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# TAKE-OVERS BULLETIN

A periodic newsletter by the Secretariat of the Singapore Securities Industry Council for participants in take-overs and mergers

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## Highlights

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## Happy New Year

To our readers: We hope you have had a great start to the New Year!

In this issue of the bulletin, we highlight SIC's findings in its hearing into breaches of the Singapore Code on Take-overs and Mergers (the "Code") arising from the offer for OSIM International Ltd ("OSIM"). Related to this, we also set out some examples where the offer price and market purchases might be impacted by the offeree company announcing or paying a dividend. In this issue, we also reiterate the need for independent financial advisors' ("IFA") opinions to be clear and unequivocal and the expectations for pre-conditional offer announcements.

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## The offer for OSIM International Ltd

The SIC issued a public statement on 24 November 2016 following a hearing into breaches of the Code arising from the offer (the "Offer") for OSIM International Ltd ("OSIM") by Vision Three Pte Ltd (the "Offeror"). The Offeror was found to have breached Note 3 on Rule 20.1 of the Code<sup>1</sup>, while its advisers, Credit Suisse (Singapore) Limited ("CS") and Morgan Lewis Stamford LLC ("MLS"), were found to have failed in their responsibility to ensure that the Offeror complied with the Code. The public statement can be accessed [here](#).

The Offeror had made market purchases at prices above its offer price after having announced that it would not increase its offer price i.e. a "no increase statement". This arose from a distinction not being made between the books closure

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<sup>1</sup> Note 3 on Rule 20.1 states that an offeror must not place itself in a position where it would be required to revise its offer if (a) it has made a no increase statement or (b) such revision would require the offer period to be extended beyond the last day on which the offer is capable of becoming or being declared unconditional as to acceptances.

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date (6 April 2016) for a dividend declared by OSIM and the ex-dividend trading date (4 April 2016), in determining the maximum price for market purchases made on 5 April 2016.

Under the terms of the Offer, OSIM shares were to be acquired together with all rights and entitlements. Accordingly, the offer price would be adjusted for any dividends declared, depending on whether the Offeror acquired the right to the dividend. If an acceptance was settled before the books closure date, the Offeror would be entitled to the dividend and would thus pay the offer price. Conversely, if an acceptance was settled after the books closure date, the Offeror would not be entitled to the dividend and would thus pay the offer price less the amount of the dividend.

On the other hand, open market purchases by the Offeror, which were subject to the Singapore Exchange's ("SGX") settlement period of T+3 trading days, would have had to be made at least 3 trading days before the books closure date for the Offeror to be entitled to the dividend. In other words, the Offeror would not be entitled to the dividend for shares purchased from 4 April 2016, i.e. the ex-dividend trading date, onwards. On the basis of equal treatment, from 4 April 2016 onwards, the Offeror could only purchase OSIM shares on the market at a price not exceeding the offer price less the amount of the dividend.

However, the Offeror purchased OSIM shares on the SGX on 5 April 2016 at prices above the offer price less the amount of dividend. Thus, the Offeror put itself in a position to have to set aside its "no increase statement" in breach of Note 3 on Rule 20.1 of the Code.

The case also highlights the critical role all advisers to an offeror play, in ensuring that their client complies with the Code. In this regard, advisers are held collectively responsible, and are expected to be conversant not only with the requirements of the Code, but also with the application of these requirements.

#### Impact of dividends on offer price and market purchases

The OSIM case also highlighted the operation of a fundamental principle in the Code, which is the requirement for the offeror to treat all shareholders of the same class in the offeree company equally (General Principal 3).

In the OSIM case, after the Offeror had made market purchases at prices above its offer price, it was obliged under Rule 21.1 of the Code to increase its offer to the highest price paid for the shares that it had acquired. The Offeror, through its legal advisor, applied to the SIC for a waiver of Rule 21.1. However, the SIC declined to grant the waiver, as doing so would mean that certain shareholders would receive a higher price from the Offeror for their shares as compared to others.

It is therefore important for Offerors and their advisers to be careful when determining the offer price and the price limits for market purchases, so as not to breach the Code.

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We would like to take this opportunity to set out some scenarios on how dividends declared by an offeree company, either before or after the offer announcement and to be distributed during the offer period, could affect the offer price. The effect on the offer price, and price limits for market purchases, depends on whether the offeror wishes to acquire the shares with or without the dividend rights. The following scenarios are only illustrative and are not exhaustive. Parties should consult the Secretariat to establish how the Code applies in a particular case when in doubt.

#### Scenario 1: Offer price includes acquisition of dividend rights

An offeror would usually want to protect itself against value leakage from the offeree company caused by the payment of a dividend to offeree company shareholders. Therefore, when making the offer announcement, offerors will usually set their offer price to include the acquisition of distributions, and reserve the right to reduce the offer consideration by the amount of any dividend retained by an accepting shareholder.

##### *Minimum offer price*

Where the intent is for the offer price to include the acquisition of dividend rights, in establishing the minimum offer price, the dividend amount may not be deducted from the highest price paid by the offeror (or any concert party) during the relevant period<sup>2</sup> prior to the offer announcement.

##### *Price limits for market purchases*

The offeror can purchase offeree company shares in the market during the cum-dividend<sup>3</sup> period up to the announced offer price without having to increase its offer.

However, once the shares are trading ex-dividend<sup>4</sup>, the offeror will only be permitted to purchase shares up to the offer price less the dividend amount. This ensures that shareholders who have already received the dividend do not receive any additional value for such dividend from the offeror.

#### Scenario 2: Offer price excludes acquisition of dividend rights

There might also be cases where the offer does not include the acquisition of dividend rights. The financial outlay by the offeror under this scenario will be lower.

##### *Minimum offer price*

In such cases, the minimum offer price will be the highest price paid by the offeror (or any concert party) during the relevant period prior to the offer announcement, less the dividend amount.

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<sup>2</sup> 6 months for a mandatory offer; 3 months for a voluntary offer.

<sup>3</sup> Cum-dividend: shares which trade cum-dividend carry the right to receive a dividend which has been announced. Shares trade on this basis from the date on which the dividend is announced until the ex-dividend trading date relating to the dividend.

<sup>4</sup> Ex-dividend: shares which trade ex-dividend do not carry the right to receive the relevant dividend. Shares trade on this basis from the ex-dividend trading date relating to the dividend until the date on which the dividend is paid.

*Price limits for market purchases*

The offeror (or any concert party) can purchase offeree company shares in the market or otherwise during the cum-dividend<sup>5</sup> period up to the announced offer price and the amount of the dividend announced without having to increase its offer.

However, when the shares commence trading ex-dividend<sup>6</sup>, the offeror will only be permitted to purchase shares up to the offer price.

Illustration:

The following example where highest price paid by the offeror during the relevant period prior to the offer announcement is \$2.00 per share and a dividend of \$0.03 per share is declared summarises the approach.

| <b><u>Scenario 1: Offer price includes acquisition of dividend rights</u></b>  | <b><u>Scenario 2: Offer price excludes acquisition of dividend rights</u></b>   |
|--|---|
| <p style="text-align: center;"><i>Offer announcement</i></p> <p style="text-align: center;">Minimum offer price [\$2.00] = Highest price purchased (prior offer) [\$2.00]</p>  | <p style="text-align: center;"><i>Offer announcement</i></p> <p style="text-align: center;">Minimum offer price [\$1.97] = Highest price purchased (prior offer) [\$2.00] – dividend amount [\$0.03]</p>                            |
| <p style="text-align: center;"><i>During the offer: shares trading cum-dividend</i></p> <p style="text-align: center;">Highest purchase price allowed (during offer) [\$2.00] = Offer price [\$2.00]</p>                           | <p style="text-align: center;"><i>During the offer: shares trading cum-dividend</i></p> <p style="text-align: center;">Highest purchase price allowed (during offer) [\$2.00] = Offer price [\$1.97] + dividend amount [\$0.03]</p> |
| <p style="text-align: center;"><i>During the offer: shares trading ex-dividend</i></p> <p style="text-align: center;">Highest purchase price allowed (during offer) [\$1.97] = Offer price [\$2.00] – dividend amount [\$0.03]</p> | <p style="text-align: center;"><i>During the offer: shares trading ex-dividend</i></p> <p style="text-align: center;">Highest purchase price allowed (during offer) [\$1.97] = Offer price [\$1.97]<sup>7</sup></p>                 |

*Securities exchange offer*

In a securities exchange offer (i.e. where the securities are offered as consideration instead of cash), the terms may also provide that the offer includes the acquisition of dividend rights. Where an acceptance is settled after books closure date which entitles the accepting shareholder to the announced dividend, the offeror may reduce the

<sup>5</sup> Cum-dividend: shares which trade cum-dividend carry the right to receive a dividend which has been announced. Shares trade on this basis from the date on which the dividend is announced until the ex-dividend trading date relating to the dividend.

<sup>6</sup> Ex-dividend: shares which trade ex-dividend do not carry the right to receive the relevant dividend. Shares trade on this basis from the ex-dividend trading date relating to the dividend until the date on which the dividend is paid.

<sup>7</sup> In the event the dividend is not paid (e.g. not approved by shareholders) and the offeror had purchased shares on a cum-dividend basis from the market, the offeror would normally be required to increase its offer. For example, if the offeror has purchased shares cum-dividend for \$2.00 and the dividend of \$0.03 which was announced is not subsequently paid, the offeror would normally be required to increase its offer from \$1.97 to \$2.00. This ensures that offeree company shareholders who accept the offer (and do not ultimately receive the dividend) receive the same value for their shares as those offeree company shareholders who had previously sold their shares to the offeror at \$2.00.

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consideration securities in accordance with the terms of the offer. The amount by which the consideration securities shall be reduced should normally be calculated by reference to the volume weighted average price of those securities on the last trading day before the books closure date.

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## Opinion by IFA

In June 2014, SIC published the Practice Statement on the Opinion Issued by an Independent Financial Advisor in Relation to Offers, Whitewash Waivers and Disposal of Assets under the Singapore Code on Take-Over and Mergers (the “Practice Statement”). The purpose of the Practice Statement was to provide guidance to improve the clarity and consistency of the advice given by an IFA in connection with all offers.

### *Clear and unequivocal*

The Practice Statement provides, amongst other things, that the IFA’s advice is expected to be clear and unequivocal. For example, statements that are qualified by the different investment horizons of shareholders should not be included. IFAs may, however, state that they have not taken into account the specific investment objectives of individual shareholders.

We would like to remind financial advisers of the need for the IFA opinion to be clear and unequivocal. If an IFA makes a recommendation on an offer, the recommendation should be to either “accept” or “reject”. The recommendation should not be to accept under certain conditions, and to reject under other conditions. Accordingly, recommendations should also not be conditional. This is important to help shareholders, in particular lay investors, understand and rely on the advice.

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## Pre-conditional offer announcements

Under the Code, an offeror may announce a pre-conditional offer where the announcement of a firm intention to make an offer or the triggering of a mandatory offer is subject to the fulfilment of certain pre-conditions.

### *Pre-conditions*

Having regard to General Principles 6<sup>8</sup> and 12<sup>9</sup>, Note 1 on Rule 14.2 and Note 5 on Rule 15.1 sets the standard required of pre-conditions. In particular, the fulfilment of such

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<sup>8</sup> General Principle 6 states that an offeror should announce an offer only after the most careful consideration. Before taking any action which may lead to an obligation to make a general offer, a person and his financial advisers should be satisfied that he can and will continue to be able to implement the offer in full.

<sup>9</sup> General Principle 12 states that all parties to a take-over or merger transaction should make full and prompt disclosure of all relevant information and use every endeavour to prevent the creation of a false market in the shares of an offeror or offeree company. Parties to such transactions must take care not to make statements which may mislead shareholders or the market.

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conditions cannot depend to an unacceptable degree on the subjective judgement of the offeror. Further, an offeror should not invoke any such condition so as to cause the offer to lapse, unless the circumstances which give rise to the right to invoke the condition are of material significance to the offeror in the context of the offer, and information about the condition is not available from public records or is not known to the offeror before the offer announcement.

Pre-conditions that depend on the subjective judgement of the offeror to an unacceptable degree include:

- (a) satisfactory completion of due diligence by the offeror;
- (b) finalisation of funding arrangements by the offeror; and
- (c) certain definitive agreements being entered into by the offeror.

We would like to remind market participants that pre-conditions imposed must comply with the Note 1 on Rule 14.2 or Note 5 on Rule 15.1 where appropriate. In cases of doubt, the Secretariat should be consulted.

#### *Firm intention*

We would also highlight that, taking into account General Principles 6 and 12, announcements of pre-conditional offers must provide certainty that an offeror will proceed to make an offer once the pre-conditions are satisfied or waived. Hence, the offeror is required to complete the acquisition that triggers a mandatory offer or announce a firm intention to make an offer upon fulfilment of the stated pre-conditions. Tentative pre-conditional offer announcements where the offeror would consider announcing a firm intention to make an offer or take further steps to making an offer upon the fulfilment of certain pre-conditions are prohibited.

In cases where the offeror may have difficulty in complying with Note 1 on Rule 14.2 or Note 5 on Rule 15.1 (e.g. due to conflicting regulatory requirements of its home jurisdiction), the Secretariat should be consulted.

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## Half-yearly statistics on M&A activity

In the six months ended 31 December 2016, there were 17 offers and 4 whitewashes lodged with the SIC.

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### Useful links

- The Singapore Code on Take-overs and Mergers  
[http://www.mas.gov.sg/~media/resource/sic/The\\_Singapore\\_Code\\_on\\_Take\\_Over\\_and\\_Merger\\_25%20Mar%202016.pdf](http://www.mas.gov.sg/~media/resource/sic/The_Singapore_Code_on_Take_Over_and_Merger_25%20Mar%202016.pdf)
- Securities Industry Council's Website  
<http://www.mas.gov.sg/sic>

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You may send in your feedback and comments via email.

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The information in the bulletin is intended as informal guidance and not meant to substitute consultations with the SIC Secretariat on how the Code applies to a particular case.