Global Public M&A Guide - Philippines

Before a Public Takeover Bid

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# 3. Before a Public Takeover Bid

[Last updated: 1 January 2025, unless otherwise noted]

**3.1 Shareholding rights and powers**

The table below provides an overview of the different rights and powers that are attached to different levels of shareholding within a Philippine-listed corporation:

|  |  |
| --- | --- |
| **Shareholding** | **Rights** |
| One share | * The right to subscribe to all issues or dispositions of shares of any class, in proportion to respective shareholdings (pre-emptive right).
* The right to transfer or dispose of shareholdings.
* The right to receive dividends.
* The right to attend and vote at general shareholders' meetings.
* The right to obtain a copy of the documentation submitted to general shareholders' meetings.
* The right to inspect corporate records and financial statements.
* The right to submit questions to the directors and statutory auditors at general shareholders' meetings (either orally at the meeting, or in writing prior to the meeting).
* The right to elect directors in proportion to shareholdings.
* The right to dissent and demand payment for fair value of shares in cases of (i) amendment of articles of incorporation which has the effect of changing or restricting the rights of any stockholder or class of shares, or of authorizing preferences in any respect to those of outstanding shares of any class, or extending or shortening the term of corporate existence, or (ii) lease, exchange, transfer, mortgage, pledge, or other disposition of all or substantially all of the corporate property and assets as provided in the Corporation Code; and (iii) merger and consolidation (appraisal right).
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| More than 50% (at a general shareholders' meeting) | The ability at a general shareholders' meeting:* to amend articles of incorporation
* to elect directors in proportion to shareholdings
* to invest in another business or corporation
* to increase or decrease capital stock
* to incur or increase bonded indebtedness
* to sell, dispose or encumber all or substantially all of the assets of a corporation
* to declare stock dividends
* to enter into management contracts
* to adopt, amend, or repeal by-laws;
* to fix consideration of no par value shares
* to approve any merger or consolidation
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**3.2 Restrictions and careful planning**

Philippine law contains a number of rules that already apply before a public takeover bid is announced. These rules impose restrictions and disclosures in relation to prior stake building by a bidder, announcements of a potential takeover bid by a bidder or a target company, and prior due diligence by a candidate bidder. The main restrictions and hurdles have been summarized below. Some careful planning is therefore necessary if a candidate bidder or target company intends to start up a process that is to lead towards a public takeover bid.

**3.3 Insider dealing and market abuse**

Before, during and after a takeover bid, the normal rules regarding insider dealing and market abuse remain applicable. For further information on the rules on insider dealing and market abuse see 6.3 below. The rules include amongst other things that manipulation of the target's stock price, e.g., by creating misleading rumors, is prohibited.

**3.4 Disclosure of shareholdings**

The rules regarding the disclosure of shareholdings and transparency apply before, during and after a public takeover bid. Note, further, that public companies are required to submit their public ownership reports on a quarterly basis, which provide details of the shareholdings in the company, and public ownership of the company for the covered period.

The SRC provides for thresholds necessitating a mandatory tender offer of securities intended to be acquired. Specifically, Rule 19 (SRC Rule 19, and with its subsections, hereafter collectively the "**Tender Offer Rules**") of the SRC IRR governs the procedures and other regulations applicable to the conduct of tender offers in the Philippines.

Under the Tender Offer Rules, any person or group of persons acting in concert, who intends to acquire:

at least 15% of equity securities in a public company in one or more transactions within a period of 12 months shall be required to file a declaration to that effect with the SEC;

at least 35% of the outstanding voting shares, or such outstanding voting shares that are sufficient to gain control of the board of directors of a public company, in one or more transactions within a period of 12 months shall be required to disclose such intention and contemporaneously make a tender offer for the percentage sought to all holders of such securities within the said period;

at least 35% of the outstanding voting shares, or such outstanding voting shares that are sufficient to gain control of the board of directors of a public company, directly from one or more stockholders shall be required to make a tender offer for all outstanding voting shares. Note that the sale of shares pursuant to a private transaction or a block sale shall not be completed prior to the closing and completion of the required tender offer; or

such amount of the outstanding equity securities of a public company that will result in the acquiring party owning more than 50% of the total outstanding equity securities thereof shall be required to make a tender offer for all outstanding equity securities to all remaining stockholders of the public company at a price supported by a fairness opinion provided by an independent financial advisor or equivalent third party. Note that the acquirer of securities in the public company making the tender offer is required to accept all securities tendered.

If a person or group of persons, acting in concert, intends to acquire 35% of the outstanding voting shares or such outstanding voting shares that are sufficient to gain control of the board in a public company through the PSE trading system shall not be required to make a tender offer (even if such person or group of persons acting in concert acquire the remainder through a block sale), if after the acquisition through the PSE trading system, they fail to acquire their target or 35% of such outstanding voting shares that is sufficient to gain control of the board.

If equity securities of a public company are purchased at threshold amounts provided for under the Tender Offer Rules without complying therewith, the SEC may, upon complaint, nullify such purchase and order the conduct of a tender offer, without prejudice to any other applicable sanctions under the SRC.

Furthermore, disclosure requirements applicable to acquisition / disposal of shares of stock of a public company are governed by Rule 18 and Rule 23 of the SRC IRR, as follows:

a. Reports filed by 5% beneficial owners under Rule 18 of the SRC

Any person who directly or indirectly acquires the beneficial ownership of 5% or more of any class of equity securities of a public company is required to disclose such fact to the public company, the PSE and the SEC. Such disclosure is made by way of SEC Form 18-A, and is made within five days after the date of acquisition of beneficial ownership by such person.

Generally, a person is a beneficial owner of or has beneficial ownership over an equity security, e.g., shares of stock, if such person, directly or indirectly, in respect of such security, has:

through any contract, arrangement, understanding, relationship or otherwise, the power to vote, or to direct the voting of, such security; and/or

investment returns or power, which includes the power to dispose, or to direct the disposition, of such security.

In addition, the SRC IRR provides that a person shall be deemed to have an indirect beneficial ownership interest in any security which is held by a corporation of which such person is a controlling shareholder or if such security is subject to any contract, arrangement or understanding which gives a person voting power or investment power with respect to such security. Control, for this purpose, is the power to govern the financial and operating policies of an enterprise so as to obtain benefits from its activities. Likewise, a person shall be deemed to be the beneficial owner of a security if that person has the right to acquire beneficial ownership, within 30 days, including but not limited to, any right to acquire, through the exercise of any option, warrant or right, through the conversion of any security, pursuant to the power to revoke a trust, discretionary account or similar arrangement, or pursuant to automatic termination of a trust, discretionary account or similar arrangement.

b. Reports filed by 10% beneficial owners and the directors and officers of an issuer

A (a) director, (b) officer, or (c) any person who directly or indirectly is the beneficial owner of 10% or more of any class of any security of a public company is required to disclose and file a statement with the PSE and the SEC. The disclosure is made by way of SEC Form 23-A and is made within 10 calendar days after becoming a director, officer or a beneficial owner of the public company.

If there has been any change in such ownership (including if such ownership falls below 10%) or if such person ceases to be an officer or director of the public company), a director, officer or beneficial owner shall disclose and file a statement with the PSE and the SEC within 10 days after the close of the month in which such change occurred. The disclosure is made by way of SEC From 23-B, indicating: (a) the amount of securities beneficially owned at the close of the calendar month; and/or (b) if the person ceases to be an officer or director of the public company.

c. Additional disclosures by beneficial owners, directors and officers of an issuer

Persons required to disclose their beneficial ownership in securities of an issuer are likewise required to disclose the information set out below (i) if the report is being filed due to the acquisition of 5% or more beneficial ownership of securities of a public company, and the reporting person previously owned 5% or more but not less than 10% of the outstanding securities of such public company, and (ii) if the report being filed is due to a change in the beneficial ownership of securities held by a 10% or more beneficial owner, only if such change in beneficial ownership is (1) equivalent to 50% of the previous shareholding of the reporting person, or (2) equivalent to 5% of the outstanding capital stock of the public company:

background information on the 5% or 10% beneficial owner;

purpose or purposes of the acquisition of securities of the public company;

information on the beneficial owner's interest in the securities of the public company, including, among others: (i) if the beneficial owner, together with other persons, comprise a "group", information on the beneficial ownership of securities of such group members, (ii) voting or selling arrangements between the beneficial owner and its co-members, if comprising a group, and (iii) transactions relating to the class of securities reported on that were effected during the past 60 days by the beneficial owner and its co-members, if comprising a group; and

information on (and copies of) contracts, arrangements, understandings or relationships with respect to securities of the public company between (i) the beneficial owner and its co-members, if comprising a group, or (ii) the beneficial owner and any person, involving transfer or voting of any of the securities of the public company, finder's fees, joint ventures, loan or option arrangements, puts or calls, guarantees of profits, division of profits or loss, or the giving or withholding of proxies.

We should note that the SEC, in its capacity as the primary government agency responsible for regulating transactions in Philippine securities and the implementation of the SRC and the SRC-IRR, may require from the reporting persons information other than the foregoing that the SEC may deem relevant to the acquisition so reported. The SEC may likewise require, in the public interest, the disclosure of the foregoing additional information (and submission of all contracts, agreements, instruments or other documents relating thereto) notwithstanding the fact that the conditions for disclosure thereof (as indicated in the appropriate SEC Forms) do not necessarily apply.

**3.5 Disclosures by the target company**

The target company must continue to comply with the general rules regarding disclosure and transparency. These rules include that a company must immediately announce all inside information. For further information on inside information, see also 6.1 below. The facts surrounding the preparation of a public takeover bid may constitute inside information. If so, the target company must announce this. However, the board of the target company can delay the announcement if it believes that a disclosure would not be in the legitimate interest of the company. This could for instance be the case if the target's board believes that an early disclosure would prejudice the negotiations regarding a bid. A delay of the announcement, however, is only permitted provided that the non-disclosure does not entail the risk that the public is misled, and that the company can keep the relevant information confidential.

**3.6 Announcements of a public takeover bid**

Prior to the public announcement of the takeover bid by the offeror and the target company (see section 6.2), no one is permitted to announce the launching of a public takeover bid. Announcement of a takeover prior to the actual offer launch or announcement of intent to make an offer constitutes material non-public information, which is prohibited under the SRC IRR.

A bidder that intends to announce a public takeover bid is mandated to make an announcement of its intention (to make a tender offer) in a national newspaper of general circulation within five business days from either (i) the approval by the board of directors of the selling shareholder(s) relative to the purchase of shares that may result in a mandatory tender offer or (ii) 30 business days prior to the commencement of the tender offer.

The offeror shall likewise publish the terms and conditions of the tender offer in two national newspapers of general circulation in the Philippines on the date of the commencement of the tender offer and for two consecutive days after compliance with the dissemination requirements under the Tender Offer Rules, including the distribution of notices to the holders of the class of securities sought to be acquired.

Copies of the foregoing notices of intent to make an offer are required to be submitted to the SEC after its publication.

In addition to the foregoing, the revised rules on backdoor listing of the PSE requires the applicant company to comply with the following:

**Comprehensive Corporate Disclosure** - an applicant company is obligated to submit a Comprehensive Corporate disclosure within five trading days from receipt of a request from the PSE. The disclosure must include information such as the purpose of the transaction, the complete details of the transaction, and information on the new shareholders, among others.

**Trading suspension** - a trading suspension shall be imposed immediately after evaluation of the disclosure submitted and determination on applicable of the rule on backdoor listing. The suspension shall be lifted one trading day after dissemination by the PSE of the Comprehensive Corporate Disclosure.

**Stockholders' approval** - the issuer must likewise submit a sworn Corporate Secretary's Certificate confirming that its stockholders' approved the transactions resulting in backdoor listing.

**Payment of listing and processing fees** - the issuer must likewise pay a listing fee equivalent to a tenth of 1% of the market capitalization of the new shares issued covered by the transaction, as well as a processing fee of PHP 250,000.

**Minimum public ownership**. Upon and after the backdoor listing, the listed company shall have a minimum public ownership of twenty percent (20%). Compliance with this requirement shall be reckoned from closing or completion of the transaction giving rise to the backdoor listing.

**Mandatory follow-on offering**. A backdoor listed company shall conduct a public offering of at least ten percent (10%) of its issued and outstanding shares within one year from closing or completion of the transaction giving rise to the backdoor listing. A stock rights offering (“**SRO**”) shall not be deemed a public offering for this purpose.

**Lock-up requirement**. Shares of the backdoor listed company that are acquired pursuant to the transaction giving rise to the backdoor listing shall not be sold or offered for sale, assigned or in any manner disposed of from closing or completion of the transaction giving rise to the backdoor listing and until six months after the conduct of the Mandatory Follow-On Offering. Further, shares of the backdoor listed company that are held by stockholders owning at least ten percent (10%) of the total issued and outstanding shares shall not be sold or offered for sale, assigned or in any manner disposed of for a period of one year from closing or completion of the transaction giving rise to backdoor listing.

**3.7 Early disclosures – Put-up or shut-up**

**Early disclosure demanded by the SEC** – Under the SRC, any person making a tender offer shall make an announcement of its intent in a newspaper of general circulation within five business days from either the company's board approval authorizing negotiations relative to the purchase of shares that may result in a mandatory tender offer, or 30 days prior to the commencement of the offer. The announcement of intent (pre-launch notice) is required to be disclosed to the SEC on the date of its publication. The pre-launch notice is appended to, and shall form part of, the Initial Tender Offer Report (SEC Form 19-1).

**Put-up or shut-up** – The SEC mandates the submission of an intention to launch a tender offer on the date of the announcement of the intention to purchase shares that will result in a tender offer.

**3.8 Due diligence**

The Philippine public takeover bid rules do not contain specific rules regarding the question of whether a prior due diligence can be organized, nor how such due diligence is to be organized. Be that as it may, the concept of a prior due diligence or pre-acquisition review by a bidder is generally accepted (also by the SEC), and appropriate mechanisms have been developed in practice to organize a due diligence or pre-acquisition review and to cope with potential market abuse and early disclosure concerns (such as the use of strict confidentiality procedures and data rooms).

**3.9 Acting in concert**

For the purpose of the Philippine takeover bid rules, the definition of "persons acting in concert" under the Tender Offer Rules is not defined. While the phrase "persons acting in concert" is not expressly defined under the SRC IRR or the Tender Offer Rules, we believe that this may be taken to mean, in its ordinary usage, persons or entities acting together, with common intent, interest and/or objective in respect of the activity sought to be regulated – in this context, the acquisition of outstanding securities or voting shares of the target public company.

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