

THE TAKEOVER PANEL

PRACTICE STATEMENT NO. 23

RULE 21.2 – INDUCEMENT FEES AND OTHER OFFER-RELATED ARRANGEMENTS

1. Introduction

1.1 Rule 21.2(a) provides that, except with the consent of the Panel, neither the offeree company nor any person acting in concert with it may enter into any offer-related arrangement with either the offeror or any person acting in concert with it during an offer period or when an offer is reasonably in contemplation. Rule 21.2(b) clarifies that this prohibition includes inducement fee arrangements generally and other arrangements that have a similar or comparable financial or economic effect and also describes certain permitted offer-related arrangements.

1.2 Notwithstanding the general prohibition on inducement fee arrangements, Note 1 (“*Competing offerors*”) and Note 2 (“*Formal sale process*”) on Rule 21.2 explain that, in certain limited circumstances, the Panel may permit an offeree company to enter into one or more inducement fee arrangements with an offeror (or offerors) provided that:

- (a) the aggregate value of the inducement fee or fees that may be payable by the offeree company is *de minimis* (i.e. normally no more than 1% of the value of the offeree company calculated by reference to the price of the offer or competing offer (or, if there are two or more competing offerors, the first competing offer) at the time of the announcement made under Rule 2.7); and
- (b) any inducement fee is capable of becoming payable only if an offer becomes or is declared wholly unconditional.

- 1.3 The purpose of this Practice Statement is to clarify the way in which the Executive applies Rule 21.2 to inducement fee agreements.

2. Calculation of the maximum amount payable

- 2.1 In determining the maximum amount permitted for an inducement fee, the Executive will normally consider that:

- (a) the 1% limit can be calculated on the basis of the fully diluted equity share capital of the offeree company, but taking account only those options and warrants that are “in the money”. When determining the value of the fully diluted equity share capital, the Executive will consider the value attributable to options and warrants to be their “see through” value (being their value by reference to the value of the offer for the shares to which they relate, net of any exercise price). The Executive will consider the value attributable to convertible securities to be the offer price for the shares into which the convertible securities may be converted multiplied by the conversion ratio;
- (b) any VAT payable as a result of the payment of an inducement fee to an offeror should be taken into account in determining whether the 1% limit would be exceeded (except to the extent that such VAT is recoverable by the offeree company); and
- (c) in a securities exchange offer, the value of the offeree company will be fixed by reference to the value of the offer as stated in the firm offer announcement and will not fluctuate as a result of subsequent movements in the price of the consideration securities.

- 2.3 The Executive also interprets Note 1 on Rule 21.2 as permitting an offeree company to agree inducement fees with multiple offerors or potential offerors, provided that the aggregate amount payable by the offeree company in respect of all such inducement fees does not exceed 1% of the value of the offeree company calculated on the basis described above.

3. Consulting the Executive

- 3.1 The Executive should be consulted at the earliest opportunity in all cases where there is any doubt as to whether a proposed agreement, arrangement or commitment is subject to Rule 21.2 or where it is proposed that an offeree company should enter into one or more inducement fee arrangements.
- 3.2 In addition, the Executive will be keen to ensure that offerors do not seek to bring claims against offeree companies in relation to breaches of the agreements, arrangements and commitments that are permitted under Rule 21.2(b) as a means of recovering offer-related costs, losses and expenses that they are not able to recover as a result of the general prohibition on inducement fee arrangements in Rule 21.2.

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.

10 July 2008

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