

MALAYSIAN CODE ON TAKE-OVERS AND MERGERS

AMENDMENTS TO PRACTICE NOTES

Amendment of Practice Note 1.3

1. The Practice Notes (Jil. 42, No. 27, Tambahan No. 4, No. 13489), which is referred to as the "principal Practice Notes" is amended in Practice Note 1.3 by substituting for subsection (1) the following subsection :

"(1) Any person who intends to or who is obliged to make a take-over offer, or who intends to apply for an exemption from the provisions of the Code, should seek advice from advisers, who have the necessary expertise and experience in corporate matters. Advisers may include merchant banks, firms of public accountants, law firms and such other parties, subject to the discretion of the Commission, which provide advice to such person in connection with a submission to the Commission as required pursuant to the Code. Where an acquirer or a person wishes to seek an exemption from a mandatory offer obligation under Part II of the Code, he should seek advice from such advisers."

Amendment of Practice Note 1.4

2. The principal Practice Notes is amended by substituting Practice Note 1.4 for the following :

"Practice Note 1.4

General guidelines for application for exemptions from mandatory offers

(1) In relation to an application for an exemption from making a mandatory offer, consultation with the Commission may be required. If so, such consultation should begin at an early stage.

(2) Applications for an exemption should be submitted prior to the obligation to make a mandatory offer under Part II of the Code arising."

Amendment of Practice Note 2.2

3. Practice Note 2.2 is amended by substituting for paragraph (1)(a) the following paragraph:

- “(1) Part II of the Code applies to a person who intends to obtain or has obtained control in an upstream company which :
- (a) holds or is entitled to exercise or controls the exercise of more than 33% of the voting shares of a downstream entity; and”.

Amendment of Practice Note 2.3

4. Practice Note 2.3 is amended by inserting before subsection (1) the following subsection :

“(1A) When a person has acquired shares without the knowledge of other shareholders or potential shareholders but subsequently comes together with other shareholders to co-operate as a group to obtain or consolidate control of a company and their shareholding amounts to more than 33% of the voting shares of the company, Part II of the Code will not normally apply. Upon such parties having come together, however, Part II of the Code will apply:

- (a) if the combined holding of the group is less than 33%, where any member of that group acquires additional voting shares such that the group’s holding exceeds 33%; or
- (b) if the combined holding of the group is more than 33% and less than 50%, where any member of that group acquires additional voting shares such that the combined holding of the group is increased by more than 2% in any six month period.”.

Amendment of Practice Note 2.9.1

5. Practice Note 2.9.1 is amended –

- (a) by substituting for subsection (6) the following subsection :

“(6) For the purposes of paragraph (5)(a), a “disqualifying transaction” refers to a transaction where the person to whom the new securities are to be issued or any group of persons acting in concert with him, has purchased voting shares of the company in the 6 months prior to the posting to the holders of voting

shares of the circular relating to the proposal but subsequent to negotiation, discussion, understanding or agreement with the directors of the company in relation to the proposed issue of new securities, whichever is the shorter period.”.

(b) by inserting after paragraph (12)(f) the following paragraph :

“(g) it must include all information and statements as required under Schedule 2.”.

Amendment of Practice Note 2.9.2

6. Practice Note 2.9.2 is amended by substituting for paragraph (2)(b) the following paragraph :

“(b) the applicant has not acquired such convertible securities other than by way of his rights issue entitlement, i.e. his holding excludes any convertible securities obtained by way of rights renounceable by other holders of voting shares; and”.

Amendment of Practice Note 2.9.4

7. The principal Practice Notes is amended by substituting for Practice Note 2.9.4 the following :

“Practice Note 2.9.4

Exemption arising from the enforcement of security for a loan

(1) The following categories of persons are not required to make an offer under Part II of the Code:

(a) a licensed commercial bank, a licensed finance company or a licensed merchant bank under the Banking Financial Institutions Act 1989, or a licensed dealer in securities by reason of its holding of voting shares of a company as security for a loan; and

(b) a receiver or liquidator when he takes control of a holding of more than 33% of a company.

However, a purchaser from such persons would be subject to Part II of the Code.

(2) Save for subsection (1), where a lender intends to make arrangements involving a transfer of voting shares to itself

such that it would amount to enforcement of its security, the lender would incur an obligation under Part II of the Code and may therefore apply for an exemption.

- (3) The Commission will consider an application under subsection (2) for an exemption if all the following criteria are met:
- (a) the voting shares were not pledged under circumstances where the lender had reason to believe that foreclosure would be likely;
 - (b) the lender is able to justify to the Commission that foreclosure is necessary;
 - (c) the lender must undertake to place the voting shares of the company within a period of 6 months from the date of foreclosure, or such longer period as may be determined by the Commission, so as to reduce his holding to below 33% of the voting shares of the company.

However, any exemption granted will not apply to a purchaser who acquires from the lender such voting shares of the company.

- (4) In an application for an exemption to the Commission under subsection 3 the following information must be submitted:
- (a) date when the security was taken and reasons;
 - (b) details of the voting shares held as security;
 - (c) date and reasons for foreclosure;
 - (d) proposed placement of the securities; and
 - (e) such other details considered relevant for the Commission's consideration."

Amendment of Practice Note 2.9.5

8. Practice Note 2.9.5 is amended –

- (a) by substituting for subsection (1) the following subsection :

"(1) A person may apply for an exemption from an obligation under Part II of the Code where:

- (a) in either a restructuring exercise or pursuant to an acquisition involving the issue of new securities, the person obtains control of more than 33% of the voting shares of a company but makes a prior arrangement or gives a written undertaking to reduce his holding in the voting shares of the company to less than 33%; or
- (b) the voting shares of a company are underwritten and these voting shares, together with the voting shares already held by the same underwriter, allow the underwriter to hold, acquire or be entitled to hold, or entitled to exercise or control the exercise of, more than 33% of the voting shares of the company.”.

(b) by substituting for subsection (2) the following subsection :

“(2) Where paragraph (1)(a) applies, the Commission will consider the application for an exemption provided all the following criteria are met:

- (a) the acquisition which causes the applicant to seek an exemption under this Note would result in the applicant obtaining control in the company through the issue of new securities;
- (b) there is, prior to the proposal, a firm arrangement entered into for the placement of any voting shares to a level below 33% in the company. A firm arrangement could be based on the following:
 - (i) the proposal is conditional upon the placement of the excess voting shares; or
 - (ii) the applicant had entered into an agreement for placement of the voting shares of the company; and
 - (iii) an underwriter has been appointed to underwrite the placement;

- (c) the Commission may dispense of the requirement stated under subparagraph (2)(b)(iii) above if there is a definite identification of a placee for the voting shares of the company; and
- (d) the applicant who seeks an exemption under this Note must, through a written confirmation to the Commission, declare that none of the parties who would be acquiring the voting shares as a result of the transaction referred to in subsection (1) is acting in concert with him.”.

(c) by substituting for subsection (4) the following subsection :

- “(4) Where paragraph 1(b) applies, the Commission will only consider granting an exemption to that underwriter if:
 - (a) underwriting is in the normal course of business of the underwriter; and
 - (b) the underwriter gives a written undertaking to the Commission to place the voting shares within a period of 6 months from the date an exemption under this Note is granted or such longer period as may be determined by the Commission.”.

Amendment of Practice Note 2.9.7

9. Practice Note 2.9.7 is amended by substituting for subsection (1) the following subsection :

- “(1) A person may apply for an exemption from the obligation to make a mandatory offer under Part II of the Code where:
 - (a) the voting shares of a group of persons acting in concert total more than 33% of the voting shares of a company, and as a result of an acquisition of voting shares from other group members, one or more members of the group increase their voting shares to more than 33%, or if they are holding more than 33% and less than 50% of the voting shares, increase their holding by more than 2% in any 6 month period;

- (b) the group acting in concert holds more than 50% of a company and one or more members of the group acquires voting shares from either members of the group or non-members which increase their voting shares to more than 33%, or if they are holding more than 33% and less than 50% of the voting shares, increase their holding by more than 2% in any 6 month period.”.

Amendment of Practice Note 2.9.8

10. Practice Note 2.9.8 is amended by inserting after subsection (4) the following subsection :

- “(5) The relevant parties shall be subject to sections 7 and 10 of the Code until the compulsory acquisition scheme under section 180 of the Companies Act 1965 is effected.”.

Amendment of Practice Note 2.9.10

11. Practice Note 2.9.10 is amended by inserting after paragraph (11)(f) the following paragraph :

- “(g) it must include all information and statements as required under Schedule 2.”.

Amendment of Practice Note 4.2

12. The principal Practice Notes is amended by substituting for Practice Note 4.2 the following :

“Practice Note 4.2
Section 14 - Offeree board of directors’ comments on the take-over offer

With regard to subsection 14(1) of the Code, in the case of a take-over offer that is a management buy-out or is being made by the existing controlling holders of voting shares, or a group of holders of voting shares, the board of directors of the offeree must appoint an independent adviser to advise the board of directors of the offeree and holders of voting shares as soon as possible after it becomes aware of the possibility that a take-over offer may be made. ”.

Insertion of Practice Note 6.1

13. The principal Practice Notes is amended by inserting under Part VI, Timing of Offer, the following Practice Note :

“Practice Note 6.1

Section 24 – Closing of take-over offers

- (1) Consent under subsection 24(4A) of the Code may be given by the Commission in respect of a cash underwritten alternative offer where the value of that cash underwritten alternative is, at the time of announcement, more than half of the maximum value of the offer.
- (2) The Commission will not grant its consent under subsection 24(4A) of the Code where a competing offer has been announced.”.