

THE TAKEOVER PANEL

RELEASE OF PANEL EXECUTIVE PRACTICE STATEMENTS NO. 10 AND 11

The Panel Executive has today released Practice Statements No.10 (Cash Offers Financed by the Issue of Offeror Securities) and 11 (Working Capital Requirements in Cash and Securities Exchange Offers), copies of which are attached to this Statement.

25 April 2005

THE TAKEOVER PANEL

PRACTICE STATEMENT NO. 10

CASH OFFERS FINANCED BY THE ISSUE OF OFFEROR SECURITIES

Under General Principle 3 and Rule 2.5(a) of the Code, an offeror should announce an offer only when it has every reason to believe that it can and will continue to be able to implement the offer. Under Rule 24.7, which derives from General Principle 3, when an offer is made in cash or includes an element of cash, the offer document must include confirmation by an appropriate third party (usually the offeror's financial adviser) that resources are available to the offeror sufficient to satisfy full acceptance of the offer (a "cash confirmation").

From time to time, the Executive is consulted, in the context of these provisions, about:

- the conditions to which a cash offer, or an offer which includes an element of cash, may be subject when it is to be financed, or partially financed, by the issue of offeror securities; and
- the form of the cash confirmation required in such circumstances, and whether the cash confirmation can be expressed as being conditional on the success of the issue of the offeror's securities.

Conditions

Where an offeror proposes to finance a cash offer (or a cash alternative to a securities exchange offer) by an issue of new securities, the Executive will be concerned to ensure that the only conditions to the offer relating to the issue of such securities are those which are necessary, as a matter of law or regulatory requirement, in order validly to issue such securities. Conditions which the Executive will generally consider to be necessary for such purposes include:

- the passing of any resolution(s) necessary to create or allot the new securities and/or to allot the new securities on a non-pre-emptive basis (if relevant); and
- where the new securities are to be admitted to the Official List or to trading on AIM, an appropriate listing or admission to trading condition.

For offerors incorporated overseas, or whose securities are traded on a foreign exchange, equivalent conditions will normally be permissible, depending on the applicable legal and regulatory requirements.

It will not be appropriate for the offer to be conditional upon any placing, underwriting or underpinning agreement in relation to the issue of the new securities becoming unconditional and/or not being terminated. A condition of this nature is not necessary as a matter of law or regulatory requirement in order to issue the new securities or, therefore, to implement the offer.

If an offer, which was to be financed by the issue of offeror securities, lapses or is withdrawn owing to a failure to fulfil a condition relating to the issue, the Executive will wish to be satisfied that General Principle 3 and Rule 2.5(a) were complied with (so that, on announcement, the offeror and its financial adviser had had every reason to believe that the offer could and would be implemented) and also that Rule 13.4(b) had been complied with (i.e. that the offeror had used all reasonable efforts to ensure the satisfaction of the condition).

Cash confirmation

The second paragraph of Rule 24.7 provides as follows:

“In exceptional circumstances, with the consent of the Panel, a conditional form of [cash] confirmation may be allowed.”

The Executive does not regard the financing of an offer in whole or in part by the issue of offeror securities as “exceptional circumstances” for the purposes of Rule 24.7. Accordingly, the Executive will not allow the cash confirmation given in these circumstances to be conditional upon the success of the issue of the new offeror securities.

In order to satisfy General Principle 3, Rule 2.5(a) and Rule 24.7, it is therefore the responsibility of the party giving the cash confirmation and the offeror (and, if it is not the cash confirmer, the offeror’s financial adviser) to take all reasonable steps, before announcement of the offer, to satisfy themselves that the issue of the new securities will be successful, and that the offeror will have the necessary cash available to finance full acceptance of the offer.

The Executive should be consulted at the earliest opportunity in cases of doubt on either issue.

Practice Statements are issued by the Executive to provide informal guidance to companies involved in takeovers and practitioners as to how the Executive normally interprets and applies relevant provisions of the Code and the SARs in certain circumstances. Practice Statements do not form part of the Code or the SARs. Accordingly, they are not binding on the Executive or the Panel and are not a substitute for consulting the Executive to establish how the Code and the SARs apply in a particular case. All Practice Statements issued by the Executive are available on the Panel’s website at www.thetakeoverpanel.org.uk.

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PRACTICE STATEMENT NO. 11

WORKING CAPITAL REQUIREMENTS IN CASH AND SECURITIES

EXCHANGE OFFERS

From time to time, the Executive is consulted by potential offerors about the acceptability of offer conditions relating to the working capital requirements of the enlarged offeror group after the completion of the offer. “Working capital” in this context means any third party debt of the enlarged offeror group that is required for reasons other than satisfying the cash consideration due under the offer.

The Executive’s practice in this area is as follows:

- an offeror will not, other than in exceptional circumstances (such as those described in the Note on Rule 13.3 of the Code in relation to financing pre-conditions), be permitted to include a specific condition to its offer relating to the offeree company’s, or the enlarged offeror group’s, working capital position or the availability of working capital facilities upon completion of the offer;
- if working capital concerns arise after announcement of the offer, the offeror will be able to allow its offer to lapse only if it is able to invoke one of the conditions to the offer in accordance with the usual application of Rule 13.4(a); and
- in the event that an offer lapses as a result of working capital concerns, the Executive will wish to be satisfied that the offeror and its financial adviser had, at the time of announcement of the offer, complied with General Principle 3 and Rule 2.5(a) and, following the announcement of the offer, complied with the obligation under Rule 13.4(b) to use all reasonable efforts to ensure the satisfaction of any conditions to which the offer was subject.

An offeror and its financial adviser need not, however, ensure that any working capital financing of the enlarged offeror group is obtained on a “certain funds” basis as contemplated by Rule 24.7.

The Executive should be consulted in cases of doubt.

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