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

**SECURITIES INDUSTRY COUNCIL**

Monday, 10 Oct 2011

Introduced in 1974, the Singapore Code on Take-overs and Mergers (the "Singapore Code") was last revised in 2007. In view of market innovations and evolving international practices, there is a need to review and update the Singapore Code.

The Securities Industry Council (“SIC” or the "Council") has, in discussion with investment bankers and lawyers active in merger and acquisition ("M&A") transactions, identified the areas of the Singapore Code that need to be refined or updated. These discussions as well as experience gained from administering the Singapore Code on specific M&A transactions over the past 4 years form the basis of this consultation paper, which sets out the proposals to amend the Singapore Code.

The Council invites interested parties to forward their views and comments on the proposed changes to the Singapore Code outlined 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

SIC would like to request all comments and feedback by Monday, 7 Nov 2011. 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

The Singapore Code needs to be updated regularly to keep pace with market innovations and evolving international practices as well as to ensure that the M&A market in Singapore remains efficient.

2 Since 2007, when the Singapore Code was last revised, a number of high profile M&A transactions have taken place in the local market. Drawing from the experience of administering the Singapore Code as well as discussions with investment bankers and lawyers active in M&A transactions, the Council is proposing additions and amendments to the Singapore Code.

3 This paper sets out proposed additions and amendments, and is divided into two parts. Part I outlines the proposed changes to the Singapore Code for public consultation, while Part II sets out other proposed amendments. At Annex 1 is a marked up text of the draft revised Singapore Code, while Annex 2 contains the draft Form 2.

# PART I: CHANGES FOR CONSULTATION

## Section 2 of the Introduction – Enforcement of the Singapore Code

*Sanctions for breaches*

4 Currently, it is set out in the Introduction of the Singapore Code that persons in breach of the Singapore Code may be subject to private reprimand or public censure or, in a flagrant case, actions designed to deprive the offender temporarily or permanently of its ability to enjoy the facilities of the securities market.

5 However, to deal with cases where the offenders have refused to comply with the Council's directions, the Council's sanctions have been stiffer. In one case, the offender and his concert parties' shares in the company in question were delisted and disenfranchised for a stated period. The shares were also not acceptable as security for a stated period. Other sanctions that the Council has imposed include barring an offender from making a take-over offer under the ambit of the Singapore Code for a stated period and declaring an offender to be unfit to be a director of a listed company in Singapore for a stated period.

6 It is important that the Council should have the flexibility to calibrate its sanctions to suit the gravity and circumstances of each breach.

7 The current list of sanctions does not cater adequately to breaches of the Singapore Code by advisers. In previous cases, where findings of serious breach against the advisers of the offeror have been made, the advisers had volunteered to abstain from advising on matters related to the Singapore Code for a stated period. Nevertheless, it was likely that the hearing committee would have considered including in its sanctions a "cold-shoulder" order to stop Singapore Code-related work if the offending

advisers had not volunteered to do so. Merely censuring the advisers publicly will not be sufficient in serious cases.

8 The Council proposes to amend the Singapore Code to (a) clarify that the Council may have recourse to further actions against the 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.

9 In this connection, the following amendments are proposed:

> "If the Council finds that there has been a breach of the Code, it may have recourse to private reprimand or public censure or, in a flagrant case, to further action as the Council thinks fit, including actions designed to deprive the offender temporarily or permanently of its ability to enjoy the facilities of the securities market. In the case of advisers, the Council may also require such adviser to abstain from taking on Code-related work for a stated period. If the Council finds evidence to show that a criminal offence has taken place whether under the Companies Act, the Securities and Futures Act or under the criminal law, it will refer the matter to the appropriate authority."

*[Please see Annex 1: page 2, para 6 of Section 2]*

*Compensation Orders*

10 In the case of Jade Technologies Limited, it was necessary for the hearing committee to explain in its report why no compensation was ordered and to set out the type of breaches that would have attracted a compensation order. This was in response to a general expectation in the market that compensation would be required. Such expectation was due largely to the fact that most of the publicised cases on breaches of the Singapore Code prior to that related to a failure to make a general offer

after incurring an obligation to do so, where compensation has invariably been ordered.

11 As set out in the report on Jade Technologies Limited, compensation is normally appropriate where there is a breach of an obligation to make an offer on the terms prescribed by the Singapore Code. An example of such an obligation is Rule 14, which requires a mandatory offer to be made when an offeror acquires more than 30% of the shares in the offeree company or in the case of an offeror already holding between 30% to 50% of such shares, when he acquires more than 1% of such shares within any 6-month period. Rule 14 also requires a mandatory offer to be at the highest price paid by the offeror of such shares within 6 months of the offer. Another example is Rule 21, which requires an offeror who purchases shares during the offer period at above the offer price to increase his offer to not less than this higher price. Where the breach is of such an obligation, found only under the Singapore Code, it is unlikely that shareholders will be able to rely on civil remedies to seek compensation in the courts.

12 Conversely, where the Rule breached does not relate to an obligation to make an offer on terms prescribed by the Singapore Code and shareholders would otherwise have recourse to a civil remedy in a court of law, the Council would not normally require compensation.

13 To provide clarity as to when the Council may normally direct compensation, it is proposed that the Rules which if breached might result in compensation being ordered be enumerated:

"**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 14, 15, 17, 18, 19, 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 1: page 3, new para 7 Section 2]*

*Consultation 1:* SIC seeks views on the proposal to clarify that the Council may have recourse to further actions in addition to depriving the offender of his ability to enjoy the facilities of the securities market in flagrant cases and state explicitly that advisers may be required to abstain from Singapore Code-related work as sanction.

*Consultation 2:* SIC seeks views on the proposal to list the Rules which if breached might result in compensation being directed. SIC also invites comments on whether there are any other specific provisions which should be included in the list.

## Real Estate Investment Trusts

14 In Singapore, the regulatory regime for take-overs and mergers of companies has been adapted for real estate investment trusts ("REITs") over the past few years. In 2007, the Council issued a practice statement to state that it would extend the ambit of the Singapore Code to REITs. In 2008, the Council issued a practice statement setting out the requirements in respect of mergers and privatisations of REITs via trust schemes. In July 2009, amendments to the Securities and Futures Act ("SFA") to give effect to the extension were enacted. In addition, amendments to the SFA to provide for compulsory acquisition of units in a REIT came into effect on 29 Mar 2010.

15 The Council proposes to codify its practice statements on REITs as well as make certain amendments, mainly to clarify the application of the Singapore Code given the relationships between the REIT, the manager and the trustee. While the latter will be dealt with in the paragraphs immediately ensuing, the codification of the two practice statements on REITs which have been in place since 2007 and 2008 are set out in Part (II) below.

*Manager and trustee presumed concert parties*

16 Given that the manager performs a similar role to directors of a company, it is proposed that where a presumed concert party relationship involves a REIT, such relationship should be with its manager. This is in line with the current treatment of directors of a company in the Singapore Code, where a company is presumed to be acting in concert with its directors.

17 In the case of the trustee, it is less straightforward. The trustee performs the role of the custodian, holding assets of the REIT for the benefit of unitholders. In addition, while it does not manage the REIT and has no control over its affairs, the trustee oversees the activities of the manager for compliance with the relevant constitutive documents of the REIT and the applicable regulatory requirements. By design, the trustee is independent of the manager.

18 On the other hand, the trustee is required to carry out the instructions of the manager in respect of investments unless these are in conflict with the constitutive documents of the REIT or the applicable regulatory requirements.

19 Furthermore, it is usually the case that the trustee is nominated by the manager when the REIT is established. In addition, should the trustee be removed, it is the manager who appoints a replacement.

20 It is also noted that, in practice, if the manager intends to make an acquisition, it would normally consult the trustee to obtain its consent beforehand as the trust assets are held by the trustee and the trustee has a duty to oversee the activities of the manager. Even though the trustee is unlikely to make any active business decisions itself, it is in a position to influence the decisions of the manager and can veto such decisions if it considers that they would breach the constitutive documents of the REIT or the applicable regulatory requirements.

21 On balance, taking into consideration the close relationship of the manager and the trustee, it is proposed that where a presumed concert-party relationship involves a REIT, such relationship should be with the trustee in addition to the manager.

22 Further, it is likely that a REIT trustee would 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, it is proposed that the concert party presumption in the case of a trustee be limited to the trustee in its capacity as trustee for that REIT. To extend 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.

23 To summarise, it is proposed that, in the context of concert party relationships, where a reference to a company should be taken as a reference to a REIT, the concert-party relationship should be with the following parties:

(a) the manager of the REIT; and

(b) the trustee of the REIT acting in such capacity.

24 In addition, as each case would depend on its own particular facts, it is proposed that the Council be consulted where there is a common manager or trustee for the parties to an offer.

25 The proposed amendments are as follows:

*"NOTES ON DEFINITION OF ACTING IN CONCERT*

*...*

*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.*

*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 1: New Definition 7, page 9]*

*Consultation 3:* SIC seeks 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 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.

*Manager and trustee as associates*

26 The definition of associate covers all persons acting in concert. In a take-over or merger transaction where a REIT (through its trustee or

manager) is involved either as an offeror, offeree, or shareholder of the offeror or offeree in circumstances which render the REIT an associate, its manager and trustee (in its capacity as trustee of the REIT) would "directly or indirectly own, or deal in, the shares of the offeror or offeree" and "have (in addition to their normal interests as shareholders) an interest or potential interest, whether commercial, financial or personal, in the outcome of the offer". Accordingly, it is proposed that such parties be included as classes of persons deemed associates.

27 The proposed revisions in this regard are as follows:

"**2 Associate:** ...

(h) any trustee (in its capacity as trustee of a REIT) of the offeror, the offeree or any REIT that relates to the offeror or offeree in any of the ways set out in (a) above;

(i) any manager (together with its parent, subsidiaries, and fellow subsidiaries, and its associated companies and companies of which it is an associated company) of the offeror, the offeree or any REIT that relates to the offeror or the offeree in any of the ways set out in (a) above; and"

*[Please see Annex 1: New Definitions 2(h) and 2(i), page 11]*

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|---|
| *Consultation 4:* SIC seeks 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. |

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

28 Similar to a board of directors, the manager is responsible for the management of a REIT in accordance with its constitutive documents. There is, however, a fundamental difference between a company and a REIT. The former exists as a separate legal entity, which is subject to statutory requirements, whereas the latter does not. A company can therefore own assets as a legal person while a REIT (or trust in general) holds assets through its trustee or special purpose vehicles (the issued share capital of which is held by the trustee) set up specifically for such purpose.

29 Given the unique structure of a REIT, it is proposed that an express statement be included in the Singapore Code that where a reference to a company in the Singapore Code should refer to a REIT, actions taken by the company should refer to actions taken by the trustee (in its capacity as trustee of a REIT) and/or the manager. This avoids arguments that the manager or the trustee is not prohibited from or obliged to take certain action under the Singapore Code on the basis that such prohibitions or obligations are imposed on the REIT (as offeror or offeree) rather than on the manager or the trustee.

30 As the REIT also does not hold assets by itself, the concepts of parent/subsidiary relationship, fellow subsidiaries and associated companies do not strictly apply to REITs. This results in a number of provisions of the Singapore Code, which are drafted with company structures in mind, being rendered inapplicable to REITs. For example, if a REIT is an offeror, the special purpose vehicle(s) (which would be held by the trustee) would not be deemed to be acting in concert with the REIT and hence any units of the target REIT held by a special purpose vehicle would not be included in the aggregate holdings of the offeror's concert

party group. To address this concern, it is proposed that it should be stated in the Singapore Code that where a reference to a company in the Singapore Code should refer to a REIT, voting rights or assets held by the company should refer to voting rights or assets held by the trustee (in its capacity as trustee for the REIT), or the manager or the special purpose vehicles held by the trustee.

31 In this connection, the proposed amendments are as follows:

*"NOTE ON DEFINITION OF REIT*

*...*

*Where a reference to a company should refer to a REIT, an action taken by the company should refer to an action taken by the trustee (in its capacity as trustee of a REIT) or the manager and/or any of its directors (in their respective capacity on behalf of a REIT). In cases of doubt, the Council should be consulted.*

*Where a reference to a company should refer to a REIT, voting rights owned, controlled or held by the company should refer to voting rights owned, controlled or held, whether directly or indirectly, by the trustee (in its capacity as trustee of a REIT) or the manager and/or any of its directors (in their respective capacity on behalf of a REIT). In cases of doubt, the Council should be consulted.*

*Where a reference to a company should refer to a REIT, assets owned, controlled or held by the company should refer to assets owned, controlled or held by the trustee (in its capacity as trustee of a REIT). This would include assets owned, controlled or held by the trustee through any special purpose vehicle. In cases of doubt, the Council should be consulted."*

*[Please see Annex 1: New Note on Definition of REIT, page 18]*

*Consultation 5:* SIC invites comments on the proposal to clarify the application to Singapore Code to actions by and voting rights and assets owned, controlled or held by the trustee and the manager.

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

32 Given that both the manager and the trustee have a role to play in the running of a REIT, it is proposed that there should be a clarification that the frustrating action restrictions in Rule 5 apply to the manager (and its directors) as well as the trustee of an offeree REIT.

33 With regard to service contracts in the context of frustrating actions, the Council is of the view that this should not be limited to service contracts between the REIT and the manager, and should also include those between the manager and its directors. The proposed amendments are:

> *"6. Registered business trusts, business trusts and REITs*
>
> *For the avoidance of doubt, no frustrating action should be undertaken by:*
>
> *…*
>
> *(b) in the case of an offeree REIT, the manager and/or any of the directors of the manager and/or the trustee (in its capacity as trustee of such offeree REIT).*
>
> *In particular, in addition to the matters set out in this Rule, the relevant parties must not, without the approval of the unitholders, do or agree to do the following:*

…

*(ii) in the case of an offeree REIT, otherwise than in the ordinary course of business:*

*(A) alter the terms of engagement between the offeree REIT and its manager; or*

*(B) enter into or alter the terms of, the service contracts between the manager and any of its directors.*

*[Please see Annex 1: New Note 6 on Rule 5, page 35]*

*Consultation 6:* SIC invites comments on the proposal to apply the frustrating action restrictions of Rule 5 to the manager and the trustee.

*Dividend forecast a profit forecast*

34 A REIT is required to distribute to unitholders each year by way of dividends an amount not less than 90% of its audited net income after tax[1]. With the dividend forecast figure, the floor and ceiling of a REIT's profits can easily be worked out using the 90% formula. Given the close correlation between a dividend forecast and a profit forecast, it is proposed that a dividend forecast in respect of a REIT be treated as a profit forecast. The proposed amendments are as follows:

"**25.6 Statements which will be treated as profit forecasts**

...

(e) Dividend forecasts

A dividend forecast does not normally constitute a profit forecast unless, for example, it is accompanied by an estimate as to dividend cover. A

[1] This is a condition for tax transparency. All existing REITs are subject to this condition.

dividend forecast of a REIT would normally be regarded as a profit forecast. In cases of doubt, the Council should be consulted.

…"

*[Please see Annex 1: Rule 25.6(e), page 158]*

*Consultation 7:* SIC invites comments on the proposal to regard a dividend forecast of a REIT as a profit forecast for the purposes of the Singapore Code.

## Business Trusts

35 The Singapore Code was applied to business trusts during the last revision of the Singapore Code in 2007. In 2008, the Council issued a practice statement setting out the requirements in respect of mergers and privatisations of business trusts via trust schemes to supplement the relevant requirements already in the Singapore Code.

36 The Council proposes to codify the practice statement issued in relation to trust schemes as well as make clarifications and refinements to the regime for business trusts. The codification of the practice statement in relation to trust schemes is dealt with in Part (II) below.

37 The structure of a business trust is similar to that of a REIT (or trust in general). The main difference is that the roles and responsibilities of the manager and the trustee in the case of a REIT are combined into that of the trustee-manager in the case of a business trust. As a consequence, most of the clarifications and refinements proposed for REITs above would apply with the appropriate modifications to business trusts. Likewise, the rationale behind the proposed amendments for REITs is

relevant to those for business trusts. Hence, they will not be discussed here.

38 To summarise, amendments are proposed to clarify the following:

(a) 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 is with the trustee-manager of the registered business trust or business trust. The proposed amendments in this regard are:

*"NOTES ON DEFINITION OF ACTING IN CONCERT*

*...*

*6. Registered business trusts and business trusts*

*Where a reference to a company should be taken as a reference to a registered business trust or a business trust, the concert party relationship is with the trustee-manager of the registered business trust or business trust.*

*..."*

*[Please see Annex 1: New Note 6 on Definition of acting in concert, page 9]*

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|---|
| *Consultation 8:* SIC seeks 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. |

(b) A trustee-manager of a registered business trust or business trust is deemed to be an associate. The proposed amendments are as follows:

"**2 Associate:**

...

(g) any trustee-manager (together with its parent company, subsidiaries, and fellow subsidiaries, and its associated companies and companies of which it is an associated company) of the offeror, the offeree or any registered business trust or business trust relates to the offeror or offeree in any of the ways set out in (a) above;

..."

*[Please see Annex 1: New Definition 2(g); page 11]*

*Consultation 9:* SIC seeks views on the proposal to include the trustee-manager of a business trust as a class of persons defined as associates.

(c) Where a reference to a company should refer to a business trust, an action taken by the company should refer to an action taken by the trustee-manager and/or any of its directors (in their respective capacity on behalf of a business trust). The relevant proposed amendments are:

*"NOTE ON DEFINITION OF REGISTERED BUSINESS TRUST AND BUSINESS TRUST*

*...*

*Where a reference to a company should refer to a registered business trust or business trust, an action taken by the company should refer to an action taken by the trustee-manager and/or any of its directors (in their respective capacity on behalf of a registered business trust or business trust). In cases of doubt, the Council should be consulted.*

*..."*

*[Please see Annex 1: New Note on Definition of registered business trust and business trust, page 17]*

(d) Where a reference to a company should refer to a business trust, voting rights owned, controlled or held by the company should refer to voting rights owned, controlled or held by the trustee-manager and/or any of its directors (in their respective capacity on behalf of the business trust). The relevant proposed amendments are:

*"NOTE ON DEFINITION OF REGISTERED BUSINESS TRUST AND BUSINESS TRUST*

*...*

*Where a reference to a company should refer to a registered business trust or business trust, voting rights owned, controlled or held by the company should refer to voting rights owned, controlled or held, whether directly or indirectly, by the trustee-manager and/or any of its directors (in their respective capacity on behalf of the registered business trust or business trust). In cases of doubt, the Council should be consulted.*

*..."*

*[Please see Annex 1: New Note on Definition of registered business trust and business trust, page 17]*

(e) Where a reference to a company should refer to a business trust, assets owned, controlled or held by the company should refer to assets owned, controlled or held by the trustee-manager. The relevant proposed amendments are:

*"NOTE ON DEFINITION OF REGISTERED BUSINESS TRUST AND BUSINESS TRUST*

...

*Where a reference to a company should refer to a registered business trust or business trust, assets owned, controlled or held by the company should refer to assets owned, controlled or held by the trustee-manager. This would include assets owned, controlled or held by the trustee-manager through any special purpose vehicle. In cases of doubt, the Council should be consulted.*

*..."*

*[Please see Annex 1: New Note on Definition of registered business trust and business trust, page 17]*

*Consultation 10:* SIC invites comments on the proposal to clarify the application to Singapore Code to actions by and voting rights and assets owned, controlled or held by the trustee-manager.

(f) The restrictions on frustrating action apply to actions of the trustee-manager of an offeree business trust. In addition, changes to the terms of engagement between the offeree business trust and its trustee-manager or the terms of the

service contracts between the trustee-manager and any of its directors otherwise than in the ordinary course of business may be considered a frustrating action. In this connection, the proposed amendments are as follows:

*"NOTES ON RULE 5*

*…*

*6. Registered business trusts, business trusts and REITs*
*For the avoidance of doubt, no frustrating action should be undertaken by:*

*(a) in the case of an offeree registered business trust or business trust, the trustee-manager and/or the directors of the trustee-manager; and*

*….*

*In particular, in addition to the matters set out in this Rule, the relevant parties must not, without the approval of the unitholders, do or agree to do the following:*

*(i) in the case of a registered business trust or business trust, otherwise than in the ordinary course of business:*

*(A) alter the terms of engagement between the offeree registered business trust or business trust and its trustee-manager; or*

*(B) enter into or alter the terms of, the service contracts between the trustee-manager and any of its directors; and*

…"

*[Please see Annex 1: New Note 6 on Rule 5, page 35]*

*Consultation 11:* SIC invites comments on the proposal to apply the frustrating action restrictions of Rule 5 to the trustee-manager.

**New Rules 3.5(f) – Announcement of firm intention and New Rules 23.3(f) – Disclosure of interests**

39 Following the announcement of an offer, trading and investment decisions are based on the likelihood of the offer becoming unconditional. Hence, information in the offer announcement and document that has a bearing on the offer becoming unconditional, such as the level of shareholdings of the offeror, must be accurate to enable the market to assess this likelihood.

40 As there would be some degree of uncertainty in respect of the level of shareholdings of the offeror if his shares were charged, borrowed or lent, the offeror is expected to disclose any such arrangements in relation to his shares. Hence, it is proposed that amendments be made to make clear that offerors must disclose if their offeree company shares they hold have been charged as security, borrowed or lent. Specifically, the following amendments are proposed:

**3.5 Announcement of firm intention to make an offer**

...

(f) details 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; or
(iii) lent to another person."

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

…

(f) details 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; or
(iii) lent to another person."

*[Please see Annex 1: New Rule 3.5(f), page 29; New Rule 23.3(f), page 131]*

*Consultation 12:* SIC seeks comments on the proposal to require offerors to disclose whether their holdings of offeree company shares have been charged as security, borrowed or lent.

## New Note 3 on Rule 14.1 – Collective shareholder action

41 Note 2 on Rule 14.1 states that the Council will not normally regard the action of shareholders voting together on particular resolutions at one general meeting as action which of itself should lead to an offer obligation. The question then would be in what circumstances would shareholders voting together on a single resolution cause them to be regarded as parties acting in concert and possibly trigger a general offer obligation.

42 To address this, the Council proposes to set out the circumstances where voting together in a single resolution may cause shareholders to be regarded as parties acting in concert by adopting the UK approach on collective shareholder action.

43 In the UK, where the resolutions at one general meeting are for the purposes of seeking control of the board, the shareholders who requisition or threaten to requisition such resolutions may be presumed to be acting in concert. Such parties will be presumed to be acting in concert once an agreement or understanding is reached between them in respect of the board control-seeking proposal with the result that subsequent acquisitions of interests in shares by any member of the group could give rise to an obligation to make a general offer. The UK Takeover Code also sets out the approach in assessing whether or not a resolution would be regarded as board control-seeking.

44 The proposed new Note in this connection is as follows:

*"NOTES ON RULE 14.1*

*…*

*3. Collective shareholders' action*

*Notwithstanding Note 2 above, the Council will normally presume shareholders who requisition or threaten to requisition the consideration of a board control-seeking proposal at a general meeting, together with their supporters as at the date of requisition or threat, to be acting in concert with each other and with the proposed directors. Such parties will be presumed to be acting in concert once an agreement or understanding is reached between them in respect of a board control-seeking proposal with the result that subsequent acquisitions of interests in shares by any member of the group could give rise to an obligation to make a general offer under this Rule.*

*In determining whether a proposal is board control-seeking, the Council will have regard to a number of factors including the following:*

*(a) the relationship between any of the proposed directors and any of the shareholders proposing them or their supporters. Relevant factors in this regard would include:*

*(i) whether there is or has been any prior relationship between any of the proposing shareholders, or their supporters, and any of the proposed directors;*

*(ii) whether there are any agreements, arrangements or understandings between any of the proposing shareholders, or their supporters, and any of the proposed directors with regard to their proposed appointment; and*

*(iii) whether any of the proposed directors will be remunerated in any way by any of the proposing shareholders, or their supporters, as a result of or following their appointment.*

*If, on this analysis, there is no relationship between any of the proposed directors and any of the proposing shareholders or their supporters, or if any such relationship is insignificant, the proposal will not be considered to be board control-seeking such that the parties will not be presumed to be acting in concert and it will not be necessary for the factors set out at paragraphs (b) to (f) below to be considered. If, however, such a relationship does exist which is not insignificant, the proposal may be considered to be board control-seeking, depending on the application of the factors set out at paragraph (b) below or, if appropriate, paragraphs (b) to (f) below;*

*(b) the number of directors to be appointed or replaced compared with the total size of the board;*

*If it is proposed to appoint or replace only one director, the proposal will not normally be considered to be board*

*control-seeking. If it is proposed to replace the entire board, or if the implementation of the proposal would result in the proposed directors representing a majority of the directors on the board, the proposal will normally be considered to be board control-seeking.*

*If, however, the implementation of the proposal would not result in the proposed directors representing a majority of the directors on the board, the proposal will not normally be considered to be board control-seeking unless an analysis of the factors set out at paragraphs (c) to (f) below would indicate otherwise;*

*(c) the board positions held by the directors being replaced and to be held by the proposed directors;*

*(d) the nature of the mandate, if any, for the proposed directors;*

*(e) whether any of the proposing shareholders, or any of their supporters, will benefit, either directly or indirectly, as a result of the implementation of the proposal other than through its interest in shares in the company; and*

*(f) the relationship between the proposed directors and the existing directors and/or the relationship between the existing directors and the proposing shareholders or their supporters.*

*In determining whether it is appropriate for such parties to be held no longer to be acting in concert, the Council will take account of a number of factors, including the following:*

*(a) whether the parties have been successful in achieving their stated objective;*

*(b) whether there is any evidence to indicate that the parties should continue to be held to be acting in concert;*

*(c) whether there is any evidence of an ongoing struggle between the proposing shareholders, or their supporters, and the board of the company;*

*(d) the types of proposing shareholders involved and the relationship between them; and*

*(e) the relationship between the proposing shareholders, or their supporters, and the proposed/new directors.*

*…"*

*[Please see Annex 1: New Note 3 on Rule 14.1, page 74]*

*Consultation 13:* SIC seeks comments on the proposed new Note 3 on Rule 14.1. SIC also invites 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.

*Consultation 14:* SIC invites 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.

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

45 There have been numerous cases where it is proposed that certain offeree company shareholders (other than management) are to retain an interest in the offeree company following the offer through the exchange of their offeree company shares for shares in the bid vehicle. In deciding whether such arrangements would be regarded a special deal under Rule

10, the Council makes reference to the principles and factors set out in the UK Takeover Panel's statement on *Canary Wharf plc*.

46 In *Canary Wharf plc*, the UK Takeover Panel set out that if it found that the offeror and the offeree company shareholder had come together to form a consortium on such terms and in such circumstances that each of them can be considered to be a joint offeror, any arrangements between themselves regarding the future membership, control and management of the business being acquired would not be regarded as a special deal. In determining whether a person is a joint offeror certain factors were considered.

47 In response to requests from market practitioners for more clarity on this issue, the Council proposes to adopt the UK Takeover Panel's approach on joint offerors in the New Note 6 on Rule 10 as follows:

> *"NOTES ON RULE 10*
>
> *…*
>
> *6. Joint offerors*
>
> *When two or more persons come together to form a consortium on such terms and in such circumstances that each of them can be considered to be a joint offeror, Rule 10 is not breached if one (or more) of them is already a shareholder in the offeree company. Subject to that, joint offerors may make arrangements between themselves regarding the future membership, control and management of the business being acquired. The factors that the Council will take into account in determining whether a person is a joint offeror include the following:*
>
> *(a) the proportion of equity share capital of the bid vehicle the person will own after completion of the acquisition;*

*(b) whether the person will be able to exert a significant influence over the future management and direction of the bid vehicle;*

*(c) the contribution the person is making to the consortium;*

*(d) whether the person will be able to influence significantly the conduct of the bid; and*

*(e) whether there are arrangements in place to enable the person to exit from his investment in the bid vehicle within a short time or at a time when other equity investors cannot.*

*..."*

*[Please see Annex 1: New Note 6 on Rule 10, page 57]*

*Consultation 15:* SIC seeks views on the proposed new Note 6 on Rule 10. SIC also invites suggestions on other factors that should be taken into account in determining if the parties are participating as joint offerors.

**Definition 2 - Associate**

48 The term "associate" is intended to cover all persons (whether or not acting in concert with the offeror, offeree company or with one another) who directly or indirectly own, or deal in, the shares of the offeror or offeree company in a take-over or merger transaction and who have (in addition to their normal interests as shareholders) an interest or potential interest, whether commercial, financial or personal, in the outcome of the offer. The Singapore Code goes on to set out the categories of persons who would normally be regarded as associates.

49 The consequence of being an associate is having to disclose dealings in shares of the offeree company (and offeror in the case of a securities exchange offer) by 12 noon on the dealing day following the date of the relevant transaction. The objective of this is to allow offeree company shareholders and the investing public to gauge how the trading in offeree company shares during the offer period have been affected by the trading of associates.

50 Currently, one of the categories of persons listed as associate is a holder of 10% or more of the equity share capital of the offeror or offeree company. The Council is of the view that this is too high.

51 In Hong Kong, it is 5%, in line with Hong Kong's threshold for substantial shareholdings. While in the UK, prior to the abolition of the term associate, holders of 1% or more were deemed to be associates.

52 Taking into account the smaller market capitalisations of companies in Singapore compared to those in the UK, a 1% threshold for disclosure might be overly stringent. Hence, the Council proposes to lower the threshold to 5%. 5% is also the threshold for substantial shareholder notifications in Singapore.

53 The proposed amendments in this regard are as follows:

"**2 Associate:**

...

(f) a holder of ~~10~~5% or more of the equity share capital of the offeror or offeree company. This includes a holder who acquires shares which takes him through ~~10~~5%. Where two or more persons act as a syndicate or other group, pursuant to an agreement or understanding (whether

formal or informal) to acquire or hold such equity share capital, they will be deemed to be a single holder for the purpose of this paragraph; ~~and~~

..."

*[Please see Annex 1: definition 2(f), page 11]*

| |
|---|
| *Consultation 16:* SIC seeks comments on the proposal to lower the shareholding threshold for a person to be deemed an associate from 10% to 5%. |

**Options and derivatives**

54 During the last revision of the Singapore Code, the Council had consulted on whether to adopt the then newly introduced approach by the UK Takeover Panel to apply the UK Takeover Code to dealings in options and derivatives[2].

*The UK approach*

55 In the UK, parties to an offer and other market participants were increasingly dealing in derivatives and options. One the most common form of derivative instruments encountered in the UK was a contract for differences ("CFD"), which proffers an economic interest in the underlying shares to the CFD holder based on the difference in price of the underlying shares between the beginning (the "reference price") and end of the contract period without transferring ownership rights. The counterparty to such a transaction, typically an investment bank or a securities house, will normally hedge its exposed position arising from writing the CFD contract by acquiring or selling short (as the case may be)

[2] Derivatives refer to any financial product whose value in whole or part is determined directly or indirectly by reference to the price of an underlying security, whether cash or physically settled.

a corresponding number of the underlying securities (“hedge shares”) at or around the CFD reference price.

56 Since the CFD holder has only an economic interest in the movement of the price of the underlying shares, it could be argued that there should be no consequences under take-over regulation. Further, as a matter of law, title to the hedge shares (in the case of a long CFD) is held by the counterparty and the contractual arrangements between the CFD holder and the counterparty usually reflect this.

57 However, the holder of a long CFD is able, in practice, to exercise a significant degree of de facto control over the shares held by the counterparty to hedge its position. The counterparty normally has no economic exposure in respect of the transaction and will naturally wish to obtain repeat business from the holder of the long CFD. As a result, the counterparty will often exercise the voting rights attaching to the hedge shares according to the wishes (or likely wishes) of the long CFD holder. Furthermore, the holder of a long CFD knows that, because the counterparty will not normally wish to be in an unhedged position, the counterparty is unlikely to dispose of the hedge shares until the CFD is closed out.

58 Even if the holder of the long CFD were not able to control the voting rights attached to the hedged shares, the long CFD 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.

59 Given the possible abuse of options and derivatives in a take-over situation, the UK Takeover Panel decided that the UK Takeover Code should apply to options and derivatives, whether these were cash or

physically settled. Under UK's new regime, a person is deemed to have acquired an interest in the underlying shares if he acquires an option or derivative which causes him to have a long economic exposure in the shares underlying the option or derivative. Accordingly, if the acquisition of such interests causes him to cross the mandatory offer thresholds, such person would incur an obligation to make an offer for the company. In addition, dealings in long options and derivatives were included as dealings to be disclosed during the offer period by holders of more than 1% of the issued share capital of the company.

*2006 consultation feedback*

60 One respondent to an earlier consultation conducted in 2006 supported the adoption of the UK approach to apply the Singapore Code to dealings in options and derivatives. Most practitioners refrained from commenting. Another respondent suggested a more detailed consultation where specific changes required to the Singapore Code could be more thoroughly considered, citing the different shareholding patterns between Singapore and UK-listed companies and the difference in the level of development in the equity derivatives markets in the two countries.

61 As this was then a developing area, the Council decided not to introduce any amendments for the time being but continue to consider this issue in greater depth before deciding whether to conduct a more detailed consultation on specific rule changes later. In the meantime, shareholders who acquired long options or derivatives which could cause them to cross the mandatory offer thresholds were advised to consult the Council beforehand.

*Experience since 2007*

62 In 2009, the Council conducted a survey of the top 10 banks based on gross value of equity derivatives booked in Singapore. In aggregate,

the 10 banks accounted for just above 92% of the total amount of equity derivatives booked in Singapore. Based on the responses received, most of the options and derivatives referenced to stocks of Singapore-listed companies were in respect of large-cap companies. The volume of transactions of each bank in an average month in equity derivatives on the top 20 Singapore-listed companies ranged from $200,000 to $4.2 million in each company. Given the large market capitalisations of the companies, the derivatives accounted for less than 0.5% of each company.

63 The Council had dialogues with a number of market practitioners on the use of options and derivatives in take-over situations. The feedback received was that there had been few queries on engaging in option or derivative transactions by major shareholders of Singapore-listed companies. This accords with the Council's own experience where there have been only two cases in relation to options and derivatives.

64 Therefore, it would appear that the use of options and derivatives in Singapore since 2007 in take-over situations is not prevalent.

*Other jurisdictions*

65 In Hong Kong, while disclosure is required for dealings in long options and derivatives during the offer period by persons holding more than 5% of a company's issued share capital, holdings of long options and derivatives are not taken into account for the purposes of determining whether a mandatory offer is triggered.

66 In Australia, disclosure is required where a person acquires long options or derivatives over shares representing 5% or more of a company's issued capital during a control transaction. If there was non-disclosure or the level of disclosure is inadequate, the Australian

Panel may have recourse to, amongst others, requiring disposal of the long option or derivative.

*Proposal*

67 In view of the limited use of options and derivatives in take-overs in Singapore as well as the practices in the UK, Hong Kong and Australia, the Council proposes to:

(a) maintain the status quo of requiring 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, while clarifying that all acquisitions of long options or derivatives (i.e. without offsetting the value of short positions) would normally be regarded as acquisitions of shares for the purposes of Rule 14. This is in contrast to the current position where a person only acquires an interest in the underlying shares upon exercise of the physically-settled instrument for the purposes of Rule 14 and where cash-settled instruments are excluded for such purposes; and

(b) 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 by including a definition of derivative to capture instruments that are cash-settled [3].

68 To give effect to this, the following changes are proposed:

[3] Currently, Note 8 on Rule 12 requires 5% holders to disclose dealings in instruments convertible into, rights to subscribe for and options in respect of securities being offered for or which carry voting rights.

"**DEFINITIONS**

…

7 **Convertible Securities:** Convertible securities means securities convertible or exchangeable into new shares or existing shares in the company."

9 **Derivative:** Derivative includes any financial product whose value in whole or in part is determined directly or indirectly by reference to the price of an underlying security or securities.

*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. In cases of doubt, the Council should be consulted.*

...

15 **Options:** Options means options to subscribe for or purchase new shares or existing shares in the company.

...

25 **Warrants:** Warrants means rights to subscribe for or purchase new shares or existing shares in the company."

"*NOTES ON RULE 12*

…

*6. Details to be included in disclosures*

…

*(iii) in the case of dealings in options or derivatives, full details should be given so that the nature of the dealings can be fully understood. For options, this should include the number of securities under option, the exercise period (or in the case of exercise, the exercise date), the exercise price and any option money paid or received. For derivatives, this should include, at least, the number of reference securities to which they relate (when relevant), the maturity date (or if applicable, the closing out date) and the reference price;*

…

*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~~.*

*"NOTES ON RULE 14.1*

*…*

*~~9~~10. Instruments convertible into, rights to subscribe for and options in respect of new shares ~~securities~~ which carry voting rights*

*In general, the acquisition of instruments convertible into, rights to subscribe for and options in respect of new shares~~securities~~ which carry voting rights does not give rise to an obligation under this Rule to make an offer. However, ~~but~~ the exercise of any conversion or subscription rights or options will be considered to be an acquisition of voting rights for the purpose of this Rule.*

*~~For the granting and taking of options, the Council will consider the time when the option is exercisable, whether the grantor of the option has also sold part of his holding (see Note 5 above), the consideration paid for the option, and any other circumstances to determine whether the relationship and arrangements between the two parties concerned are such that effective control over underlying voting rights has or may have passed to the taker of the option. Where the Council takes the view that effective control over the voting rights has passed, it will treat the grant of the option as constituting an acquisition of the voting rights.~~*

…"

*16. Options and derivatives*

*For the purposes of Rule 14, a person who has acquired 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.*

*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.*

*[Please see Annex 1: New Definition 7, page 12; New Definition 9, page 12; New Definition 15, page 16; New Definition 25, page 19, Note 6(a)(iii) on Rule 12, page 65; Note 8 on Rule 12, page 66; Note 10 on Rule 14.1, page 87; and New Note 16 on Rule 14.1, page 89]*

*Consultation 17:* SIC seeks views on the proposal to clarify that all acquisitions of long options or derivatives would normally be regarded as 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.

*Consultation 18:* SIC seeks 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.

## Appendix 2 - Share buy-back

69 When a company buys back its shares, any resulting increase in the percentage of voting rights held by a shareholder and persons acting in concert with him is 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.

70 Nonetheless, to facilitate share buy-backs, the Council would normally grant an exemption from the requirement to make a general offer subject to certain conditions. 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, any exemption granted by the Council would normally be subject to, amongst others, shareholders' approval and the persons seeking the exemption not having made any disqualifying transactions.

71 Most companies would seek a mandate to buy back shares so that they have the flexibility to do so should the need arise. As a result, applications for exemptions are voluminous, particularly during the times companies typically hold their annual general meetings.

72 Applications for such exemption have been routine and straightforward. Indeed, when granting the exemptions, the Council has thus far not considered it necessary to impose conditions over and above those set out in Appendix 2 of the Singapore Code.

73 The Council proposes to remove the need for parties to seek the Council's exemption in such cases. Parties who comply with the conditions set out in Appendix 2 of the Singapore Code would automatically be exempted from the requirement to make an offer. Nevertheless, to ensure that parties comply with the requirements for exemption, we propose to require such parties to submit a new Form 2 containing certain information and confirmations within 7 days following the approval of the mandate by shareholders.

74 The proposed amendments in this regard are as follows:

**"3 Directors and persons acting in concert with them**

(a) Listed companies

For 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, ~~any exemption from the requirement to make an offer under Rule 14 granted by the Council to~~ directors and persons acting in concert with them will be exempted from the requirement to make an offer under Rule 14, subject to the following conditions:-

…

(iv) within 7 days after the passing of the resolution to authorise a buy-back, each of the directors to submit to the Council a duly signed form as prescribed by the Council;

…"

*[Please see Annex 1: Appendix 2 Section 3(a), page 185; and Appendix 2 New Section 3(a)(iv), page 186.]*

75 The proposed prescribed form, Form 2, is set out in Annex 2.

*Consultation 19:* SIC seeks 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.

*Consultation 20:* SIC also invites comments on the proposed new Form 2.

**(II) Other Amendments**

76 The Council will also be making other amendments to the Singapore Code. These changes relate mainly to effecting amendments to the SFA, codifying the Council's practice statements and clarifications on certain Rules.

**REITs**

77 In June 2007, SIC 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.

78 The Council will now be amending the Singapore Code to give effect to the amendments to the SFA and codify the practice statement.

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

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

79 In October 2008, the Council 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.

80 The Council will be making amendments to incorporate the practice statement in the Singapore Code.

*[Please see Annex 1: Note on Definition of Offer, page 13]*

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

81 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 will be codifying this practice statement.

*[Please see Annex 1: New Rule 14.1(c), page 91;*
*Rule 15.1, page 104*
*New Appendix 3, page 195]*

**Note 1 and New Note 2 on Rule 19**

82 It has been the market practice to offer the "see-through" for convertibles. This has led to some confusion as to whether the General Principle 3 on equality of treatment should apply between shareholders and holders of convertibles such that a price higher than the "see-though" price cannot be offered.

83 The Council will make amendments to clarify 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 will be 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 1: Note 1 on rule 19, page 119;*
*and New Note 2 on Rule 19, page 120]*

**Rule 34 – Fees leviable by the Council**

84 The reference to Minister for Finance will be amended to the Minister.

*[Please see Annex 1: Rule 34, page 177]*