SIC ISSUES GUIDANCE TO IFAS ON IFA OPINIONS

The Securities Industry Council ("**SIC**") has issued a Practice Statement ("**Practice Statement**") on the Opinion Issued by an Independent Financial Adviser ("**IFA**") in Relation to Offers, Whitewash Waivers and Disposal of Assets under the Singapore Code on Take-overs and Mergers ("**Code**"). This Practice Statement will apply to transactions announced from 9 July 2014.

It deals with the following matters:

- What is meant by the phrase "fair and reasonable"?
- The duties of the IFA when advising on general offers.
- The duties of the IFA when advising on a whitewash resolution.
- The duties of the IFA when advising on special deals.

What is "Fair and Reasonable"?

As noted above, the Practice Statement deals with the advice given by an IFA as to whether a take-over offer, a whitewash transaction, or a disposal that constitutes a special deal is "fair and reasonable".

"Fair and reasonable" comprises two distinct concepts

When advising the board of the offeree company on an offer, the IFA should conclude whether an offer is "fair and reasonable". The term is not a composite one but comprises two distinct concepts. Hence, an offer can be:

- "fair and reasonable";
- "not fair but reasonable";
- "not fair and not reasonable"; or
- "fair but not reasonable".

Opinion of "fair but not reasonable"

With respect to the last formulation, the SIC has stated that an offer would normally be considered "reasonable" if it is assessed to be "fair" and, accordingly, an opinion that an offer is "fair but not reasonable" should not be given unless there are strong and exceptional grounds.

Meaning of "fair"

The Practice Statement explains the two terms as follows:

- The term "fair" relates to an opinion on the value of the offer price or consideration compared against the value of the securities subject to the offer (the "**Offeree Securities**"). An offer is "fair" if the price offered is equal to or greater than the value of the Offeree Securities.

Meaning of "reasonable"

- The term "reasonable" relates to an opinion on matters other than the value of the Offeree Securities. Such matters include, but are not limited to, the existing voting rights in the offeree company held by the offeror and its concert parties and the market liquidity of the Offeree Securities.

Opinion Must Be Clear and Unequivocal

Clear and unequivocal

The IFA's opinion should be clear and unequivocal. For example, statements that are qualified by different investment horizons of shareholders should not be included. IFAs may, however, state that they have not taken into account the specific investment objectives of individual shareholders.

Application to Specific Situations

Non-cash offer consideration

The Practice Statement sets out the following guidance for offer considerations that are non-cash:

- Where the offeree company shareholders will be receiving scrip constituting minority interests, the IFA should compare the value of the securities being offered on an enlarged group basis (allowing for a minority discount), against the value of the Offeree Securities (the IFA should assume that 100% of the Offeree Securities are for sale).
- If the IFA uses the market price of the securities as a measure of the value of the offered consideration, he should consider and comment on the depth of the market for those securities, the volatility of the market price, and whether or not the market value is likely to represent the value if the take-over offer is successful.

Whitewash resolutions and special deals

The Practice Statement notes that the term "fair and reasonable" should similarly be analysed as two distinct concepts when applied to:

- Transactions subject to a whitewash resolution; and
- Disposals of assets which constitute special deals under the Code.

With respect to such disposals, it further states that the IFA should consider the merits of the disposal:

- Independently of the general offer, even if the take-over offer is conditional upon the disposal; and
- Independently of the whitewash transaction (if applicable), even if the completion of the whitewash transaction is conditional upon the disposal.

Food for Thought: Should the Code Be Amended Further to Make It Easier for an IFA Opinion to Take into Account Projections or Growth Prospects?

This Practice Statement is timely as there has been a spate of commentaries on IFA opinions in connection with take-overs in recent months. The SIC's clarification that the term "fair and reasonable" is not one but two distinct concepts is particularly welcomed.

Should it be easier for an IFA opinion to take into account projections or growth prospects?

However, one common complaint of minority shareholders is that the scope of the IFA opinion is too narrow as it usually does not take into account financial projections or future growth prospects of the company. This is because the stringent standards and timeline under the Code do not make it easy for one to prepare a properly considered set of profit forecasts. Perhaps there is room for the Code to be amended further (as in the UK) to relax the rules in relation to profit forecasts and merger benefit statements. This will certainly encourage IFAs to expand the scope of their opinion.

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