

PROPOSALS THAT MAKE IT HARDER TO BUY OUT MINORITY SHAREHOLDERS IN AN OFFER ACCEPTED BY MOF AND ACRA

Posted on September 25, 2023



Category: [CNPupdates](#)

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Introduction

To ensure Singapore's corporate laws and regulatory framework stay competitive, several areas in the Companies Act 1967 ("**Act**") were reviewed by the Companies Act Working Group ("**CAWG**") and public stakeholders. One of the areas under review pertains to a perceived loophole in the existing compulsory acquisition framework which makes it easier for an offeror in a public takeover situation ("**Offeror**") to reach the 90% threshold and exercise the right of compulsory acquisition.

On 16 February 2023, the Ministry of Finance ("**MOF**") and the Accounting and Corporate Regulatory Authority ("**ACRA**") accepted certain proposed amendments to close off the aforementioned loophole.

Existing law and loophole

Currently, under Section 215 of the Act, an Offeror has the right to compulsorily acquire the shares of any dissenting shareholder if the offer for all the shares of a target company ("**Target**") has been approved by shareholders of the Target who hold at least 90% of all the shares of the Target (excluding treasury shares, and any shares already held at the date of the offer by the Offeror). To illustrate, an individual owning 80% of a Target as at the date of the offer would have to acquire 90% of the remaining 20% of all shares, which works out to an effective control of 98% of all shares, in order to exercise the right of compulsory acquisition. Further, shares held or acquired by (i) a nominee on behalf of the Offeror; or (ii) a related corporation of the Offeror or a nominee of that related corporation (collectively, the "**Excluded Entities**"), are treated as shares held or acquired by the Offeror, such that these shares are excluded from the computation of the 90% threshold for compulsory acquisition.

In recent years, there have been instances where an Offeror who already holds a substantial shareholding in the Target took advantage of the limited scope of the Excluded Entities and structure the takeover such that it achieves the 90% threshold more easily. For example, a controlling shareholder of a Target typically sets up a special purpose vehicle ("**SPV**") and uses the SPV to mount an offer for the shares of the Target. As the controlling shareholder is neither the Offeror nor an Excluded Entity, shares held by the controlling shareholder can be counted towards the 90% threshold, even though the controlling shareholder controls the SPV and the SPV may have been set up for the purposes of exploiting the loophole. The controlling shareholder may also control other entities which hold shares in the Target, and unless they are Excluded Entities, the shares held by these entities would similarly be counted towards the computation of the 90% threshold. In contrast, if the controlling shareholder were to make the offer in his own capacity, the shares he holds would not be counted towards the computation of the 90% threshold, making it more difficult for the controlling shareholder to satisfy the 90% threshold.

Proposed amendments to the Act

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Some industry observers believe that the current loophole prejudices the interest of minority shareholders by making it easier for their shares to be compulsorily acquired, especially in situations where the offer price is deemed unattractive, and the 90% threshold would not otherwise be reached had the Offeror not made use of the loophole. While Section 215 of the Act does allow dissenting minority shareholders to apply to court in the case of unfairness, the CAWG noted that most retail shareholders may feel that it would not be worth incurring the costs and risks of commencing legal action given that their individual shareholdings are likely to be relatively small.

In light of the situation, the proposed amendments seek to expand the scope of the exclusions under Section 215 of the Act, by excluding shares held or acquired by the following persons from the computation of the 90% threshold for compulsory acquisition:

1. A person who is accustomed or is under an obligation whether formal or informal to act in accordance with the directions, instructions or wishes of the Offeror in respect of the Target;
2. An entity controlled by the Offeror;
3. The Offeror's close relatives (i.e., spouse; children, including adopted children and step-children; parents; and siblings);
4. A person whose directions, instructions or wishes the Offeror is accustomed or is under an obligation whether formal or informal to act in accordance with, in respect of the Target; and
5. An entity controlled by a person described in paragraph (d) above.

Paragraphs (a) to (c) above capture related parties who are in one way or another controlled by the Offeror, while paragraphs (d) and (e) above address the reverse situation where the related party controls the Offeror. An example in which paragraphs (d) and (e) may apply is where a person sets up a SPV to make an offer for the shares of a Target while controlling entities which hold shares in the Target. Applying paragraphs (d) and (e), shares held by the person and the entities he controls would not be counted for purposes of determining whether the SPV has achieved the 90% threshold. CAWG has further stated that paragraphs (d) and (e) are intended to apply to the facts of each case to determine if actual control and influence is exercised, and does not automatically exclude, for instance, shares held by sister or parent companies of the Offeror from the computation of the 90% threshold.

Conclusion

The proposed amendments will be tabled in the Parliament. If passed as law, the proposed amendments may plug a loophole often used by Offerors to reach the compulsory acquisition threshold more easily, and make it more difficult for Offerors to squeeze out minority shareholders with an offer price that undervalues the Target.

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