

THE TAKEOVER PANEL

PRACTICE STATEMENT NO. 10

CASH OFFERS FINANCED BY THE ISSUE OF OFFEROR SECURITIES

Under Rule 2.7(a) of the Takeover Code, an offeror should announce a firm intention to make an offer only when it has every reason to believe that it can and will continue to be able to implement the offer. Under Rules 2.7(d) and 24.8, 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 Panel 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

Rule 13.4 provides that, 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 offer must be made subject to any condition required, as a matter of law or regulatory requirement, in order validly to issue such securities or to have them listed or admitted to trading. Conditions which will normally be considered to be necessary for such purposes include:

- the passing of any resolution 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 listing or to trading on any investment exchange or market, any necessary listing or admission to trading condition.

It will not, however, 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.

Cash confirmation

In order to satisfy Rules 2.7(a), 2.7(d) and 24.8, it is 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.

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 Rule 2.7(a) was complied with (so that, on announcement, the offeror and its financial adviser had every reason to believe that the offer could and would be implemented) and also that Rule 13.5(b) had been complied with (i.e. that the offeror had used all reasonable efforts to ensure the satisfaction of the condition).

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

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.

25 April 2005

Last amended 19 September 2011