

Key Changes to the Rules on Take-overs, Mergers and Compulsory Acquisitions

In brief

On 28 December 2021, the Securities Commission of Malaysia (SC) revised the **Rules on Take-overs, Mergers and Compulsory Acquisitions** (Rules). The effective date of the revisions is 29 December 2021.

This Alert focuses on the key amendments introduced to the Rules and a comparison against equivalent provisions under the United Kingdom's Takeover Code (UK Code), the Singapore Code on Take-Overs and Mergers (SG Code) and the Hong Kong Codes on Takeovers and Mergers and Share Buy-Backs (HK Code).

In this issue

[Summary of amendments](#)

[Key amendments](#)

[Other amendments](#)

[Conclusion](#)

Summary of amendments

The SC has introduced three key amendments to the Rules, which are summarized as follows:

1. Introduction of new restrictions on dealings by persons who are not the offeror prior to the announcement of a take-over offer
2. Clarification in respect of pre-conditional announcements and pre-conditional voluntary offer announcements
3. Introduction of new conduct requirements that will apply in a whitewash exemption

Additionally, the SC also refined other sections of the Rules and these are summarized under "other amendments".

Key amendments

Restriction on dealings before the offer

The revised Rules introduce a new Rule 19.01 which restricts dealings by persons (who are not the offeror) who have access to confidential price-sensitive information concerning an offer before the takeover offer is announced.

Rule 19.01 stipulates that "no dealings of any kind in the securities of the offeree company (including convertible securities, warrants, options and derivatives in respect of such securities) may be transacted by any person, not being the offeror, who has confidential price-sensitive information concerning an actual or contemplated offer or revised offer between the time when there is reason to suppose that an approach or an offer or revised offer is contemplated and the announcement of the approach, the offer, the revised offer, or of the termination of the discussions".

There is also a new provision to allow dealings by persons acting in concert (PACs) with the offeror where the securities held by the PACs are excluded from the offer or where there are no profit arrangements in place between the offeror and the PACs.

The new Rule 19.01 is aimed at clarifying the scope of insider trading restrictions. Under the Malaysian Capital Markets and Services Act 2007, the prohibitions on dealing and tipping while in possession of price-sensitive non-public information do not apply to take-overs. Read together with Rule 19.01, it is now clear that the offeror and PACs can rely on this exemption prior to the launch of a takeover offer, but not other third parties such as advisers involved in the take-over.

Similar concepts to permit dealings by the offeror and PACs are also set out in the UK Code and HK Code. However, the UK Code and HK Code expressly require a consultation with the takeover panel before PACs can deal in shares of the offeree prior



to the launch of an offer. While the Rules do not expressly require such consultation with the SC, we consider it a best practice to do so.

Pre-Conditional Announcements

The SC has clarified its position on pre-conditional announcements and has distinguished between pre-conditional possible offer announcements and pre-conditional voluntary offer announcements. A similar distinction exists under the UK Code, SG Code and HK Code.

Pre-conditional possible offer announcements

Previously, possible offer announcements could not include any conditions or pre-conditions which depend solely on subjective judgments by the offeror. Possible offer announcements are typically triggered where there are rumours or speculations about a possible offer causing a fluctuation in the price of the offeree but the offeror is not ready to launch the offer.

Under the revised Rules, the restriction on subjective conditions has been removed as the SC acknowledges that some conditions may inevitably be subjective in nature given the early stage of the discussions, e.g., the final offer being subject to satisfactory due diligence or availability of financing. However, the SC must nevertheless be consulted if the possible offer announcement includes any pre-conditions or terms on which an offer might be made.

The UK Code, SG Code and HK Code impose similar requirements, where the takeover panel (or other similar bodies) has to be consulted prior to the issuance of a pre-conditional possible offer announcement.

Pre-conditional voluntary offer announcements

A pre-conditional voluntary offer announcement is typically made to facilitate engagement with a broader group of stakeholders prior to the launch of a voluntary offer (such as where regulatory approval is required before any offer is made or if there are uncertainties if such approval can be obtained within the timelines prescribed under the Rules for fulfilling the conditions under a voluntary offer).

The SC has largely retained the previous requirement that conditions cannot be subjective in nature. However, the SC may allow elements of subjectivity where it is not practicable to exhaustively specify all the factors on which satisfaction of the condition may be subject to. An example would be a regulatory approval where a broad condition may be imposed by the regulator to which the offeror or offeree may not be in a position to fulfil.

Conduct requirements to whitewash exemptions

A whitewash exemption from the mandatory offer obligation is potentially available where the mandatory offer obligation is triggered as a result of a subscription of new shares by the offeror, and non-interested shareholders of the offeree agree to waive their right to receive a mandatory offer.

Under the revised Rules, offerors, PACs and offerees seeking to rely on a whitewash exemption must comply with specific conduct requirements.

Restrictions against favourable deals

The offeror and PACs in a whitewash exemption are now subject to favourable deal restrictions.

The new Rule 18.02 prohibits an offeror or PACs, from acquiring shares within six months after the shareholders' meeting (i.e., the meeting where shareholders voted in favour of waiving their right to receive a mandatory offer) from a person who was a director or substantial shareholder of the company at the time of the whitewash exemption, without approval from the SC. Any such acquisition will be deemed a favourable deal and is therefore prohibited. However, the SC may grant a waiver to the offeror or PACs if such acquisition is insignificant.

The SC has clarified that if a director resigns after the shareholders' meeting (approving the whitewash exemption) but prior to the SC granting the exemption from a mandatory offer obligation, the restriction against favourable deals would apply to such director. This is because the director was a director at the relevant point of time of deliberation of the proposed exemption by the shareholders. On the other hand, the restriction against dealings in the offeree shares would not apply to a director who is appointed after the shareholders have voted on the proposed exemption but prior to the SC granting the exemption, on the basis that the director was not a director when the proposed exemption was deliberated.

This amendment appears to be unique to the Rules and there are no equivalent provisions under the UK Code, SG Code and HK Code. However, the UK Code does require the offeror and its PACs to consult the takeover panel on their subsequent dealings in voting shares of the offeree company after a whitewash exemption.



Restrictions on the appointment and resignation of directors

Under the revised Rules, no nominee of the offeror or PACs, shall be appointed to the board of the offeree without prior consent from the SC before the whitewash circular is dispatched to the offeree shareholders. Similarly, no offeree director can resign before the shareholders' have voted on the whitewash exemption.

There are similar restrictions under the HK Code but not the UK Code and SG Code.

Other amendments

Other amendments have been made to the Rules and a summary is set out below.

Rule	Amendment
Rule 3 - Advisers	<ul style="list-style-type: none"> Clarifies that the principal adviser bears the main responsibility for: <ul style="list-style-type: none"> Complying with the Malaysian Code on Take-overs and Mergers 2016 (Code) and Rules Ensuring that, so far as reasonably able, their clients and its directors are aware of their responsibilities under the Code and the Rules, and will comply with them
Rule 4 - Mandatory offer	<p><u>Paragraph 4.03 - Deemed Persons Acting in Concert</u></p> <ul style="list-style-type: none"> Clarifies that a person, other than a licenced bank or prescribed institution which provides indirect financial assistance, i.e., lending or advancing any money, guaranteeing, indemnifying or providing collateral for a debt, for the acquisition of voting shares or voting rights, will be presumed to be a PAC unless the contrary is established <p><u>Paragraph 4.01 - Application of Chain Principle Assessment when Entity is Loss Making</u></p> <ul style="list-style-type: none"> In a situation where a company is acquired through an upstream entity, a mandatory offer will be triggered where the holding in the downstream company is significant in relation to the upstream entity, i.e., where it constitutes 50% or more of the assets, market capitalisation, shareholders' funds, sales or earnings to the upstream entity. The amendments clarify that the assessment of earnings may be irrelevant in the case of a loss making company. <p><u>Paragraph 4.08 - Whitewash Exemption</u></p> <ul style="list-style-type: none"> Clarifies that: <ul style="list-style-type: none"> Any distribution of shares or instruments convertible into shares and options in respect of shares on a pro rata basis which do not involve fundraising, such as bonus issues, are not disqualifying transactions. A whitewash exemption approved by the shareholders cannot be transferred or assigned to another person. <p><u>Paragraph 4.09 - Rescue Proposal</u></p> <ul style="list-style-type: none"> Introduces factors that the SC will consider when determining whether to grant an exemption from a mandatory offer obligation under a rescue proposal. These factors include: <ul style="list-style-type: none"> The justifications that it would be impracticable for the rescue proposal to be submitted for approval of shareholders The benefit of the rescue proposal to the offeree
Rule 6 - Key Terms	<p><u>Paragraph 6.03 - Computation of Offer Price</u></p> <ul style="list-style-type: none"> Clarifies the computation of the offer price when a mandatory offer is triggered through the exercise of rights or options The offer price will be established based on the higher of: <ul style="list-style-type: none"> The highest price (excluding stamp duty and commission) paid or agreed to be paid by the offeror or PACs for any voting shares or rights to which the offer relates, during the offer period and within six months prior to the beginning of the offer period Either the (i) highest price paid by the offeror and its PACs for the securities together with the exercise price of the securities where the offeror and its concert parties have acquired any such rights or



	<p>options within six months prior to the offer and during the offer period (Highest Price Paid Assessment Criteria), or (ii) volume weighted average traded price of the voting shares or rights on the day where the conversion notice was submitted.</p> <ul style="list-style-type: none"> The amendments clarify that where the rights or options were issued or sold privately to the purchaser and when the offer price as established under the Highest Price Paid Assessment Criteria is at a steep discount to the market, the SC may also take into account the volume weighted average traded price of the voting shares or rights on the day on which the notice of conversion or subscription was submitted. The SC must be consulted if there is doubt as to the computation of the offer price.
Rule 19 - Dealings During Offer Period	<p><u>Paragraph 19.05 - Disclosure of Dealings</u></p> <ul style="list-style-type: none"> Clarifies that the requirement to disclose dealings during the offer period applies to all advisers appointed in connection with the take-over offer, merger or compulsory acquisition (including the underlying transaction that leads to the take-over offer)
Rule 22 - Compulsory Acquisition and Rights of Minority Shareholder	<ul style="list-style-type: none"> Clarifies that: <ul style="list-style-type: none"> An offeror must announce whether it is still eligible to undertake a compulsory acquisition at the close of a take-over offer. Voting shares arising from the conversion of convertible securities will not be considered as acceptances when assessing whether the compulsory acquisition threshold has been met.
Schedule 3 - Scheme of Arrangement	<ul style="list-style-type: none"> New requirements have been introduced: <ul style="list-style-type: none"> For the offeree to appoint a scrutineer for vote-taking when convening a shareholders' meeting for the scheme. The scrutineer will be either the auditor of the offeree, the share registrar or an accountant registered with the Audit Oversight Board. That any revision to a scheme of arrangement should normally be made by no later than 14 days prior to the date of the shareholders' meeting.

Conclusion

The changes are not significant but provide insightful enhancements and clarity to a take-over process. The revisions also aligns the Malaysian take-overs regime with those of other key financial jurisdictions and are greatly welcomed.



Contact Us



Brian Chia

Partner

[Brian.Chia](mailto:Brian.Chia@WongPartners.com)

[@WongPartners.com](mailto:Brian.Chia@WongPartners.com)



Sue Wan Wong

Partner

[SueWan.Wong](mailto:SueWan.Wong@WongPartners.com)

[@WongPartners.com](mailto:SueWan.Wong@WongPartners.com)



Adrian Wong

Senior Associate

[Adrian.Wong](mailto:Adrian.Wong@WongPartners.com)

[@WongPartners.com](mailto:Adrian.Wong@WongPartners.com)



Angel Ling

Senior Associate

[Angel.Ling](mailto:Angel.Ling@WongPartners.com)

[@WongPartners.com](mailto:Angel.Ling@WongPartners.com)

© 2022 Wong & Partners. This client alert was issued by Wong & Partners, a member firm of Baker McKenzie International, a global law firm with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner or equivalent in such a law firm. Similarly, reference to an "office" means an office of any such law firm. This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.

