

03 October 2016

Notes on the New Malaysian Code on Take-Over 2016

Introduction

On 15 August 2016, the Securities Commission of Malaysia (**SC**) revised the take-overs and mergers regulatory framework in Malaysia by the launch of its new rule book as well as a vastly revised take-overs code.

The Rules on Takeovers, Mergers and Compulsory Acquisitions 2016 (**Rules**) together with the Malaysian Code on Take-Overs and Mergers 2016 (**New Code**) replaces the Malaysian Code on Take-Overs and Mergers 2010 (**2010 Code**) as of 15 August 2016.

The operational and conduct requirements in relation to takeovers are now contained in the Rules, where they were formerly set out in the 2010 Code. The New Code rather than setting out specific requirements, now prescribes a set of 12 general principles (**General Principles**) to be adhered to by all parties involved in any takeover or merger transaction.

In its press statement, the SC stated that the enhancements in the new Rules and the New Code are intended 'to facilitate market activities in a fast changing environment, whilst ensuring appropriate shareholder protection' as well as 'to ensure that the take-over framework will be facilitative to commercial realities while providing protection to shareholders where required.'

General Principles in the New Code

The New Code sets out 12 General Principles which are to be observed and complied by all persons engaged in any takeover or merger transaction. Some examples of the 12 General Principles are listed below to give a flavour to the priorities and the intention of the revised framework:-

- (i) So far as practicable, all shareholders of an offeree of the same class shall be treated equally in relation to a take-over offer and have equal opportunities to participate in benefits accruing from the take-over offer, including in the premium payable for control.
- (ii) The acquirer or offeror and the offeree's board of directors must act in good faith in observing the general principles in the Code and any guidelines, directions, practice notes

and rulings issued by the SC. All shareholders must not be oppressed or disadvantaged by the treatment and conduct of the acquirer or offeror or of the board of directors of the offeree.

- (iii) The offeree's board of directors must act in the interests of the shareholders as a whole and shall not deny the shareholders the opportunity to decide on the take-over offer.
- (iv) The period in which an offeree is subject to a take-over or merger must not be longer than what is reasonable.

From the principles above, shareholder protection appears to be the overarching focus. The SC will have regard to the 12 General Principles when considering whether an exemption under the New Code shall be made.

Key Changes under the Rules and New Code

Some of the key changes to takeovers, mergers and compulsory acquisitions framework under the Rules and New Code (**new takeovers framework**) are as follows:

- **Takeover Schemes by parties who do not own 50% or more**

In a move towards a proportionate regulatory regime, the SC has removed the requirement of a minimum 50% shareholding for parties intending to initiate a takeover scheme (such as scheme of arrangement, compromise, amalgamation or selective capital reduction) in the Rules. Previously, any person intending to initiate a takeover scheme must hold at least 50% of the voting share or voting right in the target company in order to launch such a scheme.

- **Unlisted Public Companies subject to the New Code**

The 2010 Code previously applied to all public companies whether listed or unlisted. Under the Rules, only sizeable unlisted public companies having more than 50 shareholders and net assets of RM15 million or more will come within the new takeovers framework.

Unlisted public companies which do not meet that threshold will not be subject to the new takeovers framework.

- **Specification of Persons Acting in Concert for REITs and Business Trusts**

The New Code specifies persons who are presumed to be parties acting in concert in relation to a takeover offer where the offeror is a real estate investment trust and business trust.

In the case of an offeror being a real estate investment trust, the following are presumed to be parties acting in concert:-

- (i) its management company;

- (ii) a director of the management company (together with his spouse, close relatives and related trusts);
- (iii) any person who owns or controls 20% of the voting shares of the management company;
- (iv) any person who is related to its associate or management company; and
- (v) and its trustee.

However, in relation to a professional trustee of the real estate investment trust, the concert party relationship is limited to the trustee (including its directors) acting in the capacity as trustee.

In the case of an offeror being a business trust, the following are presumed to be parties acting in concert:-

- (i) its management company; its trustee-manager including the agent;
- (ii) a director of the trustee-manager (together with his spouse, close relatives and related trusts);
- (iii) any person who owns or controls 20% of the voting shares; and
- (iv) any person who is related to an associate of the trustee-manager.

- **Offer Price in Respect of Mandatory Takeover Offer Arising From Arrangement To Control Between Persons Acting In Concert**

The Rules lists out the out the minimum offer price in a mandatory takeover arising from an arrangement, agreement or understanding to control between the offeror and persons acting in concert (**PACs**). In such takeover offers, the offer price shall be the higher of the highest purchase price paid by the offeror and PACs or the volume weighted average traded price (**VWAP**) of the offeree for the last 20 market days prior to the triggering of the mandatory offer obligation. In respect of VWAP, the SC has the discretion to disregard any unusually high or low traded prices within the relevant period. The 2010 Code previously did not explicitly specify the SC's discretion in respect of unusually high or low traded prices.

- **Offeree with Dual Listing**

The Rules are intended to be aligned to newer developments in the capital markets. While the 2010 Code was silent, the Rules now provide guidance on the treatment of offeree companies which have listings in dual jurisdictions.

In respect of an offeree with primary listing on both a stock exchange in Malaysia and outside of Malaysia, the offeree may be subject to the dual jurisdiction of the SC and the foreign takeover regulator. The Rules provide that in such cases, early consultation with the SC is required so that

guidance may be given on how to resolve any conflicts between the relevant regulatory framework.

Where the offeree has a primary listing on a stock exchange outside of Malaysia and a secondary listing in Malaysia, the Rules provide that the SC may consider disapplying the Rules provided that the applicant is able to demonstrate that the relevant takeover regulation in the foreign jurisdiction accords an equivalent level of protection to offeree shareholders as provided under the Rules.

Conclusion

The changes and enhancements in the Rules and New Code are intended to be more facilitative towards commercial realities and also serve as a detailed guidance on conduct to be taken in respect of takeover transactions. Overall, the offered shareholders are offered a higher degree of protection in the form of enhanced requirement for disclosures as well as an enhanced role of independent advisers.

The SC has conducted consultation with market practitioners as well as investors prior to coming up with the revisions and the changes can be seen to be a welcomed development in the takeovers regime.

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