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

SECURITIES INDUSTRY COUNCIL

Thursday, 19 July 2018

On 26 June 2018, the Singapore Exchange Limited (“SGX”) introduced a primary listing framework for dual class share (“DCS”) structures. This paper seeks feedback on proposed changes to the Singapore Code on Take-overs and Mergers (the "Singapore Code") to take into account the primary listing of companies with DCS structures on the Mainboard of Singapore Exchange Securities Trading Limited (“SGX-ST”).

The Council invites interested parties to send their comments on the proposed changes to the Singapore Code in the consultation paper. Written comments should be submitted to:

The Securities Industry Council
10 Shenton Way #25-00
MAS Building
Singapore 079117
Email: sic@mas.gov.sg

Please submit all comments by Friday, 17 August 2018. Respondents should include their names, addresses and phone numbers. Comments received will be carefully considered and, where appropriate, incorporated in the amended Singapore Code.

Please note that all submissions received may be made public unless confidentiality is specifically requested.

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INTRODUCTION

On 16 February 2017, SGX issued a concept consultation paper (the "2017 Consultation") to seek feedback on whether to introduce a primary listing framework for DCS structures (the "DCS Framework"), and if introduced, the appropriate safeguards to be put in place. SGX subsequently issued a consultation paper (the "2018 Consultation") on 27 March 2018 inviting feedback on its revised proposals which took into account the responses to the 2017 Consultation. On 26 June 2018, SGX published its response to the 2018 Consultation and set out its finalised DCS Framework.[1]

2 Under the DCS Framework, issuers seeking a primary listing on the SGX-ST may choose to adopt a DCS structure. Such DCS structures involve the company having a share structure that gives certain shareholders voting rights disproportionate to their shareholding. Shares in one class carry one vote per share (i.e. ordinary voting shares or "OV shares"), while shares in another class carry multiple votes per share (i.e. multiple voting shares or "MV shares"). The voting rights attached to MV shares of a company with such a DCS structure (a "DCS company") is limited to 10 votes per share. MV shares are not listed for trading.

3 This paper highlights two features of the DCS Framework which have implications on the requirements of the Singapore Code and sets out our proposed changes to the Singapore Code in this regard for public consultation.

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[1] SGX's Responses to Comments on Consultation Paper – Proposed Listing Framework for Dual Class Share Structures, dated 26 June 2018, can be accessed at www.sgx.com.

CHANGES FOR CONSULTATION

Triggering a mandatory offer as a result of MV shares being converted to OV shares or voting rights of MV shares being reduced

Conversion of MV shares to OV shares or reduction of voting rights of MV shares

4 One feature of the DCS Framework is the requirement for automatic conversion of the MV shares. MV shares may be held by a person, or by a group of persons or an entity (the "permitted holder group") that the company specifies upfront. Upon the occurrence of any of the following events (collectively referred to as the "Automatic Conversion Events"), MV shares would be automatically converted into OV shares:

(a) if the holder of MV shares sells or transfers part or all of his MV shares to any person, whether or not for value. In the case of a permitted holder group, auto-conversion will only occur if the holder of MV shares sells or transfers part or all of his MV shares to persons outside the permitted holder group; or

(b) if the holder of MV shares ceases to be a director, whether through death, incapacity, retirement, resignation or otherwise. In the case of a permitted holder group, auto-conversion will only occur if the permitted holder group fails to appoint a new responsible director to replace the director who has departed.

5 In addition to automatic conversion, holders of MV shares can themselves seek to convert their MV shares to OV shares or reduce the number of voting rights attached each MV share (e.g. from 10 votes per MV share to 5 votes per MV share).

Triggering a mandatory offer

6 Rule 14.1 of the Singapore Code requires a person who acquires shares which carry 30% or more of the voting rights of a company or a person who, if he and his parties acting in concert with him in aggregate hold between 30% and 50% of the voting rights of a company, acquires more than 1% of the voting rights in any period of 6 months, to make a general offer for the remaining voting rights in the company.

7 A conversion of MV shares to OV shares (the "Conversion") or a reduction in the number of voting rights per MV share (the "Reduction"), results in a lowering of the total number of voting rights of the company. As with the case of share buy-backs[2], the Council would regard any resulting increase in the percentage of voting rights of a shareholder and persons acting in concert with him (whether holding MV and/or OV shares) as an acquisition for the purpose of Rule 14. Consequently, a shareholder or group of shareholders acting in concert (the "Triggering Shareholder" or "Triggering Shareholders") could obtain or consolidate effective control of the company and become obliged to make an offer under Rule 14.

Triggering Shareholder independent of conversion

8 In the case where the Triggering Shareholder is independent of the Conversion (as is likely to be the case in an automatic conversion) or the Reduction, the Council proposes to waive the obligation to make a general offer under Rule 14. This approach is consistent with the Council's current approach to share buy-back cases where a shareholder, who is not acting in concert with the directors of the company, and therefore independent of any board decision to buy back shares, need not make a general offer under Rule 14 in the event that he acquires or consolidates effective control

[2] Appendix 2 of the Singapore Code

as a result of the share buy-back. We note that Hong Kong adopts a similar approach.

Triggering Shareholder not independent of conversion

9 If the Triggering Shareholder is deemed to be not independent of the Conversion or the Reduction, the Council proposes to:

(a) require the Triggering Shareholder to make a general offer under Rule 14 within 6 months of the date of the Conversion or the Reduction;

(b) provide for a waiver from the requirement for the Triggering Shareholder to make a general offer under Rule 14, subject to the approval of the independent shareholders of the company for a Whitewash Resolution being obtained either before or within 3 months of the date of the Conversion or the Reduction; and

(c) allow the Triggering Shareholder to dispose of such number of shares as is necessary to reduce his aggregate voting rights in the company to a level below the thresholds stipulated in Rule 14.1 within 6 months of the date of the Conversion or the Reduction (or such longer period of time as the Council may allow where exceptional circumstances warrant such extension of time) in lieu of making a general offer under Rule 14.

10 The provisions in paragraphs 8 and 9 above are subject to the Triggering Shareholder not acquiring additional voting rights in the company or exercising his voting rights which are above the relevant

mandatory offer threshold in the interim, starting from the time the Triggering Shareholder is first aware of the Conversion or the Reduction.

11 To give effect to the foregoing, new note 18 on Rule 14.1 is proposed:

"*18. <u>Conversion of multiple voting shares to ordinary voting shares or reduction of voting rights of multiple voting shares</u>*

When there is a conversion of multiple voting shares to ordinary vote shares (the "Conversion") or a reduction in the voting rights attached to each multiple voting share (the "Reduction"), any resulting increase in the percentage of voting rights held by a shareholder and persons acting in concert with him will be treated as an acquisition for the purpose of Rule 14. Consequently, a shareholder or group of shareholders acting in concert could obtain or consolidate effective control of the company and become obliged to make an offer under Rule 14. For the purposes of this Rule, the Council will not normally require such shareholder and his concert parties to make a general offer for the company as required under Rule 14 if the shareholder is independent of the Conversion or the Reduction. The Council should be consulted in all relevant cases.

If such shareholder is not independent of the Conversion or the Reduction, he and his concert parties who acquire or consolidate effective control in the company arising from the Conversion or the Reduction must:-

(a) make a general offer for the company as required under Rule 14. Such offer must be announced within 6 months (or such longer period of time as the Council

may allow under paragraph (b) below) after the date of the Conversion or the Reduction.

The shareholder and/or his concert parties must announce immediately a general offer for the company as required under Rule 14 if they:-

(i) after becoming aware that the Conversion or the Reduction is imminent, acquire before or after the date of the Conversion or the Reduction additional voting rights in the company; or

(ii) after the date of the Conversion or the Reduction, exercise the voting rights attached to such number of shares which is above the thresholds stipulated in Rule 14.1,

without first disposing of the required number of shares as per paragraph (b) below or obtaining a Whitewash waiver as per paragraph (c) below;

(b) dispose within 6 months (or such longer period of time as the Council may allow where exceptional circumstances warrant such extension of time) of the date of the Conversion or the Reduction such number of shares as is necessary to reduce their aggregate voting rights in the company to a level which is within the thresholds stipulated in Rule 14.1.

The shareholder and/or his concert parties must announce immediately a general offer for the company as required under Rule 14 if they have not obtained a Whitewash waiver as per paragraph (c) below and they:-

(i) after becoming aware that the Conversion or the Reduction is imminent, acquire before or after the date of the Conversion or the Reduction additional voting rights in the company;

(ii) after the date of the Conversion or the Reduction, exercise the voting rights attached to such number of shares which is above the thresholds stipulated in Rule 14.1; or

(iii) fail to divest such number of shares which is above the thresholds stipulated in Rule 14.1 within 6 months (or such longer period of time as the Council may allow) of the date of the Conversion or the Reduction; or

(c) obtain the approval of the independent shareholders of the company for a Whitewash Resolution (see Note 1 of Notes on Dispensation from Rule 14 and Appendix 1 "Whitewash Guidance Note") to waive the requirement for the shareholder to make a general offer for the company. Such Whitewash waiver by the shareholder may be obtained either before or after the date of the Conversion or the Reduction.

If the Whitewash waiver by independent shareholders is sought before the date of the Conversion or the Reduction, any exemption from the requirement to make an offer under Rule 14 granted by the Council will be subject to the following conditions:-

(i) *the Whitewash Resolution to be approved by a majority of independent shareholders present and voting at a shareholders meeting on poll;*

(ii) *the circular to shareholders for the shareholders meeting contains advice to the effect that by voting for the Whitewash Resolution, shareholders are waiving their right to a general offer at the required price by the shareholder and his concert parties who would acquire or consolidate effective control in the company after the Conversion or the Reduction; and the names of the shareholder and his concert parties, as well as their voting rights in the company at the time of the resolution (where applicable) and after the Conversion or the Reduction, to be disclosed in the same circular; and*

<u>Disqualifying transactions</u>

(iii) *the shareholder and his concert parties who could become obliged to make an offer for the company as a result of the Conversion or the*

Reduction not to have acquired and not to acquire any shares in the company during the period between when they become aware that the Conversion or the Reduction is imminent, and the date on which the shareholders approve the Whitewash Resolution. The shareholder and/or his concert parties must announce immediately a general offer for the company as required under Rule 14 if this condition is not met.

If the Whitewash waiver by the independent shareholders is sought after the Conversion or the Reduction, any exemption from the requirement to make an offer under Rule 14 granted by the Council will be subject to the following conditions:-

(i) the Whitewash Resolution to be approved by independent shareholders at a shareholders meeting to be held as soon as practicable, but in any case not later than 3 months after the date of the Conversion or the Reduction;

(ii) the circular to shareholders for the shareholders meeting contains advice to the effect that by voting for the Whitewash Resolution, shareholders are waiving their right to a general offer at the required price by the shareholder and his concert parties who would acquire or consolidate effective control in the company after the Conversion or the Reduction; and the

names of the shareholder and his concert parties, as well as their voting rights in the company at the time of the resolution, to be disclosed in the same circular;

<u>Disqualifying transactions</u>

(iii) the shareholder and his concert parties who could become obliged to make an offer for the company as a result of the Conversion or the Reduction not to have acquired and not to acquire:-

- *any shares in the company during the period between when they become aware that the Conversion or the Reduction is imminent and the date of the Conversion or the Reduction; and/or*

- *any shares in the company during the period between when they become aware that the Conversion or the Reduction is imminent and the date on which independent shareholders approve the Whitewash Resolution.*

The shareholder and/or his concert parties must announce immediately a general offer for the company as required under Rule 14 if this condition is not met; and

(iv) the shareholder and/or his concert parties not to exercise the voting rights attached to such number of their shares which is above the thresholds specified in Rule 14.1 during the period between the date of the Conversion or the Reduction and the date the independent shareholders approve the Whitewash Resolution. The shareholder and/or his concert parties must announce immediately a general offer for the company as required under Rule 14 if this condition is not met.

Regardless of whether the Whitewash waiver by shareholders is sought before or after the Conversion or the Reduction, if such Whitewash waiver is not approved by shareholders but the Conversion or the Reduction has taken place, the shareholder and/or his concert parties must make a general offer for the company as required by Rule 14 or reduce their aggregate voting rights in the company by such amount and within such time period as per paragraph (b) above."

Offer price for OV shares

12 In the case where the Triggering Shareholder decides or has to make a mandatory offer but has not purchased any OV shares in the previous 6 months, we propose that the minimum offer price for OV shares be the simple average of the daily volume weighted average traded prices of the company on either of the latest 20 trading days or whatever number of trading days there were within the 30 calendar days prior to the date of the Conversion or the Reduction. This would be in line with the current rules under the Singapore Code on calculating the minimum offer price where

the offeror has not purchased shares in the last 6 months in the case of triggering a mandatory offer as a result of (a) pro-rata distribution of voting rights in a downstream company by an upstream company to its shareholders (Note 4 on Rule 14.3), and as well as (b) the Chain Principle (Note 3 on Rule 14.3).

13 The proposed new Note 8 on Rule 14.3 in this connection is as follows:

> "8. *Conversion of multiple voting shares to ordinary voting shares or reduction of voting rights of multiple voting shares*
>
> *The offer price will be the highest price that the offeror and/or its concert parties have paid for voting rights in the company in the 6 months prior to the date of the conversion of multiple voting shares to ordinary vote shares (the "Conversion") or a reduction in the voting rights attached to each multiple voting share (the "Reduction"). If the offeror and its concert parties did not acquire shares in the company in the 6 months prior to the date of the Conversion or the Reduction, the Council will generally require the offer price to be the simple average of the daily volume weighted average traded prices of the company on either the latest 20 trading days or whatever number of trading days there were within the 30 calendar days prior to the date of the Conversion or the Reduction. The Council, however, reserves the right to disregard any inexplicably high or low traded prices during the said 30 calendar days when computing the offer price."*

Consultation 1: Should any increase in the percentage of voting rights held by a shareholder and persons acting in concert with him resulting from a Conversion or a Reduction be treated as an acquisition for the purpose of Rule 14?

Consultation 2: Should the obligation incurred by a Triggering Shareholder who is independent of the event which led to the Conversion or the Reduction be waived?

Consultation 3: Should the Triggering Shareholder be permitted to (a) make a general offer under Rule 14 within 6 months, (b) reduce his aggregate voting rights to the thresholds stipulated in Rule 14.1 within 6 months, or (c) seek a waiver from independent shareholders from the requirement to make a general offer within 3 months and, failing which, reduce his aggregate voting rights to the thresholds stipulated in Rule 14.1 within 6 months?

Consultation 4: Do you have any comments on the proposed new Note 18 on Rule 14.1?

Consultation 5: Do you have any comments on the proposed new Note 8 on Rule 14.3?

Comparable offers for share classes that only differ in voting rights

14 Another feature of the DCS framework is that, notwithstanding the Automatic Conversion Events, MV shares may be sold or transferred as MV shares to any third party if approval by independent shareholders at a

general meeting is obtained. If eligible to vote at such general meeting, each MV share is limited to only one vote [3] (the "Enhanced Voting Process").

15 Given that MV shares may be transferred to third parties, an offeror may have to make an offer for both MV shares and OV shares when making a take-over offer for a DCS company.

Comparable offers

16 It is set out in the Introduction to the Singapore Code that the Singapore Code represents the collective public opinion on the standard of conduct to be observed in general, and how fairness can be achieved in particular, in a take-over or merger transaction. How fairness can be achieved between different classes of equity is elaborated in Rule 18 which states that:

> "Where a company has more than one class of equity share capital, a comparable offer must be made for each class; the Council should be consulted in advance in such cases."

The question is what should be the ratio of offer values between MV shares and OV shares that ensures comparability.

Approach of other jurisdictions

17 In Sweden, which has one of the largest proportion of DCS companies in Europe (approximately 50% of its listed companies are DCS companies), the value of the consideration offered must be the same for all classes of shares in the case where (a) not all classes of shares are traded,

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[3] The MV shareholder in question will be required to abstain from voting as he has a vested interest. The associates of such MV shareholder should also abstain from voting on the resolution.

and (b) the different classes of shares differ only in terms of the voting rights carried by the shares. This requirement is in line with the principle that all holders of the same class of securities in an offeree company must receive equal treatment and, if a person has acquired control of a company, other holders of securities must be protected[4].

18 Similarly, in the case of DCS companies listed on the Toronto Stock Exchange ("TSE") in Canada, the "coat-tail" requirement results in an identical offer being made for OV shares. Holders of OV shares have the opportunity to participate in the offer for MV shares through a right of conversion to MV shares, unless an identical offer is concurrently made for OV shares. In this regard, the Council notes that a proposal to include a coat-tail provision[5] similar to that of the TSE was consulted on in SGX's 2017 Consultation. A majority of respondents had agreed that holders of OV shares should be put on equal footing with holders of MV shares in the event of a take-over offer, where offers made for MV shares must be offered in near identical or better terms for the OV shares.[6]

19 The Council agrees with the approach taken by Sweden and the TSE. In addition to providing certainty to market participants and potential

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[4] The Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids

[5] Based on SGX's 2017 Consultation, the purpose of a coat-tail provision is to ensure that holders of OV shares will participate in a take-over offer on an equal footing with the holders of MV shares. In general, holders of MV shares under the coat-tail agreement entered into among holders of MV shares, the issuer and a trustee, will be obliged to not sell, directly or indirectly, any MV shares unless concurrently an offer is made to purchase OV shares that, *inter alia*, offers a price per OV share at least as high as the highest price paid per share paid or required to be paid pursuant to the take-over offer for the MV shares, and is in all other material aspects identical to the offer for MV shares.

[6] SGX's Responses to Comments on Consultation Paper – Possible Listing Framework for Dual Class Share Structures, dated 28 March 2018, can be accessed at www.sgx.com.

offerors, it induces the holders of MV shares to take into account the interests of the holders of OV shares by ensuring that any premium paid for MV shares is paid for OV shares.

20 The Council proposes to amend Note 1 on Rule 18 as follows:

"NOTE ON RULE 18

1. Ratio of offer values

In the case of offers involving two or more classes of equity share capital, the ratio of the offer values must be justified to the Council in advance. Where the offers relate to equity shares that are listed, the Council 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 equity shares over the course of 6 months (3 months in the case of voluntary offers) preceding the commencement of the offer period. ~~In all other cases where traded prices of the equity shares are not available, the Council will have regard to all relevant circumstances including but not limited to the rights attaching to each class of shares.~~ Where traded prices are not available for all the classes of equity shares, and the classes of equity shares differ only in their voting rights, the Council will normally accept the ratio of the offer values to be equal to one. In all other cases, the ratio of the offer values must be justified to the Council in advance and the Council will have regard to all relevant circumstances."

<u>Consultation 6:</u> Should the ratio of offer values between MV shares and OV shares be one for the purposes of Rule 18?

<u>Consultation 7:</u> Do you have any comments on the proposed amendments to Note 1 on Rule 18?