SVCA Singapore Venture Capital & Private Equity Association
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Dear Daniel, Theng Siong, and the SIC,

Thank you for meeting us on 14 October 2019 and for your encouraging reception of the issue we discussed. We apologize that it has taken us some time to revert to you on this matter. We set out below our request for your consideration.

Background

To re-cap the point raised at the meeting, we would appreciate SIC looking into the application of the Singapore Code on Take-overs and Mergers ("**Code**") to unlisted public companies.

Currently, the Code applies to unlisted public companies with more than 50 shareholders and with net assets of S$5 million or more.

Under the Companies Act (the "**CA**"), any company which has more than 50 shareholders (excluding employees and former employees) is required to convert to a public company.

The rapid development of the technology ecosystem in Southeast Asia over the past few years has led to a meaningful list of companies having raised substantial amounts of capital through multiple funding rounds. In a number of these cases the companies have ended up with well more than 50 shareholders and net assets in excess of S$5 million.

Some of these companies (for example Grab) are already under Singapore holding company structures. Others (for example Gojek) are considering re-domiciling to Singapore, sometimes under pressure from their shareholders who would prefer to see these companies (i) subject to the strong governance Singapore offers, (ii) benefiting from the well-developed and transparent legal, regulatory and tax regimes, and (iii) potentially eligible for the fiscal benefits available in Singapore.

Issue

We understand the intention of having the Code apply to unlisted public companies with more than 50 shareholders and with net assets of S$5 million or more is principally to protect small minority shareholders who may not be sophisticated enough or may not have sufficient leverage to adequately protect their interests against the decisions of larger shareholders. This is understandable.

Most of the investors who are funding the new crop of growth companies in Southeast Asia are VC/PE funds, large global technology companies, sovereign wealth funds, family offices and other accredited investors.

We would offer that these are not the type of investors that the Code was implemented to protect. In addition, these investments are usually heavily negotiated with Shareholder Agreements being put in place, often containing very specific exit rights for the investors (drag along rights, tag along rights, obligations on the investee company to seek an IPO within a defined period of time, etc.). In many cases these investors are of strategic importance to the investee company and both the company and its other shareholders specifically desire for these shareholders to hold significant stakes.

An exit pursuant to requirements of the Code is not something that these sophisticated and strategically important shareholders contemplate (or, we would suggest, desire) nor is such an exit catered for in the Shareholders Agreement. In fact, we believe that many of these shareholders would be surprised to find that through continued funding of an investee company (often through the exercise of pro-rata/pre-emptive rights or other rights that are

specifically set forth in the Shareholders Agreement) they could end up triggering a mandatory offer (if their stake comes to exceed 30%). Nor would the other shareholders of these companies be expecting such an outcome.

We are of the view that compliance with the Code in such circumstances therefore may not serve the objectives of the company or its shareholders.

We are aware of transactions (including the Walmart investment in Flipkart) where, due to the lack of clarity on whether case-specific exemption from the application of the Code could have been granted, parties have elected to engage in costly and perhaps risky restructurings (for example, engaging in pre-transaction share buybacks to reduce the number of shareholders). Such restructures are typically not optimal and may result in companies and key shareholders reconsidering Singapore as a domicile for their holding companies. In another recent example, a very large MNC which is in the early stages of considering a venture with a large fund is struggling with whether to incorporate in Singapore or in another jurisdiction given the issues it might later face under the Code.

Consideration and guidance sought

Accordingly, we would request Council to consider that for purposes of determining if an unlisted public company has more than 50 shareholders (and is thus subject to the Code), (i) accredited and institutional investors (each as defined in the Securities & Futures Act), and (ii) employees/directors (and former employees/directors) shall be disregarded.

We respectfully request Council to consider issuing a practice note in relation to the above as seeking case-by-case waivers from the Council is a sub-optimal route for these companies and their strategic shareholders to pursue, as it does not provide certainty of outcome at an early stage of the investment process.

If Council feels that the above is not an appropriate way of addressing the issue, we would welcome the opportunity to discuss other alternatives.

We also re-attach for ease of reference the comparison table provided to you earlier on the approach in different jurisdictions.

Comparison of the positions in selected jurisdictions on the restrictions on number of members that a private company may have and application of the Code on Takeovers and Mergers

Jurisdiction	Restrictions on number of members of a private company	What a private company must do if it crosses the threshold	Does the relevant Code on Takeovers and Mergers apply?
Singapore	Yes	Under the Companies Act (Cap. 50): • a private company must, by its constitution, limit its members to no more than 50 (excluding any current employees of the company or of its subsidiaries and any person who while previously in the employment of the company or of its subsidiary was and thereafter has continued	The Singapore Code on Takeovers and Mergers (the "**Singapore Takeovers Code**") applies to unlisted public companies with more than 50 shareholders and net tangible assets of SG$5,000,000 or more. **Waiver:** The Securities Industry Council (the "**SIC**") has the discretion to waive the application of the Singapore Takeovers Code. In considering

		to be a member of the company) (section 18(1)(b)). • If the number of members exceeds 50, the Registrar may serve a notice on the company which will determine that the company will cease to become a private company (section 32(2)(a)).	applications for waiver, the SIC will take into account, amongst others, the following factors: • the number of Singapore shareholders and unitholders and the extent of trading in Singapore; and • the existence of protection available to Singapore shareholders or unitholders provided under any statute or code regulating takeovers and mergers outside Singapore.
Hong Kong	Yes	Under the Companies Ordinance (Cap. 622): • A company must, among other requirements, limit the number of its members to no more than 50 (excluding any current employees and any person who was a member while being an employee and who continues to be a member after ceasing to be such employee) in its articles in order to qualify as a private company (section 11(1)(a)(ii)). • If a company alters its articles so that the articles no longer comply with section 11(1)(a)(ii), the company will cease to be a private company and the company required to, within 15 days after the date on which the alteration takes effect, notify the Registrar and re-register as a public company (sections 88(5) and 94).	The Code on Takeovers and Mergers and Share Repurchases (the "**Hong Kong Takeovers Code**") applies to "public companies" in Hong Kong. The test for determining whether a company is a "public company" for the purposes of the Hong Kong Takeovers Code is different from that under the Companies Ordinance (Cap. 622). In determining whether a company is a "public company in Hong Kong", the Executive will consider all the circumstances and will apply an economic or commercial test, taking into account: • primarily, the number of Hong Kong shareholders and the extent of share trading in Hong Kong; and • other factors including: o the location of its head office and place of central management; o the location of its business and assets, including such factors as registration under companies legislation and tax status; and o the existence or absence of protection available to Hong Kong shareholders given by any statute or code regulating takeovers, mergers and share repurchases outside Hong Kong

			(paragraph 4 to the Introduction to the HK Takeovers Code).
United Kingdom	No	N/A	The Code on Takeovers and Mergers (the "**UK Takeovers Code**"): • generally does not apply to private companies; and • applies to an unlisted public company if it has its registered office in the United Kingdom, the Channel Islands or the Isle of Man and which is considered by the UK Takeover Panel to have its place of central management and control in the UK (paragraph 3(a)(ii) to the Introduction to the UK Takeovers Code). ○ This management control test principally concerns whether the majority of directors are ordinarily resident in the United Kingdom, the Channel Islands or the Isle of Man. ○ **Waiver:** A waiver will generally only be granted in respect of a specific transaction to companies with approximately 10 members or fewer, and only if all members consent, after receipt of full information about a potential transaction, to the UK Takeovers Code being disapplied and the UK Takeover Panel consent to the disapplication.
Delaware, U.S.	No restrictions under the Delaware General Corporation Law, but there are restrictions under the Securities Exchange Act of 1934 (the	Under the Securities Exchange Act of 1934, a private company is required to re-register as a "reporting company" if, at the end of the company's fiscal year, it has: • total assets exceeding more than US$10 million; or • either 2,000 or more shareholders, or 500 or more shareholders that are not accredited investors.	The relevant rules and regulations contained in and/or promulgated under the Delaware General Corporation Law and the Securities Exchange Act of 1934 relating to acquisition of a U.S. public company / tender offers are generally not applicable unless the reporting company is a public company (i.e., has securities publicly traded on a U.S. securities exchange, the issuance of which is governed by the requirements of

	federal securities law)	"Reporting companies" are required to file certain periodic reports and information as if they have registered securities for trading.	the U.S. Securities Act of 1933, as amended).
Cayman Islands	No	No distinction between "private" and "public" companies in this regard.	No. The Cayman Takeovers Code only applies to companies which are listed on the Cayman Island Stock Exchange. The majority of listings on the Cayman Islands Stock Exchange are mutual funds and specialist debt securities.

We look forward to discussing the above in further detail.

Please do not hesitate to contact Dominic Tan, Research and Communications Executive at research@svca.org.sg