Singapore

Takeover Guide

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INTRODUCTION

The Singapore legal system is based on the common law system, where case precedents and statutory provisions exist side by side.

The Companies Act 1967 of Singapore (the 'Companies Act') contains general corporate legislation, including provisions relating to the incorporation, management, administration and winding-up of companies. Two basic types of companies are provided for under the Companies Act: private company and public company. A company is a private company where its constitution contains a restriction on the right to transfer shares and a limitation on the number of members to not more than 50. A public company is a company that is not a private company. Public companies include companies limited by guarantee and companies limited by shares that are incorporated as public companies and that may or may not be listed on a stock exchange. Many public companies incorporated in Singapore are listed on the Singapore Exchange Securities Trading Limited (the 'SGX'), and all companies listed on the SGX are necessarily public companies. The SGX is currently the only securities exchange in Singapore.

The acquisition and takeover of a private company is not regulated by provisions of law but by the provisions of the private company's constitution. The takeover of a listed Singapore public company, on the other hand, is regulated and the requirements are currently set out in the Securities and Futures Act 2001 of Singapore (the 'SFA'), the Singapore Code on Takeovers and Mergers (the 'Takeover Code'), the Companies Act and the SGX Listing Manual (the 'Listing Manual'). The focus of the discussion in this guide revolves around the requirements relating to a takeover offer for a listed Singapore public company.

This guide should not be treated as a substitute for specific legal advice concerning particular transactions.

LEGAL AND REGULATORY FRAMEWORK

The Singapore legal and regulatory framework allows a number of ways to effect corporate acquisitions and mergers, and the choice as to which route to take largely depends on the type of company involved. Where a public listed company is being acquired or taken over, such activity is regulated. Public takeover offers generally involve the acquisition of shares in a listed public company by an acquiring entity so that the target company becomes a subsidiary of the acquiring entity. In the acquisition of shares in private companies, these transactions are generally unregulated. Apart from the acquisition of shares, an entity intent on acquiring the business of another may effect this through the acquisition of assets and liabilities rather than shares.

SFA and Companies Act

Part VIII of the SFA contains legislative provisions relating to takeover offers. Section 138 of the SFA provides for the establishment of an advisory body known as the Securities Industry Council (SIC). The SIC is the regulator that oversees the Takeover Code and is part of the Monetary Authority of Singapore (MAS). Section 140 of the SFA lists the offences relating to takeover offers. It is an offence for a person to give notice or publicly announce that he/she intends to make a takeover offer if he/she has no intention to make one. It is also an offence to make a takeover offer or give notice or publicly announce an intention to make a takeover offer if a person has no reasonable or probable grounds for believing that he/she will be able to perform his/her obligations pursuant to the offer being accepted or approved.

The Companies Act is also relevant in the context of corporate acquisitions and mergers. Section 210 of the Companies Act provides for schemes of arrangement, which is one of

the methods used to privatise a Singapore-incorporated listed company. Singapore-incorporated companies can also use the amalgamation process in sections 215A–215K of the Companies Act to facilitate the combination of such companies. Section 215 of the Companies Act governs the compulsory acquisition of the shares of dissenting shareholders once an offeror (who can be either a company or an individual) has acquired 90 per cent of the target's shares through a takeover offer (excluding the shares already held at the date of the offer by the offeror). Shares includes units of shares (eg, options and convertibles) and shares held by the offeror include shares held by a nominee on behalf of the offeror, as well as shares held by a related corporation of the offeror or a nominee of that related corporation. Under the Companies Act, a related corporation is a holding company, subsidiary or fellow subsidiary.

Sections 76 and 76A of the Companies Act also contain provisions relating to financial assistance. Currently, these provisions restrict a public company or a company whose holding company or ultimate holding company is a public company (such companies being incorporated in Singapore) from providing financial assistance, whether directly or indirectly, to any person in the acquisition or proposed acquisition of shares or units of shares in that company or the holding company or ultimate holding company of that company. The provisions relating to financial assistance are widely drafted. For instance, if a party seeking to acquire shares in a target company procures the target company to charge its assets to refinance a loan taken by the offeror to acquire the target company, this may constitute financial assistance by the target company.

Financial assistance is, however, a restricted but not a prohibited activity under the Companies Act. It is possible to 'whitewash' financial assistance through either a director-approval process or a shareholder-approval process. In the case of the director-approval process, financial assistance can be 'whitewashed' if the giving of such financial assistance does not materially prejudice: (1) the interests of the company or its shareholders; or (2) the company's ability to pay its creditors. The board of directors of the company must resolve that the company should give the financial assistance, the terms and conditions under which the assistance is proposed to be given are fair and reasonable to the company and include the grounds for such conclusions. A copy of such board resolution must be lodged with the Registrar of Companies (the 'Registrar'). In a shareholder-approval process, the company must obtain its shareholders' approval by a special resolution and comply with the procedures set out in sections 76(10)–76(14) of the Companies Act, which include the filing of certain prescribed forms with the Registrar, publishing a notice of intention to give financial assistance in a daily newspaper and permitting objections to be made by shareholders, debenture-holders and creditors of the company or the Registrar. A special resolution requires the approval of a majority of not less than 75 per cent of shareholders present and voting at a general meeting for which in relation to a private company, not less than 14 days' prior notice and in relation to a public company, not less than 21 days' prior notice has been given. Where the company is a subsidiary, the ultimate holding company, if listed or incorporated in Singapore, is also required to obtain its shareholders' approval for giving the financial assistance. Financial assistance may also be given in other circumstances subject to compliance with the requisite provisions under the Companies Act, including where the amount of financial assistance is not more than ten per cent of the company's paid-up capital and reserves or where the resolution to provide the financial assistance receives the unanimous approval of the shareholders of the company.

Takeover Code and the SIC

The Takeover Code applies to the acquisition of voting control of public companies. It applies to corporations (including corporations not incorporated under Singapore law) with a primary listing of their equity securities in Singapore, registered business trusts with a primary listing of their units in Singapore and real estate investment trusts (REITs). While the Takeover Code was drafted with listed public companies, listed registered business trusts and REITs in mind, unlisted public companies and unlisted registered business trusts with more than 50 shareholders or unit holders, as the case may be, and

net tangible assets of SGD 5m or more must also observe, wherever possible and appropriate, the letter and spirit of the Takeover Code as set out in its General Principles and Rules. The Takeover Code does not apply to takeovers or mergers of other unlisted public companies and unlisted business trusts, or private companies. With respect to foreign-incorporated companies and foreign-registered business trusts, the Takeover Code applies only to those with a primary listing in Singapore.

The Takeover Code applies to all offerors, whether they are natural persons or not, be they resident in Singapore or not and whether citizens of Singapore or not, and whether they are corporations or bodies unincorporate, be they incorporated or carrying on business in Singapore or not. The Takeover Code also extends to acts done or omitted to be done in and outside Singapore.

The Takeover Code is administered and enforced by the SIC. The SIC is provided with discretion to waive the application of the Takeover Code in relation to: (1) Singapore-incorporated companies or Singapore-registered business trusts or Singapore-registered REITs with a primary listing overseas; and (2) unlisted public companies and unlisted registered business trusts with more than 50 shareholders or unitholders, as the case may be, and more than SGD 5m of net tangible assets.

The SIC is made up of representatives from the government, the MAS and the private sector. The day-to-day business of the SIC is conducted by a professionally staffed full time Secretariat. The MAS is a statutory board formed under the Monetary Authority of Singapore Act 1970 of Singapore, and is the de facto central bank of Singapore, as well as the integrated regulator of the banking, insurance, financial, securities and futures industries.

The Takeover Code contains General Principles, Rules and Notes. Nonetheless, the Takeover Code notes that it is impracticable to devise rules in sufficient detail to cover all circumstances that can arise in takeover and merger transactions. Therefore, both the letter and spirit of the Takeover Code must be observed, especially in circumstances not explicitly covered by any rules. The SIC may, pursuant to section 139 of the SFA, also issue rulings on the interpretation of the General Principles and the Rules in the Takeover Code and lay down the practices to be followed by the parties in a takeover offer or a matter connected therewith. In the course of a takeover, it is not unusual to require rulings from the SIC. The SFA provides that such rulings issued or practices laid down by the SIC shall be final and not be capable of being challenged in any court.

The SIC is available at all times for confidential consultation on points of interpretation of the Takeover Code. When there is any doubt as to whether a proposed course of conduct in a takeover offer accords with the General Principles or Rules of the Takeover Code, it is advisable for the parties or their advisers to consult the SIC in advance, as such confidential consultation minimises the risk of breaches of the Takeover Code.

The parties to a takeover are primarily responsible for ensuring observance of the provisions of the Takeover Code. If there appears to be a breach of the Takeover Code, the SIC may summon the alleged offenders to appear before the SIC for a hearing, where every alleged offender will have the opportunity to answer allegations and also to call witnesses. The SFA provides the SIC with powers to investigate any acts of misconduct in relation to or connected with a transaction involving a takeover or merger transaction, where it has reason to believe that any party or any financial adviser is in breach of the Takeover Code. In this respect, the SIC is empowered to make enquiries, summon persons to give evidence on oath or affirmation, or to produce any document or material necessary for the purpose of the enquiry.

Although the Takeover Code does not have the force of law and does not give rise to criminal proceedings, its breach may result in the imposition of sanctions by the SIC. Sanctions that the SIC may impose include private reprimands, public censure and, where the breach is flagrant, further action as the SIC thinks fit, including actions

designed to deprive the offender temporarily or permanently of its ability to enjoy the facilities of the securities market. In the case of advisers, the SIC may also require such an adviser to abstain from taking on Takeover Code-related work for a stated period. Where a person has breached the Takeover Code, the SIC may also make a ruling requiring the person concerned to pay holders or former holders of securities in the target company such an amount as it thinks just and reasonable to ensure that holders receive what they would have been entitled to receive had the relevant rule been complied with. The SIC may also rule that interest be paid on the sums.

If the SIC finds evidence to show that a criminal offence has been committed under the Companies Act, the SFA or any relevant criminal law, it will recommend to the Attorney-General, the prosecutorial authority in Singapore, that the alleged offender be prosecuted. It is noted that the SFA sets out the criminal offence of insider trading and prohibits a person with non-public, price-sensitive information to deal in the shares of a target company.

Listing Manual and the SGX

Where either the acquiring company or target company is a company listed on the SGX, the Listing Manual also applies. In summary, the Listing Manual contains rules regulating the general affairs of listed companies and therefore, its provisions have to be taken into account if either the acquiring company or the target company is listed on the SGX.

The listing rules set out in the Listing Manual are not statutory in nature. They are issued by the SGX and subject to the approval of the MAS as required under the SFA. The SFA also empowers the SGX to apply to the court for a court order to enforce compliance with the listing rules, though this power has been rarely, if ever, used. In practice, ready observance of the Listing Manual is advised as failure to comply may lead to a reprimand by the SGX, and at worst, a delisting. Furthermore, the SFA provides that a company listed on the SGX must not intentionally, recklessly or negligently fail to notify the SGX of information on specified events or matters, as they occur or arise, which are required to be disclosed under the listing rules for the purpose of making information available to the market.

The Listing Manual sets out the continuing listing requirements and corporate disclosure policy that a listed company has to comply with. A listed company is required to keep the SGX, its shareholders and other holders of its listed securities informed of all material information relating to it, and this includes information in relation to a takeover, merger or acquisition. A listed company intending to make an acquisition or a listed company that is the target of an offer will have to make the necessary disclosures in a timely manner. The information to be disclosed has to be factual, clear and succinct, and contain sufficient quantitative information to allow investors to evaluate its relative importance to the activities of the listed company. This includes information pertaining to the particulars of the transaction, its rationale, any consideration payable, any analysis of financial impact, the conditions for the transaction and the disclosure of any conflicts of interest.

The Listing Manual is also relevant where a listed offeror offers new shares as consideration in its takeover offer. Where the target company is a listed company, the Listing Manual contains provisions relating to reverse takeovers (see the discussion on reverse takeovers). The approval of the SGX is required in a reverse takeover for the transaction itself, as well as for the listing of new shares in the target company.

Competition Act

Section 54 of the Competition Act 2004 of Singapore (the ‘Competition Act’) prohibits mergers, including the creation of full-function joint ventures, that result, or may be expected to result, in a substantial lessening of competition (SLC) within any market for goods or services in Singapore (the ‘Section 54 Prohibition’). The Section 54 Prohibition may apply even where the merger takes place outside Singapore, or where any merger

party is located outside Singapore, as long as the merger has an effect on any market affecting Singapore. This involves an evaluation of how the competitive incentives of the merger parties and their competitors may change as a result of the merger. The examination of the competitive effects of the merger rests on a sound understanding of the competitive constraints under which the merged entity will operate, identified through a market definition analysis.

A merger control filing to the Competition and Consumer Commission of Singapore (CCCS) is voluntary but appropriate if a merger may potentially result in an SLC in a relevant market or parties are unsure as to whether their merger may result in an SLC.

The failure to submit a notification can be considered to be an intentional or negligent infringement of Singapore competition laws, resulting in financial penalties of up to ten per cent of the relevant turnover in Singapore of the parties involved for up to three years. In addition, remedies may be imposed by the CCCS (acting on its own or upon a complaint by a third party) on parties to the transaction, such as a direction for the merger to be unwound or for divestments to be carried out.

Statutory shareholding restrictions in specific industries

Other statutes relating to particular industries also govern takeover activity in Singapore insofar as they limit or require prior regulatory approval for share ownership in companies engaged in those industries. Those industries are generally industries perceived to be critical to national interests, for instance, banking, finance, insurance and media.

Examples of such statutes include the Banking Act 1970 of Singapore, the Finance Companies Act 1967 of Singapore, the Insurance Act 1966 of Singapore, and the Newspaper and Printing Presses Act 1974 of Singapore.

TAKEOVER METHODS

A takeover or acquisition of shares of a listed Singapore public company may be effected in various ways, taking into account financing preferences, tax considerations and market conditions. The most efficient method for any particular transaction depends on the circumstances and the objectives of the transaction parties. The more common methods, which will be discussed in further detail, are cash purchases and/or share swaps, reverse takeovers and schemes of arrangement. The amalgamation process, as set out in sections 215A–215K of the Companies Act, may also be used.

The end result of these various takeover methods is that the target company becomes a subsidiary of the acquiring company. This enables the acquiring company to consolidate the results of the target company with its own. Apart from the above methods, there are other ways to achieve this result, for instance, incorporating a new holding company to acquire both the acquirer and target company or amalgamating the target company into the acquirer so that the target company ceases to exist as a legal entity.

CASH PURCHASE AND/OR SHARE SWAP

An acquiring entity may offer cash, shares or other securities or a mixture of any of these as consideration for the takeover bid. The offer may be in the form of cash from the acquirer's own resources, from debt financing or from an underwritten issue of the acquirer's own shares. In a cash purchase, the acquiring entity makes an offer and acquires the shares of the target company for cash only. In a share swap arrangement, the acquiring entity acquires shares in the target company from the shareholders of the target company and in return, provides shares in itself, the acquirer.

The Takeover Code provides that a mandatory offer has to be in the form of a cash offer or be accompanied by a cash alternative. In the case of a voluntary offer, a cash offer or an offer accompanied by a cash alternative has to be made in certain circumstances (see the discussion on mandatory offers and voluntary offers). Apart from any mandatory cash and securities components stipulated in the Takeover Code, the choice of consideration for the takeover offer depends, among other things, upon the acquirer's own financial position and, if it is proposing an underwritten share issue to effect a share swap, the market's appetite for its shares. The shareholders of a target company may be given a choice of consideration, for example, cash with a partial share alternative. They may also be offered the facility to be able to mix and match different forms of consideration between themselves by making certain elections to the acquirer.

REVERSE TAKEOVERS

In a reverse takeover transaction, the acquirer transfers to the target company certain assets and business in exchange for new shares in the target company. The acquirer may then be required to make, or may decide to make, a takeover offer for all the remaining shares in the target company that it does not own. Where the target company is a listed company, the effect of a reverse takeover is that the acquirer gains control of a listed company, and such transactions are also known as 'back-door listings'. These transactions are subject to additional approvals and requirements by the SGX.

The Listing Manual contains specific provisions relating to 'very substantial acquisitions' or 'reverse takeovers'. Whether a transaction is considered a very substantial acquisition or a reverse takeover depends on various calculation modes set out in the Listing Manual or whether a transaction would result in a change in control of the listed company. In calculating whether a transaction is a very substantial acquisition for the purposes of the Listing Manual, the following figures are taken into account:

- the net profits attributable to the assets acquired, compared with the net profits of the target company and its subsidiaries;
- the aggregate value of the consideration given, compared with the market capitalisation of the target company based on the total number of issued shares excluding treasury shares; or
- the number of equity securities issued by the target company as consideration for an acquisition, compared with the number of equity securities previously in issue.

If any one of the relative figures equals 100 per cent or more, or is one which results in a change of control of the target company, the transaction is regarded as a very substantial acquisition or reverse takeover, respectively. The Listing Manual requires the transaction to be made conditional upon the approval of shareholders. The shareholders' circular for a meeting held to seek the shareholders' approval of a reverse takeover is required to contain specific information prescribed in the Listing Manual. In addition, the shareholders will have to approve the issue of new shares in accordance with the Companies Act.

Furthermore, the transaction, as well as the issue and listing of the new shares, will have to be approved by the SGX. In this respect, the SGX requires that the enlarged group consisting of the offeror and target companies will have to re-comply with the SGX listing requirements. 'Back door' listings are viewed by the SGX in the same regard as initial public offerings.

SCHEMES AND AMALGAMATIONS

Scheme of arrangement

Instead of pursuing a takeover under the Takeover Code, the acquisition of a public company may also be effected through a scheme of arrangement provided for in section 210 of the Companies Act. In a scheme of arrangement, the target company cancels its existing shares and issues new shares in the target company to the acquirer in consideration of the acquirer paying cash or issuing new shares in the acquiring company (or a combination of both cash and shares) to the shareholders of the target company. Alternatively, outstanding shares in the target company may be transferred from the shareholders of the target company to the acquirer. As the section 210 scheme of arrangement is an arrangement between a company and its members, only the target company may initiate a scheme of arrangement. It is, therefore, not available as an option in a hostile acquisition. A scheme of arrangement is typically used only in a situation where the acquirer wishes to acquire all the shares of a target company and such an acquisition is 'welcomed' by the target company.

All schemes of arrangement are subject to compliance with the Takeover Code. However, the SIC may, subject to conditions, exempt a scheme from certain provisions of the Takeover Code. These provisions include those relating to the offer timetable and terms of the offer. The SIC will normally grant such exemptions if the following four conditions are met:

- the acquirer and its concert parties, as well as the common substantial shareholders of the scheme companies (those holding five per cent or more in both the companies to be merged), are to abstain from voting on the scheme;
- persons and their concert parties who as a result of the scheme would acquire 30 per cent or more voting rights in a scheme company or a new entity that holds the scheme company or companies, or persons who as a result of the scheme (if they already hold 30 per cent to 50 per cent of the voting rights in the scheme company before the scheme) would increase their voting rights in the scheme company by more than one per cent in any period of six months are to abstain from voting on the scheme;
- the directors of a scheme company who are also directors of the other scheme company or who are acting in concert with those persons mentioned in the earlier conditions are to abstain from making a recommendation on the scheme to shareholders of the scheme companies; and
- the scheme company that is in effect the target company has to appoint an independent financial adviser to advise its shareholders on the scheme. Where the scheme involves a reverse takeover or a 'merger of equals', each of the scheme companies must appoint an independent financial adviser to advise their respective shareholders. In cases of doubt, the SIC should be consulted.

Various other approvals are also required for a scheme of arrangement to take effect. In accordance with section 210 of the Companies Act, a scheme of arrangement requires the approval of the majority in number of members of the target company (unless the General Division of the High Court of Singapore (the 'High Court') orders otherwise) present and voting in person or by proxy, representing at least 75 per cent in value of the shares voted at a scheme meeting. As stated above, in the voting process, the acquirer and its concert parties, as well as common substantial shareholders of the acquirer and the target company, would have to abstain from voting. A substantial shareholder is one who has an 'interest' (as defined by the SFA) of five per cent or more of the total votes attached to all the voting shares (excluding treasury shares) in a company. Furthermore, in accordance with the Companies Act, the scheme also requires the sanction of the High

Court. Once an order for a scheme has been approved by the High Court, it binds all shareholders, including those who had objected to it at the scheme meeting or in the High Court.

In a scheme of arrangement, the target company issues a scheme document to its shareholders. Essentially, the scheme document is a circular to convene, at the direction of the High Court, a meeting of the shareholders of the target company to approve the scheme of arrangement and that also contains an explanatory statement to explain to shareholders the effect of the implementation of the scheme. In order to satisfy the conditions (set out above) to obtain an exemption from selected provisions of the Takeover Code, the scheme document must disclose the names of those common substantial shareholders, and persons who would acquire more voting rights as a result of the scheme, who are to abstain from voting. The scheme document must also disclose their voting rights in the scheme company and/or the new entity after the scheme is completed, and further state that by voting for the scheme, the shareholders are agreeing to the person acquiring or consolidating effective control without having to make a general offer.

Amalgamation process

As an alternative to the scheme of arrangement, the acquisition of a public company may be effected through an amalgamation process. Such a process may involve either two or more companies amalgamating and continuing as one company or two or more companies amalgamating and forming a new company. All the amalgamating companies must be Singapore-incorporated companies. The main difference of the amalgamation process is that it does not require the sanction of the High Court, unlike a scheme of arrangement. The clearance of the SIC is required for the exemption from complying with certain provisions of the Takeover Code. These provisions include those relating to the offer timetable, acceptances, keeping the offer open for 14 days after it is revised, and the right of acceptors to withdraw their acceptances. The SIC would normally grant the application for exemption if the conditions set out above that are also applicable to schemes of arrangement are met. Additionally, the SIC would require the amalgamation proposal to be posted within 35 days of the announcement of the amalgamation, and for the amalgamation to be effective by 1730 on the 60th day after the date of posting of the amalgamation proposal.

The following approvals are required for an amalgamation process:

- an amalgamation proposal, containing the information required by the Companies Act, must be approved by the members of each amalgamating company by special resolution at a general meeting and by any third party, if so provided for in the amalgamation proposal;

- the board of directors of each amalgamating company, before the general meeting, has:

  - resolved that the amalgamation is in the best interest of the amalgamating company; and

  - made a solvency statement in relation to each of the amalgamating company and the amalgamated company, in each case in accordance with the Companies Act;

- each director who votes in favour of the resolution and the making of the solvency statements described above has signed a declaration stating that, in his/her opinion, certain specified conditions set out in the Companies Act are satisfied and the grounds for that opinion;

- the board of directors of each amalgamating company has sent to every member of the amalgamating company, not less than 21 days before the general meeting, inter alia, a copy of the amalgamation proposal, the declaration of the directors set out above, a statement of any material interests of the directors, and such further information and explanation as may be necessary to enable a reasonable member of the amalgamating company to understand the nature and implications, for the amalgamating company and its members, of the proposed amalgamation; and

- the directors of each amalgamating company have, not less than 21 days before the general meeting, sent a copy of the amalgamation proposal to every secured creditor of the amalgamating company as well as published in at least one daily English newspaper circulating generally in Singapore a notice of the proposed amalgamation, including certain statements as set out in the Companies Act.

In order to effect the amalgamation, the documents specified in section 215E of the Companies Act must be filed with the Registrar. Upon the receipt of the relevant documents and fees, the Registrar shall issue a notice of amalgamation. The effective date of the amalgamation is the date shown on such notice of amalgamation, which is either the date of filing with the Registrar or the date specified in the amalgamation proposal on which the amalgamation is intended to be effective (if it is to be on or after the date of such filing).

On the effective date of the amalgamation, all property, rights and privileges of each amalgamating company are transferred to and vested in the amalgamated company. All liabilities and obligations of each amalgamating company are transferred to and become liabilities of the amalgamated company.

DUE DILIGENCE

Before an offer for a takeover or acquisition is made, the acquirer may require due diligence to be conducted on the target company. There is no standard method for carrying out due diligence. However, as shall be seen, the due diligence process is often limited by various legal and regulatory restrictions. While offerors seek to find out all they can about the target company, there is no obligation imposed on a target company to assist an offeror with its enquiries. If a target company provides information to an offeror, the Takeover Code requires that the same information has to be provided to any other bona fide offeror who later emerges. This duty to provide information to all competing offerors extends to persons seeking to acquire all or materially all of the assets or business of the target company. The directors of the target company have to authorise the disclosure and bear in mind that their fiduciary duty is to act in the best interests of the target company.

Notably, any disclosure of information in the due diligence process by the target company is hampered by the restrictions on disclosure set out in the Listing Manual, as well as the insider dealing laws and regulations. A listed company is subject to continuing disclosure requirements that require the company to keep the SGX, the company's shareholders and other holders of the company's listed securities informed of all material information relating to it, and as a corollary, a listed company cannot provide any information to a person that would put this person in a privileged dealing position. Any such disclosure by the target company may also give rise to insider dealing concerns under the SFA (see also the discussion on insider dealing).

Therefore, in a takeover scenario, there is more often than not only limited due diligence conducted by an offeror for a target company before a takeover bid is made. The offeror has to rely largely on information that is already publicly available. This may be found in the target company's constitution and other documents and filings with the Registrar,

including details of the company's directors, and details of the company's issued share capital and shareholders. Other public information may be found in any prospectus or shareholders' circular that the target company has published. If the target company is listed, the company has a continuing obligation under the Listing Manual to keep the public informed of major new developments, including significant acquisitions and disposals and material trading developments. The listed company also has to publish semi-annual (unless the listed company is associated with higher risks) financial information and other routine information, such as the results of meetings and dividend details. Various investment banks and broking houses also publish research by their analysts.

The SFA also requires the listed company to announce and notify the SGX of information on specified events or matters as they occur or arise, in order for the SGX to disseminate it to the market, and any intentional or reckless failure to do so would be a criminal offence.

ANNOUNCEMENT OF THE OFFER

The Takeover Code requires that a bid must first be notified to the target company's board of directors or its advisers. Following an approach to the board of the target company, which may or may not lead to an offer, the primary responsibility for making an announcement normally rests with the board of the target company. The target company's board must then inform its shareholders without delay when it receives notification of a firm intention to make an offer from a serious source, irrespective of whether the target company's board views the offer favourably or otherwise. The target company's board must issue a paid press notice, or, where the offeror has published a paid press notice, an announcement.

Furthermore, when, following an approach to the target company, the target company is the subject of rumour and speculation about a possible offer, or there is undue movement in its share price or a significant increase in the volume of share turnover, whether or not there is a firm intention to make an offer, the target company's board must make an announcement. When negotiations or discussions between the offorer and the target company are about to be extended to include more than a very restricted number of people, the target company's board must also make an announcement. When a company's board is aware of negotiations or discussions between a potential offeror and shareholders carrying 30 per cent or more of the voting rights of the company or when the board is itself seeking potential offerors, then where the company is the subject of rumour or speculation about a potential offer, or there is undue movement in the company's share price or a significant increase in the volume of share turnover, or where more than a very restricted number of potential purchasers or offerors are about to be approached by the board, the board must accordingly make an announcement. In these circumstances, the target company or company concerned may also make a request to the SGX to grant a temporary halt in dealings in the securities of the relevant company.

The Takeover Code requires that absolute secrecy must be maintained before an announcement of a takeover offer is made. Therefore, where there is a leak regarding a potential takeover transaction, an offeror is required by the SIC to make an announcement clarifying its position. The Takeover Code provides that where target shareholder(s) carrying 30 per cent or more of the voting rights of the target company hold negotiations or discussions with a potential offeror before the offeror makes an approach to the board of the target company, the potential vendor must make an announcement when the target company then becomes the subject of rumour or speculation about a possible offer, or there is undue movement in its share price or a significant increase in the volume of share turnover, and there are reasonable grounds for concluding that it is the potential vendor's actions (whether through inadequate security or otherwise) that have contributed to the situation. The target company, if listed, may

have to make an announcement to the SGX accordingly, in compliance with the Listing Manual's corporate disclosure policy.

In the announcement of an offer, there is no substantive difference between the procedure for hostile and recommended bids. Typically, in a hostile bid, the respective boards of directors of the offeror and target company make separate announcements and issue circulars separately. This is also typically the standard procedure in situations where the directors of the target company recommend the offer, but there have been a handful of takeover offers in Singapore that have been carried out on a 'recommended' basis, involving joint announcements and circulars issued by the offeror and the target company.

When an intention to make an offer is announced, the Takeover Code stipulates the information which has to be stated in the announcement, including:

- the terms of the offer;
- the identities of the offeror and the ultimate offeror or ultimate controlling shareholder of the offeror, where applicable;
- details of any existing holding of securities that are being offered for or which carry voting rights, or convertible securities, warrants, options or derivatives in respect of securities that are being offered for or that carry voting rights in the target company, that the offeror owns or over which it has control or that is owned or controlled by its concert parties;
- details of any existing holding of securities for which the offeror or any person acting in concert with it has received any irrevocable commitment to accept the offer;
- all conditions to which the offer or the posting of it is subject, including normal conditions relating to acceptances;
- details of any arrangement in relation to the offeror's shares or the target company's shares that might be material to the offer; and
- the percentage and number of securities in the target company held by the offeror or its concert parties that has been charged or pledged as a security interest, borrowed or lent. Borrowed shares that have either been on-lent or sold are excluded from the disclosure.

When an offeror announces a firm intention to make an offer, the offeror becomes obliged under the Takeover Code to post an offer document not earlier than 14 days, but not later than 21 days, after the announcement. In cases in which the offer is for cash or includes an element of cash, the offer should, therefore, not be announced unless the offeror has the financial resources unconditionally available to allow it to satisfy all acceptances of the offer. The SIC would expect the financial adviser to the offeror (ie, a financial institution, eg, a bank or investment bank, sponsoring the takeover) to confirm this. In a cash offer, the offer announcement must include an unconditional confirmation by the financial adviser or other appropriate independent party (eg, the offeror's banker) that sufficient resources are available to the offeror to satisfy the full acceptance of the offer.

ACTING IN CONCERT

In ascertaining whether takeover offers have to be made, the acquisition of shareholdings by an offeror includes shares acquired by that person taken together with shares held or acquired by persons acting in concert with the offeror. The Takeover Code provides that

persons acting in concert comprise individuals or companies who, pursuant to an agreement or understanding (whether formal or informal), cooperate, through the acquisition by any of them of shares in a company, to obtain or consolidate effective control of that company.

The following individuals and companies are presumed to be persons acting in concert with each other unless the contrary is established:

- a company, its parent, its subsidiaries and its fellow subsidiaries, all their associated companies, companies whose associated companies include any of the above companies and any person who has provided financial assistance (other than a bank in the ordinary course of business) to any of these entities for the purchase of voting rights;
- a company with any of its directors (together with their close relatives and related trusts, as well as companies controlled by any of the directors, their close relatives and related trusts);
- a company with any of its pension funds and employee share schemes;
- a person with any investment company, unit trust or other fund whose investment such a person manages on a discretionary basis, but only in respect of the investment account that such a person manages;
- a financial or other professional adviser, including a stockbroker, with its client in respect of the shareholdings of the adviser and persons controlling, controlled by or under the same control as the adviser;
- directors of a company (together with their close relatives, related trusts and companies controlled by any such directors, their close relatives and related trusts) that is subject to an offer or where the directors have reason to believe a bona fide offer for their company may be imminent;
- partners; and
- an individual, his/her close relatives, his/her related trusts, any person who is accustomed to act in accordance with the instructions of the individual and companies controlled by any of these persons, and any person who has provided financial assistance (other than a bank in the ordinary course of business) to any of these persons for the purchase of voting rights.

Where a reference to a company should be taken as a reference to a registered or unregistered business trust, the concert party relationship is with the trustee-manager of the registered or unregistered business trust. Where a reference to a company is with reference to a REIT, the concert party relationship is with the manager or trustee of the REIT.

The Takeover Code states that it is not practicable to define ‘associate’ in precise terms that would cover all the different relationships that may exist in a takeover or merger transaction. The term is intended to cover all persons (whether or not acting in concert with the offeror, the target company or with one another) who directly or indirectly own, or deal in, the shares of the offeror or target company and who have (in addition to their normal interests as shareholders) an interest or potential interest in the outcome of the offer. The Takeover Code also sets out some non-exhaustive examples of entities that the term ‘associate’ normally includes, for instance:

- in relation to the offeror or the target company, its parent, its subsidiaries and its fellow subsidiaries;

- any person who has provided financial assistance (other than a bank in the ordinary course of business) to the offeror, the target company or any company mentioned in the first bullet point above for the purchase of voting rights; and

- a holder of five per cent or more of the equity share capital of the offeror or the target company.

TYPES OF TAKEOVER OFFERS

Takeover offers may generally take three forms under the Takeover Code. They may be either mandatory offers that are triggered by the offeror's shareholdings in the target company or voluntary offers that are not. They could also be partial offers, in which the offeror does not seek to obtain 100 per cent of the shares in the target company. An offeror can seek irrevocable undertakings from the shareholders of the target company to accept its offer. Such undertakings must be publicly disclosed.

Where a company has more than one class of equity share capital, the Takeover Code provides that a comparable offer must be made for each class, and the SIC must be consulted in advance in such cases. The Takeover Code also provides that where a target company has convertible securities in issue, the offeror shall also make an appropriate offer to the holders of those convertible issues. The Notes to the Takeover Code provide guidance on the appropriate offer price for instruments convertible into rights to subscribe for and options in respect of securities being offered, or that carry voting rights.

Mandatory offers

Generally, there are no restrictions on an offeror building a significant stake in a target company, as long as a mandatory offer is not triggered. The circumstances wherein mandatory offers are triggered are set out in the Takeover Code. Rule 14 of the Takeover Code provides that a mandatory offer is triggered when an offeror acquires, whether by a series of transactions over a period of time or not, shares that, taken together with shares held or acquired by persons acting in concert with it, amount to 30 per cent or more of shares carrying voting rights of the target company. A mandatory offer is also triggered when an offeror and persons acting in concert with it hold between 30 per cent and 50 per cent of the target company's shares carrying voting rights, and acquire in aggregate more than one per cent of the target company's shares carrying voting rights in any rolling six-month period. For these purposes, a person who has acquired or written any option or derivative that causes him/her to have long economic exposure to changes in the price of securities is normally treated as having acquired those securities, and persons who would breach the relevant thresholds by acquiring such derivatives must consult the SIC beforehand to determine whether an offer is required and if so, the terms of such an offer.

In a mandatory offer, the offer price cannot be lower than the highest price paid by the offeror or any person acting in concert with it for any shares carrying voting rights during the offer period and within the six months leading up to the beginning of the offer period. The consideration paid in the mandatory offer should be in cash or accompanied by a cash alternative. A mandatory offer is conditional upon the offeror obtaining acceptances that result in the offeror and persons acting in concert with it holding shares carrying more than 50 per cent of the voting rights of the target company. Generally, no other conditions are permitted to be imposed in a mandatory offer. An exception to this rule applies to a mandatory offer where the parties are seeking clearance with the CCCS under the Competition Act. In such a situation, the SIC allows for an additional condition relating to the CCCS process to be imposed.

Chain principle

Where an offeror acquires more than 50 per cent of the voting shares of a target company and the target company holds 30 per cent or more of the voting shares of a public company in Singapore that is subject to the Takeover Code, and as a result the offeror acquires or consolidates control of the Singapore public company because the target company itself had effective control of the Singapore public company, the offeror may be required to make a mandatory takeover offer for the Singapore public company. Note 7 to Rule 14.1 of the Takeover Code states that the SIC does not normally require an offer to be made in these circumstances, unless the Singapore public company constitutes or contributes significantly to the target company in respect of assets, market capitalisation (where both companies are listed), sales or earnings. The SIC should be consulted in all cases that may come within the scope of Note 7 to Rule 14.1 to establish whether, in the circumstances, any obligation arises to make a mandatory offer.

Whitewash

In certain situations, for example, one that involves a 'back-door listing', the SIC may, on application, grant a waiver to an offeror from making a mandatory takeover offer. Such a waiver is typically subject to the condition that the majority of independent shareholders (ie, shareholders who are not involved in or interested in the transaction in question) present at a general meeting of the target company approve, on a poll, a separate resolution (typically referred to as a 'whitewash' resolution) waiving their rights to receive a takeover offer. The offeror and persons acting in concert with it must abstain from voting on the 'whitewash' resolution.

The Takeover Code contains a Whitewash Guidance Note at Appendix 1. It sets out, in general, the procedure to be followed if the SIC is to be asked to waive the obligation to make a general offer under Rule 14 of the Takeover Code that would otherwise arise where, as a result of the issue of new securities as consideration for an acquisition, or a cash injection, or in fulfilment of obligations under an agreement to underwrite the issue of new securities, or upon the exercise of the conversion of convertibles, a person or group of persons acting in concert acquires shares that give rise to the obligation to make a general offer.

Voluntary offers

A voluntary offer occurs where the offeror makes an offer for all the shares of the target company and this offer does not trigger the mandatory offer rules in Rule 14 of the Takeover Code. Voluntary offers are provided for in Rule 15 of the Takeover Code. The offeror can make a voluntary offer at any time unless it becomes obliged to make a mandatory offer. A voluntary offer must always be conditional on the offeror and its concert parties acquiring more than 50 per cent of the target company. In addition, the offeror can stipulate other objective conditions, such as a particular level of acceptances, shareholders' approval and certain regulatory approvals, where these are applicable, without reference to the SIC. The SIC should be consulted where other conditions, save for those specified above, are attached. In the case of voluntary offers conditional on high-level acceptances, that is, a level that is higher than 50 per cent, the SIC allows such offers where the offeror states clearly in the offer document the level of acceptances upon which the offer is conditional and the offeror satisfies the SIC that it is acting in good faith in imposing such a high level of acceptance. Generally speaking, the conditions that may be attached to a voluntary offer must not be of a kind whose fulfilment is dependent on the subjective interpretation or discretion of the offeror. As an exception to this rule, the SIC allows an offeror to subject a voluntary (but not mandatory) offer to a condition that the CCCS issues a favourable decision allowing the voluntary offer to proceed on terms acceptable to the offeror.

Note 4 to Rule 15.1 of the Takeover Code provides that the SIC considers allowing the offeror to revise the initial acceptance level to a lower level (but above the 50 per cent as

required by Rule 15.1) during the course of the voluntary offer, provided the revised offer remains open for another 14 days following the revision. In addition, shareholders who have accepted the initial offer should be permitted to withdraw their acceptance within eight days of notification of the revision. The revised acceptance level will take into account withdrawals and new acceptances as at the close of the offer.

Note 5 to Rule 15.1 of the Takeover Code provides that an offeror may announce a preconditional voluntary offer where the announcement of a firm intention to make an offer is subject to the fulfilment of certain preconditions. In such a case, the preconditions should be stated clearly in the announcement of the preconditional offer, and be objective and reasonable. The announcement of the preconditional offer must specify a reasonable period for the fulfilment of the preconditions, failing which, the offer will lapse. No precondition should be relied upon to cause the offer to lapse unless: (1) the offeror has demonstrated reasonable efforts to fulfil the conditions within the time period specified; and (2) the circumstances that give rise to the right to rely upon the conditions are material in the context of the proposed transaction.

In a voluntary offer, the offer price cannot be lower than the highest price paid by the offeror or any of its concert parties for any shares carrying voting rights in the target company during the offer period and within the three months leading up to the beginning of the offer period. The offer may be in cash or securities or a combination thereof.

The Takeover Code provides that where the offeror and any of its concert parties have bought for cash during the offer period, and within six months prior to its commencement, shares of the target company carrying ten per cent or more of the voting rights of that class, then an offer must be in cash or accompanied by a cash alternative of not less than the highest price paid by the offeror or any concert parties during the offer period and within six months prior to its commencement. A cash offer may also be required where, in the view of the SIC, there are circumstances that render such a course necessary.

In addition, when the offeror and any of its concert parties purchase target company shares carrying ten per cent or more of the voting rights in exchange for securities during the offer period and in the three 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 in a takeover offer.

The SIC is given discretion to require securities to be offered even in cases where the amount purchased is less than ten per cent or the purchase took place more than three months prior to the commencement of the offer period, where the vendors are directors or otherwise closely connected with the offeror or the target company.

The SIC should be consulted when ten per cent or more of the voting rights of the target company has been acquired during the offer period and six months prior to the commencement period for a mixture of securities and cash.

Partial offers

Partial offers are voluntary offers for less than 100 per cent of the outstanding shares in a target company. The provisions relating to partial offers are found in Rule 16 of the Takeover Code. All partial offers must be approved by the SIC, and Rule 16 sets out situations where the offeror makes an offer for less than 30 per cent, for between 30 per cent and 50 per cent, and for between 50 per cent and 100 per cent of the target company's shares carrying voting rights.

The Takeover Code provides that the SIC will normally grant consent for a partial offer that could not result in the offeror and persons acting in concert with it holding shares carrying 30 per cent or more of the voting rights of the target company. There is no requirement for a target company to seek competent independent advice for partial offers that result in an offeror holding less than 30 per cent.

The SIC will not grant consent in the case of a partial offer that could result in the offeror and its concert parties holding shares carrying not less than 30 per cent but not more than 50 per cent of the voting rights of the target company.

In the case of a partial offer that could result in the offeror and its concert parties holding shares carrying more than 50 per cent but less than 100 per cent of the voting rights of the target company, consent will not normally be granted by the SIC unless the conditions set out in Rule 16.4 of the Takeover Code are satisfied. These conditions include the requirement that the partial offer is not a mandatory offer under Rule 14 of the Takeover Code and that the partial offer must be approved by shareholders of the target company.

Furthermore, the offeror and parties acting in concert with it must not acquire shares in the target company six months prior to the announcement and in the period between applying for approval from the SIC and making the partial offer and during the offer period and during the six-month period after the close of the partial offer.

The Takeover Code also provides that the SIC will not normally consent to a partial offer that could result in the offeror and its concert parties holding more than 50 per cent of the voting rights of the target company, unless the partial offer is conditional, not only on the specified number or percentage of acceptances being received, but also on approval by the target company's shareholders, where the offeror together with parties acting in concert with it hold 50 per cent or less in the target company prior to the announcement of the partial offer. Where the offeror and its concert parties hold more than 50 per cent of the voting rights of the target company, approval of the target company's shareholders would still be required if the partial offer could result in the offeror and its concert parties holding more than 90 per cent of the target company, or the target company breaching the minimum free float requirement under the SGX Listing Rules. The offeror, parties acting in concert with it and their associates are not allowed to vote on the partial offer.

Generally, the provisions in the Takeover Code applicable to a voluntary offer also apply to partial offers and the documents required for a partial offer are also required in relation to a voluntary offer. The consideration for a partial offer may be in the form of cash or securities, or a combination of both. Similar to the situation of a voluntary offer, if the offeror and its concert parties had purchased for cash, shares carrying ten per cent or more of the voting rights of the target company during the offer period and within six months prior to the commencement of a partial offer, the partial offer shall be in cash or accompanied by a cash alternative of not less than the highest price paid for shares in the target company by the offeror and its concert parties during the offer period and within six months prior to the commencement of the partial offer. Likewise, when the purchase was made in exchange for securities, such securities are normally required to be offered to all other holders of shares of that class.

BIDS

Failed bids

A takeover offer is unsuccessful if the offer does not become unconditional in all respects. In such a case, the Takeover Code provides that, except with the consent of the SIC, where an offer other than a partial offer does not become unconditional in all respects, the offeror and its concert parties may not, within 12 months from the date on which such an offer is withdrawn or lapses, either make an offer for the target company or acquire shares in the target company if the offeror or its concert parties would thereby become obliged to make a mandatory offer for the target.

Except with the consent of the SIC, where the offeror and its concert parties hold more than 50 per cent of the target company following an offer other than a partial offer, the offeror cannot make a second offer for the target company or acquire shares from any shareholder of the target company at a price higher than the offer price within six months

of the close of the first offer.

In the case of partial offers, any person who intends to make a partial offer for the same target company within 12 months from the date of the close of a previous partial offer (whether successful or not) must seek the SIC's prior consent. The SIC does not normally grant its consent, unless the subsequent partial offer is, as would be normally required, recommended by the board of the target company and proposed to be made by a person not acting in concert with the previous offeror.

Competitive bids

Where an offeror has announced a firm intention to make an offer and a potential competing offeror becomes the subject of a possible offer announcement, the potential competing offeror must normally clarify its intentions by the 53rd day from the date the first offeror despatches its initial offer document, either by announcing a firm intention to make an offer, or by making a no intention to bid statement ('put up or shut up'). Where the first offeror's offer is being implemented by way of a scheme of arrangement, a trust scheme or an amalgamation, the deadline for the potential competing offeror to clarify its intention would normally be no later than the seventh day prior to the date of the shareholders' meeting to approve the relevant scheme or amalgamation.

If a competing bid is announced while an existing offer is open for acceptance, the first offeror's offer period may be extended past the 60-day period from the posting of its offer document, with the permission of the SIC. In such cases, all existing offers are normally bound by the timetable established by the despatch of the offer document of the latest competing offeror.

If a competitive situation continues to exist in the later stages of the offer period, that is, where a competitive situation continues to exist at 1700 on the 46th day following the despatch by the second competing offeror of its offer document (ie, the last day on which each competing offeror can unilaterally revise its offers) or, if the second competing offeror is proceeding by means of a scheme or arrangement, such date as the SIC shall determine ('Day 46'), the SIC will normally require revised offers to be announced in accordance with the auction procedure set out in Appendix 4 of the Takeover Code, where no alternative procedure has been agreed between the competing offerors, the board of the target company and the SIC. The auction procedure is designed to achieve finality and an orderly conclusion to the competitive situation in an open and transparent manner.

The auction procedure is an open auction procedure that replicates the competitive process that prevails up to Day 46 without an undue extension in time.

Competing offerors are normally required to post their revised offer documents no later than seven days after the end of the auction. In consultation with the target company, the SIC may dispense with the requirement for a competing offeror to post its revised offer document if it is clear that the value of the competing offeror's offer is lower than the value of the other competing offeror's offer.

The target company is required to post its offeree circulars on the revised offers no later than seven days after the posting of the revised offer documents. Where the SIC has dispensed with the requirement for a competing offeror to post a revised offer document, the target company is not required to post an offeree circular on that offer.

The latest date that either offer made by the competing offerors may become or be declared unconditional as to acceptances is 14 days after the posting of the revised offer documents.

BREAK FEES

The Takeover Code provides for rules governing break fee arrangements. An offeror or potential offeror may negotiate break fees with the target company if certain specified events occur that have the effect of preventing the offer from proceeding or causing it to fail, for instance, where the board of the target company recommends a higher competing offer. The SIC must be consulted at the earliest opportunity in all cases where a break fee arrangement is proposed. Break fees are typically only permitted in limited circumstances, such as where a target company has announced a formal sale process and the break fee arrangement is entered into with one of the offerors who have participated in the process.

A break fee is in the form of a cash sum payable by the target company. In all cases where a break fee is proposed, certain safeguards must be observed. In particular, a break fee must be minimal, and normally must not exceed one per cent of the value of the target company calculated by reference to the offer price. The Takeover Code provides guidelines for calculating the one per cent limit. Moreover, the board of the target company and its financial adviser must provide, in writing, to the SIC:

- confirmation that the break fee arrangements were agreed as a result of normal commercial negotiations;
- an explanation of the basis, appropriateness and circumstances in which the break fee becomes payable;
- any relevant information concerning possible competing offerors, for example, the status of any discussions, the possible terms, any preconditions to the making of an offer, and the timing of any such offer;
- a confirmation that all other agreements or understandings in relation to the break fee arrangements have been disclosed; and
- confirmation that they each believe the fee to be in the best interests of the shareholders of the target company.

Any break fee arrangement must be fully disclosed in the offer announcement and offer document.

The rule on break fees also applies to:

- any other favourable arrangements with an offeror or potential offeror that have a similar or comparable financial or economic effect, even if such arrangements do not actually involve any cash payment. Such arrangements 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; and
- the payment of an inducement fee in the context of a ‘whitewash’ transaction. In this context, the one per cent test is normally calculated with reference to the value of the target company immediately prior to the announcement of the proposed ‘whitewash’ transaction.

OFFER TIMETABLE

The Takeover Code sets out a timetable for takeovers to protect the management of the target company from being indefinitely distracted by dealing with a bid and to limit market uncertainty about the fate of the target company.

The offer document should normally be posted not earlier than 14 days but not later than 21 days from the date of the offer announcement. The target company then has 14 days after the posting of the offer document to post an offeree document to its shareholders.

An offer must initially be open for at least 28 days after the date on which the offer document is posted.

The offer cannot be kept open after the period of 60 days following the day on which the offer document was posted, unless it has previously become unconditional as to acceptances. An extension beyond 60 days is normally only granted by the SIC if there is a competing bid. In such cases, all existing offers are normally bound by the timetable established by the despatch of the offer document of the latest competing offeror.

The following table sets out an indicative takeover timetable:

No.	Time	Action
(1)	T	Offeror announces its intention to make an offer for the target company
(2)	Around T + 1 as soon as possible after (1)	Target company releases a holding announcement
(3)	Around T + 2 as soon as possible after (2)	Target company appoints an independent financial adviser on the offer
(4)	T+ 21 or earlier (but not earlier than 14 days and not later than 21 days after (1))	Offeror posts offer document to the shareholders of the target company, and lodges the same with the SGX and SIC
(5)	T + 35 or earlier (not later than 14 days after (4))	Target company posts the offeree document to its shareholders, containing the advice of the independent financial adviser and recommendation of the target company's directors on the offer, and lodges the same with the SGX and SIC
(6)	T + 49 (not earlier than 28 days after (4))	First possible closing date of the offer
(7)	T + 81 (60 days from (4))	Latest date for the offer to become unconditional as to acceptances, failing which the offer lapses
(8)	T + 102 (21 days from (7))	Latest date for all offer conditions to be fulfilled (assuming the offer is declared unconditional as to acceptances on T + 81), failing which the offer lapses

DOCUMENTATION

All documents, announcements and advertisements addressed to shareholders issued during the course of an offer must satisfy the highest standards of accuracy, and the information given must be adequately and fairly presented. All documents issued to shareholders and advertisements published in connection with an offer must state that the directors of the offeror or, as the case may be, the target company have taken all reasonable care to ensure that the facts stated and the opinions expressed in those documents are fair and accurate, and that where appropriate, no material facts have been omitted. The documents must also state that the directors jointly and severally accept responsibility that all reasonable care was taken to ensure that the facts stated and the opinions expressed in the documents are fair and accurate and, where appropriate, no material facts have been omitted.

The principal documents that would be encountered in the takeover process are:

- the takeover announcement;
- the offer document; and
- the offeree document or circular containing an opinion from the independent financial adviser as to whether the offer is fair and reasonable and the recommendation of the independent directors of the target company whether or not to accept the takeover offer.

The Takeover Code sets out the information that has to be included in an offer document, including

- the offeror's intentions relating to the target company and its employees;
- disclosure of interests in securities held by the offeror, its directors and concert parties;
- financial information about the offeror; and
- conditions of the offer and any special arrangements.

Information about irrevocable undertakings must be set out in the offer document and any document evidencing an irrevocable undertaking to accept the offer should be made available for inspection.

As a general principle, the Takeover Code requires that the shareholders of the target company must be put in possession of all the facts necessary for the formation of an informed judgement as to the merits or demerits of an offer. The obligation of the offeror in these respects towards the shareholders of the target company is no less than the offeror's obligation towards its own shareholders. Following the publication of the initial offer document or offeree circular (as appropriate) and until the end of the offer period, the relevant company must promptly announce any changes in information disclosed in any document or announcement published by it in connection with the offer that are material in the context of that document or announcement, and any material new information that would have been required to have been disclosed in any previous document or announcement published during the offer period, had it been known at the time.

The Takeover Code also sets out the information that must be contained in an offeree document. The offeree document has to contain the advice of the independent financial adviser of a target company (except in the case of a partial offer for less than 30 per cent

of the target company) and the recommendation of the target company's directors on the offer. In the case in which all the directors of the target company board are not independent in relation to the offer, the responsibility for making a recommendation to shareholders resides primarily with the independent financial adviser.

The offeree document must also include:

- information on the shareholdings of the target company in the offeror;
- the shareholdings in the target company and in the offeror in which the directors of the target company are interested;
- the shareholdings in the target company controlled by its independent financial adviser; and
- whether the target company's directors intend to accept or reject the offer, in respect of their own beneficial shareholdings.

Information as to certain arrangements affecting directors must also be provided in the offeree document, for instance, details of any agreement or arrangement made between any director of the target company and any other person in connection with or conditional upon the outcome of the offer.

DUTIES OF DIRECTORS AND CONTROLLING SHAREHOLDERS

The Takeover Code prevents a target company from frustrating a bona fide offer. When a target company's board of directors has been notified of a bona fide offer, or after the target's board has reason to believe that a bona fide offer is imminent, the board cannot, without shareholders' approval, take any steps that could effectively result in either the offer being frustrated or denial of the target shareholders' opportunity to decide on the merits of the offer. The SIC does not normally treat actions by the target company's board of directors in soliciting a competing offer or running a sale process for the target company as actions that frustrate the original offer. The target company's board of directors must obtain competent independent advice when it receives an offer or is approached with a view to an offer being made and must subsequently inform the shareholders of the substance of this advice. If the target company's board of directors is in possession of management projections and forecasts, it may also consider sharing these with the independent financial adviser for the purpose of the latter's advice on the offer.

Under common law, the directors of a company in Singapore owe a duty to act in the best interests of the company and its shareholders as a whole. Controlling shareholders are not subject to any common law or fiduciary duties similar to those imposed on directors, and are therefore entitled to act in accordance with their own interests. However, controlling shareholders of a listed target company may be precluded from voting at a general meeting of shareholders to approve a takeover or merger if they have a conflict of interest, for instance, if they have a substantial interest in the offeror.

Shareholder disclosures

The Takeover Code provides that parties to a takeover transaction and their associates are free to trade in the target company's shares, but are subject to additional disclosure obligations during the offer period. The parties to a takeover and their associates are required to disclose shares, convertible securities, warrants, options or derivatives purchased or sold by them on their own account on a daily basis. The term 'associate' normally includes a holder of five per cent or more of the equity share capital of the offeror or target company. Additionally, for a financial or professional adviser that belongs

to a group with an extensive network of companies worldwide, the SIC normally exempts funds managed on a discretionary basis within the group from the disclosure requirements if the group has in place distinct and effective ‘Chinese walls’ between its various operations and the offeror is not part of such a group.

Disclosure should be made to the SGX, SIC and press. Dealings by an offeror or the target company or by any of their associates must be disclosed by the party concerned or by an agent, for instance, an investment bank or stockbroker, who acts on its behalf. Where there is more than one agent, particular care should be taken to ensure that the responsibility for disclosure is agreed between the parties and that it is neither overlooked nor duplicated.

Apart from the Takeover Code, shareholder disclosure obligations are found in the SFA with regard to listed companies. Disclosure obligations arise when a shareholder becomes a substantial shareholder. Disclosure must subsequently be made if there is a change in the substantial shareholder’s ‘percentage level’ of interest in voting shares in a company. ‘Percentage level’ is defined in section 136(3) of the SFA.

In summary, substantial shareholders are required to disclose changes to their interest in threshold bands of one per cent. Disclosure is required to be made by the shareholder to the listed company under the SFA. The listed company is also obliged under the SFA to pass the details on to the SGX for public release.

Financial disclosures

An offer document and an offeree circular must contain, among other things, the following financial information about the offeror or the target company, as the case may be:

- details, for the last three financial years, of turnover, exceptional items, net profit or loss before and after tax, minority interests, net earnings per share and net dividends per share, and details relating to the foregoing in respect of any interim statement or preliminary announcement made since the last published audited accounts;

- a statement of the assets and liabilities shown in the last published audited accounts;

- particulars of all subsequent material changes (or where appropriate, a negative statement) in the financial position of the offeror or the target company, as the case may be, which are known;

- significant accounting policies together with the notes of the accounts that are of major relevance for the interpretation of the accounts; and

- where, because of a change in accounting policy, figures are not comparable to a material extent, this should be disclosed and the approximate amount of the resultant variation should be stated.

Any material change (together with particulars of such a change) in the financial position or prospects of a target company since the date of the last balance sheet laid before the target company in a general meeting that is known to an offeror must also be disclosed in the offer document.

Separately, when a profit forecast appears in any document addressed to the shareholders in connection with the takeover offer, the following reports are required (except for a forecast made by an offeror offering solely cash):

- a report by the auditor or reporting accountant on the accounting policies and calculations for the forecast;
- a report by the financial adviser, if he/she is mentioned in the document containing the forecast, on his/her view on whether the forecast has been made after due and careful enquiry; and
- where revenue or profit from land and buildings is a material element in the forecast, a report by an independent valuer.

SUSPENSION OF TRADING AND COMPULSORY ACQUISITION

If the offeror and its concert parties should, as a result of the offer or otherwise, own or control above 90 per cent of the total number of issued shares (excluding treasury shares) of the target company, the SGX may suspend the listing of the shares in the target company until such time when the SGX is satisfied that the appropriate minimum shareholding spread stipulated by the SGX is met. The Listing Manual provides that a minimum shareholding spread of ten per cent of shares, excluding treasury shares (excluding preference shares and convertible equity securities), must be held by the public (which excludes directors and substantial shareholders).

An offeror who acquires not less than 90 per cent of the issued shares in the target company pursuant to a takeover offer (excluding those shares held at the date of the offer by, or by a nominee for, the offeror or its related corporations) is entitled to compulsorily acquire any remaining target shares under section 215 of the Companies Act. Conversely, dissenting shareholders of the target company have a right to be bought out by the offeror if the offeror, its related corporations and their respective nominees hold 90 per cent or more of the issued shares in the target company.

To do so, the offeror needs to deliver a notice of the compulsory acquisition to the dissenting shareholders of the target company, who then have the right to request for the list of dissenting shareholders. The dissenting shareholders then have one month from the date of notice or 14 days from the date on which the list of dissenting shareholders is provided (whichever is the later) to object to the compulsory acquisition by filing an application with the High Court. If there is no objection or any objection is dismissed, the target company must register the offeror as the holder of all the shares held by the dissenting shareholders upon the offeror transmitting a copy of the notice of the compulsory acquisition delivered by the offeror to the dissenting shareholders together with a duly executed instrument of transfer and making payment of the consideration for the acquisition to the target company. The target company will hold the consideration for the acquisition on trust for dissenting shareholders until claimed by them or transferred to the official receiver.

If, pursuant to an offer, the offeror fails to acquire a sufficient number of target company shares to compulsorily acquire the remaining target company shares, subject to obtaining the approval of the SIC, the offeror may request the target company to apply to the SGX to be delisted if it satisfies the following requirements under the Listing Manual. The target company has to convene a general meeting of the shareholders of the target company to seek their approval for the delisting. The delisting resolution has to be approved by a majority of at least 75 per cent of the total number of issued shares (excluding treasury shares) held by the independent shareholders present and voting on a poll (ie, the offeror and parties acting in concert with it must abstain from voting on the delisting resolution). An exit offer must be made to the target company’s shareholders, and the exit offer must be fair and reasonable and include a cash alternative as the default alternative. The target company must appoint an independent financial adviser to advise on the exit offer and the independent financial adviser must opine that the exit offer is fair and reasonable.

INSIDER DEALING

If an offeror is in possession of price-sensitive information regarding the target company, it cannot deal in the target company's shares until the information has become public or is no longer price sensitive. In the context of a takeover, if price-sensitive information is disclosed to the offeror during due diligence, whether inadvertently or otherwise, or the offeror is otherwise in possession of price-sensitive information, the offeror would be prevented from making the bid unless the information is disclosed to all the shareholders of the target company as well.

The provisions relating to insider dealing are found in the SFA. An insider dealer may be subject to criminal prosecution and to civil action maintained by an aggrieved investor, as well as to civil action taken by the MAS.

TAX ISSUES

In relation to the transfer of certain assets (including shares), Singapore stamp duty is payable on the transfer instrument. Transfers of assets between associated companies and upon the reconstruction and amalgamation of companies may qualify for stamp duty exemption, subject to certain conditions.

Insofar as income tax on realised gains is concerned, there is no imposition of capital gains tax in Singapore. Therefore, when the shareholders of a target company dispose of their target shares, the question is whether the gain realised, if any, constitutes capital gains or trading income, the latter of which is subject to income tax. Whether the gain is treated as capital gains or trading income depends on whether the relevant shareholders of the target company are regarded by the Inland Revenue Authority of Singapore to be share traders.

LABOUR AND EMPLOYEE BENEFITS

A takeover or merger transaction involving the transfer of shares, as opposed to the transfer of a business undertaking, does not typically affect the employees of the acquiring company or the target company. An employee of the target company continues to be employed by the target company and is not transferred to the offeror. However, in a transfer of business undertaking, the Employment Act 1968 of Singapore (the 'Employment Act') provides that all employees of the target that fall under the Employment Act with respect to the undertaking at the date of the transfer will automatically become employees of the offeror on the same terms and conditions as their employment under the target company. All employees are covered under the Employment Act save for very limited categories of workers, such as seafarers and domestic workers. The transfer of employees who do not fall under the Employment Act is a matter to be agreed between the transferor, the transferee and the relevant employees.

In general, there are no statutory or regulatory requirements for employee consultation and approval in relation to a takeover, save that the offeror may not enter into any arrangements with employees who are also shareholders of the target company that extend favourable conditions not granted to all shareholders. In addition, the offer document would have to disclose (or where appropriate, contain negative statements on):

- details of any payment or other benefit that will be made or given to any director of a target company or its related corporations (including a director who is also an employee of such a corporation) as compensation for the loss of office or otherwise in connection with the takeover offer; and

- whether and in what manner the emoluments of the directors of an offeror (including a director who is also an employee of the offeror) will be affected by the acquisition of the target company.

OVERSEAS SHAREHOLDERS

The laws of other jurisdictions may be relevant to a takeover offer if the target company has shareholders who are resident or incorporated outside Singapore. As a general guideline, specific advice should be obtained in relation to any jurisdiction in any of the following circumstances:

- the securities of the target company are listed or dealt in on a securities exchange in that jurisdiction;
- a significant percentage of the target securities are owned by overseas shareholders in that jurisdiction;
- there is a large number of overseas holders of the target securities in that jurisdiction;
- the securities of the target company have been marketed in that jurisdiction; or
- the target company is required to comply with any filing or reporting requirements relating to its securities in that jurisdiction.