



15 August 2016 - The Malaysian Code on Take-Overs and Mergers 2010 (Old Code) has been revoked and has now been superseded by the Malaysian Code on Take-Overs and Mergers 2016 (New Code). This circular seeks to list out the key changes, particularly under the Rules on Take-Overs, Mergers and Compulsory Acquisitions (Rules) that will govern merger & acquisition (M&A) transactions in Malaysia after 15 August 2016.

While the Old Code consisted of an amalgamation of both principles and rules supplemented by practice notes, the New Code consists of 12 general principles which must be observed and complied with. In tandem with the implementation of the New Code, the Rules provide an important new point of reference which contains additional guidance in the form of notes to each respective Rule, to aid interpretation and operation.

KEY CHANGES UNDER THE NEW TAKE-OVERS CODE & RULES

APPLICATION OF THE RULES

The Rules now apply to unlisted public companies with more than 50 shareholders and net assets of RM15 million or more. Previously, all unlisted public companies irrespective of size were subject to the Old Code. However, Business Trusts listed in Malaysia are now also subject to the New Code and the Rules. (Rule 1.08 of the Rules).

Q: When do the New Code and the Rules take effect?

A: The New Code and the Rules will apply to all take-overs, and merger transactions after 15 August 2016. But where any transaction has been commenced or undertaken before commencement of the New Code, such transactions shall be dealt with under the provisions of the Old Code as if the Old Code had not been revoked.

Q: Why create a separate rule book?

A: As stated in the Securities Commission Malaysia's (SC) Press Release issued on 15 August 2016, the Rules are meant to be a legislative supplement under Section 377 of the Capital Markets and Services Act 2007 to provide a more comprehensive point of reference for operational and conduct requirements in relation to take-over and merger transactions.

MANDATORY OFFERS

Persons Acting in Concert (PAC)

The Rules have retained the existing 3 circumstances for the SC's consideration in determining if a particular arrangement constitutes a PAC arrangement save for an additional consideration under the Rules where agreements to restrict shareholders or the directors from either offering for, or accepting an offer for, the shares of a company or from increasing or reducing shareholdings may also constitute a PAC arrangement (Rule 4.03 of the Rules).

Board Control Seeking Proposals

There is now a rebuttable presumption that shareholders, along with their supporters who requisition or threaten to requisition for a board control-seeking proposal in a general meeting are considered to be acting in concert (Note to Sub-Paragraph 4.03(c)). Additionally, the SC will no longer regard the action of shareholders voting together on resolutions at just 1 general meeting as acting in concert to ordinarily trigger a Mandatory Offer Obligation. However, a voting pattern at more than 1 general meeting may be an indication to that effect which could thereby trigger a Mandatory Offer Obligation. (Note to Sub-Paragraph 4.03(b) of the Rules).

Options and Derivatives

Under the Rules, a person who acquires or written any option or derivative which causes him to have long economic exposure to changes in the price of securities will be treated as having acquired those securities. If that person would acquire control or trigger the creeping threshold, he must first consult the SC to determine if an offer is required and if so, the terms of the offer. (Note 11 to Paragraph 4.01 of the Rules).

Upstream Acquisitions

Under the Rules, a mandatory offer obligation will now apply to upstream acquisitions where a person or a group of PAC has acquired more than 50% in an upstream entity (Notes to Paragraph 4.01 of the Rules). Further, the test to determine if an upstream entity has a "significant degree of influence" under the Old Code has been deleted (See Note 3 to Paragraph 4.01 of the Rules).

OFFER PRICE

Offer Price

The Rules now prescribe differing minimum offer prices for mandatory and voluntary offers. For mandatory offers, not less than the highest price paid or agreed to be paid by the offeror or group of PAC during the offer period and within the 6 month period preceding the offer applies; and for voluntary offers during the offer period and within the 3 month period preceding the offer period (Rule 6.03 of the Rules).

The Rules now also provide that where mandatory offers arise from an arrangement, agreement or understanding to control, the offer price shall be the higher of:

the highest price paid by the offeror or the group of PAC for the voting shares or rights of the offeree during a period of 6 months prior to triggering the mandatory offer obligation; or
the volume weighted average traded price of the offeree for the last 20 market days prior to triggering the mandatory offer obligation (Note 10 to Paragraph 6.03 of the Rules).



¹ An upstream acquisition is an acquisition that results in the acquirer of the upstream entity (which need not be a company to which the Rules or New Code apply) acquiring or consolidating control of voting rights in another company (known as the downstream company) (Note 3 to Paragraph 4.01 of the Rules).

ANNOUNCEMENTS AND NOTICES

Approach

There is now a requirement that an offer must first be put forward to the board of the offeree before the offer is announced (Rule 9.01 of the Rules).

The board of offeree is entitled in good faith, to make enquiries to satisfy themselves that the offeror is able to implement the offer (Rule 9.03 of the Rules);

The Rules have removed the requirement under the Old Code that the board of offeree must confirm in the initial announcement upon receipt of an offer as to whether it is seeking a competing offer.

Timing of Announcement of Firm Intention

Under the Rules, an announcement of a firm intention to make a take-over offer must now be made within 1 hour of incurring an offer obligation or to revise an offer already made (Note (14) to Rule 9 of the Rules). The offeror and PAC are also prohibited from making any purchase of the offeree's shares until an announcement of firm intention is made (Rule 9.10(2) of the Rules).

TIMING AND CONTENTS OF DOCUMENTS

Offer Document

The SC's role is no longer to provide approval for offer documents before dispatch as it was under the Old Code but to provide its comments and guidance to resolve issues regarding the offer documents (Rule 11.01 of the Rules). The dispatch documents however, must not be dispatched until the SC has notified that it has no further comments thereon (Rule 11.02(3) of the Rules).

Independent Advice Circular

Where the Old Code provides that the SC must first consent to the contents of the independent advice circular, the Rules now provide that the SC need only notify that it has no further comments thereon. It should not however be taken to suggest that the SC wholly assents to the recommendations of the independent adviser nor assumes responsibility for the circular (Rule 11.04 of the Rules).

TIMING OF OFFER

Duration of Take-Over

The Rules have extended the period of acceptance of a voluntary take-over offer by the offeree shareholders from 74 days to 95 days from the date of dispatch of the offer documents (Rule 12.01(2) of the Rules).

Competitive Situations

This is a new provision under the Rules, where if a competing offer continues to exist in later stages of the offer period (after 5.00 p.m. on Day 46), the SC will require revised offers to be announced through an auction procedure (Rule 12.04 and Schedule 4 of the Rules). The auction procedure is as set out in Schedule 4 of the Rules or the SC will consider alternative procedures as agreed between competing offerors and the offeree board.

The auction procedure under Schedule 4 of the Rules is as follows:

- Auction Days 1 to 4: A competing Offeror may announce a revised offer where if he wishes to do so, he must submit an announcement to the SC before 4.00 p.m. on relevant day.
- Auction Day 5 (Last Day): If either competing offeror wishes to announce a revised offer on Auction Day 5, that competing offeror must submit an offer announcement to the SC before 4.00 pm on that day. The offer announcement may be submitted subject to a condition that the revised offer will be announced only if the other competing offeror also submits an offer announcement to the SC before 4.00pm on that day (but not subject to any other conditions, such as the level of a competing offeror's revised offer). In such a case as the above, the SC will, before 4.30 pm on Auction Day 5, notify the relevant competing offeror whether the stipulated condition has been satisfied. If both competing offerors submit an offer announcement subject to a condition as referred to above, both conditions will be deemed to have been satisfied.



mkp MAH-KAMARIYAH & PHILIP KOH
ADVOCATES & SOLICITORS • NOTARY PUBLIC

We help you put
the right pieces in place.

Our key Corporate and M&A practice area contacts:

PHILIP KOH
philip.koh@mkp.com.my



ADRIAN KOH
adrian.koh@mkp.com.my



LIM LEE
lim.lee@mkp.com.my



YEE CHEW YAN
ycy@mkp.com.my



KUALA LUMPUR / PJ (HEAD OFFICE)

3A07, Block B, Phileo Damansara II
15 Jalan 16/11, Off Jalan Damansara
46350 Petaling Jaya, Selangor
Malaysia

T +603-7956 8686
F +603-7956 2208 Corporate, Property & Banking
+603-7956 2209 Litigation & Dispute Resolution
E general@mkp.com.my
W www.mkp.com.my

JOHOR BAHRU

Unit 02-02, Level 2 Tropika Welcome Center
10 Jalan Setia Tropika 1/21, Taman Setia Tropika
81200 Johor Bahru
Johor Darul Takzim, Malaysia

T +607-2881 362
F +607-2975 020

AWARDS & RECOGNITIONS:

