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

Welcome Message

Welcome to the third issue of the Secretariat's Take-overs Bulletin.

In this issue, we highlight amendments made to the Practice Statement on the Opinion Issued by an Independent Financial Advisor (IFA) in Relation to Offers, Whitewash Waivers and Disposal of Assets under the Singapore Code on Take-Overs and Mergers (IFA Practice Statement) in relation to "not fair but reasonable" opinions.

We also discuss the information to be made available to a competing offeror under Rule 9.2 of the Singapore Code on Take-Overs and Mergers (Code), and some points to note when consulting the Secretariat.

Finally, a significant change in the balance between the shareholdings in a concert party group may trigger a mandatory offer. We set out one of the circumstances that is likely to be regarded as a significant change in the balance between the shareholdings in the concert party group in Note 5 on Rule 14.1 of the Code.

Amendments to the IFA Practice Statement

In June 2014, the Securities Industry Council (SIC or the Council) published the IFA Practice Statement to provide guidance to improve the clarity and consistency of the advice given by an IFA in connection with all offers. SIC amended the IFA Practice Statement in February 2017 to include guidance on "not fair but reasonable" opinions.

Paragraph 7 of the IFA Practice Statement now states that: Where the IFA concludes that an offer is "not fair but reasonable", it should be on the basis that the IFA is of the view that despite the offer being "not fair", the offer is "reasonable" after taking into consideration other matters as well as the value of the offeree securities. Consequently, if the IFA is to make a recommendation on whether to accept or reject the offer, the recommendation in such cases would be to accept the offer.

This amendment standardises the approach to be followed by IFAs in providing a "not fair but reasonable opinion". This provides consistency and clarity to market participants, which is important given that IFA opinions are read and relied on by the public, including retail investors.

We would like to take this opportunity to remind IFAs to comply with the IFA Practice Statement.

Information provided to a competing offeror

The conduct of due diligence on an offeree company by offerors or potential offerors is a key part of take-overs and mergers. Where there is more than one offeror, the issue of whether there is parity of information between the competing offerors may arise, particularly where one of the competing offers is a management buy-out.

The Code requires that information provided to one offeror be furnished to a competing offeror if requested. Under Rule 9.2 of the Code, any information, including particulars of shareholders, given to one offeror or potential offeror must, on request, be furnished equally and promptly to any other bona fide offeror or potential offeror, who should specify the questions to which it requires answers. In cases where information on the offeree company's trade and business secrets had been given earlier by the offeree company to one offeror or potential offeror, the offeree company should consult the Council before rejecting a request by any other bona fide offeror or potential offeror for the same information.

The Code also provides guidance on the kind of information required to be provided to a competing offeror in cases of management buy-outs. Note 1 on Rule 9.2 states that the information which has to be given to a competing or potential offeror which has specified the questions to which it requires answers is:-

(a) the information generated by the offeree company (including the management of the offeree company acting in their capacity as such) which is passed to external providers or potential providers of finance (whether equity or debt) to the offeror or potential offeror; and

(b) any other information that is material in the context of making an offer insofar as the board of the offeree company is aware that the management is in possession of such information.

This, however, does not include providing information on the offeree company's trade and business secrets. The Council expects the directors of the offeree company who are involved in making the offer to co-operate with the independent directors of the offeree company and its advisers in the assembly of information.

Offeree boards should be mindful of their obligations under Rule 9.2 of the Code. What constitutes trade and business secrets would depend largely on the nature of the business and the industry the offeree company is in. Hence, it is not practical to define what are trade and business secrets. Nonetheless, before rejecting requests for information that has been provided to another offeror or potential offeror or which resides with management in the case of a management buy-out, the offeree board should consult the Secretariat and justify with supporting facts why it intends to reject the information request. Likewise, the potential offeror requesting such information could be required to explain why the information requested is material in the context of making an offer and why he should be considered a bona fide potential offeror.

Significant change in the balance between the shareholdings in a concert party group

Under Note 5 on Rule 14.1 of the Code, notwithstanding that a concert-party group may hold over 50% of a company’s voting rights, a single member or sub-group of the group may still be required to make a mandatory offer where he acquires voting rights sufficient to increase his holding to 30% or more or, if he already holds between 30% and 50%, by more than 1% in any 6-month period. In determining whether a mandatory offer is required, the Council will take into account certain factors, including whether the leader of the concert-party group or the largest individual shareholding has changed and whether the balance between the shareholdings in the group has changed significantly.

An acquisition that results in a single member or sub-group acquiring more than 49% of the voting rights is likely to be considered a significant change in the balance between the shareholdings in the group. This is because with more than 49% the single member or sub-group would have the freedom to move to more than 50% without incurring a mandatory offer, and would then no longer need to act in concert with other members of the group to have statutory control of the company.

A single member or sub-group within a concert-party group that holds in aggregate more than 50% should consult the Secretariat before acquiring voting rights in excess of the mandatory offer thresholds.

Half-yearly statistics on M&A activity

In the six months ended 30 June 2017, there were 17 offers and 1 whitewash lodged with the SIC.

Useful links

- The Singapore Code on Take-overs and Mergers
  http://www.mas.gov.sg/~/media/resource/sic/The_Singapore_Code_on_Take_Overs_and_Merger_25%20Mar%202016.pdf

- Securities Industry Council's Website
  http://www.mas.gov.sg/sic

Our contact details

Securities Industry Council
25th Storey, MAS Building
10 Shenton Way
Singapore 079117
Tel: (65) 62299222
Fax: (65) 62251350
Email: sic@mas.gov.sg

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