

Amended Saudi Arabian Merger and Acquisition Regulations

November 2017



Amended Merger and Acquisition Regulations were issued by the Saudi Arabian Capital Market Authority (the “CMA”) pursuant to its Board Resolution No. 2-94-2017 dated 25/1/1439H, corresponding to 15/10/2017G, and came into force on 19 October 2017.

In this note we look at a number of noteworthy changes that have been made to the regulation of public M&A transactions in Saudi Arabia as a consequence of the amended rules, including amendments to the requirements for public offers, new provisions for privately negotiated transactions and clarification of the regulation of public merger transactions.

The new rules updated the CMA’s original M&A rules that were enacted in 2007 under the Board of the CMA’s Resolution No. 1-50-2007 dated 21/9/1428H, corresponding to 03/10/2007G. However, given the lack of public takeover activity that has taken place since 2007 the practical interpretation of the rules and approach likely to be taken by the CMA remains uncertain. This uncertainty, combined with the wide discretion afforded to the CMA when interpreting its rules, in common with other governmental authorities, means that we advise entering into discussions with the CMA at an early stage when contemplating effecting a takeover in the Kingdom of Saudi Arabia.

The regulations continue to apply to any (i) purchase or sale of voting shares in a Saudi listed company resulting in ownership or control of 10% or more of the shares, and (ii) offer to purchase voting shares in such a company, if the shares sought to be acquired would increase ownership to 10% or more.

Key amendments**Offers**

- > If a person obtains or controls 40% or more of any class of voting shares, it now may not have control over those shares during the following six-month period without approval from the CMA and in accordance with any conditions specified. Disclosure obligations on the acquirer and the target also apply in this situation
- > The offer timetable set out in the regulations now has specified time periods added (eg publication of the offer document within three days of obtaining the CMA’s approval and the first closing date no earlier than 28 days from publication of the offer document) for certain key events regarding the offer (ie the last day which the offeror may revise its offer or publish new information), which offers a greater degree of clarity than the provisions contained in the old regulations, which did not set out any specific time period, and only referred to a timetable being established with the CMA
- > The obligation to inform the CMA at the end of each trading day during the offer period of all shareholders holding 1% or more of any class of relevant shares has been removed
- > The offeror’s independent financial advisor now has an obligation to inform the CMA before any target shareholder or (if offeror shareholder consent is required) offeror shareholder is contacted to seek an irrevocable commitment to vote a certain way
- > Partial offers to all shareholders in the target are now expressly permitted
- > Securities exchange offers are now expressly permitted, contingent on receiving the approval of (i) the CMA, and (ii) the Extraordinary General Assembly of the shareholders of both parties by a 75% majority of the shares represented at the meeting
- > The threshold for material contracts that must be disclosed in the offer document has been reduced from 20% to 10% of annual revenues

Linklaters LLP

Ninth Floor
Currency House
Dubai International Financial Centre
Dubai, UAE

Linklaters LLP

Level 27 Al Sila Tower 1
Abu Dhabi Global Market Square
Abu Dhabi, UAE

Zamakhchary & Co.

4th Floor, Al-Mada Center
7758 King Fahad Road
Riyadh 12333-4187
Kingdom of Saudi Arabia

Privately negotiated transactions

Specific rules have been included for "Private Transactions". These are defined as a sale or purchase of voting shares in a Saudi listed company negotiated between the offeror and selling shareholder(s) without making an Offer (see above) or involving the other shareholders or directors of the target.

Private Transactions are therefore distinct from an Offer, which is a general tender offer made to all holders of shares carrying voting rights in the target for the purposes of purchasing shares or effecting a merger.

The rules for Private Transactions include:

- > a selling shareholder and the offeror **may** inform the target board or its advisers of the potential transaction at their discretion in order to request price sensitive confidential information on a confidential basis
- > following formal notification to the target board, an obligation on the board to act independently to serve the best long-term interests of the target and its shareholders arises
- > also following such notification, the target **may** share confidential and price sensitive information with a bona fide offeror for the purposes of due diligence and evaluation of the merits of the proposed transaction, provided strict confidentiality is maintained
- > an obligation on the offeror to promptly notify the target board and the CMA of the Private Transaction and make an announcement if there is a leak of confidential price sensitive information or the target is subject to rumours regarding the potential transaction. There is also an obligation to announce if certain share price movements occur
- > a requirement to announce the Private Transaction when a definitive sale and purchase agreement is signed
- > specific restrictions on share dealings in the target by a selling shareholder, the offeror or persons acting in concert with them or persons with access to confidential price sensitive information

- > the need for the offeror to make an offer for the remaining target shares if it (including its concert parties and beneficiaries) becomes the owner or controller of 40% or more of the target's voting shares
- > a selling shareholder and offeror may agree on any purchase price they deem appropriate for the acquired shares in applying a premium or discount to the market price of the shares. The purchase price must be disclosed in the announcement required when a definitive sale and purchase agreement is signed and
- > the CMA's private placement requirements are expressly disappplied.

Independent Advisers

It is now mandatory for the offeror and the target in an Offer or Merger to appoint an independent legal advisor authorised to practice law in Saudi Arabia. This is in addition to the existing requirement for an independent financial advisor. However, neither advisor is compulsory for a Private Transaction.

Mergers

- > Although the Companies Law (as approved by the Council of Ministers Decision No. 30 of 1437H issued on 27/01/1437H corresponding to 09/11/2015G) provides for the possibility of mergers between companies, it had previously been unclear whether the CMA would permit mergers involving listed companies
- > The amended regulations track the merger structures permitted in the Companies Law by providing that a listed company may merge by way of (i) absorption into a listed or unlisted company, or (ii) merging with another company into a newly formed legal entity
- > Absorption into a listed company: a security exchange offer must be made, where the shares of the offeror will remain listed on the stock exchange, and the target company's shares will be delisted
- > Absorption into an unlisted company: a security exchange offer must be made, where the target company's shares will be delisted
- > Newly formed legal entity: a security exchange offer must be made, where shares in the newly formed legal entity will be distributed amongst the new shareholders, and all shares will be delisted. Should the newly formed legal entity wish to list their shares, a new application must be submitted to the CMA
- > The rules applicable to Offers also apply to the security exchange offers involved in Merger transactions
- > A Merger transaction may be declared unconditional as to acceptances once the offeror has acquired or agreed to acquire shares carrying over 50% of the voting rights attributable to any class of shares. However, the implementation and closing of the transaction will still remain subject to the Companies Law requirement of approval at an Extraordinary General Assembly of the shareholders of both parties by a 75% majority of the shares represented at the meeting
- > Other continuing requirements of the Companies Law for mergers include that (i) the participating companies enter into a merger agreement specifying the method of valuing the assets and liabilities of the merged company and the number of shares that shareholders in the target are entitled to, and (ii) the transaction may not complete until 30 days from publication of the shareholder resolutions approving the merger, provided that creditors may formally object to the merger during that period, in which case completion is suspended until either the creditor withdraws his objection or the company provides adequate security.

If you need advice or you would like to discuss any of the issues raised, please contact one of the contacts listed below or your usual Linklaters or Zamakhchary & Co contact.

Scott Campbell
Managing Partner
Tel: +971 4 369 5811
scott.campbell@linklaters.com

Omar El Sayed
Managing Associate
Tel: +971 4 369 5845
omar.el_sayed@linklaters.com

Monaji F Zamakhchary
Partner and Managing Director
Tel: +966 55 801 1161
monaji.zamakhchary@zamakhchary.com

Martin Creek
Partner
Tel: +966 11 218 2941
martin.creek@zamakhchary.com

linklaters.com

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