

PRACTICE STATEMENT NO 31

STRATEGIC REVIEWS, FORMAL SALE PROCESSES AND OTHER CIRCUMSTANCES IN WHICH A COMPANY IS SEEKING POTENTIAL OFFERORS

1. Introduction

- 1.1 From time to time, the Panel Executive is consulted in relation to the application of the Takeover Code where a company wishes:
 - (a) to make an announcement that it is conducting a strategic review of its business (a “strategic review announcement”), which in certain cases may include an offer for the company as a possible outcome;
 - (b) to conduct a “formal sale process” and benefit from the dispensations referred to in Note 2 on Rule 2.6 and Note 2 on Rule 21.2; or
 - (c) otherwise to seek one or more potential offerors.
- 1.2 This Practice Statement describes the way in which the Executive normally interprets and applies certain aspects of Rule 2, Rule 21.2 and Rule 21.3 in these circumstances.
- 1.3 Rule 2.4 requires a potential offeror with which the offeree company is in talks or from which an approach has been received (and not unequivocally rejected) to be identified in an announcement which commences an offer period and (except where the announcement is made after an offeror has announced a firm intention to make an offer for the offeree company) in any subsequent announcement by the offeree company which refers to the existence of a new potential offeror. Rule 2.6(a) provides that such a potential offeror must either announce a firm intention to make an offer or announce that it does not intend to make an offer by not later than 5.00 pm on the 28th day following the date of the announcement in which it is first identified (unless the Panel has consented to an extension of the deadline).
- 1.4 Rule 21.2 restricts an offeree company and any person acting in concert with it from entering into any offer-related arrangement with an offeror or any person acting in concert with it during an offer period or when an offer is reasonably in contemplation.
- 1.5 Rule 21.3 provides that any information given to one offeror or potential offeror, whether publicly identified or not, must, on request, be given equally and promptly to another offeror or bona fide potential offeror even if that other offeror is less welcome.

PRACTICE STATEMENT NO 31 CONTINUED**2. Strategic reviews****(a) Introduction**

- 2.1 In some cases, a strategic review announcement will identify an offer for the company as one of the possible outcomes of the strategic review. The Executive is aware that, whilst the ultimate conclusion of a strategic review might be an offer for the company, an offer may be only one of a number of options being explored by the company. The Executive is also mindful that such reviews may take place over a protracted period of time.
- 2.2 The Executive's practice in relation to strategic review announcements and Rule 2 is set out below. Companies and their advisers are encouraged to consult the Executive before making a strategic review announcement or any statement that confirms that the strategic review is continuing.

(b) Strategic review announcement which refers to an offer

- 2.3 If the strategic review announcement refers specifically to an offer (or a formal sale process or a merger or the search for a buyer for the company) as one of the options to be considered as part of the strategic review, the Executive will normally treat the announcement as commencing an offer period in relation to the company. This is in accordance with the definition of "offer period", which states that an offer period will commence "when the first announcement is made of an offer or possible offer for a company, or when certain other announcements are made, such as an announcement ... that the board of the company is seeking potential offerors".
- 2.4 Any potential offeror with which the company is in talks, or from which it has received an approach with regard to a possible offer, at the time at which the strategic review announcement is made will be required to be identified in accordance with Rule 2.4(a) and the date on which the deadline set in accordance with Rule 2.6(a) will expire must be specified in accordance with Rule 2.4(c), unless the strategic review also incorporates a formal sale process in relation to which the Executive has granted the dispensations referred to in Note 2 on Rule 2.6 (see section 3 below). If, at the time that the strategic review announcement is made, the company is not in talks with any potential offeror and is not in receipt of any approach with regard to a possible offer, the Executive considers that this should be stated in the announcement.
- 2.5 If the conclusion of the strategic review is not to pursue an offer, the company will be required to update the position promptly by way of an announcement.

PRACTICE STATEMENT NO 31 CONTINUED**(c) Strategic review announcement which does not refer to an offer**

- 2.6 If the strategic review announcement does not refer to an offer (or a formal sale process or a merger or the search for a buyer for the company), the Executive will not treat the announcement as automatically commencing an offer period.
- 2.7 In such circumstances, the Executive will make enquiries of the company's advisers as to the options being considered by the board. The Executive will normally require the company to make a further announcement, identifying that an offer is one of the options to be considered as part of the strategic review, where both:
- (a) an offer is being, or will be, actively considered (as opposed to being, as it almost inevitably will be, one of many possibilities); and
 - (b) there is rumour and speculation about a possible offer for the company or an untoward movement in its share price.
- 2.8 Any such further announcement will commence an offer period and any potential offeror with which the company is in talks, or from which it has received an approach with regard to a possible offer, at the time at which the announcement is made will be required to be identified in accordance with Rule 2.4(a) and the date on which the deadline set in accordance with Rule 2.6(a) will expire must be specified in accordance with Rule 2.4(c). If the conclusion of the strategic review is not to pursue an offer, the company will be required to update the position promptly by way of an announcement.

3. Formal sale processes**(a) Announcement and conduct of a formal sale process**

- 3.1 Note 2 on Rule 2.6 provides that where, prior to an offeror having announced a firm intention to make an offer, the board of the offeree company announces that it is seeking one or more potential offerors for the company by means of a formal sale process, the Panel will normally grant a dispensation from the requirements of Rules 2.4(a) and (b) and Rule 2.6(a), such that any potential offeror which agrees with the offeree company to participate in that process will not be required to be publicly identified under Rule 2.4(a) or (b) and will not be subject to the 28 day deadline referred to in Rule 2.6(a), for so long as it is participating in that process.
- 3.2 Note 2 on Rule 21.2 provides that where, prior to an offeror having announced a firm intention to make an offer, the board of the offeree company announces that it is seeking one or more potential offerors

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by means of a formal sale process, the Panel will normally grant a dispensation from the prohibition in Rule 21.2, such that the offeree company will be permitted to enter into an inducement fee arrangement with one offeror (who has participated in that process) at the time of the announcement of its firm intention to make an offer. Any such inducement fee will be subject to the provisos set out in Note 1(a) and (b) on Rule 21.2, i.e.:

- (a) the value of the inducement fee must be de minimis; and
- (b) the inducement fee must be capable of becoming payable only if an offer becomes or is declared wholly unconditional.

3.3 As referred to by the Code Committee in paragraph 2.40 of Response Statement 2011/1 (Review of certain aspects of the regulation of takeover bids), the Executive will normally only grant the dispensations set out in Note 2 on Rule 2.6 and Note 2 on Rule 21.2 in circumstances in which a board is genuinely putting a company up for sale. Where it is proposed to conduct a formal sale process as part of a strategic review, the Executive will consider granting the dispensations set out in Note 2 on Rule 2.6 and Note 2 on Rule 21.2 if a sale of the company is genuinely being explored by the board as a possible outcome of a strategic review.

3.4 The Executive should be consulted at the earliest opportunity in all cases in which the dispensations set out in Note 2 on Rule 2.6 are sought. In order for the Executive to consider a request for such dispensations, the advisers to the offeree company should provide the Executive with a copy of the draft announcement which will commence the formal sale process (or the strategic review which incorporates a formal sale process). The Executive considers that the announcement should:

- (a) include the phrase “formal sale process” in the heading and that the text of the announcement should make clear that a formal sale process is being commenced;
- (b) explain how the formal sale process will be conducted, including:
 - (i) who an interested party should contact if it wishes to participate;
 - (ii) what documentation an interested party will be required to enter into in order to participate; and
 - (iii) an indicative timetable (or a commitment by the offeree company to make a further announcement in relation to the timetable for the formal sale process);

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- (c) confirm whether the offeree company is in discussions with, or is in receipt of an approach from, any potential offeror at the date of the announcement; and
 - (d) explain that the Panel has granted a dispensation from Rules 2.4(a), 2.4(b) and 2.6(a), such that any potential offeror which has agreed or subsequently agrees with the offeree company to participate in the formal sale process will not be required to be identified under Rules 2.4(a) or (b) and will not be subject to the deadline referred to in Rule 2.6(a), for so long as it is participating in that process.
- 3.5 The offeree company will be required to make announcements providing an update on the progress of the formal sale process, as appropriate.
- 3.6 If at any stage the company decides not to proceed with the formal sale process, the company will be required to update the position promptly by way of an announcement.
- 3.7 The Executive notes that an offeree company may require a potential offeror to enter into certain arrangements as a condition to its agreeing that the potential offeror can participate in the formal sale process (and therefore benefit from the dispensations granted from Rules 2.4(a), 2.4(b), 2.6(b) and, if applicable, Rule 21.2). For example, the offeree company may seek a “standstill” provision, which would prevent the potential offeror from acquiring shares in the offeree company without the consent of the board of the offeree company.
- 3.8 Subject to paragraph 3.9 below, it is the Executive’s view that an offeree company may require a potential offeror to enter into such arrangements as a condition to the potential offeror’s participation in the formal sale process, and that the offeree company may enter into different arrangements with different potential offerors.
- 3.9 However, the Executive considers that an offeree company may not require a potential offeror to agree to waive provisions of the Code as a condition to it participating in a formal sale process, save that the offeree company may require the potential offeror to undertake not to request any information under Rule 21.3 (Equality of information to competing offerors), provided that the undertaking applies only until the earlier of:
- (a) the announcement by a third party of a firm intention to make an offer; or
 - (b) the conclusion of the offer period.

PRACTICE STATEMENT NO 31 CONTINUED***(b) Converting private discussions to a formal sale process***

- 3.10 The Executive notes that a company may decide to have private discussions with one or more potential offerors and choose not to make any announcement of its intention to have those discussions. Section 5 of Practice Statement No 20 sets out the Executive's approach to the application of certain aspects of Rule 2 in those circumstances, including the circumstances in which an announcement will be required.
- 3.11 If a company which has been in private discussions with one or more potential offerors decides that it wishes to announce a formal sale process, the Executive will take into account all relevant factors in deciding whether to grant the dispensations set out in Note 2 on Rule 2.6. Relevant factors may include how far the discussions with potential offerors have progressed at the time of the proposed announcement of the formal sale process and how the company plans to include new potential offerors in the formal sale process.
- 3.12 If a company wishes to announce a formal sale process in circumstances in which an announcement is required to be made under Rule 2.2 (for example, where the offeree company is the subject of rumour and speculation or there is an untoward movement in its share price), the Executive will normally require all potential offerors which are in discussions with the company at that time, or from which the company is in receipt of an approach, to be identified in accordance with Rule 2.4(a). However, taking into account the circumstances at the time, the Executive may consent to a company announcing a formal sale process which otherwise benefits from the dispensations set out in Note 2 on Rule 2.6 such that:
- (a) any potential offeror which subsequently agrees with the offeree company to participate in the formal sale process following the date of the announcement will not be required to be identified under Rules 2.4(a) or (b); and
 - (b) each of the potential offerors (whether identified or not) will not be subject to the deadline referred to in Rule 2.6(a),
- provided that (and for so long as) it is participating in the formal sale process.
- 3.13 The Executive should be consulted at the earliest opportunity in all cases in which a company is in private discussions with a potential offeror and may subsequently wish to announce a formal sale process. In particular, an announcement required under Rule 2.2 should not be delayed in order for a company to seek the dispensations set out in Note 2 on Rule 2.6.

PRACTICE STATEMENT NO 31 CONTINUED**4. Equality of information**

- 4.1 Under Rule 21.3, any information given to one offeror or potential offeror must, on request, be given equally and promptly to another offeror or bona fide potential offeror even if that other offeror is less welcome. Note 2 on Rule 21.3 limits the conditions that an offeree company may attach to the passing of information pursuant to the Rule, on the basis that the imposition of onerous conditions might deter a subsequent offeror and the shareholders of the offeree company might therefore be deprived of the opportunity to consider another, potentially more favourable, offer.
- 4.2 Note 2 applies only in respect of the passing of information requested by an offeror or potential offeror where that information has already been provided to an earlier offeror or potential offeror. It does not address the position of the first offeror or potential offeror to which information is provided, and Rule 21.3 does not seek to intervene in relation to the conditions that an offeree company might seek to impose on the first offeror or potential offeror because it does not apply at that stage.
- 4.3 On occasion, an offeree company might wish to approach a number of potential offerors to ask them to participate in an auction process (whether by means of a formal sale process, private discussions or otherwise) to acquire the company. In such a case, each of the potential offerors receiving information as part of the auction will normally be considered to be a “first offeror” for the purposes of Note 2 on Rule 21.3, provided that each of them agrees to the conditions on which it will receive the information before that information is passed to any of them. Note 2 does not, therefore, seek to limit the conditions that the offeree company may seek to attach to the passing of information to those potential offerors and the offeree company may agree different conditions with each such potential offeror.
- 4.4 Any subsequent offeror or potential offeror who was not approached by the offeree company to participate in the auction, or any potential offeror who was initially approached but who refused to agree to the conditions sought to be imposed before information was passed (or to the conditions sought to be imposed to its participation in the formal sale process), will continue to benefit from the protections in Rule 21.3 and Note 2 thereon if it chooses not to participate in the auction.
- 4.5 The announcement of the commencement of a formal sale process will be treated as equivalent to the announcement of the existence of a potential offeror to which information has been given. Accordingly, following the announcement of a formal sale process, any information passed to any potential offeror participating in the process must, on

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request (and subject to any undertaking and waiver entered into which complies with paragraph 3.9 above), be passed to a bona fide potential competing offeror, even if that party is not participating in the formal sale process.

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 in certain circumstances. Practice Statements do not form part of the Code. 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 applies 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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