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

SECURITIES INDUSTRY COUNCIL

Wednesday, 21 Jun 2006

The Singapore Code on Take-overs and Mergers (the "Singapore Code") introduced in 1974, was last revised in 2001. 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 discussed, in broad terms, with investment bankers and lawyers active in merger and acquisition ("M&A") transactions the areas the Singapore Code needs 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 5 years formed the basis of this consultation paper, which sets out the proposals to amend the Singapore Code.

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 Friday, 28 Jul 2006. 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 is efficient.

2 Since 2001, when the Singapore Code underwent a major revision, 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, Council is proposing additions and amendments to the Singapore Code.

3 This paper sets out the proposed additions and amendments for public comments, and is divided into two parts. Part I outlines the proposed specific changes to the Singapore Code, while Part II deals with emerging issues and developments. At Annex I is a marked up text of the draft revised Singapore Code, while Annex II summarises other proposed amendments.

PART I: SPECIFIC CHANGES

Section 2 of the Introduction – Enforcement of the Code

4 Previously, the Singapore Code applied only to Singapore-incorporated public companies. To give Singapore investors greater protection, the Securities and Futures Act ("SFA") was amended in 2005 to extend the application of the Singapore Code to foreign-incorporated companies with a listing on the Singapore Exchange ("SGX"). In addition, business trusts registered under the Business Trusts Act ("Singapore BTs") as well as foreign-registered business trusts ("Foreign BTs") listed on the SGX fall within the ambit of the Code.

5 To pre-empt possible difficulties faced by offerors of having to comply with different sets of take-over regulations, and to provide certainty to investors, Council proposes to clarify in the Introduction to the Singapore Code that the Singapore Code would only apply to foreign-incorporated companies and Foreign BTs with a **primary** listing on the SGX.

6 Further, it is proposed that the Council be given the discretion to waive the application of the Singapore Code in relation to (i) foreign-incorporated companies or business trusts with a primary listing on the SGX; (ii) Singapore-incorporated companies or business trusts with a primary listing overseas; and (iii) unlisted Singapore-incorporated public companies and unlisted Singapore BTs with more than 50 shareholders or unitholders, as the case may be, and more than S$5 million of net tangible assets. In considering such applications for waivers, Council would take into account the number of Singapore investors, the extent of share trading in Singapore and whether protection is given to Singapore investors under any applicable statute or code in other jurisdictions

regulating take-overs and mergers. For instance, Council may grant a waiver to a Singapore-incorporated public company with a primary listing in Country X on account of the fact that there are few Singapore shareholders, trading of the company's shares resides predominantly in Country X and the company is obliged to comply with the Country X Take-over Code.

7 In this connection, the following amendments are proposed:

"The Code applies to both take-overs and mergers. It applies to corporations with a primary listing of their equity securities and business trusts with a primary listing of their units in Singapore. While the Code ~~It~~ is drafted with listed public companies and listed registered business trusts in mind, ~~but~~ unlisted public companies and unlisted registered business trusts with more than 50 or more shareholders or unitholders, as the case may be, and net tangible assets of $5 million or more must also observe the letter and spirit of the General Principles and Rules, wherever this is possible and appropriate. The Code does not apply to take-overs or mergers of other unlisted public companies and unlisted registered business trusts, or private companies. The Code applies to all offerors, whether they are natural persons (be they resident in Singapore or not and whether citizens of Singapore or not), corporations or bodies unincorporate (be they incorporated or carrying on business in Singapore or not); and extends to acts done or omitted to be done in and outside Singapore."

"Note on Section 2

"Registered business trusts" and "business trusts" have the same meanings as in Section 2 of the Business Trust Act (Cap. 31A). References to shares, shareholders and board of a company throughout the Code would, where appropriate, refer to units, unitholders and the trustee manager.

Corporations and business trusts with a primary listing in Singapore, public companies and registered business trusts with a primary listing overseas as well as unlisted public companies and unlisted registered business trusts with more than 50 shareholders or *unitholders, as the case may be, and net tangible assets of $5 million or more may apply to the Council to waive the application of the Code. In considering such applications, the Council would take into account, amongst others, the following factors:*

(a) the number of Singapore shareholders or unitholders and the extent of trading in Singapore; and

(b) the existence of protection available to Singapore shareholders or unitholders provided under any statute or code regulating take-overs and mergers outside Singapore."

[Please see Annex 2: page 1, para 2 of Section 2; and page 2, Note on Section 2]

Consultation 1: SIC seeks views on the proposal to apply the Singapore Code to foreign-incorporated companies and business trusts with a **primary** listing on the SGX.

Consultation 2: SIC also seeks views on the proposal for Council to have the discretion to waive the application of the Code in relation to (i) foreign-incorporated companies or business trusts with a primary listing on the SGX; (ii) Singapore-incorporated companies or Singapore-registered business trusts with a primary listing overseas and (iii) unlisted public companies and unlisted registered business trusts with more than 50 shareholders or unitholders, as the case may be, and more than S$5 million of net tangible assets.

Consultation 3: SIC invites comments on whether there are any specific provisions that require revision to apply the Singapore Code to business trusts.

Definition 1(a)(vii) and 1(h)(vi) and Note 5 on Definition of Acting in Concert

8 Council proposes to formalise its practice of regarding a party (other than a bank in the ordinary course of business) which provides another party with financial assistance for the purchase of voting rights to be parties acting in concert.

9 While banks are normally not presumed to be acting in concert with their clients to consolidate or acquire effective control of an offeree company, there may be instances where they have an incentive to do so. An equity "kicker", usually in the form of an option granted by an offeror to the bank to purchase offeree company shares at a discount in the event his offer is successful, may create incentives for the bank to assist the offeror in his take-over bid. Such an arrangement may, therefore, give rise to a presumption that the bank is acting in concert with the offeror to obtain or consolidate control of the offeree company. However, depending on the size of the equity "kicker", amongst others, this may not always be the case. Council proposes to deal with this on a case-by-case basis.

10 The proposed revisions in this regard are as follows:

"(a) the following companies:-

(i) a company;
(ii) the parent company of (i);
(iii) the subsidiaries of (i);

(iv) the fellow subsidiaries of (i);

(v) the associated companies of any of (i), (ii), (iii) or (iv);

(vi) companies whose associated companies include any of (i), (ii), (iii), (iv) or (v); and

(vii) any person who has provided financial assistance (other than a bank in the ordinary course of business) to any of the above for the purchase of voting rights."

"(h) the following persons and entities:-

(i) an individual;

(ii) the close relatives of (i);

(iii) the related trusts of (i);

(iv) any person who is accustomed to act in accordance with the instructions of (i); and

(v) companies controlled by any of (i), (ii), (iii) or (iv); and

(vi) any person who has provided financial assistance (other than a bank in the ordinary course of business) to any of the above for the purchase of voting rights."

"5. Banks

An arm's length agreement between a shareholder and a bank (including agreements under which the shareholder borrows money for the acquisition of shares) will not normally lead the Council to conclude that the bank is a concert party. In the event that such agreement involves the bank acquiring offeree company shares or an option over such shares, or otherwise creates an incentive for the bank to assist the shareholder in obtaining or consolidating effective control of the offeree company, the Council should be consulted."

[Please see Annex 2: page 5, Definition 1(a)(vii); page 6, Definition 1(h)(vi); and page 7 Note 5 on Definition of acting in concert]

Consultation 4: SIC seeks views on the proposals to (i) regard a party which provides another party with financial assistance (other than a bank in its ordinary course of business) for the purchase of voting rights to be parties acting in concert; and (ii) consider on a case-by-case basis whether an arrangement, such as an equity "kicker", gives rise to a presumption that a bank is acting in concert with the offeror to obtain or consolidate control of the offeree company.

Rule 9.2- Information to competing offeror

11 Rule 9.2 requires any information given to one offeror or potential offeror to be given equally and promptly to any other bona fide offeror or potential offeror on request. The Note on 9.2 offers guidance on the application of this rule when one of the offers is a management buy-out or similar transaction. However, a person making an offer to acquire all or materially all of the offeree company's assets and businesses (i.e. asset offer) need not comply with Rule 9.2 as the Code only applies to an offer for voting rights but not an asset offer.

12 Council is of the view that an offer for assets and/or businesses that account for or contribute more than **20%** of the offeree company's sales, earnings or total assets or market capitalisation may be in direct competition with any offer for the voting rights of the company. To create a level playing field amongst the competing bidders, Rule 9.2 should be extended to such asset offers. The intention is not to apply all the provisions of the Code to these asset offers but only Rule 9.2. In this connection, Rule 9.2 would apply to asset offers only where there is a bona fide offer or potential offer for shares, and would apply equally to all the asset and share offerors involved.

13 The proposed additions are as follows:-

"**9.2 Information to competing offeror**

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

This Rule also applies to a person seeking to acquire all or materially all of the assets and/or businesses of a company which is the subject of an offer or bona fide potential offer. In such cases, the Rule applies equally to such person and the offeror and/or the bona fide offeror. The Council should be consulted in cases of doubt."

"2. Offer for assets or business of the offeree company

For the purpose of this Rule, Council would normally regard a person to be seeking to acquire materially all of the assets and/or businesses of a company if such assets and/or businesses account for or contribute more than 20% of the offeree company's sales, earnings, assets or market capitalisation. The Council should be consulted in cases of doubt."

[Please see Annex 2: page 48, Rule 9.2; and page 48, Note 2 on Rule 9.2]

Consultation 5: SIC invites comments on the proposal to apply Rule 9.2 to an offer for assets and/or businesses of the offeree company that account for or contribute more than 20% of the offeree company's sales, earnings or total assets or market capitalisation.

Rule 13 - Dealings by persons with a commercial interests

14 Rule 13 requires a person with a commercial interest in the outcome of an offer to consult the Council in advance with respect to his dealings and be prepared to justify his proposed action as not being prejudicial to the interests of the shareholders as a whole.

15 It is noteworthy that persons with a commercial interest in the outcome of an offer are deemed associates and are required to disclose their dealings under Rule 12. This being the case, Council is of the view that dealings by such persons should not be fettered by requiring prior consultation with Council. Therefore, we propose to delete this Rule.

[Please see Annex 2: page 61, Rule 13]

Consultation 6: SIC seeks views on the proposal to remove the requirement for a person with a commercial interest in the outcome of an offer to consult the Council in advance for his dealings.

New Rule 13 – Break Fee

16 It has become increasingly common for offerors and offeree companies to negotiate break or termination fees, where a cash sum will be payable by the offeree company if certain specified events occur which have the effect of preventing the offer from proceeding or causing it to fail.

17 As a break fee diminishes the value of the offeree company in the event that the offer fails, it may dissuade potential competing offerors from joining the fray to the detriment of offeree company shareholders. In this regard, Council has, in response to previous applications, adopted the UK approach to limit termination fees to 1% of the value of the offeree company based on the offer price. In addition, the offeree company board

and its financial adviser must confirm in writing that they each believe that the termination fee is in the best interests of shareholders. Council proposes to formalise its practice on termination fees by introducing new rules as follows:-

"13 BREAK FEES

In all cases where a break fee is proposed, certain safeguards must be observed. In particular, a break fee must be minimal (normally no more than 1% of the value of the offeree company calculated by reference to the offer price) and the offeree company board and its financial adviser must provide, in writing, to the Council:-

(a) a confirmation that the break fee arrangements were agreed as a result of normal commercial negotiations;

(b) an explanation of the basis (including appropriateness) and the circumstances in which the break fee becomes payable;

(c) any relevant information concerning possible competing offerors, eg. the status of any discussions, the possible terms, any pre-conditions to the making of an offer, the timing of any such offer etc.;

(d) a confirmation that all other agreements or understandings in relation to the break fees arrangements have been fully disclosed; and

(e) a confirmation they each believe the fee to be in the best interests of offeree company shareholders.

Any break fee arrangement must be fully disclosed in the announcement made under Rule 3 and in the offer document. Relevant documents must be made available for inspection.

The Council should be consulted at the earliest opportunity in all cases where a break fee or any similar arrangement is proposed.

NOTES ON RULE 13

1. Arrangements to which the Rule applies

A break fee is an arrangement which may be entered into between an offeror or a potential offeror and the offeree company pursuant to which a cash sum will be payable by the offeree company if certain specified events occur which have the effect of preventing the offer from proceeding or causing it to fail (e.g. the recommendation by the offeree company board of a higher competing offer).

This Rule will also apply to any other favourable arrangements with an offeror or potential offeror which have a similar or comparable financial or economic effect, even if such arrangements do not actually involve any cash payment.

Such arrangements also include, but are not limited to, penalties, put or call options or other provisions having similar effects, regardless of whether such arrangements are considered to be in the ordinary course of business. In cases of doubt, the Council should be consulted.

3. Statutory provisions

Any view expressed by the Council in relation to such fees or arrangements can only relate to the Code and must not be taken to extend to any other relevant law or regulation.

4. "Whitewashes"

This Rule also applies to the payment of an inducement fee in the context of a "whitewash" transaction. In this context, the 1% test will normally be calculated by reference to the value of the offeree company immediately prior to the announcement of the proposed "whitewash" transaction. "

[Please see Annex 2: page 61, Rule 13]

Consultation 7: SIC invites comments on the proposal to introduce rules governing break fees.

New Note 5 on Rule 14.3

18 Under Note 1 on Rule 14.2, an offeror is permitted to attach conditions to a share acquisition agreement or a put and call option agreement which, on fulfilment of the conditions precedent, would trigger a mandatory bid obligation (this requires a cash offer or cash alternative). Upon entering into such a conditional share acquisition agreement or put and call option agreement, the offeror is required to make an announcement stating, inter alia, the cash offer price.

19 When listed securities are offered as consideration for the acquisition of voting rights under the conditional share acquisition agreement or put and call option agreement, Note 2 on Rule 14.3 advises that the value of such listed securities offered as consideration will normally be established by reference to the simple average market price (i.e. the arithmetic average of the highest and lowest traded prices) of the listed securities on the date of the acquisition, i.e. the date when the conditions precedent are fulfilled.

20 However, as the conditional share acquisition agreement or put and call option agreement will only be completed at some point in the future when all the conditions precedent are fulfilled, it is not possible to announce the terms of the cash offer or cash alternative [which could only be ascertained by reference to traded prices when the conditions precedent are fulfilled (Note 2 on Rule 14.3)] at the time of the announcement of the conditional share acquisition agreement or put and call acquisition agreement. Further, the potential offeror will be concerned about the prolonged exposure to price movements in the listed shares offered as consideration.

21 One way to address this uncertainty would be to value the securities offered as consideration on the date of announcement of the conditional share acquisition agreement or put and call option agreement. However, permitting the offeror to lock-in the price of the consideration shares at the time of the announcement of the offer may not be fair to offeree company shareholders as the cash offer when made later, sometimes up to a year, may not be representative of the value of consideration securities offered to the exiting major shareholder.

22 To balance the two conflicting concerns, Council had previously allowed a potential offeror to announce a cash offer based on the value of the consideration securities established by reference to the simple average market price of the securities on the date of the announcement of the share acquisition or put and call option agreement. Such cash offer price would be valid so long as the share acquisition agreement or put and call option agreement is completed within 3 months. If the conditional share acquisition agreement or put and call option agreement is completed after 3 months, the cash offer will be the value of the consideration shares established by reference to the simple average

market price of the listed securities on the date of completion of the transaction.

23 Council proposes to formalise its ruling in this regard in Note 5 on Rule 14.3.

> *"5. Conditional agreements and put and call option agreements*
>
> *When listed shares are offered as consideration under a conditional share acquisition agreement or put and call option agreement referred to in Note 1 on Rule 14.2, the relevant price for the purpose of Rule 14.3 is to be established by reference to the simple average market price (i.e. the arithmetic average of the highest and lowest traded prices) of the listed securities on the date of the announcement of the conditional share acquisition or put and call option agreement.*
>
> *If the relevant price so established represents the highest price paid by the offeror and his concert parties in the 6 months prior to the date of the announcement of the share acquisition or put and call option agreement and the offeror does not acquire any further voting rights in the offeree company at a higher price, then the offeror may make the consequent mandatory offer at such relevant price as long as the conditions precedent are fulfilled and the mandatory offer is triggered within 3 months of the date of the announcement of the share acquisition or put and call option agreement.*
>
> *If the conditions precedent are fulfilled and the mandatory offer is triggered more than 3 months after the date of the announcement of the share acquisition or put and call option agreement, the relevant price for the purpose of Rule 14.3 is to be established by reference to the simple average market price (i.e. the arithmetic average of the highest and lowest traded prices) of the listed*

securities on the date the conditions precedent are fulfilled and the mandatory offer is triggered. The offeror may make the mandatory offer at such relevant price if the offeror and his concert parties have not acquired any shares at higher than the relevant price during the offer period and in the 6 months prior to the date of its commencement. In cases of doubt, Council should be consulted. "

[Please see Annex 2: page 83, Note 5 on Rule 14.3]

Consultation 8: SIC seeks views on the new Note 5 on Rule 14.3.

Consultation 9: SIC invites comments on the application of a 3-month validity period for prices determined on the date of the announcement of the conditional share acquisition or put and call option agreement.

New Note on Rule 16.2

24 In response to applications, Council would normally subject partial offers for less than 30% of voting rights to less stringent requirements given that the offeror does not acquire effective control of the offeree company. Amongst others, shareholders' approval for the partial offer is not required and the offeror is not prohibited from purchasing offeree company shares before the commencement of the offer period and, subject to certain conditions, following the close of a successful offer. The offeror is also not obliged to offer the highest price he paid for offeree company shares in the 3 months prior to the start of the offer period. However, like all other partial offers, an independent financial adviser is required to be appointed and the partial offer can only become unconditional if the specified number of acceptances is received by the

offeror. It is proposed that Council's position in respect of partial offers for less than 30% be publicised in a new Note on Rule 16.2.

> *"NOTE ON RULE 16.2*
> *Council would normally consent to a partial offer for less than 30% of the voting rights of the offeree company, subject to the offeror complying with Rule 16.4(d), (f), (g), (h) and (j). In addition, the offeror and its concert parties must not acquire any voting rights in the offeree company during the offer period. However, the offeror may acquire voting rights in the offeree company before the commencement of the offer period and immediately after the close of a successful partial offer."*

[Please see Annex 2: page 94, Note on Rule 16.2]

Consultation 10: SIC invites comments on the proposed conditions, in particular the requirement to appoint an independent financial adviser, in respect of partial offers for less than 30% of the voting rights of an offeree company.

Rule 16.4(c) – Approval by shareholders

25 Under Rule 16.4(c), independent shareholders' approval, amongst other conditions, is required for all partial offers which could result in the offeror and its concert parties holding shares carrying more than 50% of the voting rights of the offeree company. This is regardless of whether the offeror and its concert parties have statutory control (i.e. more than 50% of the voting rights) of the offeree company before the partial offer is made.

26 Council is of the view that an offeror who already has statutory control of an offeree company need not be required to seek shareholders' approval if he makes a partial offer for the company. This is because the

partial offer will not result in a change in control. The exception being when such partial offer results in the offeree company breaching the minimum free float requirement (10%) under SGX Listing Rules, which could result in the offeree company being delisted. This is an important consideration that should be put to independent offeree company shareholders for approval.

27 Council proposes to amend the Code to require shareholders' approval for partial offers where (i) an offeror holds 50% or less of the offeree company; and (ii) in the case where an offeror holds more than 50%, the partial offer will result in the offeror holding more than 90% or otherwise cause the offeree company to breach SGX's free float requirements. The proposed revisions to Rule 16.4(c) are as follows:-

> "(c) the partial offer is conditional, not only on the specified number or percentage of acceptances being received, but also on approval by the offeree company's shareholders, where the offeror together with parties acting in concert with it hold 50% or less in the offeree company prior to the announcement of the partial offer. Where the offeror together with parties acting in concert with it hold more than 50% of the voting rights of the offeree company, approval by the offeree company's shareholders is still required if the partial offer could result in the offeror and parties acting in concert with it holding more than 90%, or the offeree company failing to comply with the Securities Exchange's rules on minimum free float. The offeror, parties acting in concert with it and their associates are not allowed to vote on the partial offer. …"

[Please see Annex 2: page 95, Rule 16.4(c)]

Consultation 11: SIC seeks views on the proposal to allow an offeror who has statutory control of an offeree company to make a partial offer without seeking shareholders' approval as long as the partial offer does not result in the offeree company breaching the minimum free float requirement under SGX Listing Rules.

New Rule 17.2 – When a securities offer is required

28 Currently, having regard to the General Principle 3 on equality of treatment, Rule 17 requires an offeror who has acquired 10% or more of the offeree company's voting rights for cash during the offer period and 6 months prior to its commencement to make his voluntary offer in cash or be accompanied by a cash alternative.

29 It has been Council's practice to extend General Principle 3 to cases where the offeror makes substantial acquisitions of voting rights in the offeree company using securities as consideration by requiring such offerors to make available a securities offer in their take-over offer. Council proposes to publicise this practice, which is in line with the requirement in the UK, in new Rule 17.2.

"17.2 When a securities offer is required

Where purchases of any class of the offeree company shares carrying 10% or more of the voting rights have been made by an offeror and any person acting in concert with him in exchange for securities during the offer period and in the 3 months prior to the commencement of the offer period, such securities will normally be required to be offered to all other holders of shares of that class.

Unless the vendor is required to hold the securities received until either the offer has lapsed or the offer consideration has been posted to accepting shareholders, an obligation to provide a cash alternative will also arise under Rule 17.1. (See Note 3 on Rule 17.1.)

NOTES ON RULE 17.2

1. Basis on which securities are to be offered

Any securities required to be offered pursuant to this Rule must be offered on the basis of the actual number of consideration securities received by the vendor for each offeree company share. Where there has been more than one relevant purchase, offeror securities must be offered on the basis of the largest number of consideration securities received for each offeree company share.

When shares of a company carrying voting rights have been allotted (even provisionally) but have not yet been issued, for example under a rights issue when the shares are represented by renounceable letters of allotment, the Council should be consulted. Such shares are likely to be relevant for the purpose of calculating percentages under this Rule.

2. Equality of treatment

The Council may require securities to be offered on the same basis to all other holders of shares of that class even though the amount purchased is less than 10% or the purchase took place more than 3 months prior to the commencement of the offer period. However, this discretion will not normally be exercised unless the vendors are directors or other persons closely connected with the offeror or the offeree company.

3. Vendor placings

Shares acquired in exchange for securities will normally be deemed to be purchases for cash for the purposes of this Rule if an offeror or any of its associates have in place arrangements for

the immediate placing of such consideration securities for cash, in which case no obligation to make a securities offer under this Rule will arise.

4. Management retaining an interest

In a management buy-out or similar transaction, if the only offeree company shareholders who receive offeror securities are members of the management of the offeree company, the Council will not, so long as the requirements of Note 4 on Rule 10 are complied with, require all offeree company shareholders to be offered offeror securities under this Rule, even though such members of the management company propose to sell, in exchange for offeror securities, more than 10% of the offeree company's shares.

If, however, offeror securities are made available to any non-management shareholders (regardless of the size of their holding of offeree company shares), the Council will normally require such securities to be made available to all shareholders on the same terms.

5. Acquisition for a mixture of cash and securities

The Council should be consulted when 10% or more of the voting rights of the offeree company has been acquired during the offer period and 6 months prior to the commencement of the offer period for a mixture of securities and cash.

6. Purchases in exchange for securities to which selling restrictions are attached

Where an offeror and any person acting in concert with him has purchased 10% or more of the voting rights in the offeree company during the offer period and within 6 months prior to the commencement and the consideration received by the vendor includes shares to which selling restrictions of the kind set out in

the second sentence of Rule 17.2 are attached, the Council should be consulted."

[Please see Annex 2: page 100, Rule 17.2]

30 The proposed 3-month reference period for the requirement to make a securities offer is half that in the case of a cash offer. Council is of the opinion that the shorter 3-month reference period is appropriate. Taking into account the fluctuations in the price of securities, the requirement to make a securities offer based on any longer time reference period may be inequitable.

Consultation 12: SIC seeks views on the proposed new Rule 17.2.

Consultation 13: SIC also invites comments on the proposed 3-month reference period for the requirement to make a securities offer.

Note 2 on Rule 20.2 - "Competitive Situation"

31 Under Note 2 on Rule 20.2, an offeror is permitted to set aside a no increase statement in the event of a "competitive situation" arising if he has reserved the right to do so. A no increase statement is used as a tactic to pressure shareholders to accept an offer. Hence, an offeror should not be allowed to set aside a "no increase" statement on frivolous grounds. Council is of the view that the mere possibility of a competing offer is not sufficient basis for disregarding a no increase statement as no real alternative has materialised. To avoid any confusion as to the interpretation of a "competitive situation", Council, therefore proposes to replace the phrase "competitive situation arises" in Note 2 to Rule 20.2 with "competing offer is announced".

32 References to "competitive situation" also appear in Rule 22.6 (Offer to remain open for 14 days after becoming unconditional as to acceptances) and Rule 29 (Acceptors' right to withdraw). For the sake of clarity and to harmonise the language used, it proposed that the phrase "in a competitive situation" in Rules 22.6 and 29 be substituted with "when a competing offer has been announced".

NOTE 2 ON RULE 22.6

"…

If a ~~competitive situation arises~~ competing offer is announced after a no increase statement is made, the offeror can choose not to be bound by it and be free to increase the offer only if he has specifically reserved the right to set aside the no increase statement when such statement was made and provided that:-"

[Please see Annex 2: page 109, Note 2 on Rule 20.2; page113, Rule 22.6; and page 154, Rule 29]

Consultation 14: SIC invites comments on the proposal to amend Note 2 on Rule 20.2, Rule 22.6 and Rule 29 to replace the phrases "competitive situation arises" and "in a competitive situation" with "when a competing offer is announced".

Note 3 on Rule 20.2

33 Under Note 3 on Rule 20.2, the offeror may set aside his "no increase" statement without express reservation to do so if the offeree company board recommends the increased offer.

34 Offerors employ the no increase statement as a tactic to pressure offeree company shareholders to accept their offers. To prevent abuses and to maintain an orderly market, the offeror issuing such a statement has to be held to it. At the same time, the question arises as to why offeree company shareholders should be denied an increased offer if the offeree company board thinks that it is for the good of shareholders as a whole having taken all factors into account (including shareholders who have sold their shares). On balance, Council had, during the last revision of the Code in 2001, decided that an offeror should be allowed to set aside a no increase statement if the offeree company board recommended it, regardless of whether or not the offeror had reserved the right to do so.

35 Nevertheless, having had the benefit of experience, Council now proposes that the Code should be amended so that offerors are required to draw offeree company shareholders' attention to Note 3 on Rule 20.2 in their no increase statements to be able to set aside their no increase statements. The proposed revisions are as follows:-

> *"3. Recommended offers*
>
> *~~Notwithstanding Note 2 above, t~~The offeror can choose not to be bound by a no increase statement which would otherwise prevent the posting of an increased or improved offer recommended for acceptance by the board of the offeree company if the first document sent to shareholders, where the no increase statement was mentioned, includes prominent reference to this Note."*

[Please see Annex 2: page 109, Note 3 on Rule 20.2]

Consultation 15: SIC invites comments on the proposal to allow an offeror to set aside a no increase statement only if he had included prominent reference in the first document sent to shareholders that he could choose not to be bound by the no increase statement if his improved offer is recommended by the offeree company board.

Rule 21.2 - Offers involving a further issue of listed securities

36 Under Rule 21.2, the current value of a share offer on any given day is established by reference to the simple average market price (i.e. the arithmetic average of the highest and lowest traded prices as reported by the Securities Exchange) of the securities offered as consideration on the date of the announcement of the shares offer.

37 A reference price for current value of a share offer is necessary for the purpose of determining if an offeror making a share offer is required to increase his offer on account of his purchases of voting rights in the offeree company for cash.

38 For this purpose, a reference price based on prices at the time of announcement, which is right at the start of the offer period, may not be an accurate reflection of the value of the share offer during the entire offer period. This is especially so if the offer is long drawn. Hence, Council proposes that, for the purpose of determining whether a revision to a share offer is required, reference should be made to the simple average market price of the offered shares on the immediately preceding trading day.

39 Under this proposal, which is in line with the UK, whether or not an offeror is required to revise his shares offer would depend on the price at which he purchases offeree company shares for cash versus the value of the shares offered based on the simple average market price of the securities offered as consideration on day before. The proposed revisions to Rule 21.2 are as follows:-

"**21.2 Offers involving a further issue of listed securities**

For the purposes of this Rule, if the offer entails a further issue of securities of a class already listed on the Securities Exchange, the current value of the offer on a given day should normally be established by reference to the simple average market price (i.e. the arithmetic average of the highest and lowest traded prices as reported by the Securities Exchange) traded on such securities during the immediately preceding trading day.~~:~~

~~(a) on the date of the announcement of the offer; or~~

~~(b) on the dealing day immediately preceding the date of the announcement of the offer and on which there are dealings, should there be no dealings on the date of the announcement of the offer.~~

The Council reserves the right to set aside any inexplicably high or low traded prices."

[Please see Annex 2: page 110, Rule 21.2]

Consultation 16: SIC seeks views on the proposed amendments to Rule 21.2.

Rule 22.9 - Final day rule

40 Under Rule 22.9, unless Council's consent is obtained, an offer cannot be kept open beyond 3.30 pm on the 60th day ("Day 60") after the date the offer document is initially posted.

41 Council notes that the practice is for offerors to use the 3.30 pm cut-off time in the final day rule as the cut-off time for their first closing dates or further closing dates, although there are no prescribed cut-off times for these dates. Such a cut-off in the middle of the afternoon session of trading on the SGX is disruptive as a trading halt is usually called either to announce the extension of the offer or pending further announcement of a lapsed offer.

42 The 3.30 pm deadline for the final day is historical and takes into account the time needed for counting and verifying acceptances of scrip shares for the announcement on level of acceptances to be made by 8.00 am the next morning. Given that the process of counting and verifying is faster now as the bulk of shares in most companies are held in scripless form, the Council proposes to push back the cut-off time on Day 60 from 3.30pm until 7.00 pm, after the close of the market. The proposed revisions are as follows:-

> **"22.9 Final day rule**
>
> No offer (whether revised or not) will be capable of becoming or being declared unconditional as to acceptances after ~~3.30~~7.00 pm on the 60th day after the date the offer document is initially posted nor of being kept open after the expiry of such period unless it has previously become or been declared unconditional as to acceptances. An offer may be extended beyond that period of 60 days with the permission of the Council. The Council will consider ~~normally~~ granting such permission in circumstances, including but not limited to, ~~if~~ where a competing offer has been announced."

[Please see Annex 2: page 114, Rule 22.9]

Consultation 17: SIC seeks views on the proposal to move the cut-off time on Day 60 from 3.30pm to 7:00pm.

Note 3 on Rule 24.1 – Conflicts of interest

43 In previous privatisation cases, there have been instances where all the directors of the offeree company faced irreconcilable conflicts of interests and were exempted from making a recommendation on the privatisation offer. In such instances, Council ruled that the responsibility to make a recommendation to offeree company shareholders lay with the appointed independent financial adviser. This is also the practice in Hong Kong. Council proposes to publicise this by adding on to Note 3 on Rule 24.1.

"*3. Conflicts of interests*

Directors who have an irreconcilable conflict of interests and those who have been exempted by the Council from making recommendations to shareholders on an offer should not join with the remainder of the board in the expression of its views on the offer. In such cases, the reasons for their exclusion should be clearly explained to shareholders. In the case where all the directors on the offeree company board have been exempted by the Council, the responsibility for making a recommendation to shareholders shall reside primarily with the independent financial adviser."

[Please see Annex 2: page 126, Note 3 on Rule 24.1]

Consultation 18: SIC invites comments on whether the responsibility to make a recommendation on the offer should rest with the appointed independent financial adviser in the event all the directors of the offeree board face conflicts of interests.

New Note 5 on Rule 28

44 Shares acquired or agreed to be acquired by the offeror and its concert parties during the offer period will be counted towards the acceptance condition under Rules 14.2 (50% for mandatory offers) and 15.1 (at least 50% for voluntary offers).

45 Whilst there are strict guidelines as to what is required for acceptances of the offer to be counted towards fulfilling an acceptance condition, there are, however, no guidelines as to what is required for shares acquired or agreed to be acquired during the offer period to count towards the acceptance condition.

46 Clear guidelines are particularly important where an offer becomes unconditional only marginally at the end of the maximum permitted offer period and where the acceptance condition was fulfilled largely by acquired shares. The concern here is that parties can assist the offeror in fulfilling the acceptance condition by selling short to the offeror.

47 In view of this, Council proposes that only (a) purchases made through the Securities Exchange in the normal course of trading securities on the Securities Exchange and where there is no pre-arrangement or collusion between the parties or their agents to such transaction; or (b) purchases that are fully completed and settled would count to the acceptance condition. The proposed revisions are as follows:-

"5. Purchases of shares

Purchases made through the Securities Exchange by the offeror and parties acting in concert with it with no pre-agreement or collusion between the parties to such transactions or their agents, may be counted towards satisfying the acceptance condition. All other purchases by the offeror and parties acting in concert with it (i.e. off market purchases) may only be counted when fully completed and settled."

[Please see Annex 2: page 152, Note 5 on Rule 28.1]

Consultation 19: SIC seeks views on the proposal to allow only (a) purchases made through the Securities Exchange in the normal course of trading securities on the Securities Exchange; and (b) purchases that are fully completed and settled to count towards the acceptance condition.

Rule 30 - Settlement of Consideration

48 Offerors are currently required to settle acceptances as soon as practicable, but in any event within 21 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.

49 In most cases, offerors have made full use of the 21 days permitted to settle acceptances. The 21-day time period for settlement has its

origins in the days when shares were mostly in the form of scrips. Additional time was needed to verify the validity of scrip documents before payment could be made. This is no longer the case as shares are mostly held in scripless form.

50 Council proposes to amend the Code to require settlement of acceptances within 10 days, in line with the practice in Hong Kong.

> "Shares represented by acceptances in any offer, other than a 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 ~~21~~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.
>
> *[Please see Annex 2: page 155, Rule 30; and page 97, Rule 16.6]*

Consultation 20: SIC invites comments on the proposal to shorten the settlement period for acceptances tendered from 21 to 10 days.

Appendix 1 – Whitewash Guidance Note

51 Under Note 9 on Rule 14.1, a Whitewash waiver may be obtained in respect of instruments convertible into and options in respect of new shares before the issue of such instruments and options. Appendix 1 requires conversion of the convertible instruments or exercise of the

options within a period of 2 years from the date of issue of the convertible instruments or options for the Whitewash waiver to be valid. Further, disclosures on the details of the Whitewash waiver obtained is required to be made periodically during the 2-year period in accordance with Note 2 on Section 2 of Appendix 1.

52 Market practitioners have suggested extending the 2-year validity period to 5 years as most convertible instruments and options have an exercise period of up to 5 years.

53 When the Code was last revised, there was concern that future shareholders may be prejudiced as current shareholders can bind the company to a course of action indefinitely through an ordinary resolution. To address this concern, the validity period for Whitewash waivers in respect of convertible instruments and options was limited to a period of 2 years.

54 Having regard to commercial practices and the fact that details of the Whitewash waiver are disclosed at regular intervals, Council is of the view that extending the validity of Whitewash waiver to 5 years is reasonable and will not unduly prejudice future shareholders. Therefore, Council proposes to increase the validity period of the Whitewash waiver for convertible instruments and options from a period of 2 years to 5 years. The proposed revisions to Appendix 1 are as follows:-

> "(i) to rely on the Whitewash Resolution, the acquisition of new shares or convertibles by the offeror pursuant to the proposal must be completed within 3 months of the approval of the Whitewash Resolution. For a Whitewash Resolution involving convertibles, the acquisition of new shares by the offeror upon the exercise or

conversion of the convertibles must be completed within 25 years of the date of issue of the convertibles. (See Note 2 on Section 2.)"

[Please see Annex 2: page 164, Section 2(i)]

Consultation 21: SIC seeks views on the proposal to increase the Whitewash waiver validity period from 2 to 5 years.

Rule 34, New Schedule 1 - Fees leviable by Council

55 Currently, fees are not levied for the lodgement of offer documents although Rule 34 provides that the Minister for Finance may prescribe such fees. In contrast, both the UK and Hong Kong Panels levy fees.

56 To recover costs incurred in administering the Singapore Code, Council proposes to introduce a tiered fee structure at Schedule 1 for the lodgement of offer documents based on the value of the offer. In addition, a flat fee of S$2,000 is proposed for the lodgement of Whitewash circulars.

"

SCHEDULE 1

FEES LEVIED FOR LODGEMENT OF DOCUMENT

(See Rule 34)

1 Fees for lodgement of offer document

The amount of fees payable will depend on the value of the offer according to the table below:-

Value of offer ($ million)	Charge ($)
Less than 15	3,000
Over 15 to 30	15,000
Over 30 to 50	30,000
Over 50 to 100	40,000
Over 100 to 250	70,000
Over 250	100,000

2 Fees for lodgement of Whitewash circular

A fee of $2,000 is payable for the lodgement of a Whitewash circular.

3 Value of Offer

For the purposes of this Schedule, value of offer refers to:-

(a) where the shares which are the subject of the offer are to be acquired for cash, the total amount of such cash; and

(b) where the shares which are the subject of the offer are to be acquired for listed securities, the value of such listed securities established by reference to the simple average market price (i.e. the arithmetic average of the highest and lowest traded prices) of the listed securities on the offer announcement.

The Council should be consulted in the event the shares which are the subject of the offer are to be acquired for a consideration other than cash or listed securities.

In the case where the offer document contains alternative offers to the same offeree company, or contains 2 or more offers of different values to different offeree companies, the value of the offer used to determine the fee to be levied shall be the lower or lowest value.

4 Payment

Fees must be paid by cheque made payable to "The Monetary Authority of Singapore" at the time of lodgment of the offer document. Subsequently, on the date of posting of any written notification of a revised offer to offeree shareholders, there shall be payable to the Monetary Authority of Singapore a fee equal to the difference between the fee previously paid based on the value of the offer determined on lodgement of the offer document (including any revisions other than the current one) and the fee which would be payable based on the revised offer."

[Please see Annex 2: page 178, Schedule 1]

Consultation 22: SIC invites comments on the proposed fee structure for lodgement of offer documents and Whitewash circulars.

PART II: EMERGING ISSUES AND DEVELOPMENTS

Real Estate Investment Trusts ("REITs")

57 In Singapore, REITs may be structured as Collective Investment Schemes ("CIS") under the SFA or registered business trusts under the Business Trusts Act. Currently, the Singapore Code would apply only in the latter case. However, most, if not all, REITs have been structured as CIS ("CIS REITs").

58 Concerns relating to proper governance and accountability are applicable to REITs structured as CIS or BTs even though they are governed under different regulatory regimes. For this reason, investors are empowered to vote at general meetings on issues concerning the running of both CIS REITs and BTs, including the appointment of managers, in the case of CIS REITs, and trustee managers, in the case of BTs.

59 To facilitate the market for corporate control and ensure fair and equal treatment of all unitholders in a take-over and merger situation, Council considers that the Singapore Code should apply to CIS REITs given that it already applies to BTs. If there is a change in effective control in a CIS REIT, any premium paid to a particular investor to acquire such effective control should likewise be offered to all other CIS REIT investors.

60 To clarify, it is not proposed that the Code be applied to all CIS. CIS (other than CIS REITs) are open ended. The concept of effective control is meaningless in such cases as the CIS manager may issue and redeem units in the CIS without investor approval.

61 Further, any changes to apply the Singapore Code to CIS REITs would require amendments to the SFA. Therefore, such changes, if any,

would be made during the next round of amendments, and not during this round of revisions to the Singapore Code.

Consultation 23: SIC invites comments on whether the Singapore Code should apply to CIS REITs.

Dealing in Derivatives and Options

62 In the UK, parties to an offer and other market participants are increasingly dealing in derivatives and options. One the most common form of derivative instrument encountered in the UK is 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) a corresponding number of the underlying securities ("hedge shares") at or around the CFD reference price.

63 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.

64 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.

65 To take into account this development, the UK Code was amended on 7 Nov 2005 and 21 Apr 2006 following extensive consultation. The first round of amendments dealt with the disclosure of dealings in derivatives and options (the "Disclosure Issues"), while the latter round dealt with dealings in derivatives and options by parties to an offer and whose interests fall into the 30% to 50% band (the "Control Issues").

66 The key changes are as follows:

Disclosure Issues

(a) During an offer period, a person who is interested (directly or indirectly) in 1% or more of any class of securities in the offeree company would be required to disclose all dealings in such relevant securities. Such interests would include those arising from a long economic exposure[1] to the changes in the price of the relevant securities in addition to those arising from ownership of those securities.

(b) Dealings in the relevant securities captures any transaction which results in an increase or decrease in the number of securities in which the person is interested or in respect of

which he has a short position. In addition to buying and selling securities, granting or exercising an option, subscribing for securities, and entering into, closing out or varying a derivative references to securities would be considered dealing.

Control Issues

(c) The thresholds for triggering an obligation to make a mandatory offer would take into account the aggregate number of shares carrying voting rights, call options and written put options in respect of such shares, and long derivatives[2] referenced to such shares.

(d) The price paid for any acquisition of an interest in shares will be determined:

(i) in the case of a call option which remains unexercised, by the middle market price of the underlying shares at the time the option is entered into;

(ii) in the case of a call option which has been exercised, by the amount paid on exercise of the option together with any amount paid by the option-holder on entering into the option;

(iii) in the case of a written put option (whether exercised or not), the amount paid or payable on exercise of the

[1] A person who has a long economic exposure in a security would benefit economically if the price of the security goes up and will suffer economically if the price of that security goes down.
[2] Long derivatives refer to derivatives where the holder will benefit economically if the price of the underlying security goes up, and will suffer economically if the price goes down.

option less any amount paid by the option-holder on entering into the option ;and

(iv) in the case of a derivative, the initial reference price together with any fee paid on entering into the derivative.

(e) Call options and written put options in respect of offeree company shares carrying voting rights, and long derivatives referenced to such shares will not count towards the 50% acceptance condition.

67 Council has encountered a number of instances where the controlling shareholder proposed to purchase CFDs in respect of shares of his company which when added to his existing shareholdings would cause him to cross the mandatory offer thresholds. In such cases, Council's practice has been to confirm that the counterparty to the CFD would not be regarded as a concert party of the controlling shareholder, hence any shares bought by the counterparty to hedge the CFD would not be aggregated with those of the controlling shareholder for the purposes of determining whether a mandatory offer is triggered. Such confirmation is subject to (i) the counterparty putting in place proper procedures to ensure that the controlling shareholder cannot vote or influence the voting of the hedge shares acquired; and (ii) written confirmations from the controlling shareholder and the counterparty to the effect that they are not parties acting in concert.

68 However, given the UK experience with options and derivatives, Council is reviewing this practice, and is considering adopting the UK approach.

Consultation 24: SIC invites comments on whether the UK approach in respect of dealings of options and derivatives should be adopted.