# PROPOSED REVISION TO THE TAKEOVER CODE

*Posted on September 1, 2015*

**Category:** CNPupdates

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**Date Published: 1 September 2015**

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On 6 July 2015, The Singapore Securities Industry Council ("**SIC**") issued a consultation paper on proposed amendments to the Singapore Code on Take-overs and Mergers ("**Code**"). The amendments proposed by the SIC seek to take into account market developments and practices which have emerged in a number of high profile local M&A deals, notably the 2013 takeover of Fraser and Neave, Limited by Thai Beverage Plc (the "**F&N Case**"), as well as developments in international practice that have occurred since the SIC's last review of the Code in 2012.

## Proposed Amendments

This article examines the key proposals set out in the consultation paper, which include:

- Codification of a default auction procedure;
- Guidance on when potential competing offerors are required to clarify their intentions;
- Guidance on board conduct during an offer;
- Clarification on setting aside no increase and no extension statements;
- A requirement that material changes to information previously published in connection with an offer are promptly disclosed;
- Amending the deadline for settlement to 7 business days;
- Clarification of certain positions regarding pre-conditional offers; and
- Streaming and codification of existing practices.

## Codification of default auction procedure

The SIC proposes to incorporate a default auction procedure based on the auction procedure set out by the Panel on Takeovers and Mergers in the UK (the "**UK Panel**") to 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.

In the 2013 F&N case, the SIC prescribed an auction procedure (the "**F&N Auction Procedure**") to resolve the competitive situation, wherein the two competing offerors, having launched their initial offers, had not revised their bids resulting in a stalemate in the later stages of the offer period. The F&N Auction Procedure was modelled closely on the auction procedure set out by 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

The UK Panel recently codified a modified version of the F&N Auction Procedure (the "**Modified Auction Procedure**") on 1 Jan 2015. The key features on the Modified Auction Procedure are:

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- The auction will comprise a maximum of 5 rounds of bidding, with one round of bidding taking place each day, over the 5 business days immediately following Day 46;
- Both the competing offerors may announce a revised offer in the 1st round of the auction;
    - Thereafter (in the 2nd to 4th round), a competing offeror may announce a revised offer only if the other competing offeror has announced a revised offer in the previous round;
    - In the 5th and final round, 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;
    - 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;
- 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;
- Formula offers are prohibited;
- Introduction of new forms of consideration are allowed;
- No minimum increment over latest competing bid;
- During the auction, the competing offerors and their concert parties cannot:
    - make an announcement which could reasonably be expected to affect the orderly operation of the auction procedure; or
    - 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
- 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.

The SIC is in favour of adopting the Modified Auction Procedure as it is of the view that incorporating such an auction procedure in the 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. In the consultation paper, the SIC states that the Modified Auction Procedure is designed to achieve finality and an orderly conclusion to competitive situations 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.

## Extension of Deadline for Clarification of Intentions

Given the need under General Principle 10 of the Code for offeree company shareholders to have timely and sufficient information, where an offeror ("**Offeror 1**") has announced a firm intention to make an offer

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and there is a potential competing offeror ("**Offeror 2**"), 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. Where Offeror 2 becomes the subject of a possible offer announcement, the SIC has in the past required Offeror 2 to "put up or shut up" ("**PUSU**") by clarifying its intentions through either:

- Announcing a firm intention to make an offer; or
- Make a no intention to bid statement.

The SIC now proposes to follow the UK panel's practice by extending the PUSU deadline from Day 50 to Day 53 from the date Offeror 1 posts its offer document, as it is of the view that this would be beneficial to offeree company shareholders for the reason that providing more time to 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.

In the case where Offeror 1's offer is being implemented by way of a scheme of the arrangement, a trust scheme or an amalgamation, the SIC proposes that the PUSU deadline for Offeror 2 be 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 Offeror 2 after Day 53

Under Rule 33.1(c) of the Code, in the case where Offeror 2 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.

The SIC now proposes to introduce a requirement that, 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. This is as the SIC considers Offeror 2's acquisition of shares to be inconsistent with its no intention to bid statement and views such action as raising 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 would create 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 through the PUSU requirement.

## Board Conduct during the offer

The SIC has proposed several changes to encourage offeree boards to be more proactive in serving shareholders' interests.
The SIC has proposed to clarify that Rule 5 of the Code (Frustration of Offers by an Offeree Board) should not prevent the offeree board from soliciting a competing offer or running a sale process and that doing so

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will not amount to frustration of the initial offer as such action would not result in shareholders being deprived of the opportunity to decide on the merits of the first offer. It is submitted that this proposal is apposite as Rule 5 should not preclude offeree boards from seeking alternative bids which would generally be beneficial to all shareholders.

The SIC has also proposed that the Code be amended to highlight that an offeree board may consider the availability of management projections and forecasts which can be shared with the appointed independent financial advisor (the "**IFA**") for the purpose of the latter's advice on the offer. The management projections and forecasts 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 sectors.

As IFAs typically base their analysis solely on a comparison of the offeree company with other companies in the same sector, the second proposed amendment, if effected, would place IFAs in a better position to deliver clearer opinions to shareholders. IFAs would no longer need to insert the disclaimer that they have neither considered any financial projections nor future growth prospects in arriving at their findings and would able to use more unequivocal language rather than vague or non-committal statements such as "fair but not compelling" or "adequate but not compelling" in their recommendations. This, in turn, would provide greater guidance to minority shareholders, who are often at a disadvantage due to an information asymmetry relative to majority shareholders, and to whom an impartial recommendation written in unequivocal terms would be most helpful.

## Setting aside no increase and no extension statements

Under Rules 20.2 and 22.7 of the current Code, an offeror who has issued a no increase or no extension statement may only amend the terms of the offer under wholly exceptional circumstances, or where he has specifically reserved the right to do so.

Under rule 22.8 of the current Code, an offeree board may not, unless the SIC's consent is given, announce any material new information 39 days after the posting of the initial offer document. However, the SIC will normally give its consent to a later announcement.

The SIC proposes that, in cases where an offeree board announces material new information after Day 39, an offeror should be able to set aside a no increase or no extension statement if the statement was made after Day 39. The reason for this proposal is because in such situations, the offeror would have made the statement with the expectation that the offeree company would not thereafter announce any material new information, and can claim to be disadvantaged by the late announcement of material information by the offeree board. This proposal is also in line with the approach in the UK Takeover Code.

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## Material changes to the information

Under the current Code, Note 1 on Rule 8.1 requires that 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.

The SIC notes that a gap between the time of the material change in information and its disclosure may occur and, to ensure that shareholders and investors are apprised of material information on a timely basis, the SIC is now proposing an amendment to Rule 8.1 of the Code to require prompt disclosure of:

- any material changes to information previously published in connection with the offer; and
- 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.

These proposed amendments would bring the Code 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.

## Deadline for settlement

Under the current Code, 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.

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

## Pre-conditional offers

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 SIC has noted its concern that, in respect of pre-conditions to a voluntary offer, 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.

The Code currently does not prescribe any requirements for the pre-conditions, although in practice the SIC requires such pre-conditions to meet the standards set-out in Note 1 on Rule 14.2 relating to conditional agreements and put call option agreements.

The SIC now proposes to codify this practice by introducing a new Note to Rule 15.1, which would require

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that:

- the pre-conditions should be stated clearly in the announcement of the pre-conditional offer;
- the pre-conditions should be objective and reasonable;
- 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
- no pre-condition should be relied upon to cause the offer to lapse unless:
  - the offeror has demonstrated reasonable efforts to fulfil the conditions within the time period specified; and
  - the circumstances that give rise to the right to rely upon the conditions are material in the context of the proposed transaction.

## Posting of offer document for pre-conditional offers

Rule 22.1 of the current Code provides that an offer document may only be posted between 14 to 21 days following the date of the offeror's announcement of a firm intention to make an offer. The board of the offeree company will then have 14 days from the date of posting of the offer document to despatch its offeree circular.

This 14-day prohibition on posting the offer document (the "**14-day prohibition**") is intended to allow the offeree board sufficient time (at least 28 days from the date of offer announcement) to prepare its offeree circular.

However, in a pre-conditional offer scenario, the offeror will only announce his firm intention to make an offer only upon the fulfilment of certain conditions, which may include shareholders' approval and regulatory approval. The SIC notes that these conditions would typically take around 3 months to fulfil, and by the time the offeror announces his firm intention to make an offer, the offeree board would have had sufficient notice of the offer and its terms for some time, and thus sufficient time to react.

The SIC is therefore of the view that the 14-day prohibition may unnecessarily prolong the offer period, and is proposing 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.

## Comparable offers for different classes of shares

Under Rule 18 of the current Code, where a company has more than one class of equity share capital, a comparable offer must be made for each class. Note 1 on Rule 18 of the Code currently provides that an offeror must justify the ratio of the offer values to the SIC in advance.

The SIC now proposes to adopt the UK Panel's approach by going further to state explicitly that reference

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will be made to market prices in determining the ratio of offer values. The SIC is of the view that this approach will provide certainty to market participants as to the appropriate comparable offer price, and is in line with the SIC'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).
The SIC, therefore, proposes to amend Note 1 on Rule 18 to state that:

- the Council will normally accept the ratio of the offer values to be equal to the ratio of the simple average of the daily volume-weighted average traded prices of the equity shares over the course of six months (three months in the case of voluntary offers) preceding the commencement of the offer period;
- 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.

## Streamlining existing practices

The SIC has also made several other technical amendments to codify and streamline existing practices. These include:

- a new Note to Rule 22.9 which provides that in competitive situations, all offerors will be bound by the timetable established by the despatch of the latest competing offer document.
- 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 newspapers published daily and circulating generally.

## Conclusion

It can be seen above that many of the changes proposed by the SIC to the Code were precipitated by recent market developments and advancements in international practice. Taken as a whole, the proposed changes seem efficacious in ensuring that Singapore takeover regulation is aligned with contemporary market and international practices.

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