

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

SECURITIES INDUSTRY COUNCIL

Monday, 6 Jul 2015

The Singapore Code on Take-overs and Mergers (the "Singapore Code") was introduced in 1974 and last revised in 2012. 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 the Singapore Code that need to be refined or updated. These discussions, as well as experience gained from administering the Singapore Code over the past 3 years, form the basis of this consultation paper, which sets out the proposals to amend the Singapore Code.

The Council invites interested parties to send their comments on the proposed changes to the Singapore Code 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

Please submit all comments by Wednesday, 6 Aug 2015. 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.

CONTENTS

INTRODUCTION

PART I: CHANGES FOR CONSULTATION	5
- Alignment of offer timetable in competing offers	5
- Auction procedure to resolve competitive situations existing on Day 46.....	6
- Clarification by potential competing offerors of their intentions.....	17
- Acquisition of interests in shares by a former potential competing offeror after Day 53	21
- Board conduct during an offer.....	23
- No increase and no extension statements	27
- Settlement of acceptances within 7 business days	29
- Material changes in information	30
- New Note 5 on Rule 15.1 – Pre-conditional voluntary offers	32
- New Note on Rule 22.1 - Posting of offer document for pre-conditional offers ...	35
- Comparable offers for different classes of shares	36
- Paid press notice	38
 PART II: OTHER AMENDMENTS.....	 40
- Clarification on “date of the offer”	40

Annex 1 – Marked up text of the amended Singapore Code on Take-overs and Mergers

Annex 2 – Illustrative examples of the Modified Auction Procedure

*Annex 3 – Comparison between F&N Auction Procedure and Modified Auction
procedure*

Annex 4 – Appendix 4, Auction Procedure for the Resolution of Competitive Situations

INTRODUCTION

The Singapore Code is updated regularly to keep pace with market developments and evolving international practices.

2 Since the last revision of the Singapore Code in 2012, 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. Annex 1 provides a marked up text of the draft revised Singapore Code.

PART I: CHANGES FOR CONSULTATION

Alignment of offer timetable in competing offers

4 Under Rule 22.9 of the Singapore Code, the final day on which an offer can become or be declared unconditional as to acceptances is normally the 60th day after the posting of the offer document (“Day 60”).

5 The Day 60 time limit prevents the offeree company from being in a prolonged “siege”. The uncertainty that arises from an offer can have a destabilising effect on the offeree company. It distracts senior management, can affect staff morale and creates uncertainty for suppliers and customers.

6 In the case of competing offers, the offeree company would in any case be under “siege” by the second offeror. Hence, it has been the practice for the Council to allow the first offeror to align his offer timetable with the second offeror’s timetable, as established by the posting of the second offeror’s offer document.

Fraser and Neave, Limited

7 In 2012, the Council consented to the alignment of offer timetables upon application by the first offeror in the competing offers for Fraser and Neave, Limited (“F&N”). However, the first offeror did not extend its offer immediately to the maximum permitted. Instead, the first offer was extended to dates just before or after critical dates of the second offer, e.g. date of despatch of offer document and offeree circular and the first closing date. This led to public speculation as to what considerations the Council had taken into account in permitting each extension of the first offer and why such extensions were granted when there was no increase in price of the first offer.

8 To provide greater clarity, the Council proposes to state in the Singapore Code that all the offerors will be bound by the timetable established by the despatch of the latest competing offer document in competitive situations. Hong Kong and the UK provide similar clarifications in their take-over codes¹.

9 In this connection, a new Note on Rule 22.9 is proposed as follows:

“NOTE ON RULE 22.9

Competing offers

In the event the Council grants its permission to extend on account of a competing offer having been announced, all existing offers will normally be bound by the timetable established by the despatch of the offer document of the latest competing offeror.”

[Please see Annex 1: page 128, new Note on Rule 22.9.]

Auction procedure to resolve competitive situations existing on Day 46

The auction procedure in the F&N case

10 In the F&N case, the two competing offerors, having launched their initial offers, did not revise their bids. The stalemate persisted till the later stages of the offer period. Under the Code, the final day for either offeror to revise its offer is Day 46². To ensure there was finality and an orderly conclusion to the competitive situation with Day 46 approaching, the

¹ Note 2 on Rule 15.5 of the Hong Kong Code and Note 4 on Rule 31.6 of the UK Code.

² As an offer can remain open for acceptances up to Day 60 and the offer must be kept open for acceptances for at least 14 days following any revision, the final day on which the offer can be revised is the 46th day (Day 46) following the posting of the offer document.

Council imposed an auction procedure to regulate offer price revisions from Day 46 onwards.

11 The auction started only if either or both offerors revised their offers on Day 46. Thereafter, an offeror could revise its bid once a day and only if the other offeror has revised his bid. This continued until there was no revision by either offeror on any given day. Formula bids³ were not permitted and the only way in which either offeror could revise its offer was by unconditionally increasing the cash consideration payable under its offer by an amount of at least \$0.01⁴.

12 In the event the auction became prolonged, the Council could impose a final day for the announcement of revised offers under the auction procedure. Both offerors could announce a revised offer on the final auction day. However, any revised offer announced by one party had to be an odd-numbered price, and that by the other party had to be an even-numbered price⁵.

13 Following the close of the auction, offerors who had revised their offers during the auction would have 7 days to post their revised offer documents. Thereafter, there would be 14 days for the revised offers to become unconditional. The lower offeror could request a dispensation from posting its revised offer document.

³ An example of a formula bid is a bid which is made by reference to a bid made by a competing offeror, subject to a maximum.

⁴ The requirement for the revision by an offeror to increase by a fixed amount of at least \$0.01 was in line with the trading of shares on SGX for shares with share prices above \$2 where the minimum price step for trades is \$0.01.

⁵ The Council would assign beforehand which offeror to bid an odd-numbered price and which offeror an even-numbered price.

Objective of the auction procedure

14 The auction procedure used in the F&N case was prescribed only after discussions with the competing offerors and the offeree company failed to produce an alternative procedure to resolve the impasse.

15 The objective was to ensure that there was finality and an orderly conclusion to the competitive situation. By design, the auction procedure replicated the competitive bid process, which prevailed up to Day 46 of the offer timetable, on an accelerated and controlled basis after Day 46. At the end of the auction, both competing offerors would have made their final offers for the offeree company. Offeree company shareholders would then be able to decide which offer to accept or none at all.

Developments in the UK

16 The auction procedure used in the F&N case (the “F&N Auction Procedure”) followed closely the auction procedure set out by the Panel on Takeovers and Mergers in the UK (the “UK Panel”) in the case of Cove Energy plc in 2012 where, similarly, an alternative auction procedure could not be agreed upon between the competing offerors and the offeree company.

17 The UK Panel recently codified a modified form of the F&N Auction Procedure (the “Modified Auction Procedure”) on 1 Jan 2015. The key features of which are as follows:

- (a) the auction will comprise 5 rounds of bidding, with one round of bidding taking place each day, over the 5 business days immediately following Day 46;

- (b) either or both the competing offerors will be permitted to announce a revised offer in the 1st round of the auction. In the 2nd, 3rd and 4th round of the auction, a competing offeror will be permitted to announce a revised offer only if the other competing offeror has announced a revised offer in the previous round⁶. If the auction process enters into the 5th and final round (i.e. there was a revised offer announced in the 4th round of the auction), both competing offerors will be entitled to announce a revised offer in the 5th and final round. If on any day of the auction there are no revised offers announced, the auction will end;
- (c) in the 5th and final round of the auction, a competing offeror will be permitted to submit a revised offer subject to the condition that such revised offer would be announced only if the other competing offeror also submits a revised offer;
- (d) a revised offer announced by a competing offeror during the auction need not be at an increment over the last offer of the other competing offeror;
- (e) formula offers are prohibited, but the introduction of new forms of consideration are allowed;
- (f) during the auction, the competing offerors and their concert parties cannot:

⁶ For instance, if both competing offerors announce a revised offer on Day 1, both will be entitled to announce a revised offer on Day 2. However, if only one competing offeror bids on Day 1, the competing offeror who bids on Day 1 will not be able to do so on Day 2, and can only do so on Day 3 if the other competing offeror made a bid on Day 2.

- (i) make any announcement which could reasonably be expected to affect the orderly operation of the auction procedure; or
 - (ii) deal in the relevant securities of the offeree company or take any steps to procure an irrevocable commitment or letter of intent from offeree company shareholders in relation to either competing offeror's offer or to amend, vary, update or replace any irrevocable commitment or letter of intent previously procured; and
- (g) the competing offerors and their concert parties cannot acquire interests in shares of the offeree company between the end of the auction procedure and the end of the offer period, if such acquisitions would cause it to have to revise its offer.

18 Examples illustrating the operation of the Modified Auction Procedure are set out in Annex 2, while a comparison of the salient features of the F&N Auction Procedure and the Modified Auction Procedure is set out in Annex 3.

19 The Council is in favour of adopting the Modified Auction Procedure and its codification for the reasons set out below.

Objective and approach

20 Similar to the F&N Auction Procedure, the Modified Auction Procedure is designed to achieve finality and an orderly conclusion to the competitive situation in an open and transparent manner. The objective is not to identify a winner but to ensure that shareholders can decide on the outcome of a competitive situation with the benefit of final offers from the

competing offerors. The approach under the Modified Auction Procedure remains the same as that under the F&N Auctions Procedure, where the competitive bid process which prevailed up to Day 46 of the offer timetable is replicated on an accelerated and controlled basis after Day 46.

Maximum of 5 rounds

21 Limiting the bidding to a maximum of 5 rounds has a number of advantages. First, it ensures that there is a quick resolution to the competitive situation at the end of an already prolonged offer period. Second, unlike in the F&N Auction Procedure, the Modified Auction Procedure provides certainty at the outset to all parties as well as the market on the final date of the auction.

Flexibility to include new forms of consideration

22 Unlike in the F&N Auction Procedure, the Modified Auction Procedure would not prohibit the introduction of new forms of consideration during the auction. For example, an offeror whose offer stood at \$1 per share at the end of Day 46 would be able to increase his offer to \$1 and 1 share in the offeror during the 1st round of bidding.

23 Such flexibility would allow unfettered competition between the competing offerors to the benefit of offeree company shareholders. It would also be in line with the approach of replicating the competitive bid process which prevailed up to Day 46 of the offer timetable during which the competing offerors were free to introduce new forms of consideration. Further, offeree company shareholders would have sufficient time to assess the new forms of consideration introduced as the relevant offer(s) would have to remain open for 14 days following the posting of the final offer document(s) after the close of the auction. A competing offeror would have sufficient time between bidding rounds to evaluate any new form of consideration introduced by the other competing offeror.

Conditional offers on the 5th round

24 Given that both competing offers would be entitled to announce offers in the 5th and final round, a competing offeror might run the risk of bidding against itself in the event there is no bid by the other competing offeror. To address this, the Modified Auction Procedure permits that, in the 5th and final round only, a competing offeror might submit a revised offer subject to the condition that the offer will only be announced in the event that the other competing offeror also submits a revised offer.

Prohibitions on dealings and procuring irrevocable commitments and letters of intent

25 Similar to the F&N Auction Procedure, the competing offerors and their concert parties are prohibited from dealing in the relevant securities of the offeree company and from procuring (or amending) irrevocable commitments in relation to either competing offeror's offer for the duration of the Modified Auction Procedure. Such prohibitions are necessary to ensure that the auction procedure is conducted in an orderly manner.

No buying at above final price

26 Consistent with the approach in the F&N Auction Procedure, the competing offerors and their concert parties are prohibited from acquiring interests in shares after the close of the Modified Auction Procedure at terms better than their respective offers at the close of the Modified Auction Procedure. Allowing a competing offeror to put itself in a position where it would have to revise its offer after the close of the auction would defeat the purpose of the auction procedure to achieve finality in a competitive situation.

No minimum increment over competing bid

27 Neither the F&N Auction Procedure nor the Modified Auction Procedure requires an offeror entitled to bid at any given round to outbid the latest bid by his competing offeror. The Modified Auction Procedure also does not eliminate the possibility of a stalemate between the two competing offers at the close of the auction⁷.

28 The Council is of the view that the quantum of increase should be a commercial decision best left to the competing offerors. This mirrors the competitive bid situation occurring prior to the start of the auction where there is no minimum increment requirement. Moreover, where one or more competing offerors are offering securities as consideration, it might not be possible to determine definitively whether a revised offer is higher than the other.

Codification of the Modified Auction Procedure

29 Incorporating an auction procedure in the Singapore Code would eliminate any uncertainty as to the auction procedure to be followed in the event parties to the take-over cannot agree on an alternative procedure. The Council considers such clarity to be beneficial to market participants.

30 Based on the foregoing, the Council proposes to:

- (a) insert a new Rule 20.5 in the Singapore Code to state that the Council will normally require revised offers to be announced in accordance with the Modified Auction Procedure if a

⁷ Under the F&N Auction Procedure, if the auction becomes prolonged, the Council could impose a final day for the announcement of revised offers. Any revised offer announced by one party has to be an odd-numbered price and by the other party an even-number price. Where both parties announced revised offers on this final day, there would not be a stalemate.

competitive situation exists in the later stages of the offer period, unless alternative procedures are agreed between the competing offerors and the board of the offeree company. Notes will also be included to clarify when the Council would grant a dispensation from the need to make revised offer, and to highlight the need to consult the Council where one or more of the competing offers is being implemented by way of a scheme of arrangement. The amendments are as follows:

“20.5 Competitive situations

If a competitive situation continues to exist in the later stages of the offer period, the Council will normally require revised offers to be announced in accordance with an auction procedure, the terms of which will be determined and announced by the Council. That procedure will normally follow the auction procedure set out in Appendix 4. However, the Council will consider applying any alternative procedure which is agreed between competing offerors and the board of the offeree company. Under any auction procedure, the Council may set a deadline by which any revised offer document must be sent to offeree company shareholders and persons with information rights.

NOTES ON RULE 20.5

1. Dispensation from obligation to make an offer
The Council will normally grant a dispensation from the obligation to make a revised offer, which is lower than the final revised offer announced by a competing offeror, when the board of the offeree company consents.

2. Schemes of arrangement

Where one or more of the competing offers is being implemented by way of a scheme of arrangement, the parties must consult the Council as to the applicable timetable.”

[Please see Annex 1: page 122, new Rule 20.5.]

and

- (b) codify the Modified Auction Procedure in the new Appendix 4 of the Singapore Code. Please refer to Annex 4 for the proposed new Appendix 4.

[Please see Annex 1: pages 196-201, new Appendix 4.]

Consultation 1: SIC seeks views on the proposal to align the offer timetables of competing offers.

Consultation 2: SIC seeks views on the approach (as set out in the proposed new Rule 20.5) to prescribe an auction procedure if a competitive situation exists in the later stages of the offer period, unless alternative procedures are agreed between parties to the offers.

Consultation 3: SIC seeks views on whether the Modified Auction Procedure should be the default auction procedure which applies in the absence of alternative procedures. In particular:

- (a) whether to impose a maximum of 5 bidding rounds over 5 consecutive business days in the Modified Auction Procedure;

- (b) whether you agree with the following sequence of the Modified Auction Procedure:
- (i) both competing offerors being permitted to announce a revised offer in the first round of the auction;
 - (ii) a competing offeror being permitted to announce a revised offer only if the other competing offeror has announced a revised offer in the previous round;
 - (iii) both offerors being entitled to announce a revised offer in the 5th and final round of the auction;
- (c) whether a minimum increment over the value of the other offeror's last revised offer should be required in the Modified Auction Procedure;
- (d) whether the Modified Auction Procedure should ensure that both offerors do not arrive at the same offer price at the end of the auction, and if so, how this can be achieved;
- (e) whether formula offers should be allowed in the Modified Auction Procedure;
- (f) whether a competing offeror should be allowed to, in the 5th and final round in the Modified Auction Procedure, subject its revised offer to being announced only if the other competing offeror also submits a revised offer;

- (g) whether new forms of consideration should be allowed in the Modified Auction Procedure;
- (h) whether dealing in shares and procuring irrevocable commitments and letters of intent during the auction process should be disallowed in the Modified Auction Procedure;
- (i) whether announcements which could affect the orderly operation of the auction procedure, or which relate to the terms of either competing offeror's offer should be disallowed in the Modified Auction Procedure; and
- (j) whether a competing offeror and its concert parties should be prohibited from acquiring interests in offeree company shares between the close of the Modified Auction Procedure and the close of its offer if such acquisition would oblige the competing offeror to revise its offer.

Consultation 4: SIC seeks views on whether the Modified Auction Procedure should be codified in the Singapore Code.

Clarification by potential competing offerors of their intentions

31 Where an offeror ("Offeror 1") has announced a firm intention to make an offer and a potential competing offeror ("Offeror 2") becomes the subject of a possible offer announcement, Offeror 2's intentions cannot remain unclarified as they have a significant impact on the decision of offeree company shareholders to accept Offeror 1's offer. Given the need for offeree company shareholders to have timely and sufficient information under General Principle 10 of the Singapore Code, as well as the need not

to disturb the existing tactical balance between Offeror 1 and Offeror 2, the Council has required⁸ that Offeror 2 clarify its intentions (“put up or shut up” or “PUSU”) by the 50th day (“Day 50”) from the date Offeror 1 despatches its offer document by either:

- (i) announcing a firm intention to make an offer; or
- (ii) making a no intention to bid statement.

32 The PUSU deadline has to be after Day 46 (the final day on which Offeror 1 can revise its offer) to allow Offeror 2 the opportunity to observe Offeror 1’s final offer before deciding whether to make a bid. This is to preserve the existing tactical balance between Offeror 1 and Offeror 2. At the same time, the deadline has to be no later than Day 53 to allow offeree company shareholders at least 7 days to consider Offeror 1’s offer before it has to close on Day 60 in the event Offeror 2 decides not to bid. A period of 7 days is considered to be the minimum amount of time that offeree company shareholders should have to make and process their acceptance decisions⁹. In past cases, the PUSU deadline was fixed on Day 50 as it was the mid-point between Day 47 and Day 53. Offeror 2 thus had 4 days to decide whether to make a competing bid while offeree company shareholders had 10 days to decide on Offeror 1’s offer if Offeror 2 did not make a bid.

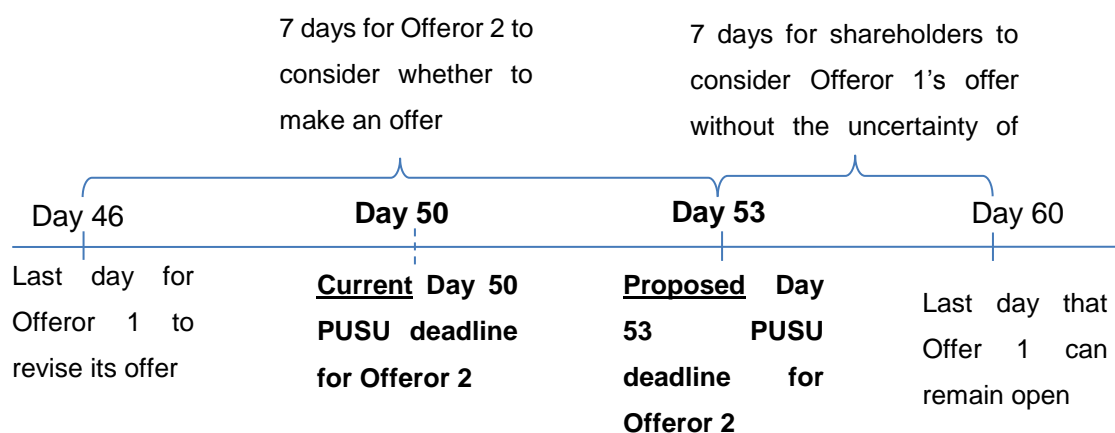
⁸ For example, SIC’s public statement on Parkway Holdings Limited, Portek International Limited, Thakral Corporation Ltd, and Sanion Enterprises Limited.

⁹ For example, Rule 20.1 requires an offeror to keep its offer open for at least 14 days after it is revised. The independent financial adviser is expected to issue its advice on the revision within 7 days leaving at least 7 days for offeree company shareholders to decide on the revised offer and process their acceptance if relevant.

Day 53

33 Taking into account the developments in the UK, where the UK Panel has extended its PUSU deadline from Day 50 to Day 53, the Council is of the view that a similar extension of the PUSU deadline can be beneficial to offeree company shareholders. Providing more time (in total 7 days) for Offeror 2 to consider and finalise the terms of an offer with the knowledge of Offeror 1's revised offer may increase the prospects of offeree company shareholders receiving a competing offer. While the time shareholders would have to consider Offeror 1's offer in the event Offeror 2 does not announce a competing offer would decrease correspondingly, offeree company shareholders would have at least 7 days.

34 The diagram below compares the timelines for the current and the proposed PUSU deadline.



Schemes of arrangement, trust schemes and amalgamations

35 Where Offeror 1's offer is being implemented by way of a scheme of arrangement, a trust scheme or an amalgamation, the PUSU deadline for Offeror 2 would normally be no later than the 7th day prior to the date of the shareholders' meeting to approve the relevant scheme or amalgamation.

Flexibility

36 While the Council proposes to include guidance in the Singapore Code on the PUSU deadline, it will retain the flexibility to impose an earlier or later deadline where appropriate.

37 A new Note on Rules 3.1, 3.2 and 3.3 is proposed:

“NOTES ON RULES 3.1, 3.2 AND 3.3

...

6. *Deadline for clarification by potential competing offerors*

Where an offeror has announced a firm intention to make an offer and a potential competing offeror becomes the subject of a possible offer announcement, the potential competing offeror must normally, by the 53rd day from the date the first offeror despatches its initial offer document, either:

(i) announce a firm intention to make an offer; or

(ii) make a no intention to bid statement.

Where the first offeror’s offer is being implemented by way of a scheme of arrangement, a trust scheme or an amalgamation, the above deadline for the potential competing offeror to clarify its intention would normally be no later than the 7th day prior to the date of the shareholders’ meeting to approve the relevant scheme or amalgamation.

The Council reserves the right to impose an earlier or later deadline where appropriate.”

[Please see Annex 1: page 27, new Note on Rules 3.1, 3.2 and 3.3]

Consultation 5: SIC seeks views on the proposal for the put up or shut up deadline to be:

- (a) in the case of a contractual offer, the 53rd day from the date the first offeror despatches its initial offer document; and
- (b) in the case of a scheme of arrangement, a trust scheme or an amalgamation, no later than the 7th day prior to the date of the shareholders' meeting to approve the relevant scheme or amalgamation.

Acquisition of interests in shares by a former potential competing offeror after Day 53

38 Under Rule 33.1(c) of the Singapore Code, where a person makes a no intention to bid statement, he is restricted from subsequently making an offer for a period of 6 months from the date of such statement unless the Council's approval to do so has been obtained. Note 1 on Rule 33.1 states that one of the instances where the Council's approval will normally be granted is where the subsequent offer is recommended by the offeree board.

39 In the case where Offeror 2 issues a no intention to bid statement, Offeror 2 and its concert parties should not subsequently acquire shares in the offeree company if it wishes to make an offer within the 6-month period with the agreement of the offeree board.

40 The Council considers Offeror 2's acquisition of shares to be inconsistent with its no intention to bid statement. Such action raises the question as to whether Offeror 2 will seek to make an offer for the company

with the consent of the offeree board should Offeror 1's offer fail. This creates uncertainty for shareholders of the offeree company in deciding whether to accept the first offer, and would be contrary to the objective of requiring Offeror 2 to clarify its position. Therefore, where Offeror 2 wishes to make an offer within the 6-month period with the agreement of the offeree board, the Council proposes to require that Offeror 2 and its concert parties must not have acquired shares after making the no intention to bid statement.

41 The proposed amendments, which are in line with the practice in the UK, are as follows:

“NOTES ON RULES 33.1

1. *Recommended and competing offers*

The Council will normally grant consent under this Rule when:-

(a) *the new offer is recommended by the board of the offeree company and the offeror is not, or is not acting in concert with, a director or substantial shareholder of the offeree company. However, where the announcement in Rule 33.1(c) was made after the announcement by a third party of a firm intention to make an offer, the Council will only grant consent under this Rule if:*

(i) that third party offer has been withdrawn or has lapsed; and

(ii) in the period following the making of the announcement in Rule 33.1(c) and prior to the third party offer being withdrawn or lapsing, neither the person who made the announcement

in Rule 33.1(c) nor any person acting in concert with that person has acquired an interest in any shares of the offeree company; or

...”

[Please see Annex 1: page 174, Note 1 on Rules 33.1]

Consultation 6: SIC seeks views on the proposal to include the additional condition such that a potential competing offeror must not have acquired an interest in any shares of the offeree company after making a no intention to bid statement, if he wishes to make an offer within a 6-month period with the agreement of the offeree board.

Board conduct during an offer

42 Under Rule 7.1 and Rule 24.1(b) of the Singapore Code, the offeree board must obtain competent independent advice on a take-over offer and the substance of such advice must be made known to shareholders in the offeree board circular. In addition, the offeree board circular should indicate whether or not the offeree board directors recommend shareholders to accept the offer. It has been observed that there have been few dissenting offeree boards and offeree boards generally do not solicit competing offers.

43 Market practitioners the Council consulted have suggested that some guidance on the permitted conduct and the factors that may be taken into account by offeree boards when considering an offer could be useful in encouraging offeree boards to be more pro-active. In particular, that offeree boards may have regard to: (a) the feasibility of soliciting a

competing offer or running a sale process; and (b) the availability of management projections and forecasts which can be shared with the appointed independent financial adviser (the “IFA”) for the purposes of the latter’s advice on the offer.

New Note 8 on Rule 5 – Soliciting a competing offer etc.

44 We note that it is possible that offeree boards might misconstrue Rule 5 of the Singapore Code (Frustration of Offers by an Offeree Board) to prohibit the soliciting of a competing offer, as the Rule prohibits any action that could effectively result in any *bona fide* offer being frustrated or the shareholders being denied an opportunity to decide on its merits, without shareholder approval. The rationale for Rule 5 is to prevent offeree directors from unilaterally affecting the state of affairs of the offeree company (e.g. by reducing the value of the offeree company by disposing of material assets) so as to provide grounds for the withdrawal of the offer and thereby deny the offeree company shareholders the opportunity to consider the merits of the offer. Rule 5 should not prevent the offeree board from soliciting a competing offer or running a sale process as the original offer would still be available for shareholders' consideration¹⁰.

45 The Council proposes that amendments be made to clarify that offeree boards may consider the feasibility of soliciting a competing offer or running a sale process and that doing so will not amount to frustration of the initial offer.

¹⁰ This position was clarified in an SIC letter published on 26 Feb 2013 in the Business Times, in response to a Business Times article “F&N saga opens can of firsts for Singapore M&A” on 18 Feb 2013, which raised the issue of whether the act of seeking a competing offer amounts to frustrating an existing offer.

46 In this connection, a new Note 8 on Rule 5 is proposed:

“NOTES ON RULE 5

...

8. Soliciting a competing offer etc.

In considering the course of actions which it may take in the face of an offer, an offeree board may consider the feasibility of soliciting a competing offer or running a sale process. The Council will not normally treat actions by the offeree board in soliciting a competing offer or running a sale process for the offeree company as actions which frustrate the original offer. A better offer or an alternative offer is generally in the interest of the offeree company’s shareholders. Such action neither hinders the progress of, nor results in shareholders being deprived of the opportunity to decide on the merits of, the first offer.”

[Please see Annex 1: page 36, new Note 8 in the Notes on Rule 5]

Availability of management projections and forecasts

47 The market participants also noted that there was a lack of forward-looking information being supplied by the management of the offeree company to the IFAs. Such information can be incorporated into the IFAs’ valuation process, so as to provide a potentially better gauge of the true value of the offeree company going forward, rather than simply basing their analyses on the values of comparable companies in similar sectors¹¹.

¹¹ This may not be the best measure of a company’s worth as the comparables’ values could have been artificially depressed by market conditions and low offer valuations in the past.

48 The Council proposes that amendments be made to highlight that an offeree board may consider the availability of management projections and forecasts which can be shared with the IFA for the purpose of the latter's advice on the offer. The Council notes that such forecasts will need to be disclosed and reported on in accordance with Rule 25 of the Singapore Code if the IFA intends to use the forecast in its published advice.

49 In this connection, the following amendments are proposed:

“NOTES ON RULE 7.1

...

5. Where the offeree board possesses management projections and forecasts

In considering the course of actions which it may take in the face of an offer, an offeree board may consider sharing available management projections and forecasts with the independent adviser for the purpose of the latter's advice on the offer.

[Please see Annex 1: page 40, new Note 5 in the Notes on Rule 7.1]

Consultation 7: SIC seeks views on the proposal to clarify that offeree boards may consider the feasibility of soliciting a competing offer or running a sale process and that doing so will not amount to frustration of the initial offer.

Consultation 8: SIC seeks views on:

- (a) the proposal to state that an offeree board may consider the availability of management projections and forecasts which can be shared with the IFA for the purpose of the latter's advice on the offer; and

- | |
|--|
| <p>(b) any other measures to encourage the use of forward-looking information in the analysis of an offer.</p> |
|--|

No increase and no extension statements

50 Under Rule 20.2 of the Singapore Code, when an offeror issues a no increase statement, he can only amend the terms of the offer under wholly exceptional circumstances or where the right to do so has been specifically reserved. Similar terms apply in the situation where an offeror issues a no extension statement under Rule 22.7.

51 Rule 22.8 states that, except with Council's consent, the offeree board should not announce any material new information 39 days ("Day 39") after the posting of the initial offer document. However, the Council will normally give its consent to a later announcement if it is not practicable to do so.

52 In the case where the offeree board announces material new information after Day 39, an offeror should be permitted to set aside his no increase or no extension statement only if such statement itself was made after Day 39. This is because an offeror could only claim to have been disadvantaged by the late announcement of material information by the offeree company if it had made its no increase or no extension statement after Day 39. In such a situation, the offeror would have made the statement with the expectation that the offeree company would not thereafter announce any material new information. This is in line with the approach in the UK.

53 In this regard, the Council proposes to introduce a new Note 4 on Rule 20.2 and a corresponding new Note 4 on Rule 22.7 to clarify this position. The proposed amendments are as follows:

“NOTES ON RULE 20.2

...

4. Offeree company announcements after day 39

An offeror may reserve the right to set aside a no increase statement in the event the offeree company makes an announcement of the kind referred to in Rule 22.8 after the 39th day following the publication of the initial offer document, only if the no increase statement is made after that day. If such an announcement is subsequently made by the offeree company and the offeror wishes to set aside its no increase statement the offeror must make an announcement to this effect within 4 business days after the date of the offeree company announcement.”

“NOTES ON RULES 22.7

...

4. Offeree company announcements after day 39

Note 4 on Rule 20.2 also applies to this Rule, except all references to “no increase statement” should be taken to be references to “no extension statement”.

[Please see Annex 1: pages 121-122 and 127, new Note 4 on Rule 20.2 and new Note 4 on Rule 22.7]

Consultation 9: SIC seeks views on the proposal to allow an offeror to set aside a no increase or no extension statement where the offeree company makes an announcement of the kind referred to in Rule 22.8 after Day 39 only if the no increase or no extension statement was made after such date.

Settlement of acceptances within 7 business days

54 Rule 30 requires an offeror to settle acceptances of shares within 10 calendar days after the offer becomes unconditional, or after the receipt of valid acceptances where such acceptances were tendered after the offer has become unconditional.

55 As this could impose practical difficulties for an offeror when part of the 10-calendar day settlement period currently prescribed coincides with public holidays, the Council proposes to adopt a 7-business day payment period. The proposed amendment is in line with the practice in Hong Kong.

56 In this respect, the Council proposes to amend Rules 30 and 16.6 as follows:

“30 SETTLEMENT OF CONSIDERATION

Shares represented by acceptances in any offer, other than partial offer (see Rule 16.6), must not be acquired by the offeror until the offer has become or been declared unconditional in all respects. Such shares must be paid for by the offeror as soon as practicable, but in any event within 7 business days ~~10 days~~ after:-

- (a) the offer becomes or is declared unconditional in all respects;
or
- (b) receipt of valid acceptances where such acceptances were tendered after the offer has become or been declared unconditional in all respects.”

and

“16.6 Settlement of Consideration

Shares represented by acceptances in a partial offer should not be acquired by the offeror prior to expiry of the partial offer. Such shares must be paid for by the offeror as soon as possible following expiry of the partial offer but in any event within 7 business days ~~10 days~~ of the partial offer’s expiry date.”

[Please see Annex 1: pages 170 and 109, Rules 30 and 16.6]

Consultation 10: SIC seeks views on the proposal to adopt a 7-business day settlement period instead of the current 10-calendar day period.

Material changes in information

57 Under Note 1 on Rule 8.1, information on any material changes to information published previously by or on behalf of the relevant company during the offer period must be included in the next document published. As the next document might be published much later, a gap between the time of the material change in information and its disclosure can occur.

58 To ensure that shareholders and investors are apprised of material information on a timely basis, the Council proposes an amendment to Rule 8.1 of the Singapore Code to require prompt disclosure of: (a) any material changes to information previously published in connection with the offer; and (b) any material new information which would have been required to be disclosed in any previous document or announcement published during an offer period, had it been known at the time.

59 The proposed amendments, which bring us in line with the practice in the UK and Hong Kong as well as the disclosure requirements of the Listing Rules of the Singapore Exchange, are as follows:

“NOTES ON RULE 8.1

1. Material changes

~~Any document issued to shareholders must include information about any material change in any information previously published by or on behalf of the relevant company during the offer period. If there have been no such changes, this should be stated.~~

Following the publication of the initial offer document or offeree board circular (as appropriate) and until the end of the offer period, the relevant company must promptly announce:

(a) any changes in information disclosed in any document or announcement published by it in connection with the offer which are material in the context of that document or announcement; and

(b) any material new information which would have been required to have been disclosed in any previous document or announcement published during the offer period, had it been known at the time.

Where an announcement is required to be made under Rule 8.1, the Council may further require a document setting out the relevant information to be sent to the shareholders in the offeree company. In addition, to ensure prompt and wide dissemination of the material change in information, a paid press notice may be needed.

Any subsequent document issued to shareholders following the publication of the initial offer document or offeree board circular (as appropriate) and until the end of the offer period must also include information about any material change in any information previously published by or on behalf of the relevant company during the offer period. If there have been no such changes, this should be stated.”

[Please see Annex 1: pages 44-45, Note 1 on Rule 8.1]

Consultation 11: SIC seeks views on the proposed changes to Rule 8.1 of the Singapore Code to require prompt disclosure of: (a) any material changes to information previously published in connection with the offer; and (b) any material new information which would have been required to be disclosed in any previous document or announcement published during an offer period, had it been known at the time.

New Note 5 on Rule 15.1 – Pre-conditional voluntary offers

60 Rule 15.1 sets out the requirements for conditions which an offeror might impose on his voluntary offer. Having regard to General Principles 6¹² and 12¹³, the fulfilment of such conditions cannot depend to an unacceptable degree on the subjective judgement of the offeror. In

¹² General Principle 6 states that an offeror should announce an offer only after the most careful consideration. Before taking any action which may lead to an obligation to make a general offer, a person and his financial advisers should be satisfied that he can and will continue to be able to implement the offer in full.

¹³ General Principle 12 states that all parties to a take-over or merger transaction should make full and prompt disclosure of all relevant information and use every endeavour to prevent the creation of a false market in the shares of an offeror or offeree company. Parties to such transactions must take care not to make statements which may mislead shareholders or the market.

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

Pre-conditional voluntary offer

61 In some cases, the offeror may subject the making of a voluntary offer to pre-conditions, which, upon fulfilment, obliges an offeror to announce a firm intention to make a voluntary offer. The same concerns arise in relation to these pre-conditions. However, the Singapore Code currently does not prescribe any requirements on the pre-conditions.

62 In practice, the Council has required such pre-conditions to meet the standards set out in Note 1 on Rule 14.2 on conditional agreements and put and call option agreements. Note 1 on Rule 14.2 regulates the pre-conditions attached to a share acquisition agreement or a put and call option agreement which, on fulfilment, would trigger a mandatory offer. The standards for pre-conditions in Note 1 on Rule 14.2 similarly have regard to General Principles 6 and 12.

63 To codify our practice of imposing standards similar to Note 1 on Rule 14.2 on pre-conditions in a pre-conditional voluntary offer, the Council proposes to introduce a new Note 5 on Rule 15.1:

“NOTES ON RULE 15.1

...

5. Pre-conditional voluntary offer

An offeror may announce a pre-conditional voluntary offer where the announcement of a firm intention to make an offer is

subject to the fulfilment of certain pre-conditions, subject to the following:-

(a) the pre-conditions should be stated clearly in the announcement of the pre-conditional offer;

(b) the pre-conditions should be objective and reasonable;

(c) the announcement of the pre-conditional offer must specify a reasonable period for the fulfilment of the pre-conditions failing which the offer will lapse; and

(d) no pre-condition should be relied upon to cause the offer to lapse unless:-

(i) the offeror has demonstrated reasonable efforts to fulfil the conditions within the time period specified; and

(ii) the circumstances that give rise to the right to rely upon the conditions are material in the context of the proposed transaction.”

[Please see Annex 1: pages 104-105, new Note 5 on Rule 15.1]

Consultation 12: SIC seeks views on the proposed new Note 5 on Rule 15.1 to provide clarity to the market on the practice of imposing standards similar to Note 1 on Rule 14.2 on pre-conditions in a pre-conditional voluntary offer.

New Note on Rule 22.1 - Posting of offer document for pre-conditional offers

64 Under Rule 22.1 of the Singapore Code, the offer document can only be posted between 14 to 21 days following the date of announcement of a firm intention to make an offer. The board of the offeree company then has 14 days from the date of posting of the offer document to despatch its offeree circular containing, amongst others, its recommendation on the offer and the advice of the IFA. The 14-day prohibition on posting the offer document (the “14-day prohibition”) is to allow the offeree board sufficient time (at least 28 days from the date of offer announcement) to prepare its offeree circular.

65 In the case where the offeror announces a pre-conditional offer (which includes the terms of the offer), the offeror would only announce a firm intention to make an offer upon the fulfilment of certain conditions. The 14-day prohibition starts only when the offeror announces such a firm intention. Pre-conditions which may be imposed include shareholders’ approval and regulatory approval. Typically, such conditions would take around 3 months to fulfil. Hence, by the time the firm intention to make an offer is announced, the offeree board would have had notice of the offer and its terms for some time, and would have had sufficient time to react. Hence, persisting with the 14-day prohibition in such cases may unnecessarily prolong the offer period.

66 The Council proposes to introduce a new Note on Rule 22.1 to allow the offeree company to seek approval for the posting of the offer document at an earlier date in the case of a pre-conditional offer. The amendments proposed are as follows:

“NOTE ON RULE 22.1

Pre-conditional offers

In the case of a pre-conditional voluntary offer or a mandatory offer triggered upon the fulfilment of conditions attached to a share acquisition agreement or a put and call option agreement, the Council may, upon application by the offeree company, permit the offer document to be posted on a date earlier than 14 days after the date of offer announcement.”

[Please see Annex 1: page 125, new Note on Rule 22.1]

Consultation 13: SIC seeks views on the proposed new Note on Rule 22.1 to allow the offeree company to seek approval for the posting of the offer document at an earlier date in the case of a pre-conditional offer.

Comparable offers for different classes of shares

67 Under Rule 18 of the Singapore Code, where a company has more than one class of equity share capital, a comparable offer must be made for each class. For example, where an offer is made for voting shares, the offeror is obliged to make a comparable offer for the non-voting equity shares such as preference shares. The rationale for this is that holders of non-voting equity might have invested on the basis of certain parties having management control of the company. Accordingly, when there is a change in management control, such holders of non-voting equity should be offered an opportunity to exit in the same way as holders of voting shares.

68 Note 1 on Rule 18 of the Singapore Code currently requires an offeror to justify the ratio of the offer values to the Council in advance. The UK Code goes further to state that in the case where both classes of equity shares are traded, the ratios would normally be equal to the average of the ratios of the middle market quotations taken from the stock exchange over the course of 6 months preceding the commencement of the offer period.

69 The Council is of the view that the UK Panel's approach to state explicitly that reference will be made to market prices in determining the ratio of offer values provides certainty to market participants as to the appropriate comparable offer price. The use of market prices is also in line with the Council's approach in determining offer prices in the case of the Chain Principle (Note 3 on Rule 14.3) and in the case where options and convertible securities are exercised and converted, respectively (Note 5 on Rule 14.3).

70 Taking into account the foregoing, the Council proposes to amend Note 1 on Rule 18 as follows:

“NOTES ON RULE 18

1. *Ratio of offer values*

In the case of offers involving two or more classes of equity share capital, the ratio of the offer values must be justified to the Council in advance. Where the offers relate to equity shares that are listed, the Council will normally accept the ratio of the offer values to be equal to the ratio of the simple average of daily volume weighted average traded prices of the equity shares over the course of 6 months (3 months in the case of voluntary offers) preceding the commencement of the

offer period. In all other cases where traded prices of the equity shares are not available, the Council will have regard to all relevant circumstances including but not limited to the rights attaching to each class of shares.”

[Please see Annex 1: page 115, Note 1 on Rule 18]

Consultation 14: SIC seeks views on the proposed amendments to Note 1 on Rule 18 to state that reference will be made to market prices in determining the ratio of offer values.

Paid press notice

71 The requirement to issue a “paid press notice” is found in Rule 3.2 (Announcements to be made by offeree company), Notes on Rule 24.1 (Updated recommendations), Rule 25.4 (Publication of reports and consent letters) and the Notes on Rule 28.1 (Securities not dealt in on the Securities Exchange)¹⁴. The requirement to make a paid press notice in addition to an announcement is to ensure that information is disseminated widely and quickly. It is noted that there has been some variation in practice with the paid press notice being carried in one newspaper in some cases and two or more in other cases.

72 To ensure that information in a paid press notice is promptly and widely disseminated, the Council proposes to amend the Singapore Code in a new note to Rules 3.1, 3.2 and 3.3 to clarify that a paid press notice refers to a paid advertisement in two leading English-language national

¹⁴ The term “paid press notice” will also be used in the proposed amendment to the Notes on Rule 8.1 (Material Changes) set out in paragraph 59 above.

newspapers published daily and circulating generally. The proposed amendments are as follows:

“NOTES ON RULES 3.1, 3.2 AND 3.3

...

7. Paid press notice

A paid press notice, for the purpose of this Rule or other parts of the Code where this term is used, refers to a paid advertisement in two leading English-language national newspapers published daily and circulating generally.”

[Please see Annex 1: page 27, new Note 7 on Rule 3.1, 3.2 and 3.3]

Consultation 15: SIC seeks views on the proposed new note to Rules 3.1, 3.2 and 3.3 to clarify that a paid press notice refers to a paid advertisement in two leading English-language national newspapers published daily and circulating generally.

PART II: OTHER AMENDMENTS

73 The Council will also be making other technical amendments to clarify Rule 5 and Rule 23.12.

Clarification on “date of the offer”

74 The term “date of the offer” is used in Rule 5 (Frustration of offers by an offeree board) and Rule 23.12(j) and (m) (Further information in cases of securities exchange offers). Whilst the same term is used in Rule 5 and Rule 23.12(j) and (m), it is clear that they should not refer to the same date.

75 The intent of Rule 5 is to prevent the offeree board from frustrating an offer which the board believes to be *bona fide* and imminent, even if such offer has not been announced. Therefore, the reference to “date of the offer” in Rule 5 should instead be to “date of the offer announcement”.

76 In contrast, the intent of Rule 23.12(j) and (m) is to provide up-to-date information on capital reorganisation undertaken and material contracts entered into by the offeror of a securities exchange offer respectively. This information should include the period between the announcement of the offer and the date of despatch of the offer document. Therefore, “date of the offer” here should refer to the date of despatch of the offer document.

77 The Council will make amendments to clarify that the reference to “date of the offer” in Rule 5 should be to “date of the offer announcement” and that the date of the offer in Rule 23.12 refers to the date the offer document is despatched. The amendments are as follows:

“5 FRUSTRATION OF OFFERS BY AN OFFEREE BOARD

In the course of an offer, or even before the date of the offer announcement, if the board of the offeree company has reason to believe that a bona fide offer is imminent, the board must not, except pursuant to a contract entered into earlier, take any action, without the approval of shareholders at a general meeting, on the affairs of the offeree company that could effectively result in any bona fide offer being frustrated or the shareholders being denied an opportunity to decide on its merits.”

and

“23.12 Further information in cases of securities exchange offers

The following additional information should be given by the offeror when it is offering its securities in exchange for the securities of the offeree company:-

...

(j) details of any re-organisation of capital during the three financial years preceding the date of the offer;

(m) details of every material contract entered into with an interested person not more than three years before the date of the offer, not being a contract entered into in the ordinary course of the business carried on or intended to be carried on by the offeror;

NOTES ON RULE 23.12

....

2. "Date of the offer"

The date of the offer refers to the date the offer document is despatched."

[Please see Annex 1: pages 32 and 139, Rule 5 and new Note on Rule 23.12]