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

SECURITIES INDUSTRY COUNCIL

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INTRODUCTION

1 On 10 Oct 2011, 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 7 Nov 2011.

2 A total of 16 respondents provided feedback on the amendments proposed in the Consultation Paper. The list of respondents is at Annex 1. The Council welcomes the feedback and is grateful to those who have participated. Comments that are of general interest to the industry, together with SIC's responses, are set out in this paper. Some comments and suggestions have been accepted in their entirety, while others have resulted in adjustments to the proposed amendments.

3 The Monetary Authority of Singapore, on the advice of the Council, has amended the Code which will come into effect on 9 Apr 2012. 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 9 Apr 2012 to obtain a ruling or guidance.

PART I: CHANGES CONSULTED ON

4 Section 2 of the Introduction – Enforcement of the Code

Sanction for breaches

4.1 SIC had proposed to (a) clarify that the Council may have recourse to further actions against an offender in addition to depriving him of his ability to enjoy the facilities of the securities market in flagrant cases and (b) state explicitly that advisers may be required to abstain from Singapore Code-related work as sanction.

Public comments

4.2 All respondents agreed with the proposal. One respondent sought clarification on what further actions may be imposed.

SIC's response

4.3 As set out in the Consultation Paper, the Council's sanctions in cases where the offenders have refused to comply with the Council's directions have been stiffer. These include delisting and disenfranchising the offender and his concert parties' shares in the company in question as well as declaring such shares not acceptable as security for a stated period. In other cases, the Council has barred offenders from making take-over offers under the ambit of the Singapore Code for a stated period and declared an offender to be unfit to be a director of a listed company in Singapore for a stated period. Nevertheless, the Council should have the flexibility to calibrate its sanctions to suit the gravity and circumstances of each breach. The objective of the amendment is to clarify this.

4.4 The Singapore Code is amended as proposed.

[Please see Annex 2: page 2, Section 2 of the Introduction to the Code]

Compensation orders

4.5 SIC had sought views on the proposal to list the Rules, namely Rules 14, 15 17, 18, 19, 21 and 33.2, which if breached might result in compensation being ordered. In addition, views were also sought as to whether there were other Rules which should be included in the list.

Public comments

4.6 Most respondents agreed with the proposal. Several suggested that Rules 10, 16 and 20 be added to the list proposed. Another respondent suggested adopting the UK approach which limits an order for compensation strictly to the Rules listed.

SIC's response

4.7 The criterion used to determine whether a Rule should be included is that the Rule should relate to an obligation to make an offer on terms prescribed by the Singapore Code. Where the breach involves such an obligation, found only in the Singapore Code, it is less likely that shareholders will be able to rely on civil remedies to seek compensation in the courts.

Rule 10

4.8 SIC agrees that Rule 10 should be included in the list. Rule 10 on special deals seeks to ensure that the offeror does not make any arrangements with selected shareholders during an offer, or when one is reasonably in contemplation, if there are favourable conditions attached which are not extended to all shareholders. As the Rule obliges the offeror to make an offer on terms which are at least as good as those offered to selected shareholders, if any, it fits the criterion for inclusion in the list.

Rule 16

4.9 Rule 16 on partial offers sets out the additional requirements which are unique to partial offers. Nonetheless, partial offers have to comply with all other relevant Rules of the Singapore Code. Hence, Rule 18 on comparable offers for different classes of capital and Rule 19 on appropriate offers, which we have proposed to be included in the list of Rules where compensation may be directed, would apply equally to partial offers. For clarity, Rules 18 and 19 have been repeated in Rules 16.4(g) and (h) respectively.

4.10 A breach of Rules 16.4(g) and (h) would arguably also be a breach of Rules 18 and 19, and therefore compensation may already be ordered based on the current list of Rules proposed. Nevertheless, SIC agrees that Rules 16.4(g) and (h) should be included in the list of Rules for completeness. The other provisions in Rule 16 do not relate to an obligation to make an offer at a prescribed price.

Rule 20

4.11 Rule 20 sets out the requirements in relation to a revision of an offer. Rule 20.4, requires that, if an offer is revised, all shareholders who accepted the original offer must receive the revised consideration. Hence, Rule 20.4 will be included in the list of Rules. The other provisions of Rule 20, do not meet the criterion for inclusion in the list of Rules.

4.12 In short, SIC has decided to include Rules 10, 16.4(g), 16.4(h) and 20.4 in the list of Rules which if breached may result in compensations being directed. The relevant parts of Section 2 of the Introduction have been amended as follows:

"**2 Enforcement of the Code**

...

Where a person has breached the Code, the Council may also make a ruling requiring the person concerned to pay, within such period as is specified, to the holders, or former holders, of securities of the offeree company such amount as it thinks just and reasonable so as to ensure that such holders receive what they would have been entitled to receive if the relevant Rule had been complied with. Such Rules normally include but are not limited to Rules 10, 14, 15, 16.4(g), 16.4(h), 17, 18, 19, 20.4, 21 and 33.2 of the Code. In addition, the Council may make a ruling requiring simple or compound interest to be paid at a rate and for a period to be determined, including any period prior to the date of the ruling and until full payment is made."

[Please see Annex 2: page 3, Section 2 of the Introduction to the Code]

5 Real Estate Investment Trusts

Manager and trustee presumed concert parties

5.1 SIC sought views on the proposal that, in the context of concert party relationships, where a reference to a company is taken as reference to a real estate investment trust ("REIT"), the concert party relationship should be with the manager of the REIT and the trustee of the REIT in its capacity as trustee of the REIT.

Public comments

5.2 Respondents generally agreed with the proposal. They suggested that it should be set out clearly in the Singapore Code that the concert party presumption with the trustee of the REIT should not extend beyond the trustee's capacity as trustee.

5.3 One respondent suggested that the concert party relationship should not extend beyond the trustee (whether or not the trustee is a separate legal entity or a business unit within a financial institution) and its directors, and apply only in relation to actions undertaken by the trustee in its capacity as trustee for that particular REIT. Actions taken by other business entities or divisions in the ordinary course of business or in their capacity as trustee for any other REIT should not be regarded as the actions of a concert party.

5.4 Another suggested that the presumption should not be extended to include:

(a) the directors (together with their close relatives, related trusts as well as companies controlled by any of the directors, their close relatives and related trusts) of the trustee;

(b) the trustee's parent, subsidiaries and fellow subsidiaries, and its associated companies and companies of which it is an associated company; or

(c) any other person presumed to be acting in concert with the trustee based on the definition of "acting in concert" under the Singapore Code.

SIC's response

5.5 As set out in the consultation paper, the intention was not to extend the presumption of acting in concert for a trustee beyond its capacity as trustee. SIC recognises that a REIT trustee is likely to be the trustee of a number of different trusts or the custodian of certain assets of a collective scheme or corporate vehicle. As each trust would be for a

different purpose and the trust properties of each are held for different beneficiaries, extending the presumption beyond that will unreasonably hinder the operation of such trustees, depriving them of the right to act in the best interests of their clients.

5.6 The Council has decided that further refinements to clarify this position can be made. However, the directors of the trustee should nonetheless be presumed to be acting in concert with the trustee, and the presumption should apply only to actions taken by the directors of such trustees in their capacity as directors of the trustee for the particular REIT. Not including the directors in their capacity as directors of the trustee for a particular REIT would make the presumption in relation to the trustee of a REIT meaningless.

5.7 The relevant portions of new Note 7 on the Definition of Acting in Concert have been amended as follows:

> *7. REITs*
>
> *Where a reference to a company should be taken as a reference to a REIT, the concert party relationship is with the REIT's:*
>
> *(a) manager; and*
>
> *(b) trustee~~acting in such capacity~~.*
>
> *In relation to the trustee, the concert party relationship is normally limited to the trustee (including its directors) acting in the capacity as trustee of the REIT.*
>
> *The Council should be consulted if a manager or a trustee, in its capacity as trustee of a REIT, acts at the same time for more than one of the following:*
>
> *(a) offeror or possible offeror;*
>
> *(b) competing offeror or possible competing offeror; and*
>
> *(c) offeree REIT.*

For the purposes of calculating the voting rights held by a group acting in concert, the voting rights held by a trustee of unrelated trusts will not normally be counted. In cases of doubt, the Council should be consulted.

…"

[Please see Annex 2: page 9, New Note 7 on Definition of Acting in Concert]

Manager and trustee as associates

5.8 SIC had sought views on the proposal to include the manager of the REIT and the trustee in its capacity as trustee of the REIT as classes of persons defined as associates.

Public comments

5.9 Respondents agreed with the proposal.

SIC's response

5.10 The Singapore Code is amended as proposed.

[Please see Annex 2: page 11, Definition 2(h) and 2(i)]

Actions, voting rights and assets owned, controlled or held deemed as those of the manager and trustee

5.11 The Council had sought comments on the proposal to clarify the application of the Singapore Code to actions by and voting rights and assets owned, controlled or held by the trustee and the manager.

Public comments

5.12 Respondents agreed with the proposal.

SIC's response

5.13 The Singapore Code is amended as proposed.

[Please see Annex 2: page 18, new Note on Definition of REIT]

Frustrating action restrictions to apply to manager (and its directors) as well as trustee

5.14 SIC had invited comments on the proposal to apply the frustrating action restrictions of Rule 5 to the manager and the trustee of a REIT.

Public comments

5.15 Respondents who commented supported the proposal.

SIC's response

5.16 The Singapore Code is amended as proposed.

[Please see Annex 2: page 35, new Note 6 on Rule 5]

Dividend forecast as profit forecast

5.17 SIC had proposed to regard a dividend forecast of a REIT as a profit forecast for the purposes of the Singapore Code.

Public comments

5.18 Respondents agreed with the proposal.

SIC's response

5.19 The Singapore Code is amended as proposed.

[Please see Annex 2: page 158, Rule 25.6(e)]

6 Business Trusts

Trustee-manager as concert party

6.1 SIC had sought views on the proposal that, in the context of concert party relationships, where a reference to a company should be taken as a reference to a business trust, the concert party relationship should be with the trustee-manager of the business trust.

Public comments

6.2 Respondents agreed with the proposal.

SIC's response

6.3 The Singapore Code is amended as proposed.

[Please see Annex 2: page 9, Note 6 on Definition of acting in concert]

Trustee-manager as associate

6.4 SIC had invited comments on the inclusion of the trustee-manager of a business trust as a class of persons defined as associates.

Public comments

6.5 Respondents agreed with the inclusion.

SIC's response

6.6 The Singapore Code is amended as proposed.

[Please see Annex 2: page 11, Definition 2 (g)]

Actions, voting rights and assets owned, controlled or held deemed as those of the trustee-manager

6.7 SIC had invited comments on the proposal to clarify the application of the Singapore Code to actions by and voting rights and assets owned, controlled or held by the trustee-manager.

Public comments

6.8 Respondents agreed with the proposal.

SIC's response

6.9 The Singapore Code is amended as proposed.

[Please see Annex 2: page 17, new Note on registered business trust and business trust]

Frustrating action restrictions to apply to trustee-manager

6.10 SIC had invited comments on the proposal to apply the frustrating action restrictions of Rule 5 to the trustee-manager.

Public comments

6.11 Respondents agreed to the proposal.

SIC's response

6.12 The Singapore Code is amended as proposed.

[Please see Annex 2: page 35, new Note 6 on Rule 5]

7 New Rule 3.5(f) – Announcement of firm intention and New Rule 23.3(f) – Disclosure of interests

7.1 SIC had sought comments on the proposal to require offerors to disclose whether their holdings of offeree company shares have been charged as security, borrowed or lent.

Public comments

7.2 Respondents generally supported the proposal to enhance disclosures to include details on an offeror's holdings of offeree company shares which have been charged as security, borrowed or lent.

7.3 A number of respondents suggested that the disclosure of securities borrowed should exclude borrowed shares which have been on-lent or sold.

7.4 Another respondent suggested a more targeted approach where the proposed disclosures should be limited to only the offeror and concert parties whose holdings would count to the acceptance condition at the outset, e.g. the offeror and a fellow subsidiary.

7.5 Other respondents asked for clarifications on the details to be disclosed.

SIC's response

7.6 The Council agrees that borrowed shares which have either been on-lent or sold may be excluded from the disclosure of borrowed shares as a borrower who has on-lent or sold the shares to a third party would not be in a position to control such shares, and therefore should not have any impact on the acceptance level. This is also the position in the UK and Hong Kong.

7.7 However, SIC does not agree with the suggestion for a more targeted approach where, instead of the offeror and his concert parties, only the offeror and certain concert parties whose holdings would count to the acceptance condition at the outset are required to make further disclosures on whether their shares have been charged as security, borrowed or lent. Disclosure of the holdings of concert parties, including details on shares that have been charged as security, borrowed or lent, accords with General Principle 10[1] on sufficient information and time, and is in line with international practice. Such disclosures can only be waived if the concert party presumption is rebutted. The more targeted approach suggested allows the offeror to avoid the proposed disclosure through structuring. For example, the offeror can set up a bid vehicle which holds no offeree company shares to make a conditional offer for all shares, including those held by himself and his concert parties. In such case, neither the offeror nor any of his concert parties would have to make the proposed disclosures under the suggested targeted approach.

7.8 The details that should be included in the disclosure are (a) the number and (b) percentage of the securities in the offeree company held by the relevant person which has been charged as a security interest, borrowed or lent.

7.9 The reference to “relevant securities” in Rule 23.3 (proposed in the Consultation Paper) will also be amended to “shareholdings” to align with the terms used in Rule 23.3.

[1] General Principle 10 states that shareholders should be given sufficient information, advice and time to enable them to reach an informed decision on an offer. No relevant information should be withheld from them.

Borrowed shares not acceptances

7.10 The rationale for having the offeror disclose the number of shares he holds which are borrowed is to make public the number of his shares which would count towards the acceptance condition. This is because borrowed shares may not normally be counted towards fulfilling the acceptance condition. The Council had ruled on this previously in a number of cases.

7.11 For completeness, SIC has decided that it should be clarified in the Code that borrowed shares may not be counted towards the fulfilling the acceptance condition. This position is also in line with Hong Kong and the UK.

7.12 It is also worth noting that, under the current Note 14 on Rule 14.1 (or Note 15 on Rule 14.1 following the proposed amendments), the borrower of the shares is deemed to have acquired the voting rights attached to the shares for the purpose of Rule 14, unless he can show that he cannot exercise, direct, or influence the exercise of such voting rights. Where a person triggers an obligation to make a general offer under Rule 14 as a result of borrowing shares, such person should consult the Council to decide how the borrowed shares should be treated for the purpose of the acceptance condition.

7.13 To give effect to these changes, further amendments to Rules 3.5 (f) and 23.3(f) have been made and new Note 10 on Rule 28.1 has been introduced:

3.5 Announcement of firm intention to make an offer

...

(f) ~~details~~ the number and percentage of any relevant securities in the offeree company which the offeror or any person acting in concert with it has:-

(i) granted a security interest to another person, whether through a charge, pledge or otherwise;
(ii) borrowed from another person (excluding borrowed shares which have been on-lent or sold); or
(iii) lent to another person."

"**23.3 Disclosure of interests in securities and dealings**

…

(f) ~~details~~the number and percentage of any ~~relevant securities~~shareholdings in the offeree company which the offeror or any person acting in concert with it has:-

(i) granted a security interest to another person, whether through a charge, pledge or otherwise;
(ii) borrowed from another person (excluding borrowed shares which have been on-lent or sold); or
(iii) lent to another person."

"NOTES ON RULE 28.1

…

10. Borrowed shares

Shares which have been borrowed by the offeror or any person acting in concert with it may not be counted towards fulfilling an acceptance condition except with the consent of the Council. In the case where a person triggers a mandatory bid obligation under Rule 14 as a result of shareholdings that include shares that

are borrowed (see Note 15 on Rule 14.1), the Council should be consulted on how the borrowed shares should be treated for the purpose of the acceptance condition."

[Please see Annex 2: page 29, Rule 3.5(f);
page 131, Rule 23.3(f); and
page 169, new Note 10 on Rule 28.1]

8 New Note 3 on Rule 14.1 – Collective shareholder action

8.1 SIC had sought comments on the proposed new Note 3 on Rule 14.1. In particular, comments on the proposed approach to assess (a) whether a resolution is board control-seeking and (b) whether the parties, having been deemed concert parties, may be held no longer acting in concert. SIC had also invited suggestions on whether there are resolutions other than board control-seeking ones which may cause shareholders voting together on them to be regarded as parties acting in concert.

Public comments

8.2 While respondents agreed with the proposals, some suggested that the term "insignificant" in the proviso to paragraph (a) of the proposed new Note 3 on Rule 14.1 be clarified.

SIC's response

8.3 The intention of the proposed new Note 3 on Rule 14.1 is to provide guidance on the considerations that Council would take into account in determining whether shareholders coming together to vote on certain resolutions would be regarded as parties acting in concert. Clarity in this regard would facilitate greater shareholder engagement. In deciding whether a relationship is "insignificant", all the relevant considerations have to be taken into account, and would depend on the particular circumstances of each case. Hence, it would not be practicable to set out the circumstances which would render a relationship

"insignificant". With experience, the Council may, where necessary, issue practice statements on how it interprets and applies the new Note on Rule 14.1 in specific circumstances.

8.4 The Singapore Code is amended as proposed.

[Please see Annex: page 74, new Note 3 on Rule 14.1]

9 **New Note 6 on Rule 10 – Joint offerors**

9.1 SIC had sought views on the proposed new Note 6 on Rule 10 which sets out the factors that should be taken into account in determining if a person was participating in an offer as a joint offeror. SIC had also invited suggestions on other factors that could be considered.

Public comments

9.2 Respondents generally supported the proposed new Note 6 on Rule 10. One respondent suggested that the following additional factors may be relevant:

(a) whether the person will be able to exert a significant influence over the management and direction of the offeree company group (whether by virtue of the size of his voting interests in the offeree company or otherwise); and

(b) whether the person contributes (whether or not in an executive capacity) to the offeree company and the details of such contribution.

SIC's response

9.3 As set out in the Consultation Paper, the objective of new Note 6 on Rule 10 is to determine when certain offeree company shareholders (other than management) who will retain an interest in the offeree company following the offer through the exchange of their offeree company shares for shares in the bid vehicle are regarded as engaging in a special deal.

9.4 Where the offeree company shareholder is participating in the offer in a significant way such that he may be considered a joint offeror and not a mere concert party, his acquisition of a stake in the bid vehicle at the exclusion of other offeree company shareholders and any arrangements in respect of such stake would not be regarded as a special deal.

9.5 Where the shareholder retains a sizable stake in the offeree company, and as a result is able to exert significant influence over the management and direction of the offeree company group, there is no special deal issue in the first instance as other offeree company shareholders can likewise retain an interest in the offeree company by not accepting the offer.

9.6 In the case where a person contributes to the offeree company in an executive capacity, specific exemption from Rule 10 is already provided for under the current Note 4 on Rule 10.

9.7 Hence, SIC will not adopt the additional factors suggested. The Singapore Code is amended as proposed.

[Please see Annex 2: page 57, new Note 6 on Rule 10]

10 **Definition 2 - Associate**

10.1 SIC sought comments on the proposal to lower the shareholding threshold for a person to be deemed an associate from 10% to 5%.

Public comments

10.2 Respondents generally agreed with the proposal. One respondent suggested abolishing the concept of "associate", in line with the position in the UK. Abolishing "associate" would also accord with the intention of the proposed changes to adopt international standards.

SIC's response

10.3 The concept of "associate" has served us well. It should be noted that Hong Kong has not done away with "associate".

10.4 Further, while the concept of "associate" has been abolished in the UK, concert parties[2] as well as holders of 1% or more of the offeree company have to disclose dealings during the offer period. Only recently, the UK Takeover Panel had considered lowering the threshold for disclosure to 0.5%.

10.5 The Singapore Code is amended as proposed.

[Please see Annex 2: page 11, Definition 2(f)]

11 **Options and derivatives**

Acquisitions for the purpose of Rule 14

11.1 SIC had sought views on the proposal to clarify that all acquisitions of long options or derivatives would normally be regarded as

[2] Parties presumed to be concert parties are included in the definition of "associate".

acquisitions of shares for the purposes of Rule 14 and require persons who acquire long options or derivatives which might cause them to cross the mandatory offer thresholds to consult the Council before entering into such transactions.

Public comments

11.2 While respondents generally expressed support for the proposal, one respondent suggested that it should be clarified that the acquisition of a long option or derivative where the voting rights of shares held by banks or financial institutions for the purposes of hedging such long option or derivative are exercised independently without any consultation with the relevant shareholder who had acquired the long option or derivative would be excluded for the purposes of Rule 14. In other words, the relevant shareholder would not need to consult the Council before entering into such transactions.

11.3 Another two respondents sought clarification as to the meaning of "long economic exposure", suggesting that it should follow the definition set out in the 2006 Consultation Paper.

SIC's response

11.4 The main reason for the proposal to regard acquisitions of long options or derivatives as acquisitions of shares for the purposes of Rule 14 is the de facto control the acquirer of such options or derivatives has over the shares held by the counterparty to hedge its position.

11.5 Similar comments that derivative transactions where there is agreement that the counterparty would vote the hedge shares independently without reference to the acquirer of the derivative were also received by the UK Panel when it consulted on proposed amendments to apply the UK Code to options and derivatives in 2005. The UK Panel's

response was that notwithstanding the contractual arrangements between them, a counterparty will usually know the derivative investor's likely wishes and therefore it would be naïve to assume that the counterparty (who has no economic interest in any hedge securities it holds but who does have an ongoing client relationship with the investor) will act without having some regard to those wishes. Further, there would inevitably be concerns that an understanding may exist between the investor and the counterparty yet such an understanding would be extremely difficult to prove. SIC agrees with the UK Panel's comments.

11.6 Moreover, as set out in the Consultation Paper, even if the holder of the long option or derivative were not able to control the voting rights attached to the hedged shares, the long option or derivative could be used by an incumbent major shareholder as a means to lock away strategic stakes so as to cause a hostile offer to fail or deter possible hostile offerors without having to make a general offer for the company himself.

11.7 The Council also understands that it is unusual for a party to acquire large derivative positions unless the objective is to acquire control of the company. Further, it is not uncommon for parties to a cash-settled option or derivative to opt for physical settlement just prior to the exercise date.

11.8 Therefore, SIC will not adopt the suggestion to clarify that the acquisition of a long option or derivative where the voting rights of shares held by banks or financial institutions for the purposes of hedging such long option or derivative are exercised independently without any consultation with the acquirer of the long option or derivative would be excluded for the purposes of Rule 14.

Long economic exposure

11.9 In the interest of clarity, SIC agrees to adopt the definition of "a long economic exposure" from Council's 2006 Consultation Paper. In addition, amendments will be made to include written options and derivatives which give the writer a long economic exposure to the underlying security in addition to acquired options and derivatives. Specifically, the further amendments are as follows:

> "*16. Options and derivatives*
>
> *For the purposes of Rule 14, a person who has acquired or written any option or derivative which causes him to have a long economic exposure, whether absolute or conditional, to changes in the price of securities will normally be treated as having acquired those securities. Such options and derivatives would exclude instruments convertible into, rights to subscribe for and options in respect of new shares (see Note 10 on Rule 14.1). Any person who would breach the thresholds stipulated in Rule 14.1 as a result of acquiring such options or derivatives, or, acquiring securities underlying options or derivatives when already holding such options or derivatives, must consult the Council beforehand to determine if an offer is required, and, if so, the terms of the offer to be made.*
>
> *In determining if an offer is required, the Council will consider, amongst others, the time when the option or derivative is entered into, the consideration paid for the option or derivative, and the relationship and arrangements between the parties to the option or derivative.*
>
> *A person who has a long economic exposure to changes in the price of a security would benefit economically if the price of the security goes up and will suffer economically if the price of that security goes down.*
>
> *For the avoidance of doubt, a conditional put and call option agreement, the nature of which is no different from a conditional share purchase agreement, will not be regarded as an option or derivative."*

Basket or index of securities

11.10 The Council's intention is that where the characteristics of a derivative are such that it may reasonably be regarded as not having a connection with an offer or potential offer, such derivatives would not fall within the ambit of the Singapore Code. Derivative products referenced to baskets or indices of securities rather than single stocks would normally be regarded as not having a connection with an offer or potential offer. This is because when the relevant securities[3] make up only a small part of the basket or index, concerns about possible manipulation are diminished as manipulation by this method is usually not cost efficient.

11.11 The proposed test for derivatives referenced baskets or indices to be regarded as not having a connection with an offer or potential offer is that, at the time of dealing, relevant securities to which the derivative is referenced represent less than 1% of the class in issue and less than 20% of the referenced securities by value. In other words, dealings or holdings of derivatives which meet this test would fall outside the ambit of the Singapore Code. Nonetheless, it should be emphasised that this test serves as a guide and is not determinative. If the test were determinative, it would be possible to design derivative products which met the test in an artificial manner with the consequence that the Singapore Code provisions relevant to derivatives do not apply to them. This would not be satisfactory. For example, a derivative referenced to a basket comprising cash or government bonds representing 85% of the value of the basket and relevant securities representing 15% of that value would be closely linked to the movements in the price of the relevant securities in the basket. Hence, such a derivative would be regarded as having a connection with an offer or potential offer.

[3] Relevant securities refer to the securities of the offeree company and, where appropriate, the offeror.

11.12 In this regard, the following further amendments have been made to emphasise that it is necessary to observe the spirit of the Rule as well as the letter:

> *"NOTE ON DEFINITION OF DERIVATIVE*
>
> *The term "derivative" is intentionally widely defined to encompass all types of derivative transactions. However, it is not the intention of the Code to restrict transactions in derivatives which are not connected to an offer or potential offer. The Council will not normally regard a derivative which is referenced to a basket or index of securities, including relevant securities, as connected with an offeror or potential offeror if at the time of dealing by the offeror or potential offeror, the relevant securities in the basket or index represent less than 1% of the class in issue and, in addition, less than 20% of the value of securities in the basket or index. Nonetheless, derivatives referenced to a basket or index which meet these tests but in effect causes the holder to have a predominant long economic exposure to a relevant security would be regarded as being connected to an offer or potential offer. In cases of doubt, the Council should be consulted.*
>
> ..."

[Please see Annex 2: page 89, new Note 16 on Rule 14.1; and page 12, Note on Definition of derivative]

Disclosure of dealings in options and derivatives

11.13 SIC had sought views on the proposal to require disclosure of dealings in long options and derivatives during the offer period by persons holding 5% or more in the offeree company's issued share capital.

Public comments

11.14 One respondent agreed with the proposal. Another sought guidance on what would constitute dealings in derivatives. Still another suggested that it should be made clear that dealings disclosure should

only be in respect of options and derivatives which cause the party obliged to disclose to have a long economic exposure to changes in the price of underlying securities.

SIC's response

11.15 The Council agrees with the comments and suggestions made.

11.16 To provide more guidance on what constitutes dealings in relation to derivatives, Note 3 on Rule 12, which already sets out what constitutes dealings in respect of options, is amended as follows:

"*NOTES ON RULE 12*

…

3. Relevant securities

…

(e) options and derivatives in respect of any of the foregoing.

The taking, granting, acquisition, disposal, ~~or~~ exercising (by either party), lapsing, closing out or variation of an option (including a traded option contract) in respect of any of the foregoing or the exercise or conversion of any security under (d) above, whether in respect of new or existing securities and the acquisition of, disposal of, entering into, closing out, exercise (by either party) of any rights under, or issue or variation of, a derivative will be regarded as dealing in relevant securities (see also Notes 6 and 8 below).

11.17 In addition, that disclosure in dealings is limited to long options and derivatives is clarified as follows:

"*NOTES ON RULE 12*

…

8. *Dealings in ~~instruments convertible into, rights to subscribe for and options in respect of securities being offered for or which carry voting rights~~ convertible securities, warrants, options and derivatives*

For the purposes of Rules 12.1 and 12.2, a disclosure of dealings in convertible securities, warrants, options and derivatives ~~instruments convertible into, rights to subscribe for, and options in respect of, securities being offered for or which carry voting rights~~ is required only if the person dealing in such instruments~~, subscription rights or options~~ owns or controls 5% or more of the class of securities which is the subject of the instruments~~,~~ ~~subscription right or option~~. Disclosure of dealings in such instruments is limited to those which cause the holder to have a long economic exposure to the underlying securities.

A person who has a long economic exposure to changes in the price of a security would benefit economically if the price of the security goes up and will suffer economically if the price of that security goes down.

[Please see Annex 2: page 64, Note 3 on Rule 12;
and page 66, Note 8 on Rule 12]

12 **Appendix 2 - Share buy-back**

Class exemption for share buy-back

12.1 SIC had sought views on the proposal to grant a class exemption in the case of a company buying back shares via a market acquisition under Section 76E of the Companies Act or an off-market acquisition on an equal access scheme under Section 76C of the Companies Act by a listed company.

Public comments

12.2 Respondents supported the proposed class exemption.

SIC's response

12.3 The Singapore Code is amended as proposed.

[Please see Annex: page : Appendix 2 Section 3(a), page 185; and Appendix 2 New Section 3(a)(iv), page 186.]

Form 2

12.4 SIC had sought views on the proposed new Form 2

Public comments

12.5 Respondents agreed with the proposed new Form 2.

SIC's response

12.6 The new Form 2 is introduced as proposed.

[Please see Annex 3]

PART II: OTHER AMENDMENTS

13 SIC has also made other amendments to the Singapore Code. These changes relate mainly to giving effect to amendments to the Securities and Futures Act (Cap 50), codifying the Council's practice statements and making clarifications on certain Rules.

14 **REITs**

14.1 In June 2007, SIC had issued a practice statement stating that parties engaged in a take-over or merger transaction involving a REIT should comply with the Singapore Code. In this connection, references to shares, shareholders and board of a company throughout the Singapore Code would, where appropriate, refer to units, unitholders and the manager of a REIT. In July 2009, amendments to the SFA to extend the application of the Singapore Code to REITs were enacted.

14.2 The Singapore Code has been amended to give effect to the amendments to the SFA and codify the practice statement.

[Please see Annex 2: page 1, Section 2 of the Introduction; and page 18, New Definition 19]

15 **Practice statement on trust schemes in respect of mergers and privatisations**

15.1 In October 2008, the Council had issued a practice statement on trust schemes in respect of mergers and privatisations. The practice statement sets out the provisions of the Singapore Code which would be waived to facilitate a merger or privatisation via a trust scheme, as well as the conditions which such waiver would be subject to. One such condition

was that the trustee or trustee-manager obtains Court approval for the trust scheme under Order 80 of the Rules of Court.

15.2 The Council has made amendments to incorporate the practice statement in the Singapore Code.

[Please see Annex 2: page 13, Note on Definition of Offer]

16 Practice statement on the merger procedures of the Competition Commission of Singapore

16.1 In May 2007, the Council issued a practice statement on the procedures for compliance with both the Singapore Code and the merger provisions of the Competition Act (Chapter 50B). The Council has incorporated this practice statement in the Singapore Code.

[Please see Annex 2: page 91, New Rule 14.1(c);
page 104, Rule 15.1
page 195, New Appendix 3]

17 Note 1 and New Note 2 on Rule 19

17.1 The Council has made amendments to make clear that offerors may offer a higher price than the "see-through" price and the highest price paid for convertibles in the relevant periods. However, a higher offer would not be considered appropriate if it is part of a special deal to provide an incentive to persons who also hold shares of the offeree company to accept the offer for shares. In addition, it has been clarified that the Council is prepared to consider a basis other than "see-through" price to determine an appropriate offer for convertibles.

[Please see Annex 2: page 119, Note 1 on rule 19;
and page 120, New Note 2 on Rule 19]

18 Rule 34 – Fees leviable by the Council

18.1 The reference to Minister for Finance has been amended to the Minister.

[Please see Annex 2: page 177, Rule 34]