

PRACTICE STATEMENT NO 21

RULE 3 – INDEPENDENT ADVICE

Rule 3.1 provides that the board of the offeree company must obtain competent independent advice on any offer. Rule 3.3, together with Note 1 on the Rule, provides that, in certain circumstances, an adviser will not be regarded by the Panel as an appropriate person to give independent advice. The purpose of this Practice Statement is to explain certain modifications which the Executive has made to its approach in determining whether a proposed Rule 3 adviser to an offeree company (an “adviser”) is independent of an offeror (or potential offeror) and is therefore in a position to give independent advice to the board of the offeree company.

1. Executive’s approach to determining independence

In determining whether an adviser is independent, the Executive examines the strength of the overall relationship between the offeror and the adviser and its group.

In doing so, to date the Executive has investigated all matters in relation to which the adviser has provided the offeror with advice over the 12 to 24 month period preceding the adviser’s proposed appointment and any matters currently in contemplation. The Executive has not been concerned solely with the provision of corporate finance advice by the adviser to the offeror since other services provided by the adviser’s group (for example, leading a debt syndication) may also involve the provision of advice and therefore be relevant for the purposes of Note 1 on Rule 3.3.

The Executive has also required information in relation to the fee income generated from the overall relationship between the offeror and the adviser and its group including, for example, the total fees generated during the relevant period and their significance to the adviser’s group.

In considering this information, the Executive’s approach has generally been that, if an adviser is providing advice to an offeror in relation to any matter at the same time as the proposed offer, that adviser would not be considered to be independent, irrespective of the size or location of the matter.

In relation to past advice, the Executive has generally concluded that an adviser may be regarded as being independent if the matters in relation to which the adviser has provided the offeror with advice are not material. The Executive has not considered it appropriate to define materiality in this context, but, in reaching its decision, has been prepared to take into account, for example, the size of past transactions and the location in which they were undertaken.

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As provided in Rule 3.3, the Executive has not considered an adviser which is in the same group as a corporate broker to an offeror to be capable of giving independent advice to the board of an offeree company.

In the context of a non-recommended offer, the Executive has, in certain circumstances, accepted that it may be in the best interests of shareholders for an offeree company to be advised by a particular adviser notwithstanding that it would not normally be regarded by the Executive as being independent from the offeror. This is generally in circumstances where it is not practicable for the board of the offeree company to find a suitable alternative adviser in the limited time available to consider its response to the offer.

2. Modifications to the Executive's approach

Given the increasingly global reach of parties to offers and their financial advisers, the possibility that an adviser is currently acting, has in the recent past acted or is seeking to act, in some capacity for an offeror is now significantly greater than was previously the case. The Executive also recognises that it is now common for parties to offers to use multiple financial advisers in a single transaction or different financial advisers in successive transactions.

As a result, the Executive believes that relationships between financial advisers and their clients are, in many cases, now less exclusive than was previously the case and has therefore concluded that it should be more flexible in its approach in determining the independence of an adviser.

First, the Executive will be prepared to accept that some matters, whether current, past or prospective, may not compromise the independence of the adviser. Consequently, the Executive may conclude that an adviser is independent notwithstanding that it is advising, has advised or is seeking to advise, an offeror in relation to a matter provided that such matter is not material. In assessing materiality, the Executive will continue to examine the strength of the overall relationship between the offeror and the adviser and its group as described above.

Secondly, the Executive will be more likely than it has been in the past to conclude that an adviser is independent if it has acted for the offeror only infrequently in the period investigated by the Executive leading up to its proposed appointment and the offeror has instructed a number of other financial advisers in the same period.

The Executive recommends consultation as soon as practicable in cases where there is any doubt about the independence of an adviser.

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Practice Statements are issued by the Panel 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 Takeover 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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