

## THE ROLE OF DIRECTORS OF THE TAKEOVER TARGET COMPANY UNDER THE RULES ON TAKE-OVERS, MERGERS AND COMPULSORY ACQUISITIONS

A director has primary responsibility to manage the affairs of the company and has both the fiduciary duties and statutory duties to act in the best interests of the company. The duties of a director originate from many sources including the common law, the Companies Act 2016, the company's constitution, other relevant statutes, and/or any agreement entered between the director and the company. One of the legislations that provides for the duties of director is under the Rules on Take-overs, Mergers and Compulsory Acquisitions ("**Rules**") which is issued by the Securities Commission Malaysia ("**SC**") pursuant to Section 377 of the Capital Markets and Services Act 2007 ("**CMSA**"). This Rules set out the required procedures and conduct of the offeror and offeree relating to take-overs, mergers and compulsory acquisitions of a company.

Among the duties of a director of the target company provided by the Rules during the offer period (i.e., from the date the offeror made an announcement of firm intention for takeover offer under Rule 9.10 of the Rules until a period of at least 21 days from the date the offer document by the offeror is first posted to the board of the offeree as provided under Rule 12.01(1) of the Rules before the offer lapses) for the takeover offer are as follows: -

### **a) When the Company Receives a Takeover Offer from an Offeror:**

Under Rule 9 of the Rules, the takeover offer must be put forward to the board of the offeree (i.e., the directors of company being taken over) before the takeover offer is announced to the public. The board of offeree is entitled, in good faith, to make enquiries to satisfy themselves that the offeror will be able to implement the offer.

Following an approach to the board of the offeree which may or may not lead to a takeover offer, the board of the offeree has the primary responsibility to make an announcement when: -

- i. the board of offeree receives notification of a firm intention to make an offer from the offeror or the offeror's advisers, irrespective of whether the board of offeree views the offer favourably or otherwise;
- ii. following an approach to the offeree, the offeree is 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, whether or not there is a firm intention to make an offer;
- iii. negotiations or discussions between the offeror or potential offeror and the offeree are about to be extended to include more than a very restricted number of people;
- iv. the board of offeree is aware that there are negotiations or discussions between a potential offeror and the holder, or holders, of shares carrying more than 33 per cent of the voting shares or voting rights of an offeree or when the board of offeree is seeking potential offerors, and-
  - a. the offeree is 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; or
  - b. more than a very restricted number of potential purchasers or offerors are about to be approached.

Upon the offeror who has a firm intention to make a takeover offer has made an announcement regarding the takeover offer, including by way of press notice and sent a written notice to the board of offeree pursuant to Rule 9.10 of the Rules, then the board of the offeree shall make an immediate announcement of the receipt of the written notice and dispatch a copy of the written notice to all offeree shareholders within seven days of receipt.

#### **b) Circular to Shareholders of the Company:**

Rule 11 of the Rules provides that after the offeror has dispatched the offer document (which is a document that will contain more details about the offeror company, its corporate information, its offer and conditions for the offer, its intentions on the offeree company and the employees, resources for the offer etc.) to the board of offeree, the board of offeree shall issue its comments, opinion and views on the takeover offer in a circular to the company shareholders and holders of convertible securities within 10 days from the dispatch of the offer document.

The circular to shareholders shall include, but shall not be limited to such comments, opinions and information on:-

- i. the offeror's stated intentions regarding the continuation of the business of the offeree;

- ii. the offeror's stated intentions regarding any major changes to be introduced in the business, including any plans to liquidate the offeree, sell its assets or redeploy the fixed assets of the offeree or make any other major change in the business of the offeree;
- iii. the offeror's stated long-term justification for the proposed take-over offer;
- iv. the offeror's stated intentions with regard to the continued employment of the employees of the offeree and of its subsidiaries; and
- v. the fairness and reasonableness of the take-over offer.

At the end of the circular to shareholders, the board of the offeree shall make a statement whether the takeover offer is fair, reasonable and is in the best interests of the company and shall make a recommendation to the non-interested shareholders of the company on whether they shall vote in favour of accepting the takeover offer. The circular to shareholders shall also include the board of the offeree's responsibility statement that the directors accept full responsibility for the accuracy of information contained in the circular, confirm that the opinions expressed in the circular have been arrived at after due and careful consideration, and that there are no false or misleading statements in the circular as required by Rule 10.03 of the Rules.

### **c) Appointment of Independent Adviser**

Rule 3.06 of the Rules states that, as soon as reasonably practicable, the board of the offeree shall appoint an independent adviser to provide comments, opinions, information and recommendation on the takeover offer in an independent advice circular. The independent advice circular shall include recommendation to the non-interested shareholders on whether to approve or reject the takeover offer based on the fairness and reasonableness of the takeover offer.

Even if the independent adviser shall be responsible for all comments, opinions, information and recommendation disclosed in the independent advice circular, the board of the offeree still has the duty to appoint independent adviser that is independent and to obtain independent adviser's declaration of independence from any conflict of interest regarding the takeover offer.

### **d) Resignation by Director of the Offeree Company:**

According to Rule 15.02 of the Rules, a director of the offeree shall not resign from the board of the offeree until the first closing date of the takeover offer or the date when the takeover offer becomes or is declared wholly unconditional, whichever is the later.

The Note under Rule 15.02 of the Rules also provides that SC must be consulted if any of the directors of the offeree is due to retire during such period.

### **e) Frustration of the Takeover Offer:**

Rule 16.01 of the Rules provides that during the offer period, or where the board of the offeree has any reason to believe that a bona fide takeover offer might be imminent, the board of the offeree shall not undertake any action or make any decision (other than in the ordinary course of business) without obtaining the approval of shareholders at a general meeting on the affairs of the offeree that could effectively result in any bona fide takeover offer being frustrated or the shareholders being denied an opportunity to decide on the merits of a takeover offer.

### **f) Restrictions on Dealings before the Takeover Offer:**

Under Rule 19.01 of the Rules, if a director of the offeree has any confidential price-sensitive information concerning an actual or contemplated offer or revised offer between the time when there is reason to suppose that an approach or an offer or revised offer is contemplated and the announcement of the approach, the offer, the revised offer, or of the termination of the discussions, then the said director shall not deal with the securities of the offeree company (including convertible securities, warrants, options and derivatives in respect of such securities).

### **g) Prompt Registration and Provision of Information**

On the registration of transfer of shares during the offer period, Rule 20.01 provides that the board of the offeree should use their best endeavours to ensure the prompt registration of transfers of shares during an offer period so that existing shareholders can freely exercise their voting and other rights.

The board of the offeree together with the company officers shall respond within four market days to a request from an offeror, for details in respect of:-

- i. the register of members, in the case of unlisted voting shares, including addresses and other information provided to the offeree by shareholders of the offeree for the receipt of documents, announcements and other information; or
- ii. the record of depositors, in the case of listed voting shares and voting rights.

Directors of the target company will have to comply with all the responsibilities above as the Rules is issued by the SC and any breach of the Rules will attract liabilities under the CMSA. Section 354 of the CMSA provides that where a person fails to comply with any written notice, direction, guideline or practice note issued by SC, then that person has committed a breach, and SC may take any one or more of the following actions:

- a) direct the person in breach to comply with, observe, enforce or give effect to such rules, provisions, written notice, direction, practice note, condition or guideline;

- b) impose a penalty in proportion to the severity or gravity of the breach on the person in breach, but in any event not exceeding one million ringgit;
- c) reprimand the person in breach;
- d) require the person in breach to take such steps as SC may direct to remedy the breach or to mitigate the effect of such breach, including making restitution to any other person aggrieved by such breach;
- e) in the case of a breach of Part VI (i.e. Issue of Securities and Takeover and Mergers) or guidelines issued pursuant to Part VI, refuse to accept or consider any submission under Part VI;
- f) in the case of a promoter or a director of a corporation, in addition to the actions that may be taken under paragraphs (a) to (e) above, the following actions may be taken by SC:
  - (i) impose a moratorium on, or prohibit any trading of or any dealing in, the corporation's securities or in any other securities which SC thinks fit by the promoter or director or any persons connected with the promoter or director; or
  - (ii) issue a public statement to the effect that, in SC's opinion, the retention of office by the director is prejudicial to the public interest.

Therefore, a director of a target company shall always be aware of his/her duties under the Rules once the company is in receipt of a takeover offer.

**Written by:**



**Moo Eng Thing**  
*Partner*  
mooengthing@azmilaw.com



**Lee Jee Yun**  
*Senior Associate*  
leejeeyun@azmilaw.com

**Corporate Communications**  
**Azmi & Associates**  
*16 April 2024*

The contents of this publication are for reference purposes only and do not constitute legal advice.