

SECURITIES INDUSTRY COUNCIL
(“SIC” OR THE “COUNCIL”)
PUBLIC STATEMENT ON THE MERGER OF MAPLETREE COMMERCIAL
TRUST (“MCT”) AND MAPLETREE NORTH ASIA COMMERCIAL TRUST
(“MNACT”)

Background

On 31 December 2021, Mapletree Commercial Trust Management Ltd. (the “MCT Manager”) and Mapletree North Asia Commercial Trust Management Ltd. (the “MNACT Manager”) announced (the “Joint Announcement”) the proposed merger of MCT and MNACT (the “Merger”) to form Mapletree Pan Asia Commercial Trust (“MPACT”). The Merger was effected through the acquisition by MCT of all the units of MNACT (the “MNACT Units”) by way of a trust scheme of arrangement (the “Trust Scheme”) in accordance with the Singapore Code on Take-overs and Mergers (the “Code”) and the deed of trust constituting MNACT. The Merger was approved by MCT and MNACT unitholders at their respective extraordinary general meetings and the Trust Scheme became effective on 21 July 2022.

2 Allen & Gledhill LLP (“A&G”) and DBS Bank Ltd. (“DBS”) acted as legal adviser and financial adviser respectively to the MCT Manager in relation to the Merger.

Omission of Whitewash Waiver Condition

3 Mapletree Investments Pte Ltd (“MIPL”) was the sponsor and common controlling unitholder of MCT and MNACT. As at the date of the Joint Announcement, MIPL (through its wholly-owned subsidiaries) owned 38.1% of the MNACT Units and 32.6% of the units in MCT (the “MCT Units”).

4 Under the terms of the Trust Scheme, an MNACT unitholder could elect to receive for each of his MNACT Unit, either:

- (a) 0.60 new units in MCT (the “Scrip-Only Consideration”);
- (b) \$0.19 in cash and 0.50 new units in MCT (the “Cash-and-Scrip Consideration”); or
- (c) \$1.19 in cash (the “Cash-Only Consideration”)¹.

5 One of the key commercial objectives was to retain, as far as possible, the incumbent unitholders in MNACT and MCT in the enlarged MCT following the Merger. In this connection, MIPL undertook to receive the Scrip-Only Consideration for its entire 38.1% interest in MNACT.

6 However, in the event the Merger was successful, MIPL could, as a consequence of its undertaking, acquire more than 1% of the total voting rights of MCT based on MCT’s enlarged total issued units. As MIPL already held 32.6% in MCT just prior to the Merger, such an increase in its unitholding in MCT would oblige MIPL to make a general offer for the enlarged MCT under Rule 14.1(b) of the Code. However, having to make a general offer immediately after the Merger would defeat the objective of retaining incumbent unitholders in the merged entity. Therefore, it was important that MIPL obtained a waiver from the requirement to make a general offer.

Whitewash waiver

7 A waiver (“whitewash waiver”) from the requirement to make a general offer is normally granted in cases where the obligation to make one is triggered by the acquisition of new shares. Such whitewash waiver is subject to conditions, in particular, the approval of the independent shareholders of the company for which the offer obligation is incurred.

¹ The Cash-Only Consideration was introduced by the MCT Manager on 21 March 2022.

8 Prior to the Joint Announcement, the issue of whether a whitewash waiver was required was raised by the MCT Manager over email with DBS on 18 October 2021 and over teleconference with A&G and DBS at a meeting on 24 November 2021 (the “24 November Meeting”). DBS had advised that a whitewash waiver was required in its 18 October 2021 email communication with the MCT Manager. A&G had advised at the 24 November Meeting that there was no need for a whitewash waiver. However, DBS did not raise any issue with A&G’s advice. Relying on A&G’s advice, the MCT Manager did not make an application to the Council for a whitewash waiver.

9 Following the Joint Announcement, the MCT Manager reviewed the transaction and sought to confirm the need for a whitewash waiver with A&G again on 6 January 2022. Having reconsidered the issue, A&G advised that a whitewash waiver was necessary. A&G proceeded to make an application on behalf of the MCT Manager to the Council to seek a whitewash waiver for MIPL. In addition, A&G sought consent for the Merger to be subject to the additional condition that independent unitholders of MCT approve the whitewash waiver (the “Whitewash Condition”). The Council granted MIPL the whitewash waiver. The Council also permitted the inclusion of the Whitewash Condition, taking into account the following:

- (a) the Merger was already subject to the approval by the independent unitholders of MCT²; and
- (b) the Merger was then in its early stages, and in particular, the Trust Scheme document had not been despatched to unitholders.

² The other approvals required of independent MCT Unitholders were the approval of not less than 50% of the independent MCT Unitholders for (a) the issuance of the Scrip Consideration and (b) the Merger.

10 The whitewash waiver and Whitewash Condition were announced on 28 January 2022³.

Breaches of Rules 3.5(d) and 8.2 of the Code

Rule 3.5(d) – Announcement of conditions

11 Rule 3.5(d) of the Code states that all conditions (including normal conditions relating to acceptances, listing and increase of capital) to which the offer or the posting of it is subject must be stated in the announcement of a firm intention to make an offer.

Rule 8.2 – Standard of care

12 Rule 8.2 of the Code states that any document or advertisement addressed to shareholders in connection with an offer or any announcement issued in connection with an offer must, as is the case with a prospectus, satisfy the highest standard of accuracy and present the information contained therein adequately and fairly.

13 It is important that conditions whose prior fulfilment an offer is subject to are disclosed at the outset in the announcement of a firm intention to make an offer. Such disclosure allows shareholders as well as investors to assess the likelihood of the offer succeeding, and may have an impact on the trading of the offeree company's shares following the announcement of the offer.

14 Therefore, the omission of the Whitewash Condition would be regarded as a material breach of Rules 3.5(d) and 8.2 of the Code. The MCT Manager, A&G and DBS were invited to make submissions on whether they have complied with the Code in respect of the omission of the Whitewash Condition.

³ For completeness, subsequent to the announcement on 28 January 2022, the MCT Manager announced on 21 March 2022 the introduction of the Cash-Only Consideration and a preferential offering which would be fully backed by MIPL to fund the Cash-Only Consideration. The Whitewash Condition was therefore revised to include the waiver of the general offer obligation that would arise from MIPL's acquisition of preferential offering units.

The SIC's Determination

15 Having considered the submissions from the MCT Manager, A&G and DBS, the Council makes the following determinations.

The MCT Manager

16 The Council finds the MCT Manager to be in breach of Rules 3.5(d) and 8.2 of the Code as it had failed to include the Whitewash Condition in the Joint Announcement.

17 The Council noted that the MCT Manager had made available all the relevant information at the 24 November Meeting, in particular, the fact that MIPL's unitholding in MCT could increase by more than 1% as a consequence of MIPL's election of the Scrip-Only Consideration. The MCT Manager had specifically flagged this issue to its advisers and sought specific advice from them in respect of whether a whitewash waiver was required at the 24 November Meeting. Regrettably, A&G provided the wrong advice whilst DBS did not raise any objections to it although DBS had advised the MCT Manager earlier on 18 October 2021 that a whitewash waiver was required.

18 Further, as set out above, it was the MCT Manager's review of the transaction that uncovered the mistake. Thereafter, the MCT Manager had taken prompt remedial action in submitting the application to the Council for a whitewash waiver and seeking approval for the addition and announcement of the Whitewash Condition.

19 Taking into account the foregoing, the Council takes no further action against the MCT Manager.

A&G

20 One of the key partners on the A&G team advising MCT (the “Key Partner”) had provided wrong advice to the MCT Manager that a whitewash waiver was not required. The Key Partner, who specialised in capital markets, real estate investment trusts (REITs) and business trusts, held the view that one of the conditions the Council would customarily impose for a waiver of certain Rules of the Code to facilitate a trust scheme provided a waiver from the requirement to make a general offer. The condition⁴ provided for an implicit approval from unitholders to forego any right to receive a general offer incurred under the trust scheme. In the case of the Merger, however, it was structured such that only the MNACT unitholders would vote on a trust scheme and would provide the implicit approval for a waiver of the general offer obligation. The MCT unitholders were asked to approve MCT’s acquisition of all the MNACT units, but as the MCT units were not being acquired, no approval for a trust scheme would be obtained from incumbent MCT unitholders. Hence, a whitewash waiver subject to approval by MCT unitholders was necessary.

21 It was only after discussing internally following the MCT Manager’s query on 6 January 2022, that the Key Partner realised that the advice given at the 24 November Meeting was wrong.

22 As an act of contrition, the Key Partner had volunteered to abstain (without any admission of liability) from undertaking Code-related work for a period of approximately 12 months beginning from 13 January 2022. The Key Partner also immediately ceased to advise the MCT Manager in relation to the Trust Scheme on the same day.

⁴ The trust scheme document to MNACT unitholders must contain advice to the effect that by voting for the trust scheme, MNACT unitholders are agreeing to MCT and its concert parties acquiring or consolidating effective control of the enlarged MCT without having to make a general offer.

DBS

23 DBS was aware that a whitewash waiver was required. In the course of assisting the MCT Manager to evaluate transaction structures on the Merger, DBS had on 18 October 2021, in response to a question from the MCT Manager, advised that MIPL would require a whitewash waiver if there was a more than 1% increase in MIPL's unitholding. However, DBS did not raise the issue with A&G when the Key Partner advised the MCT Manager at the 24 November Meeting that a whitewash waiver was not required. DBS did not further question A&G's advice which contributed to the MCT Manager's breaches of the Code.

24 As set out in the Introduction to the Code, A&G and DBS, as the professional advisers to the MCT Manager on the Merger, had collective responsibility to ensure that the MCT Manager complied with the Code. The Council is of the view that on this occasion, both A&G and DBS have fallen short of the standards expected of advisers. Accordingly, the Council finds both A&G and DBS to have breached the Code.

25 However, the Council has decided not to take any further action against A&G and DBS. The Council's decision takes into account the factors set out in paragraph 9 above as well as the following:

- (a) prompt action was taken by the advisers to mitigate the breaches;
and
- (b) both A&G and DBS have since taken steps to improve their internal processes and controls to prevent a similar incident from re-occurring.

26 The MCT Manager, A&G and DBS have consented (without any admission of liability) to the contents of and publication of this public statement.

Conclusion

27 The Council would like to remind all advisers of the critical role they play in working together to ensure their clients comply with the Code. Advisers need to be vigilant and exercise due care at all times in ensuring that their clients comply with the Code. In this connection, they are expected to be conversant not only with the requirements of the Code, but also with how these requirements are applied in practice.

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