

THE TAKEOVER PANEL

CODE COMMITTEE

Instrument 2009/5

Miscellaneous Code amendments

Pursuant to sections 942, 943 and 944 of the Companies Act 2006, and in exercise of the functions conferred on it by the Panel in paragraph 2 of its Terms of Reference, the Code Committee hereby makes this instrument containing rules.

The Takeover Code is amended, with effect from 25 January 2010, in accordance with the Appendix to this instrument.

In the Appendix, underlining indicates new text and striking through indicates deleted text.

Made by Lindsay Tomlinson, Chairman, acting on behalf of the Code Committee

16 December 2009

APPENDIX

Introduction

10 ENFORCING THE CODE

...

(c) Compensation rulings

Where a person has breached the requirements of any of Rules 6, 9, 11, 14, 15, 16.1 or 35.3 of the Code, the Panel may make a ruling requiring the person concerned to pay, within such period as is specified, to the holders, or former holders, of securities of the offeree company such amount as it thinks just and reasonable so as to ensure that such holders receive what they would have been entitled to receive if the relevant Rule had been complied with. ...

Rule 2.7

2.7 CONSEQUENCES OF A “FIRM ANNOUNCEMENT”

...

NOTE ON RULE 2.7

When there is no need to make an offer

With the consent of the Panel, ~~An announced offeror need not make an offer if a competitor has already announced a firm intention to make~~ made a higher offer ~~or, with the consent of the Panel, in the circumstances set out in Note 5 on Rule 21.1.~~

Rule 9.1

9.1 WHEN A MANDATORY OFFER IS REQUIRED AND WHO IS PRIMARILY RESPONSIBLE FOR MAKING IT

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NOTES ON RULE 9.1

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6. *Vendor of part only of an interest in shares*

Shareholders sometimes wish to sell part only of their shareholdings or a purchaser may be prepared to purchase part only of a shareholding. This arises particularly where a purchaser wishes to acquire shares carrying just under 30% of the voting rights in a company, thereby avoiding an obligation

under this Rule to make a general offer. The Panel will be concerned to see whether in such circumstances the vendor is acting in concert with the purchaser ~~in such a way as and/or has effectively to allowed~~ the purchaser to ~~exercise~~ acquire a significant degree of control over the shares retained shares by the vendor such that the purchaser should be treated as having acquired an interest in them by virtue of paragraph (2) of the definition of interests in securities, in which case a general offer would normally be required. ...

...

8. *The chain principle*

... The Panel will not normally require an offer to be made under this Rule in these circumstances unless either:-

(a) the interest in shares which the first company has in the second company is significant in relation to the first company. In assessing this, the Panel will take into account a number of factors including, as appropriate, the assets, ~~and profits~~ and market values of the respective companies. Relative values of 50% or more will normally be regarded as significant; or

(b) ~~one of the main purposes~~ securing control of the second company might reasonably be considered to be a significant purpose of acquiring control of the first company ~~was to secure control of the second company.~~

Rule 11.2

11.2 WHEN A SECURITIES OFFER IS REQUIRED

...

NOTES ON RULE 11.2

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4. *Management retaining an interest*

~~In a management buyout or similar transaction, if the only offeree shareholders who receive offeror securities are members of the management of the offeree company, the Panel will not, so long as the requirements of Note 4 on Rule 16 are complied with, require all offeree shareholders to be offered offeror securities pursuant to Rule 11.2, even though such members of the management of the offeree propose to sell, in exchange for offeror securities, more than 10% of the offeree's shares.~~

If, however, offeror securities are made available to any non-management shareholders (regardless of the size of their holding of offeree shares), the

~~Panel will normally require such securities to be made available to all shareholders on the same terms.~~

See Note 2 on Rule 16.2.

Rule 12.2

12.2 COMPETITION REFERENCE PERIODS

...

(b) If the offer period ends in accordance with Rule 12.2(a):-

...

(iii) where the competition reference period ends when either the Competition Commission or the Secretary of State has issued a prohibition decision or when the European Commission has issued a decision under Article 8(3) of Council Regulation 139/2004/EC, no new offer period will begin. The offeror or potential offeror whose offer is prohibited, together with any person acting in concert with it, will, except with the consent of the Panel, be subject to the restrictions in Rule 2.8 for six months from the date on which the relevant decision is issued.

NOTES ON RULE 12.2

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4. Offerors and potential offerors who decide not to pursue clearance or a decision from the relevant authority

Following the commencement of a competition reference period, if an offeror or potential offeror decides not to pursue clearance or a decision from the relevant authority, it must announce its decision and that it does not intend to make an offer for the offeree company. Such an announcement will be treated as a statement to which Rule 2.8 applies; the competition reference period will end on the date of the announcement and no new offer period will begin.

Rule 16

RULE 16. SPECIAL DEALS AND MANAGEMENT INCENTIVISATION

16.1 SPECIAL DEALS WITH FAVOURABLE CONDITIONS

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NOTES ON RULE 16.1

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2. *Offeree company shareholders' approval of certain transactions — eg disposal of offeree company assets*

... At this meeting the vote must be a separate vote of independent shareholders and must be taken on a poll. Where a sale of assets takes place after the offer has become unconditional, the Panel will be concerned to see that there was no element of pre-arrangement in the transaction.

...

4. ~~Management retaining an interest and other management incentivisation~~

~~Sometimes an offeror may wish to arrange for the management of the offeree company to remain financially involved in the business. The methods by which this may be achieved vary but the principle which the Panel is concerned to safeguard is that the risks as well as the rewards associated with an equity shareholding should apply to the management's retained interest. For example, the Panel would not normally find acceptable an option arrangement which guaranteed the original offer price as a minimum. The Panel will require, as a condition of its consent, that the independent adviser to the offeree company publicly states that in its opinion the arrangements with the management of the offeree company are fair and reasonable. In addition, the Panel will also require such arrangements to be approved at a general meeting of the offeree company's shareholders. At this meeting the vote must be a vote of independent shareholders and must be taken on a poll. Holdings of convertible securities, options and other subscription rights may also be relevant in determining whether a general meeting is required, particularly where such rights are exercisable during an offer.~~

~~Where the offeror wishes to arrange other incentivisation for management to ensure their continued involvement in the business, the Panel will require, as a condition of its consent, that the independent adviser to the offeree company publicly states that in its opinion the arrangements are fair and reasonable.~~

~~The Panel must be consulted in all circumstances where this Note may be relevant.~~

16.2 MANAGEMENT INCENTIVISATION

- (a) Except with the consent of the Panel, where an offeror has:**

- (i) entered into; or**

- (ii) reached an advanced stage of discussions on proposals to enter into**

any form of incentivisation arrangements with members of the offeree company's management who are interested in shares in the offeree company, relevant details of the arrangements or proposals must be disclosed and the independent adviser to the offeree company must state publicly that in its opinion the arrangements are fair and reasonable. If it is intended to put incentivisation arrangements in place following completion of the offer, but either no discussions or only limited discussions have taken place, this fact must be stated publicly and relevant details of the discussions disclosed. Where no incentivisation arrangements are proposed, this must be stated publicly.

(b) Where the value of the arrangements entered into or proposed to be entered into is significant and/or the nature of the arrangements is unusual either in the context of the relevant industry or good practice, the Panel must be consulted and its consent to the arrangements obtained. The Panel may also require, as a condition of its consent, that the arrangements be approved at a general meeting of the offeree company's shareholders.

(c) Where the members of the management are shareholders in the offeree company and, as a result of the incentivisation arrangements, they will become shareholders in the offeror on a basis that is not being made available to all other offeree company shareholders, such arrangements must be approved at a general meeting of the offeree company's shareholders.

(d) Any approval as required by paragraph (b) or (c) above must be by a separate vote of independent shareholders, taken on a poll.

NOTES ON RULE 16.2

1. Rule 15

Where members of the management of the offeree company are to receive offeror securities pursuant to an appropriate offer or proposal made in accordance with Rule 15, Rule 16.2 (a) and (b) will apply, but shareholder approval will not normally be required under this Rule in respect of such offer or proposal.

2. Management retaining an interest

If the only shareholders in the offeree company who receive offeror securities are members of the management of the offeree company, the Panel will not, so long as the requirements of this Rule are complied with, require all offeree shareholders to be offered offeror securities pursuant to Rule 11.2, even though such members of the management of the offeree company propose to sell, in exchange for offeror securities, more than 10% of the offeree company's shares.

3. Where incentivisation arrangements are put in place following the offer being made or the proposed arrangements are amended

Where, following the offer document being published, there is a change in the terms of any agreed or proposed management incentivisation arrangements or the offeror enters into, or reaches an advanced stage of discussion on proposals to enter into any form of management incentivisation arrangements, the Panel must be consulted. The Panel may require details of the changes to the arrangements or status of the discussions to be disclosed, the independent adviser to state publicly that in its opinion the arrangements are fair and reasonable and, if appropriate, a separate vote of independent shareholders to be held to approve the arrangements.

4. Incentivisation of members of management who are not interested in shares in the offeree company

Where members of management who are not interested in shares in the offeree company are to be offered significant and/or unusual incentivisation arrangements by the offeror, the Panel must be consulted.

Rule 19.10

19.10 DISTRIBUTION OF DOCUMENTS, ANNOUNCEMENTS AND INFORMATION TO THE PANEL AND OTHER PARTIES TO AN OFFER

(b) ...

Documents must also be sent in hard copy form to the Panel and the advisers to all other parties to the offer at the time of publication. Such documents, announcements or information must not be released to the media under an embargo (see also ~~the~~ Note 1 on Rule 26).

Rule 21.1

21.1 WHEN SHAREHOLDERS' CONSENT IS REQUIRED

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NOTES ON RULE 21.1

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~~5. When there is no need to make an offer~~

~~The Panel may allow an offeror not to make an offer if, at any time during the offer period prior to the publication of the offer document:-~~

~~(a) — the offeree company passes a resolution in general meeting as envisaged by this Rule; or~~

~~(b) — the Panel has given consent for the offeree company to proceed with an action or transaction to which Rule 21.1 applies without a shareholders' meeting.~~

65. Service contracts

...

76. Established share option schemes

...

87. Pension schemes

...

98. Redemption or purchase by an offeree company of its own securities

...

109. Shares carrying more than 50% of the voting rights

...

Rule 24.5

24.5 SPECIAL ARRANGEMENTS

... and full particulars of any such agreement, arrangement or understanding.

See also Rule 16.2.

Rule 25.3

25.3 INTERESTS AND DEALINGS

(a) The first major circular published by the offeree board in connection with the offer (whether recommending acceptance or rejection of the offer) must state:—

...

(v) whether the directors of the offeree company intend, in respect of their own beneficial shareholdings, to accept or reject

the offer (and, if there are alternative offers, and if so required by the Panel, which alternative they intend to elect for) or to reject the offer.

Rule 26

RULE 26. DOCUMENTS TO BE ON DISPLAY

Except with the consent of the Panel, copies of the following documents must be made available for inspection and published on a website from the time the offer document or offeree board circular, as appropriate, is published until the end of the offer ~~period~~ (and any related competition reference period). The offer document or offeree board circular must state which documents are so available ~~and~~, the place (being a place in the City of London or such other place as the Panel may agree) where inspection can be made and the address of the website on which the documents are published:—

...

~~(e) — all service contracts of offeree company directors;~~

~~(c)~~ any report, letter, valuation or other document any part of which is exhibited or referred to in any document published by or on behalf of the offeror or the offeree company (other than the service contracts of offeree company directors and any material contracts that are not entered into in connection with the offer);

~~(d)~~ ... ;

~~(e)~~ any material contract entered into by an offeror or the offeree company, or any of their respective subsidiaries, in connection with the offer that is described in the offer document or offeree board circular (as appropriate) in compliance with Rule 24.2(a), Rule 24.2(c) or Rule 25.6(a);

~~(f)~~ ... ;

~~(g)~~ ... ;

~~(h)~~ ... ;

~~(i)~~ ... ;

~~(j)~~ ... ;

~~(k)~~ ... ;

~~(l)~~ ... ;

(~~ma~~) ... ;

(~~no~~) ... ;

(~~op~~) ... ; and

(~~pe~~)

NOTES ON RULE 26

1. _____ Copies of documents

...

2. _____ Website to be used for publication

A party to an offer should normally use its own website for publishing documents to be on display. If a party to an offer does not have its own website, or intends to use a website maintained by a third party for this purpose, the Panel should be consulted.

3. _____ “Read-only” format

Documents on display on a website must be published in a “read-only” format so that they may not be amended or altered in any way.

4. _____ Shareholders, persons with information rights and other persons in non-EEA jurisdictions

See Note 3 on Rule 19.11 and the Note on Rule 30.3.

5. _____ Amendment, variation or updating of documents on display

If a document on display is amended, varied or updated during the period in which it is required to be on display under Rule 26, then the amended, varied or updated document should also be put on display.

Rule 27.1

27.1 MATERIAL CHANGES

Documents subsequently sent to shareholders of the offeree company and persons with information rights by either party must contain details of any material changes in information previously published by or on behalf of the relevant party during the offer period; if there have been no such changes, this must be stated. In particular, the following matters must be updated:-

...

(b) any known material changes in the financial or trading position (Rules 24.2(a)(iv) and 25.2);

(bc) ... ;

(ed) ... ;

(de) ... ;

(ef) ... ;

(fg) ... ; and

(gh)

Rule 31.3

31.3 NO OBLIGATION TO EXTEND

There is no obligation to extend an offer if the acceptance conditions of which are not met has not been satisfied by the first or any subsequent closing date.

Rule 35.3

35.3 DELAY OF 6 MONTHS BEFORE ACQUISITIONS ABOVE THE OFFER VALUE

... In addition, special deals with favourable conditions attached may not be entered into during this 6 months period (see also Rule 16.1).

Rule 36

36.4 OFFER FOR BETWEEN 30% AND 50%*

...

36.5 OFFER FOR 30% OR MORE REQUIRES 50% APPROVAL*

...

36.7 SCALING DOWN*

...

**This Rule is disapplied in a scheme.*

NOTES ON RULE 36

...

4. Schemes of arrangement

The Panel should be consulted where it is proposed to implement a partial offer by means of a scheme of arrangement.

Rule 37.3

37.3 REDEMPTION OR PURCHASE OF SECURITIES BY THE OFFEREE COMPANY

(a) Shareholders' approval

... Where it is felt that the redemption or purchase is in pursuance of a contract entered into earlier or another pre-existing obligation, the Panel must be consulted and its consent to proceed without a shareholders' meeting obtained (Notes 1, 5 and 109 on Rule 21.1 may be relevant).

Appendix 1

APPENDIX 1

WHITEWASH GUIDANCE NOTE

...

4 WHITEWASH CIRCULAR

...

(f) Rule 16.2 (management incentivisation);

(fg) ... ;

(gh) ... ;

(hi) ... ;

(ij) ... ;

(jk) ... ;

(kl) ... ;

~~(lm)~~ ... ;

~~(mn)~~ ... ; and

~~(no)~~

Appendix 7

APPENDIX 7

SCHEMES OF ARRANGEMENT

...

14 PROVISIONS DISAPPLIED IN A SCHEME

...

(k) ... ; and

(l) ... ; and.

~~(m) — Rules 36.4, 36.5 and 36.7 (partial offers).~~