting of the offer document.

5.4 In the situation where the competing offers remained open and capable of revision leading up to Day 46, the absence of an auction procedure might lead to a disorderly resolution of the competitive situation. The uncertainty over whether either or both offerors would make a final bid on Day 46, and when they would do so, might lead to undue movement in the share price of the offeree in the days leading up to Day 46. There was also a risk of leakage of the revised offer prices when the competing offerors rushed to print their revised offer documents to meet the Day 46 deadline, sometimes using the same printers.

5.5 In addition, even though competing offerors were not supposed to revise their offers after Day 46, it is possible that an offeror might nevertheless approach the offeree board after Day 46 to make a higher offer. This would place the offeree board in an invidious position. Whatever concerns it might have had about the impact of the extended offer period on the company, the offeree board might decide that it cannot stand in the way of an improved offer to shareholders. If the offeree board in such circumstances recommended such an offer, the Council was likely to take the view that the competing offeror should also have another opportunity to consider its options and to revise its own bid. An uncontrolled auction process might develop.

#### *Finality of offers*

5.6 These considerations justify the objective of seeking to achieve finality of offers within a reasonable timeframe through an orderly resolution of the competitive situation. Shareholders should be given a period of certainty within which to make their investment decision on the competing offers. Certainty requires that both offers are 'final' and not capable of further revision.

5.7 This objective of obtaining ‘final’ offers from the competing offerors has to be distinguished from obtaining the best possible offer for shareholders. The latter is not within the remit of the Singapore Code. The Singapore Code’s primary objective is the fair and equal treatment of shareholders. It is not concerned with the financial or commercial advantages or disadvantages of a take-over or merger, which should be decided by the company and its shareholders.

5.8 It was on these bases that the UK’s City Code of Takeovers and Mergers (the “UK Code”) provided for an auction procedure to be imposed in the absence of an agreed alternative procedure. We also note that the Panel on Takeovers and Mergers (the “UK Panel”) has stated<sup>3</sup> that the intention was not to identify a winner, but to ensure that shareholders could decide on the outcome of a competitive situation with the benefit of final offers from the competing offerors.

#### ***Approach taken in the Modified Auction Procedure***

5.9 The proposed Modified Auction Procedure is a default procedure which SIC will normally impose if the competing offerors and the offeree company cannot agree on an alternative procedure to resolve the competitive situation existing on Day 46. The Modified Auction Procedure is an open auction procedure which replicates the competitive process which prevails up to Day 46 without any undue extension in time. This auction procedure is intended to be a robust and straightforward procedure capable of being applied universally to competing offers involving all forms of consideration. By design, it is a transparent process that focuses on the financial terms of the offers to achieve finality. For example, the gathering of irrevocable commitments and letters of intent will be prohibited as this

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<sup>3</sup> The UK Panel’s Consultation Paper on “*Miscellaneous Amendments to the Takeover Code*” dated 16 Jul 2014.



effectively results in a separate, non-transparent bidding process outside the auction where the competing offeror negotiates with a few significant shareholders.

## 6 **Auction procedure to resolve competitive situations existing on Day 46**

6.1 SIC sought views on its proposed approach to prescribe an auction procedure if a competitive situation exists in the later stages of the offer period, unless alternative procedures are agreed between parties to the offer<sup>4</sup>.

### Public comments

6.2 All but one respondent supported the approach. While agreeing with the objective of achieving finality and an orderly conclusion to the competitive situation in an open and transparent manner, the dissenting respondent suggested that the approach to prescribe an auction might be unnecessary given the Council's proposal to align the offer timetables of competing offers. The respondent was of the view that the stated objective could be achieved by simply requiring that the competing offerors announce their final bids by Day 46.

### SIC's response

6.3 Although prohibiting offerors from revising their bids (even with the support of the offeree company) after Day 46 would ensure that there is finality, there is a risk of a disorderly situation arising (please refer to paragraph 5.4 above). We also note that both the UK and Hong Kong have found it appropriate to administer auction procedures rather than impose an absolute prohibition on Day 46.

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<sup>4</sup> Consultation 2 of the consultation paper.

6.4 The new Rule 20.5 is introduced as proposed.

*[Please see Annex 2: page 124, new Rule 20.5.]*

## 7 **Whether the Modified Auction Procedure should be the default auction procedure**

7.1 SIC sought views on whether the Modified Auction Procedure should be the default auction procedure which applies in the absence of alternative procedures<sup>5</sup>.

### Public comments

7.2 All but one respondent supported the proposal. The dissenting respondent was of the view that the default auction procedure should instead be a single-round bid, which is believed to produce higher revenue to sellers compared to other forms of auction.

### SIC's response

7.3 In a single-round bid, competing offerors bid blind not knowing what the other has bid. Given that the objective of the auction procedure is to obtain final offers, the default auction should be one that is generally acceptable to the competing offerors. In this regard, the bidding on Auction Days 1 to 4 of the Modified Auction Procedure replicates the sequential bidding process under the normal timetable up to Day 46 where each competing offeror has knowledge of the other's bid when it bids. Blind bidding is only resorted to on Auction Day 5 to bring the auction to a close should the competitive situation persist. SIC also notes that the

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<sup>5</sup> Consultation 3 of the consultation paper.

single-round bid has rarely been used by parties as the agreed auction procedure in the UK.

7.4 Based on the foregoing and given the support for the Modified Auction Procedure, SIC does not agree that the default auction procedure, which applies only in the absence of alternative procedures, should be a single-round bid.

## 8 **Questions on specific characteristics of the Modified Auction Procedure**

8.1 With respect to the questions at Consultation 3(a) to (j) of the consultation paper where SIC sought views on specific characteristics of the Modified Auction Procedure, all respondents agreed with the characteristics highlighted save for those at Consultation 3(d), (f), (g) and (h). These are discussed in greater detail below.

### ***Deadlock following the Modified Auction Procedure***

8.2 SIC had consulted on whether the Modified Auction Procedure should ensure that both offerors did not arrive at the same offer price at the end of the auction, and if so, how this could be achieved<sup>6</sup>.

### ***Public comments***

8.3 A number of respondents commented that in cash-only offers, the Modified Auction Procedure should not result in both offerors arriving at the same offer price. They were generally of the view that finality meant that there should be a definitive outcome where there is a winner.

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<sup>6</sup> Consultation 3(d) of the consultation paper.

8.4 To ensure a definitive outcome, they suggested the following options:

- (a) To require that the final bids submitted by the competing offerors on Auction Day 5 should be in odd and even numbers.
- (b) In addition to (a) above, to require odd and even number bids in the next round of bidding at any time same bids are made during the first four rounds on Auction Days 1 to 4.
- (c) To repeat the concurrent bidding on Auction Day 5 (prohibiting conditional bids) until different bids are obtained or until no competing offeror wishes to continue bidding.
- (d) To repeat the concurrent bidding on Auction Day 5 (prohibiting conditional bids) only once.

*SIC's response*

*Odd and even number bids*

8.5 One respondent who supported repeated final day bids to break a deadlock commented that imposing odd and even number bids was arbitrary and should not be done unless consented to by the competing offerors. The respondent was of the view that the price at which to bid was a strategic consideration given that even a \$0.01 increase would have an impact on financing requirements.

8.6 SIC agrees with this respondent's comments. The imposition of odd and even number bids could be argued to be unfair to, for example, the odd number competing offeror who could have bid a certain even number price (e.g. \$2.50) but not the next higher odd number price (\$2.51). It could also

lead to meaningless differentiations between final offers where the competing offerors add negligible amounts to their offers (e.g. \$2.5001) just to comply with the odd or even number requirements.

8.7 It is also worth noting that the odd and even number proposals could nonetheless result in a deadlock if the competing offerors do not bid on Auction Day 5 in the proposal described in paragraph 8.4(a) or the competing offerors do not bid following the imposition of odd and even number bids in the proposal described in paragraph 8.4(b)<sup>7</sup>. Further, the odd and even number proposals would not work in cases where there are more than two competing offerors.

#### *Repeated final day bids*

8.8 It is reasonable to expect the competing offerors to bid their utmost on the final day. Hence, if it then turns out that the bids are identical, further rounds of bidding are unlikely to result in improved bids or a differentiation in the bids. On this basis, SIC is of the view that repeated final day bidding may not be effective.

#### *Finality of offers*

8.9 SIC would like to emphasise that the objective of having an auction procedure is to provide an orderly process to obtain the final offers of each competing offeror which is not capable of further revision during the offer period. This provides shareholders a period of certainty to decide on whether or not to accept either offer or none at all. As stated previously, the objective is not to seek a winner. In this regard, it is worth noting that a

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<sup>7</sup> For example, offeror A submits a \$1 bid on Auction Day 1 and offeror B equals that with a bid on Auction Day 2. However, offeror A does not bid on Auction Day 3. The auction ends with both bids at \$1.

deadlock could have occurred during the competitive process up to Day 46 if both competing offerors declared their identical offers final.

*Straightforward universally applicable procedure*

8.10 In any case, attempting to avoid a deadlock would require a separate set of rules for cash-only offers. It becomes even more complicated, and likely impracticable, where there are more than two competing offerors. As a default auction procedure that is prescribed only when parties are unable to agree on an alternative procedure, SIC considers that the Modified Auction Procedure should be a robust and straightforward procedure capable of being applied to all forms of offer consideration. Parties to the offer who are concerned about a deadlock are free to negotiate and agree on an alternative procedure that best suits their commercial objectives.

*Deadlock in price only*

8.11 SIC consulted further with some of the respondents who did not voice any objection to competing offers ending in a deadlock following the close of the auction. These respondents were of the view that a true deadlock, where shareholders are unable to differentiate between the two competing offers, would be exceedingly rare. Even where the auction results in the same offer price for cash-only offers, it is likely that the competing offerors will have differing levels of shareholding in the offeree company. Offeree company shareholders will naturally gravitate towards the offer which is more likely to turn unconditional, even if both offer prices are identical.

8.12 For the above reasons, SIC is of the view that measures to prevent a deadlock under the Modified Auction Procedure are not necessary.

***Conditional bids in the 5th and final round in the Modified Auction Procedure***

8.13 Under the proposed Modified Auction Procedure, a competing offeror is allowed to, in the final round on Auction Day 5, subject its revised offer to being announced only if the other competing offeror also submits a revised offer. SIC consulted on whether such conditional bids should be allowed<sup>8</sup>.

***Public comments***

8.14 There were contrasting views regarding this proposal. One respondent was of the view that conditional bids should be disallowed altogether. The auction process should be designed to extract maximum value that the bidders are willing to pay for the target company, instead of facilitating bidders to acquire the target company for as low a price as they can get away with<sup>9</sup>.

8.15 On the other hand, a number of respondents commented that the proposal did not go far enough to prevent a competing offeror from bidding against itself. They suggested that for cash-only offers, a competing offeror should be allowed to subject its bid in the final round on Auction Day 5 to being announced only if the second competing offeror submits a bid that is higher than the first competing offeror's offer price in the 4<sup>th</sup> round.

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<sup>8</sup> Consultation 3(f) of the consultation paper.

<sup>9</sup> This respondent was also in favour of the single-round bid being the default auction procedure as it was of the view that this procedure would on average, produce greater revenue for sellers than other types of auction.

SIC's response

*Final round bids conditional upon the other competing offeror bidding*

8.16 Similar feedback was received by the UK Panel when it consulted on a proposal to allow similar conditional bids in the 5<sup>th</sup> and final round. While the UK Panel considered that there was merit in the arguments against bids in the final round being conditional on the other offeror also bidding, it considered that offeree company shareholders would not necessarily obtain a better outcome if conditional revisions were prohibited in such circumstances. This was because an offeror could be discouraged from making a revision in the final round (or making as high a revision as it might have done otherwise) as a result of the concern that it would be bidding against itself and therefore revising its offer unnecessarily. The UK Panel also noted that permitting an offeror to revise its offer conditional upon the other offeror also revising its offer replicates as closely as possible the previous four rounds, and indeed the competitive process before the auction, whereby an offeror could revise its offer in response to a revision by a competing offeror.

*Under-bidder gaming*

8.17 The UK Panel also acknowledged the concern raised by respondents that an under-bidder could “game” the process by revising its offer in the final round by only a small amount, such that its final offer remains below the higher offeror’s latest offer, in order to force the higher offeror (if it has submitted a conditional revision) to increase its offer further. However, the UK Panel noted that an offeror would not be required to make its final offer conditional upon the other offeror also revising its offer, but that if it were to do so it would have to take into account the risk that the other offeror would not increase its previous offer by a material amount.



8.18 The UK Panel concluded that an offeror should be entitled to submit a revised offer in the final round conditional upon the other offeror also submitting a revised offer.

8.19 SIC agrees with the UK Panel. SIC also notes that the respondents' proposal in relation to the under-bidding scenario would require separate rules to deal with cash-only consideration, which would go against the objective of having a straightforward default procedure capable of being applied to all forms of offer consideration<sup>10</sup>.

8.20 Accordingly, SIC considers that a competing offeror should be allowed to subject its bid in the final round on Auction Day 5 to being announced only if the second competing offeror also submits a revised offer. The competing offeror may not, however, subject his bid to being announced if the second competing offeror submits a bid that is higher than the first competing offeror's offer price in the 4<sup>th</sup> round.

### **New forms of consideration**

8.21 SIC consulted on whether new forms of offer consideration should be allowed in the Modified Auction Procedure as proposed<sup>11</sup>.

### **Public comments**

8.22 One respondent was concerned that there would not be sufficient time for the independent financial adviser ("IFA") and the offeree company

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<sup>10</sup> Even if a competing offeror was allowed to subject his bid to being announced only if the second competing offeror submits a bid that is higher than the first competing offeror's offer price in the 4<sup>th</sup> round, the second competing offeror could still "game" the process by submitting a revised final round bid that included non-cash consideration.

<sup>11</sup> Consultation 3(g) of the consultation paper.

board to assess and make a recommendation on new forms of consideration introduced during the Modified Auction Procedure. The respondent also commented that there would be insufficient time between bids (approximately one day) for the competing offeror to react to new forms of consideration introduced by the other competing offeror.

*SIC's response*

*IFA and offeree board*

8.23 The IFA and offeree company board have 7 to 14 days to consider any new forms of consideration introduced during the offer following the close of the Modified Auction Procedure. This is more than the 7 days<sup>12</sup> the IFA and offeree board have to evaluate new forms of consideration introduced during the normal take-over timetable.

*Competing offerors*

8.24 SIC is of the view that a competing offeror (together with their advisers) should, before the start of the auction process, already have anticipated that the other competing offeror could introduce new forms of consideration during the auction and what such new forms of consideration could be. It should, therefore, have planned for such a contingency as part of its bidding strategy.

8.25 In the light of the above, new forms of consideration will be allowed during the Modified Auction Procedure.

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<sup>12</sup> Under the normal offer timetable an offeror has to keep its offer open for 14 days following the posting of a revised offer. In this regard, the IFA and the offeree company board is expected to recommend on the revised offer within 7 days of its posting, and shareholders will have the remaining 7 days to accept the revised offer.

***Dealing in shares and procuring irrevocable commitments and letters of intent***

8.26 The Modified Auction Procedure as proposed prohibits the competing offerors from dealing in offeree company shares or procuring irrevocable commitments and letters of commitment in relation to offeree company shares during the auction process. SIC consulted on whether such dealings and arrangements should be allowed<sup>13</sup>.

**Public comments**

8.27 Two respondents were of the view that the procurement of irrevocable commitments and letters of intent from offeree company shareholders in relation to either competing offeror's offer during the auction process should not be prohibited. Such procurement of irrevocable commitments was an instrumental strategy in incentivising bidders to put up a higher price. This was because there were financing costs involved in offering a higher bid price and therefore a bidder might wish to reduce deal uncertainty as much as possible before committing to incurring such additional material costs. It would also be fair play since all competing offerors were equally entitled to do the same. To best protect the interest of the offeree company shareholders, there should not be additional prohibitions other than those already prescribed under the existing provisions of the Singapore Code.

**SIC's response**

8.28 SIC notes that the introduction of a prohibition on dealings in the relevant securities and the procuring of irrevocable commitments or letters of intent might have an impact on an offeror's willingness to announce a revised offer during the auction procedure. However, SIC is of the view that any concerns in this regard are outweighed by the need to ensure that

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<sup>13</sup> Consultation 3(h) of the consultation paper.

the auction procedure is conducted in the context of an orderly framework. This is because such dealings and arrangements effectively result in a separate, non-transparent bidding process outside the auction where the competing offeror negotiates with a few significant shareholders. Accordingly, the Modified Auction Procedure should prohibit the competing offerors and persons acting in concert with them from dealing in the relevant securities of the offeree company, and from procuring or amending irrevocable commitments and letters of intent, during the auction procedure, notwithstanding that such activities are not generally prohibited during the course of an offer.

8.29 To summarise, the Modified Auction Procedure as proposed is accepted as the default procedure which the Council will normally impose if the competing offerors and the offeree company cannot agree on an alternative procedure to resolve the competitive situation existing on Day 46.

## **9 New Appendix 4 – codification of the Modified Auction Procedure**

9.1 SIC consulted on whether the Modified Auction Procedure should be codified as new Appendix 4<sup>14</sup>.

### *Public comments*

9.2 Respondents supported the codification of the Modified Auction Procedure in the Singapore Code.

9.3 One respondent noted that following the close of the Modified Auction Procedure, the deadlines in the proposed new Appendix 4 for the

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<sup>14</sup> Consultation 4 of the consultation paper.

posting of the revised offer documents, the despatch of the offeree board circulars and the competing offers to turn unconditional referred to “Day 58”, “Day 65” and “Day 72” respectively. “Day 58”, “Day 65” and “Day 72” took reference from the posting of the second competing offeror’s offer document. This would result in the relevant parties having different lengths of time to post documents and for the competing offers to become unconditional depending on when the Modified Auction Procedure ended.

#### SIC’s response

9.4 SIC agrees that the amount of time provided for the posting of the revised offer documents, the despatch of the offeree board circulars and the competing offers to turn unconditional should not depend on when the Modified Auction Procedure ends. Accordingly, the new Appendix 4 will be amended to align the relevant deadlines with the end of the Modified Auction Procedure instead of the posting of the second competing offeror’s offer document:

#### **“6 Offer Timetable after the End of the Auction**

- (a) *Competing offerors are normally required to post their revised offer documents by Day 58 no later than 7 days after the end of the auction. However, in consultation with the offeree company, the Council may dispense with the requirement for a competing offeror to post its revised offer document, if it is clear that the value of the competing offeror’s offer is lower than the value of the other competing offeror’s offer.*
  
- (b) *The offeree company is required to post its offeree circulars on the revised offers by Day 65 no later than 7 days after the posting of the revised offer documents. Where the Council has dispensed with the requirement for a competing offeror to post a*

*revised offer document, the offeree company is not required to post an offeree circular on that offer.*

- (c) *The latest date which either offer made by the competing offerors may become or be declared unconditional as to acceptances will be Day 72 14 days after the posting of the revised offer documents.*

9.5 New Appendix 4 as amended above is introduced.

*[Please see Annex 2: pages 198-203, new Appendix 4.]*

## 10 **Clarification by potential competing offerors of their intentions**

10.1 SIC sought views for the put up or shut up deadline to be:

- (a) the 53<sup>rd</sup> day (instead of 50<sup>th</sup>) from the date the first offeror despatches its initial offer document for a contractual offer; and
- (b) the 7<sup>th</sup> day prior to the date of the shareholders' meeting to approve the relevant scheme or amalgamation<sup>15</sup>.

### Public comments

10.2 While respondents supported the proposal in (b), several disagreed with (a). They were of the view that the current practice of a 50<sup>th</sup> day deadline<sup>16</sup> should continue to apply as long as there has been no revised

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<sup>15</sup> Consultation 5 of the consultation paper.

<sup>16</sup> Currently, where an offeror ("Offeror 1") has announced a firm intention to make an offer and a potential competing offeror ("Offeror 2") becomes the subject of a possible offer announcement, it is Council's practice to require Offeror 2 to clarify its intentions (i.e. put up or shut up) by the 50<sup>th</sup>

offer made by the first offeror on the 46<sup>th</sup> day (being the final day on which the first offeror can revise its offer). In the event that the first offeror makes a revised offer on the 46<sup>th</sup> day, the put up or shut up deadline should only then be extended to the 53<sup>rd</sup> day. This implied that if the first offeror announced a revised offer on the 45<sup>th</sup> day, the potential offeror should have until the 52<sup>nd</sup> day to put up or shut up. If the revised offer is announced on the 44<sup>th</sup> or 43<sup>rd</sup> day, the deadline should be adjusted accordingly.

### SIC's response

10.3 The proposal by the dissenting respondents would mean that, depending on when the first offeror makes a revised offer (if at all), offeree company shareholders would have 7 to 10 days to decide on the first offer in the event the potential competing offer fails to materialise.

10.4 SIC considers such calibrations with an adjustable put up or shut up deadline unnecessarily complicated. As stated in the consultation paper, providing more time for the competing offeror to consider and finalise the terms of an offer with the knowledge of the first offeror's revised offer can be beneficial to offeree company shareholders as it may increase their prospects of receiving a competing offer. Moreover, 7 days is sufficient for offeree company shareholders to decide on the first offer in the event the potential offer fails to materialise.

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day from the date Offeror 1 despatches its offer document. Day 50 is chosen as it is the mid-point between the 47<sup>th</sup> day (which is the day after the 46<sup>th</sup> day, the final day on which Offeror 1 can revise its offer) and the 53<sup>rd</sup> day (to allow offeree company shareholders at least 7 days to consider Offeror 1's bid before it has to close on day 60 in the event Offeror 2 decides not to bid). Offeror 2 would therefore have 4 days (after day 46) to decide whether to make a competing bid while the offeree company shareholders would have 10 days (until day 60) to decide on Offeror 1's offer where Offeror 2 did not make a bid.

10.5 The new Note on Rules 3.1, 3.2 and 3.3 is introduced as proposed.

*[Please see Annex 2: page 27, new Note 6 on Rules 3.1, 3.2 and 3.3]*

11 **Acquisition of interests in shares by a former potential competing offeror after Day 53**

11.1 SIC sought views on the proposal to include the additional condition that a potential competing offeror must not have acquired an interest in any shares of the offeree company after making a no intention to bid statement, if he wished to make an offer within a 6-month period with the agreement of the offeree board<sup>17</sup>.

*Public comments*

11.2 Respondents who commented supported the proposal.

*SIC's response*

11.3 Note 1 on Rule 33.1 is amended as proposed.

*[Please see Annex 2: page 176, Note 1 on Rules 33.1]*

12 **Soliciting a competing offer etc. not frustration**

12.1 SIC sought views on the proposal to clarify that offeree company boards may consider the feasibility of soliciting a competing offer or running a sale process, and that doing so will not amount to a frustration of the initial offer<sup>18</sup>.

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<sup>17</sup> Consultation 6 of the consultation paper.

<sup>18</sup> Consultation 7 of the consultation paper.



### Public comments

12.2 While most respondents agreed with the proposal, several respondents were concerned that this would suggest that the offeree company board was obliged to solicit a competing offer or run a sale process.

12.3 Another respondent suggested that Council clarify in the proposed Note 8 on Rule 5 that it should be consulted in cases of doubt as to whether soliciting a competing offer or running a sale process amounted to frustrating an offer.

### SIC's response

12.4 SIC would like to reiterate that the intention is not to impose an obligation on offeree boards to solicit competing offers or run sale processes. In this regard, SIC is of the view that the amendments as proposed already make this sufficiently clear.

12.5 SIC accepts the suggestion for Note 8 on Rule 5 to state that it should be consulted in cases of doubt. The proposed Note 8 on Rule 5 is amended as follows:

### **“NOTES ON RULE 5**

...

“8. *Soliciting a competing offer etc.*

*In considering the course of action which it may take in the face of an offer, an offeree board may consider the feasibility of soliciting a competing offer or running a sale process. The Council will not normally treat actions by the offeree board in soliciting a competing offer or running a sale process for the offeree company as actions which frustrate the original offer. A*

*better offer or an alternative offer is generally in the interest of the offeree company's shareholders. Such action neither hinders the progress of, nor results in shareholders being deprived of the opportunity to decide on the merits of, the first offer. In cases of doubt, the Council should be consulted."*

*[Please see Annex 2: page 36, new Note 8 on Rule 5]*

### 13 **Availability of management projections and forecasts**

#### 13.1 SIC sought views on:

- (a) the proposal to state that an offeree board may consider the availability of management projections and forecasts which can be shared with the IFA for the purpose of the latter's advice on the offer; and
- (b) any other measures to encourage the use of forward-looking information in the analysis of an offer<sup>19</sup>.

#### Public comments

13.2 Respondents generally agreed with the proposal in (a). Some were, however, concerned that it could impose an obligation on the offeree company board to share management projections and forecasts with the IFA.

13.3 On the proposal in (b), a number of respondents suggested that the Council consider the UK Code's relaxed provisions on profit forecasts, to encourage the effectiveness of the proposal in (a). The UK Panel had

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<sup>19</sup> Consultation 8 of the consultation paper.

amended its profit forecast rules such that certain profit forecasts, including those published in the ordinary course or prior to the offer period or relating to a period ending more than 15 months from the date of publication, are not required to be reported on<sup>20</sup>. This is subject to, *inter alia*, offeree company directors confirming that the profit forecast has been properly compiled on the basis of the assumptions stated, and that the basis of accounting is consistent with the offeree company's accounting policies.

### SIC's response

13.4 The Council would like to clarify that the intention is not to impose an obligation on the offeree board to share management projections and forecasts with the IFA for the purposes of the latter's advice on the offer. In this regard, SIC is of the view that the amendments as proposed already make this sufficiently clear.

13.5 SIC notes the suggestion to relax the reporting requirements on profit forecast as was done in the UK to encourage the use of forward-looking information in the analysis of an offer. However, SIC understands from market practitioners that offeree company directors may be reluctant to make profit forecasts due to litigation risks, even when such forecasts would be reported on by the reporting accountant and the financial adviser. Given that the UK approach in effect places liability for the profit forecasts squarely on the offeree company directors, this may instead discourage offeree company directors from making available any projections or forecasts.

13.6 Nevertheless, SIC will study the matter further, and propose further amendments if appropriate.

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<sup>20</sup> Reports by the auditor or reporting accountant, financial adviser and independent valuer (if applicable).

13.7 The new Note 7 on Rule 7.1 is introduced as proposed.

*[Please see Annex 2: page 40, new Note 5 on Rule 7.1]*

#### 14 **No increase and no extension statements**

14.1 SIC sought views on the proposal to allow an offeror to set aside a no increase or no extension statement when the offeree company makes an announcement of the kind referred to in Rule 22.8 after Day 39 only if the no increase or no extension statement was made after such date<sup>21</sup>.

##### Public comments

14.2 The respondents supported the proposals. One respondent suggested that the right for the offeror to set aside its no increase or no extension statement need not be subject to an explicit reservation in the no increase or no extension statement itself, and should be available to the offeror so long as the offeree company makes a material announcement of the kind referred to in Rule 22.8 after Day 39.

##### SIC's response

14.3 SIC disagrees with the suggestion. No increase or no extension statements are made with the intention of putting pressure on offeree company shareholders to come to a decision on their offeree company shares. Hence, in order to preserve an orderly market, no increase or no extension statements must be capable of being relied upon by offeree company shareholders and the market as an accurate statement of the offeror's intentions as regards the conduct of the offer. Where there are circumstances that might cause the statements to be set aside, these

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<sup>21</sup> Consultation 9 of the consultation paper.

should be disclosed clearly beforehand. This is a general rule applicable to no increase or no extension statements.

14.4 The new Note 4 on Rule 20.2 and the corresponding new Note 4 on Rule 22.7 are introduced as proposed.

*[Please see Annex 2: pages 123-124 and 129, new Note 4 on Rule 20.2 and new Note 4 on Rule 22.7]*

## 15 **Settlement of acceptances within 7 business days**

15.1 SIC sought views on the proposal to adopt a 7-business day settlement period instead of the current 10-calendar day period<sup>22</sup>.

### Public comments

15.2 While the majority of the respondents supported the proposal, one respondent disagreed, noting that in situations where the settlement period does not coincide with public holidays, the proposed amendment would effectively reduce the settlement period by one calendar day. Accordingly, the respondent proposed that an 8-business day settlement period should be adopted instead.

### SIC's response

15.3 The proposal is not intended to maintain the effective 8-business day settlement period under normal circumstances under the current 10-calendar day deadline. Rather, it is to provide for a standard settlement period that is unaffected by the occurrence of public holidays. In this regard, 7 business days settlement period is in line with the practice in Hong Kong.

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<sup>22</sup> Consultation 10 of the consultation paper.

15.4 Rules 30 and 16.6 are amended as proposed.

*[Please see Annex 2: pages 111 and 172, Rules 16.6 and 30]*

## 16 **Material changes in information**

16.1 SIC sought views on the proposed changes to Rule 8.1 of the Singapore Code to require prompt disclosure of:

- (a) any material changes to information previously published in connection with the offer; and
- (b) any material new information which would have been required to be disclosed in any previous document or announcement published during an offer period, had it been known at the time<sup>23</sup>.

### Public comments

16.2 The respondents agreed with the proposals. One respondent suggested that the obligation to disclose material changes to information previously published should also be made expressly subject to the exemptions set out in Rules 703(2) and 703(3) of the SGX Mainboard Listing Rules (the “Listing Rules”) to ensure consistency with the Listing Rules. The respondent also suggested that the proposed amendments clarify whether the IFA would be required to comment on whether its opinion contained in the offeree board circular would change as a result of the information announced under the amended Note 1 on Rule 8.1 and, if so, under what circumstances.

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<sup>23</sup> Consultation 11 of the consultation paper.

SIC's response

16.3 The exemptions set out in Rules 703(2) and 703(3) of the Listing Rules might not be relevant to material information required to be disclosed by the parties to an offer during the offer period<sup>24</sup>. SIC is of the view that it is not necessary to include such references in the proposed amendments to Rule 8.1, as parties can, in any case, consult it if necessary. In this regard, we have further amended Note 1 on Rule 8.1 to remind parties to consult SIC in cases of doubt.

16.4 Note 4 on Rule 24.1 of the Singapore Code states that the Council will normally not object to the offeree board issuing an updated recommendation to its shareholders if the circumstances justify it. Where information of the kind under the Note 1 on Rule 8.1 is released and where such information is material to the offeree company shareholders in the context of deciding whether to accept an offer, the offeree board and the IFA should take into consideration this material information and, where appropriate, make a revised recommendation to the offeree company shareholders. For example, in the case of a securities exchange offer, a material adverse development in the offeror's business could materially reduce the value of the offeror's shares being offered as consideration such that the offer may no longer be fair and reasonable.

16.5 SIC is of the view that it will be impracticable for the Singapore Code to specify all circumstances under which a material change in information will require the offeree board and IFA to update their recommendations.

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<sup>24</sup> Examples where a disclosure of information is exempted under Rules 703(2) and 703(3) of the SGX Mainboard Listing Rules include: (i) a disclosure of information which would be a breach of law to disclose, (ii) the information concerns an incomplete proposal or negotiation, and (iii) the information is a trade secret.

16.6 In view of the above, further amendments to the proposed Note 1 on Rule 8.1 to remind the offeree board and the IFA to take into consideration any such material information have been made.

16.7 To summarise, the proposed Note 1 on Rule 8.1 is amended as follows:

**“NOTES ON RULE 8.1**

1. Material changes

*Following the publication of the initial offer document or offeree board circular (as appropriate) and until the end of the offer period, the relevant company must promptly announce:*

- (a) any changes in information disclosed in any document or announcement published by it in connection with the offer which are material in the context of that document or announcement; and*
- (b) any material new information which would have been required to have been disclosed in any previous document or announcement published during the offer period, had it been known at the time.*

*In cases of doubt, the Council should be consulted.*

*Where an announcement is required to be made under Rule 8.1, the Council may further require a document setting out the relevant information to be sent to the shareholders in the offeree company. In addition, to ensure prompt and wide dissemination of the material change in information, a paid press notice may be needed.*



*Any subsequent document issued to shareholders following the publication of the initial offer document or offeree board circular (as appropriate) and until the end of the offer period must also include information about any material change in any information previously published by or on behalf of the relevant company during the offer period. If there have been no such changes, this should be stated.*

*Where information of the kind under this Note is published, and where such information is material to offeree company shareholders' consideration in determining whether to accept an offer, the Council expects the independent financial adviser and the offeree board to take into consideration such material information and, where appropriate, revise their recommendation and/or advice. In cases of doubt, the Council should be consulted.*

*[Please see Annex 2: pages 44-45, Note 1 on Rule 8.1]*

## 17 **New Note 5 on Rule 15.1 on pre-conditional voluntary offers**

17.1 The Council sought views on the proposed new Note 5 on Rule 15.1 to provide clarity to the market on the practice of imposing standards similar to Note 1 on Rule 14.2 on pre-conditions in a pre-conditional voluntary offer<sup>25</sup>.

### Public comments

17.2 The respondents supported of the proposal.

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<sup>25</sup> Consultation 12 of the consultation paper.

SIC's response

17.3 The new note 5 on Rule 15.1 is introduced as proposed.

*[Please see Annex 2: pages 105-106, new Note 5 on Rule 15.1]*

18 **New Note on Rule 22.1 on posting of offer documents for pre-conditional voluntary offers**

18.1 SIC sought views on the proposed 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 a pre-conditional offer<sup>26</sup>.

Public comments

18.2 The respondents agreed with the proposal. Two respondents suggested that the offeror (with the concurrence of the offeree company) should also be allowed to seek the Council's approval for the posting of the offer document at an earlier date.

SIC's response

18.3 An earlier posting of the offer document disadvantages the offeree company by giving it less time to prepare its offeree circular. Accordingly, it should be incumbent on the offeree company to consider its position carefully and make the application if necessary.

18.4 In any event, if the offeror (with the concurrence of the offeree company) is allowed to apply for approval, a written confirmation from the offeree company that it consents to posting the offer document earlier

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<sup>26</sup> Consultation 13 of the consultation paper.

would still be required. Hence, SIC is of the view that it is not necessary to also permit the offeror to apply for approval.

18.5 The new Note on Rule 22.1 is introduced as proposed.

*[Please see Annex 2: page 127, new Note on Rule 22.1]*

## 19 **Comparable offers for different classes of shares**

19.1 SIC sought views on the proposed amendments to Note 1 on Rule 18 to state that reference will be made to market prices in determining the ratio of offer values<sup>27</sup>.

### Public comments

19.2 All of the respondents agreed with the proposal.

### SIC's response

19.3 Note 1 on Rule 18 is amended as proposed.

*[Please see Annex 2: page 117, Note 1 on Rule 18]*

## 20 **Paid press notice**

20.1 SIC sought views on the new Note on Rules 3.1, 3.2 and 3.3 to clarify that a paid press notice refers to a paid advertisement in two leading English-language national newspapers published daily and circulating generally<sup>28</sup>.

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<sup>27</sup> Consultation 14 of the consultation paper.

<sup>28</sup> Consultation 15 of the consultation paper.

### Public comments

20.2 Most respondents suggested that it was sufficient to have the paid advertisement in one leading English-language national newspaper published daily and circulating generally, given the relatively small geographical size of Singapore, the wide circulation of the leading English newspaper and the availability of offer information online, e.g. SGXNet.

20.3 One respondent commented that, other than the Straits Times, it was not clear which other newspapers will qualify as “leading”. In addition, the respondent noted that the Straits Times would only satisfy the new criteria of being published daily if the Sunday Times which was published on Sundays was treated as part of the Straits Times publication. Similarly, the Business Times had a weekend edition and was not published on Sundays.

### SIC’s response

20.4 SIC agrees that having the paid advertisement published in one leading English-language newspaper should suffice. Given that the objective is to ensure that the advertisement reaches as many shareholders as possible, the advertisement should be published in the most widely circulated newspaper in Singapore. In this regard, the Audit Bureau of Circulations Singapore Pte Ltd provides statistics on the circulation of the major newspapers in Singapore<sup>29</sup>.

20.5 SIC also clarifies that “published daily” includes, for the avoidance of doubt, “published every day except Sunday”. The new Note 7 on Rules 3.1, 3.2 and 3.3 is amended as follows:

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<sup>29</sup> The Audit Bureau of Circulations Singapore (“ABC”) provides independent audit and certification of the circulation of publications. The circulation figures can be accessed via ABC’s audited website here: <http://www.abcsingapore.org/reports.html>.

**“NOTES ON RULES 3.1, 3.2 AND 3.3**

...

**“7. Paid press notice**

*A paid press notice, for the purpose of this Rule or other parts of the Code where this term is used, refers to a paid advertisement in ~~two~~ the most widely circulated English-language national newspapers published daily ~~and circulating generally~~. For the avoidance of doubt, the reference to national newspapers published daily includes those published every day except Sunday.”*

*[Please see Annex 2: page 28, new Note 7 on Rules 3.1, 3.2 and 3.3]*

## **PART II: OTHER AMENDMENTS**

21 SIC has also made the following amendments to the Singapore Code.

### **22 Clarification on “date of the offer”**

22.1 As discussed in the Consultation Paper, SIC has introduced a new Note 2 on Rule 23.12 to clarify that the reference to “date of the offer” in Rule 5 should be to “date of the offer announcement” and that the date of the offer in Rule 23.12 refers to the date the offer document is despatched.

*[Please see Annex 2: pages 32 and 141, Rule 5 and new Note 2 on Rule 23.12]*

### **23 Reference in Note 4 on Rule 20.1**

23.1 SIC has corrected the reference to a Note on Rule 14.1 found in Note 4 on Rule 20.1. The amendments are as follows:

#### ***“NOTES ON RULE 20.1***

...

#### ***4. Triggering a mandatory offer***

*When an offeror, which is making a voluntary offer either in cash or with a cash alternative, makes an acquisition which causes it to have to extend a mandatory offer at no higher than the existing cash offer, the change in the nature of the offer will not be viewed as a revision (and will thus not be precluded by an earlier no increase statement), even if the offeror is obliged to waive any outstanding condition. But such an acquisition can be made only if the offer can remain open for acceptance for a further 14 days following the date on which the amended*

*offer document is posted. If the offeror has earlier made a no increase statement but subsequently makes an acquisition which causes it to incur a mandatory bid obligation at a higher offer price, then the offeror must implement the mandatory offer at the higher offer price. The Council takes a serious view of such breaches of the Code, and reserves the right to reprimand and or caution the offeror for going back on his earlier no increase statement. (See also Note 8 9 on Rule 14.1)*

*[Please see Annex 2: pages 122, Note 4 on Rule 20.1]*

## 24 **Rule 24.3(c) on disclosure of dealings in offeree circular**

24.1 SIC has amended Rule 24.3(c) to clarify that the applicable period for the dealings disclosure should be 3 months in the case of voluntary offers. The amendments are as follows:

### **“24.3 Shareholdings and dealings**

...

- (c) If any party whose shareholdings are required by paragraph (a) to be disclosed has dealt for value in the shares in question during the period commencing 6 months (3 months in the case of a voluntary offer) prior to the beginning of the offer period and ending with the latest practicable date prior to the posting of the offeree board circular, the details, including dates and prices, must be stated. If no such deals have been made, this fact should be stated.”

*[Please see Annex 2: pages 144, Rule 24.3]*