The Secretary to the Code Committee
The Takeover Panel
10 Paternoster Square
London EC4M 7DY

By e-mail: supportgroup@thetakeoverpanel.org.uk

Date: 1 June 2011

Dear Sir/Madam

GC100 response to the consultation paper, Review of certain aspects of the regulation of takeover bids: Proposed Amendments To The Takeover Code (PCP 2011/1)

I am writing on behalf of the GC100 Group in response to the above consultation paper. As you may be aware, the GC100 is the association for the general counsel and company secretaries in the FTSE 100. There are currently over 120 members of the group, representing some 80 companies.

The GC100 welcomes the opportunity to respond to this consultation, and thanks you for the extension until 1 June 2011 to submit our response. The responses of the GC100 to your specific questions are set out below.

Q1 Do you have any comments on the proposed new Rule 2.4 and the proposed new Note 3 on Rule 2.2?

We are not all convinced as a group that the Panel has made out its case for the requirement in the proposed new Rule 2.4 that all potential offerors should be named in all circumstances, even in the absence of leaks. We have different views on this among the GC100. Some of our members are concerned that the requirement will, as noted on page 13 of the consultation paper, significantly deter potential offerors from approaching an offeree company (or result in them withdrawing from the offer process in order to avoid being publicly identified) and thereby reduce the number of offers made for companies to which the Code applies.

In view of the potential consequences, we think it is important to have greater clarification as to what constitutes an "approach" such that an interested party becomes a "potential offeror" and that the threshold is not set too low. It would be helpful if the Panel provided guidance on this point.

Q3 Do you have any comments on the possible alternative approach to the identification of potential offerors?

See the response to Q1 above. Some of our members do prefer the alternative approach of allowing the board of the offeree company to decide, subject to Panel mandate in the event of specific and accurate rumour and speculation. In some situations, the target may take the view that this would make it easier for the target to continue discussions / negotiations with a potential bidder and that being compelled to name the bidder may increase the risk of the bidder walking away/the potential transaction being derailed.

Q6 Do you have any comments on the proposed new Rule 2.6(c) and Note 1 on Rule 2.6?

In the first line of proposed new Rule 2.6(c), we suggest replacing the reference to "will consent" with "will normally consent" to make it clear that the Panel retains a discretion in deciding whether or not to agree to a request from a target to extend the 28-day PUSU deadline.

We do not think it appropriate that offerees should be required to disclose publicly the status of negotiations and anticipated timetable in these circumstances, particularly where there are competing offerors. All that the market needs to know is that negotiations are continuing, and what the new deadline is.

In Note 1 on Rule 2.6, we suggest that it be expressly stated that there may be different (extended) deadlines for different bidders.

Q7 Do you have any comments on the proposed amendments to Rule 2.8 and to the Note on Rules 35.1 and 35.2?

In relation to Note 2(d), we suggest that the Panel clarify the exception for "material change of circumstances" by providing, in a Practice Statement, specific examples of other situations in which the Panel would consent to a Rule 2.8 statement being set aside.

Q9 Do you have any comments on the proposed new Rule 21.2?

The concept of "offer-related arrangements" is very broad. While an argument could be made that this should be narrowed (e.g. by having a test which takes account of whether the arrangements will (or are likely to) make it more difficult for another bidder to make a competing bid), on balance we favour the "cleaner" approach proposed by the Code Committee. The "blanket restriction" has the advantage of providing greater certainty on what is/is not permitted.

As regards the exceptions listed in Rule 21.2(b), we would welcome additional clarification in a Practice Statement as to whether there are intended to be any constraints imposed as a result of these changes on the remedies (e.g. indemnities, liquidated damages, etc) the target and potential offeror can agree to in connection with a breach of such arrangements. Are these also prohibited offer-related arrangements? We also suggest that reverse takeovers are recognised as a special case, in a similar way to Note 4 on Rule 20.2.

Q11 Do you have any comments on the proposed new Note 2 on Rule 21.2?

It is not clear what would constitute "exceptional circumstances" in which the Panel may consent to other "offer-related arrangements" being entered into. It would be helpful if the Panel clarified this.

Q12 Do you have any comments on the proposed new Note 3 on Rule 21.2?

We suggest that a note be added expressly dealing with the point made in para 3.25 i.e. the permissibility of entering into "offer-related arrangements" to implement a "whitewash" transaction which involves a contribution of assets by an offeror to the offeree company

Q13 Do you have any comments on the proposed new Note 4 on Rule 21.2?

We are not convinced that it is necessary to require "all relevant" details to be "fully" disclosed in the announcement. We suggest that it would be better to require material details to be disclosed in the announcement, with the relevant documents made available on display.

Q16 Do you have any comments on the proposed new Rules 24.16(a) and 25.8?

Regarding fee disclosures, we suggest revising the first paragraph of Note 2 (variable and uncapped fee arrangements) to change (i) "Where a fee is not subject to a maximum amount" to say "Where a fee is variable or not subject to a maximum amount" and (ii) "relates directly to the final value of the offer" to say "relates to the outcome or final value of the offer". The purpose is to ensure that fee structures that could give an adviser a financial incentive to prefer one outcome over another are disclosed.

There are also some ambiguities as to how the costs of financing arrangements are to be calculated. It is not clear whether, for example, the legal fees paid to the bank's lawyers should be included as financing costs or legal costs.

Generally, we query whether this additional level of disclosure will achieve the desired objective of driving down fees – if anything, it may have the opposite effect.

Q21 Do you have any comments on the proposed new Rule 24.3(a) and the related amendments?

We suggest that the Panel should consider the feasibility and practicalities of extending to non-UK companies the ability to incorporate by reference documents published on a website. In particular, we suggest that the changes to Rule 24.3(a) (as renumbered) should apply equally to Rule 24.3(b) (as renumbered) provided that the information is available on the relevant website in English. This would also be more consistent with the proposed changes to Rule 26.1, which is not restricted to offerors which are UK companies.

Q25 Do you have any comments on the proposed new Rules 26.1 and 26.2 or the related amendments?

The statement in para 6.34 that all documents relating to the financing arrangements should be put on display "without redaction" appears inconsistent with the acknowledgement in para 6.30 that "commercially sensitive" information does not have to be disclosed. We suggest that the Panel clarify in a Practice Statement that commercially sensitive information may be redacted.

Q28 Do you have any comments on the proposed new structure for the obligations in relation to the publication, content and display of documents?

We suggest that the proposed Rules be amended to add after the word "send" or "sent" something along the lines of "or make available to shareholders in a manner to which the offeree's shareholders have currently consented (or are deemed to have consented)" or alternatively use a different word such as "provide" which could then be defined accordingly to avoid confusion as to the manner in which documents must be made available to target shareholders.

Q29 Do you have any comments on the proposed new definition of "employee representative".

We consider that the offeree company should be required to publish and pay for the cost of verification of the views of employee representatives outside the UK only to the extent that there is an existing legal requirement for those views to be made known. Paragraph (b) of the definition should therefore be amended accordingly.

Moreover, it must be clear how it would apply in the context of a multinational company with employees around the world. It may be that this requirement should be limited to a single opinion (not multiple opinions) presented by the employee representative speaking for the largest number

of the offeree's UK employees, for example, except where there is a legal obligation in another jurisdiction to publish such an opinion.

Q32 Do you have any comments on the proposed new Rule 25.9 and amendments to Rule 32.6?

There should be an express requirement for the employee representatives to take responsibility for the contents of their opinion.

As to the proposal to require the offeree company to pay the costs incurred by employee representatives in obtaining such advice as may reasonably be required for the verification of the information contained in the employee representatives' opinion, we consider that the offeree company should be responsible only for the reasonable costs of verification (which should only extend to checking against existing sources and not, for example, commissioning new research to justify the relevant statements. So, for example, if the employee representatives were concerned that the financing arrangements for an offer might leave the offeree company overstretched, and wished to commission a report to review to the position, it should be for the employee representatives to pay for the report, and the offeree company would only meet the cost of ensuring that any summary of or extract from the repost has been properly reproduced.

Please note, as a matter of formality, that the views expressed in this letter do not necessarily reflect those of each and every individual member of the GC100 or their employing companies.

If you would like to discuss any of these points further, we would be happy to do so.

Yours faithfully

Mary Mullally
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