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Revised Code and Rules on Take-Overs, Mergers and Compulsory Acquisitions 2016

The new Malaysian Code on Take-Overs and Mergers 2016 (“2016 Code”), which came into effect on 15 August 2016, introduced significant changes to the take-overs and mergers regulatory framework in Malaysia. The 2016 Code supersedes the Malaysian Code on Take-Overs and Mergers 2010 (“2010 Code”). The 2016 Code was introduced together with a new set of rules, known as the Rules on Take-Overs, Mergers and Compulsory Acquisition (“2016 Rules”), which outline the required procedures and conduct relating to take-overs, mergers and compulsory acquisitions, replacing the Practice Notes previously issued under the 2010 Code.

In its media statement, Securities Commission Malaysia (“SC”) indicated that the changes are consistent with the SC’s efforts to move towards a proportionate regulatory regime, and that the enhancements seek to ensure that the takeover framework will facilitate commercial realities while providing protection to shareholders.

The 2016 Code sets out 12 general principles to be complied with by all persons engaged in any take-over or merger transaction, including the following:

- (a) all shareholders of an offeree of the same class must be treated equally in relation to a take-over offer and have equal opportunities to participate in benefits accruing from the take-over offer, including premium payable for control; and
- (b) the acquirer or offeror and the offeree’s board of directors must act in good faith in observing the general principles in the 2016 Code and any guidelines, directions, practice notes and rulings issued by the SC. All shareholders (particularly minority shareholders) must not be subject to oppression or disadvantage by the treatment and conduct of the acquirer or offeror or of the offeree’s board of directors.

Key changes introduced by the 2016 Code and 2016 Rules include the following:

- (a) Application of the 2016 Code and 2016 Rules

The 2016 Rules provide that the following entities are a “company” for the purposes of Division 2 Part VI (Take-overs, mergers and compulsory acquisitions) of the Capital Markets and Services Act 2007:

- (i) an unlisted public company with more than 50 shareholders and net assets of RM15 million or more;
- (ii) business trust listed in Malaysia; and
- (iii) a real estate investment trust (REIT) listed in Malaysia.

Accordingly, the 2016 Rules has expanded its scope to apply to business trusts listed in Malaysia but has narrowed its scope in respect of public companies — the 2010 Code applied to all types of public companies (whether or not listed on any stock exchange) in Malaysia.

- (b) Persons Acting in Concert (“PAC”)

The new 2016 Rules have introduced an additional limb to the existing three circumstances in determining

whether a person is acting in concert, i.e.:

- (i) shareholders coming together to co-operate as a group;
- (ii) shareholders voting together on a resolution;
- (iii) shareholders requisitioning or attempting to requisition for a board control-seeking proposal in a general meeting; and
- (iv) agreements between a company, or the directors of a company, and a shareholder which restrict the shareholder or the directors from either offering for, or accepting an offer for, the shares of the company or from increasing or reducing shareholdings.

Other changes brought by the implementation of the 2016 Rules include stricter disclosure requirements, for example, the disclosure of all substantial shareholders of the offeror and its PACs and the disclosure of the directors of the ultimate parent companies.

The new 2016 Code and 2016 Rules are available on the SC website:

<https://www.sc.com.my/legislation-guidelines/take-overs-code/>

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