

THE TAKEOVER PANEL

CODE COMMITTEE

Instrument 2017/4

Asset sales and other matters

Pursuant to sections 942, 943 and 944 of the Companies Act 2006, Articles 2, 3 and 4 of the Companies (Takeovers and Mergers Panel) (Jersey) Law 2009, and sections 340A, 340B and 340C of the Companies (Guernsey) Law, 2008, and in exercise of the functions conferred on it by the Panel in paragraph 2 of its Terms of Reference, the Code Committee hereby makes this instrument containing rules.

The Takeover Code is amended, with effect from 8 January 2018, in accordance with the Appendix to this instrument.

In the Appendix, underlining indicates new text and striking-through indicates deleted text.

Richard Murley
Chairman of the Code Committee
for and on behalf of the Code Committee

8 December 2017

APPENDIX

DEFINITIONS

Quantified financial benefits statement

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NOTE ON QUANTIFIED FINANCIAL BENEFITS STATEMENT

Where, in competition with an offer or possible offer, an offeree company announces that it has agreed terms on which it intends to sell all or substantially all of the company's assets (excluding cash and cash equivalents) and that it intends to return to shareholders all or substantially all of the company's cash balances (including the proceeds of any asset sale), a statement by the offeree company quantifying the cash sum expected to be paid to shareholders (either as a specific amount or as a range) will be treated as a quantified financial benefits statement. See also Rule 4.7.

Rule 2.2

2.2 WHEN AN ANNOUNCEMENT IS REQUIRED

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NOTES ON RULE 2.2

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4. When a dispensation may be granted

(a) The Panel may grant a dispensation from the requirement for an announcement to be made under Rule 2.2(c) or Rule 2.2(d) where it is satisfied that the potential offeror has ceased actively to consider making an offer for the offeree company. If such a dispensation is granted, neither the potential offeror, nor any person who acted in concert with it, nor any person who is subsequently acting in concert with either of them may:

(i) within six months of the dispensation having been granted, do any of the things set out in Rules 2.8(a) to (ef); or

(ii) within three months of the dispensation having been granted, actively consider making an offer for the offeree company, make an approach to the board of the offeree company or acquire an interest in shares in the offeree company.

(b) After the end of the period referred to in paragraph (a)(ii) above the Panel will normally consent to the restrictions in paragraph (a)(i) above being set aside in the circumstances set out in paragraphs (a)(i) to (iv)(d) of Note 2

on Rule 2.8, but during the period referred to in paragraph (a)(ii) above the Panel will normally consent to the restrictions in paragraphs (a)(i) and (a)(ii) above being set aside only in the circumstances set out in paragraphs (b) to (d)-(a)(ii) to (iv) of Note 2 on Rule 2.8.

(b) Where a potential offeror to which a dispensation has been granted under paragraph (a) has ceased actively to consider making an offer, the Panel may nonetheless require an announcement to be made where:

- (i) any rumour and speculation continues or is repeated; and/or*
- (ii) it considers that this is otherwise necessary in order to prevent the creation of a false market.*

Any such announcement made by the offeree company will not normally be required to identify the former potential offeror, unless it has been specifically identified in rumour and speculation.

Rule 2.5

2.5 TERMS AND PRE-CONDITIONS IN POSSIBLE OFFER ANNOUNCEMENTS

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NOTES ON RULE 2.5

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2. Duration of restriction

The restrictions imposed by Rule 2.5(a) will normally apply throughout the period during which the offeree company is in an offer period and for a further three months thereafter.

However, where a potential offeror has made a statement to which Rule 2.8 applies but the offeree company remains in an offer period, the restrictions imposed by Rule 2.5(a) will normally apply for three months following the making of the statement to which Rule 2.8 applies. See also Rule 2.8(f).

Rule 2.8

2.8 STATEMENTS OF INTENTION NOT TO MAKE AN OFFER

A person making a statement that he-it does not intend to make an offer for a company should make the statement as clear and unambiguous as possible. Except in the circumstances described in Note 2 or otherwise with the consent of the Panel, unless circumstances occur that the person

specified in its statement as being circumstances in which the statement may be set aside, neither the person making the statement, nor any person who acted in concert with that person, nor any person who is subsequently acting in concert with either of them, may within six months from the date of the statement:

...

(c) **acquire any interest in, or procure an irrevocable commitment in respect of, shares of the offeree company if the shares in which such person, together with any persons acting in concert with ~~him~~ it, would be interested and the shares in respect of which ~~he~~ it, or they, had acquired irrevocable commitments would in aggregate carry 30% or more of the voting rights of the offeree company;**

(d) ... ; ~~or~~

(e) ... ; or

(f) **purchase, agree to purchase, or make any statement which raises or confirms the possibility that it is interested in purchasing assets which are significant in relation to the offeree company.**

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NOTES ON RULE 2.8

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~~2. When the restrictions will no longer apply~~

The restrictions in Rule 2.8 will no longer apply if:

~~(a) the board of the offeree company so agrees. However, where the statement was made after the announcement by a third party of a firm intention to make an offer, the restrictions will only cease to apply with the agreement of the board of the offeree company if:~~

~~(i) that third party offer has been withdrawn or has lapsed; and~~

~~(ii) in the period following the making of the statement and prior to the third party offer being withdrawn or lapsing, neither the person who made the statement nor any person acting in concert with that person has acquired an interest in any shares of the offeree company;~~

~~(b) a third party announces a firm intention to make an offer for the offeree company;~~

~~(c) the offeree company announces a “whitewash” proposal (see Note 1 of the Notes on Dispensations from Rule 9) or a reverse takeover;~~

~~(d) — the Panel determines that there has been a material change of circumstances; or~~

~~(e) — the statement was made outside an offer period and an event has occurred which was specified in the statement as being an event following which the restrictions set out in Rule 2.8 would cease to apply. If a person wishes to specify such an event in a statement to which Rule 2.8 will apply, the Panel should be consulted.~~

~~The Panel will normally regard a switch by a third party offeror from a scheme of arrangement to a contractual offer in accordance with Section 8 of Appendix 7, or an announcement of its firm intention to do so, as a material change of circumstances under paragraph (d). However, a switch from a contractual offer to a scheme of arrangement will not normally be regarded as a material change of circumstances.~~

2. Setting aside a statement to which Rule 2.8 applies

(a) The circumstances that a person is permitted to specify in a statement to which Rule 2.8 applies as circumstances in which the statement may be set aside are:

(i) subject to paragraph (b), the board of the offeree company so agreeing;

(ii) a third party (including another publicly identified potential offeror) announcing a firm intention to make an offer;

(iii) the offeree company announcing a “whitewash” proposal (see Note 1 of the Notes on Dispensations from Rule 9) or a reverse takeover;

(iv) the Panel determining that there has been a material change of circumstances; or

(v) where the statement is made outside an offer period, such other circumstances as the person may, with the Panel’s prior consent, specify.

(b) Where the statement to which Rule 2.8 applies is made after a third party has announced a firm intention to make an offer, the statement may specify the agreement of the board of the offeree company as a circumstance in which the statement may be set aside only to the extent that such agreement is given after that third party offer has been withdrawn or lapsed.

(c) Where the statement to which Rule 2.8 applies is made after a third party has announced a firm intention to make an offer and the person who made the statement, or any person acting in concert with it, acquires an interest in any shares in the offeree company in the period following the making of the statement and prior to the third party offer being withdrawn or lapsing, the agreement of the board of the offeree company may not be relied

on as a reason to set aside the statement after the third party offer has been withdrawn or lapsed.

(d) Where the statement to which Rule 2.8 applies is made by a potential offeror which has made a statement to which Rule 2.5(a)(i) or (ii) applies and which did not reserve the right not to be bound by that statement with the agreement of the board of the offeree company, the board of the offeree company may not, except with the consent of the Panel, agree to the restrictions in Rule 2.8(f) being set aside for three months following the date on which the statement to which Rule 2.8 applies is made.

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5. Significant asset purchases

(a) In assessing whether assets are significant for the purpose of Rule 2.8(f), the Panel will normally have regard to:

(i) the aggregate value of the consideration for the assets compared with the aggregate market value of all the equity shares of the offeree company; and, where appropriate,

(ii) the value of the assets to be purchased compared with the total assets of the offeree company (excluding in each case cash and cash equivalents); and

(iii) the operating profit (i.e. profit before tax and interest and excluding exceptional items) attributable to the assets to be purchased compared with that of the offeree company.

For these purposes, “equity” will be interpreted by reference to Note 3 on Rule 14.1.

(b) The figures to be used for these calculations must be:

(i) for market value of the shares of the offeree company, the aggregate market value of all the equity shares of the company at the close of business on the business day immediately preceding the date of the announcement of the proposed purchase or agreement to purchase the assets, or the statement which raises or confirms the possibility that the person is interested in purchasing the assets; and

(ii) for assets and profits, the figures stated in the latest published audited consolidated accounts of the offeree company or, where appropriate, a subsequent preliminary statement of annual results or half-yearly financial report.

(c) Relative values of more than 75% will normally be regarded as being significant.

Rule 3.1**3.1 BOARD OF THE OFFEREE COMPANY**

The board of the offeree company must obtain competent independent advice as to whether the financial terms of any offer (including any alternative offers) are fair and reasonable and the substance of such advice must be made known to its shareholders. (See also Rule 15(b) and Rule 21.1(d)(i).)

Rule 4.7**4.7 SALE OF ALL OR SUBSTANTIALLY ALL OF THE OFFEREE COMPANY'S ASSETS**

(a) Where an offeree company announces that it has agreed terms on which it intends to sell all or substantially all of the company's assets (excluding cash and cash equivalents) and that it intends to return to shareholders all or substantially all of the company's cash balances (including the proceeds of any asset sale), a purchaser or potential purchaser of some or all of those assets must not acquire interests in shares in the offeree company during the offer period unless the board of the offeree company has made a statement quantifying the amount per share that is expected to be paid to shareholders and then only to the extent that the price paid does not exceed the amount stated. If a range is stated, the price paid must not exceed the bottom of the range.

(b) This restriction shall also apply to any person whose relationship with any asset purchaser is such that, if the asset purchaser were an offeror, that person would be treated as acting in concert with the asset purchaser.

Rule 9***NOTES ON DISPENSATIONS FROM RULE 9***

- 1. Vote of independent shareholders on the issue of new securities ("Whitewash")*

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In exceptional circumstances, the Panel may consider waiving the requirement for a general offer where the approval of independent shareholders to the transfer of existing shares from one shareholder to another is obtained.

See also Note 5(c).

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5. *Shares carrying 50% or more of the voting rights*

The Panel will consider waiving the requirement for a general offer under this Rule where:

(a) holders of shares carrying 50% or more of the voting rights state in writing that they would not accept such an offer; ~~or~~

(b) shares carrying 50% or more of the voting rights are already held by one other person; or

(c) in the case of an issue of new securities, independent shareholders holding shares carrying more than 50% of the voting rights of the company which would be capable of being cast on a "whitewash" resolution (see Note 1) confirm in writing that they approve the proposed waiver and would vote in favour of any resolution to that effect at a general meeting.

Rule 12.2

12.2 COMPETITION REFERENCE PERIODS

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(b) If the offer period ends in accordance with Rule 12.2(a):

(i) during the competition reference period, except with the consent of the Panel, neither the offeror, nor any person who acted in concert with the offeror in relation to the referred offer or possible offer, nor any person who is subsequently acting in concert with any of them may:

...

(C) acquire ~~an~~ any interest in, or procure an irrevocable commitment in respect of, shares of the offeree company if the shares in which such person, together with any persons acting in concert with ~~him~~ it, would be interested and the shares in respect of which ~~he~~ it, or they, had acquired irrevocable commitments would in aggregate carry 30% or more of the voting rights of the offeree company;

(D) ... ; ~~or~~

(E) ... ; or

(F) purchase, agree to purchase, or make any statement which raises or confirms the possibility that it is interested in purchasing assets which are significant in relation to the offeree company;

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NOTES ON RULE 12.2

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5. Significant asset purchases

In assessing whether assets are significant for the purpose of Rule 12.2(b)(i)(F), the Panel will have regard to the tests set out in Note 5 on Rule 2.8.

Rule 19.1**19.1 STANDARDS OF CARE**

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NOTES ON RULE 19.1**1. Financial advisers' responsibility for publication of information**

The Panel regards financial advisers as being responsible to the Panel for guiding their clients and any relevant public relations advisers with regard to any information published during the course of an offer, including information published using social media.

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Rule 20.3**20.3 VIDEOS**

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(b) A video to which paragraph (a) applies must be published on a website. ~~At the same time, the offeror or offeree company must publish an announcement in accordance with Rule 30.1 noting that the video has been published on a website and including a link to the relevant webpage.~~

Rule 20.4**20.4 SOCIAL MEDIA**

Social media must not be used by or on behalf of an offeror or the offeree company to publish information relating to an offer ~~or a party to an offer~~, other than for the publication of:

- (a) the full text of an announcement which has been published in accordance with Rule 30.1(a);
- (b) the full text of a document which has been published on a website in accordance with the relevant provisions of the Code; ~~or~~
- (c) a video which has been published with the prior consent of the Panel in accordance with Rule 20.3; or
- (ed) a notification of a link to the webpage on which such an announcement, ~~or~~ document or video has been published, which notification must comply with the requirements of paragraph (b) of the Note on the definition of website notification.

Rule 21.1

21.1 WHEN SHAREHOLDERS' CONSENT IS REQUIRED

(a) During the course of an offer, or even before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent, the board must not, without the approval of the shareholders in general meeting; ~~(a)~~—take any action which may result in any offer or bona fide possible offer being frustrated or in shareholders being denied the opportunity to decide on its merits; ~~or~~

~~(b)~~(i) issue any shares or transfer or sell, or agree to transfer or sell, any shares out of treasury or effect any redemption or purchase by the company of its own shares;

(ii) issue or grant options in respect of any unissued shares;

(iii) create or issue, or permit the creation or issue of, any securities carrying rights of conversion into or subscription for shares;

(iv) sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount; or

(v) enter into contracts otherwise than in the ordinary course of business.

(b) The Panel must be consulted in advance if there is any doubt as to whether any proposed action may fall within ~~this~~ Rule 21.1(a).

(c) The Panel will normally agree to disapply Rule 21.1(a) if:

(i) the taking of the proposed action is conditional on the offer being withdrawn or lapsing (see also Rule 21.1(e));

(ii) the offeror consents to the action proposed to be taken by the board of the offeree company;

(iii) holders of shares carrying more than 50% of the voting rights of the offeree company state in writing that they approve the proposed action and would vote in favour of any resolution to that effect proposed at a general meeting;

~~The notice convening any relevant meeting of shareholders must include information about the offer or anticipated offer.~~

Where it is felt that:

(Aiv) the proposed action is in pursuance of a contract entered into earlier or another before the beginning of the period referred to in Rule 21.1(a) or another pre-existing obligation; or

(By) a decision to take the proposed action had been taken before the beginning of the period referred to above in Rule 21.1(a) which:

(iA) has been partly or fully implemented before the beginning of that period; or

(iiB) has not been partly or fully implemented before the beginning of that period but is in the ordinary course of business;

~~the Panel must be consulted and its consent to proceed without a shareholders' meeting obtained.~~

(d) Where shareholder approval is to be sought in general meeting for a proposed action in accordance with Rule 21.1(a):

(i) the board of the offeree company must obtain competent independent advice as to whether the financial terms of the proposed action are fair and reasonable;

(ii) the Panel must be consulted regarding the date of the general meeting; and

(iii) the board of the offeree company must send a circular to shareholders containing the details set out in Note 1 as soon as practicable after the announcement of the proposed action.

(e) Where the Panel has agreed to disapply Rule 21.1(a) because the proposed action is conditional on the offer being withdrawn or lapsing, the board of the offeree company must publish an announcement containing the details set out in Note 1. (See also Rule 30.1(c), pursuant to which the Panel may require a copy of the announcement (or a document which includes the contents of the announcement) to be sent to the persons referred to in that Rule.)

NOTES ON RULE 21.1

1. ~~Consent by the offeror~~

~~Where the Rule would otherwise apply, it will nonetheless normally be waived by the Panel if this is acceptable to the offeror.~~

1. Details to be included in circular or announcement

Any circular sent to shareholders in accordance with Rule 21.1(d)(iii) or announcement published in accordance with Rule 21.1(e) must contain the following:

- (a) full details of the proposed action;
- (b) the opinion of the board of the offeree company on the proposed action and the board's reasons for forming its opinion;
- (c) if Rule 21.1(d)(i) applies, the substance of the advice given to the board of the offeree company as to whether the financial terms of the proposed action are fair and reasonable;
- (d) information about the current status of the offer or possible offer; and
- (e) any other information necessary to enable shareholders to make an informed decision.

The offeree company must also publish the circular or announcement, and any contracts entered into in connection with the proposed action, on a website. (See also Rule 26.1(a).)

2. "Material amount"

~~For the purpose of determining~~ In assessing whether a disposal or acquisition is of "a material amount" the Panel will, in general, normally have regard to the following:

- ~~(a)~~ (i) the aggregate value of the consideration to be received or given compared with the aggregate market value of all the equity shares of the offeree company; and, where appropriate,
- ~~(b)~~ (ii) the value of the assets to be disposed of or acquired compared with the assets of the offeree company; and
- ~~(c)~~ (iii) the operating profit (i.e. profit before tax and interest and excluding exceptional items) attributable to the assets to be disposed of or acquired compared with that of the offeree company.

For these purposes:

"assets" will normally mean total assets less current liabilities (other than short-term indebtedness); and

“equity” will be interpreted by reference to Note 3 on Rule 14.1.

(b) The figures to be used for these calculations must be:

(i) for market value of the shares of the offeree company, the aggregate market value of all the equity shares of the company at the close of business either:

(iA) on the ~~last-business~~ day immediately preceding the start of the offer period; or

(iB) if there is no offer period, on the ~~last-business~~ day immediately preceding the announcement of the transaction; and

(ii) for assets and profits, the figures ~~shown~~ stated in the latest published audited consolidated accounts of the offeree company or, where appropriate, interim or a subsequent preliminary statements of annual results or half-yearly financial report.

(c) Subject to Note 4, ~~the Panel will normally consider~~ relative values of 10% or more will normally be regarded as being of a material amount, although relative values lower than 10% may be considered material if the asset is of particular significance.

(d) If several transactions relevant to this Rule, but not individually material, occur or are intended, the Panel will aggregate such transactions to determine whether the requirements of this Rule are applicable to any of them.

(e) The Panel should be consulted in advance where there may be any doubt as to the application of the above.

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8. — Shares carrying more than 50% of the voting rights

~~The Panel will normally waive the requirement for a general meeting under this Rule where the holders of shares carrying more than 50% of the voting rights state in writing that they approve the action proposed and would vote in favour of any resolution to that effect proposed at a general meeting.~~

8. Inducement fees

The Panel will normally consent to the offeree company entering into an inducement fee arrangement with a counterparty to a transaction to which Rule 21.1 applies, provided that:

(a) the aggregate value of the inducement fee or fees that may be payable by the offeree company in relation to the same asset(s) is no more than 1% of the value of the transaction (or, if there are two or more transactions in respect of the same asset(s), the transaction with the highest value); and

(b) the aggregate value of the inducement fee or fees that may be payable by the offeree company in respect of all transactions to which Rule 21.1 applies is no more than 1% of the value of the offeree company calculated by reference to the price of the offeror's offer (or, if there are two or more offerors, the first offer) at the time of the announcement made under Rule 2.7.

Rule 21.2

21.2 ~~INDUCEMENT FEES AND OTHER OFFER-RELATED ARRANGEMENTS~~

Rule 21.3

21.3 EQUALITY OF INFORMATION TO COMPETING OFFERORS

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NOTES ON RULE 21.3

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6. Information given to a purchaser of assets

(a) If the offeree company commences discussions with one or more persons in relation to the sale of all or substantially all of its assets (excluding cash and cash equivalents) during an offer or following the date on which the board of the offeree company has reason to believe that a bona fide offer might be imminent, information given by the offeree company to the potential asset purchaser(s) must, on request, be given to an offeror or bona fide potential offeror.

This requirement will usually only apply when there has been a public announcement of the discussions between the offeree company and the potential asset purchaser(s) or, if there has been no public announcement, when the offeror or bona fide potential offeror requesting information has been informed authoritatively that the offeree company and the potential asset purchaser(s) are having such discussions.

(b) If a company was in discussions with one or more potential purchaser(s) regarding the sale of all or substantially all of its assets (excluding cash and cash equivalents) prior to an offer being made or the date on which the board had reason to believe that a bona fide offer might be imminent, Rule 21.3 will not apply in relation to any information given to the potential asset purchaser(s) (including information given after the offer was made or the date that the board had reason to believe that a bona fide offer might be imminent) and accordingly there is no requirement for such information to be given to an offeror or bona fide potential offeror.

Rule 28.6**28.6 DISCLOSURE REQUIREMENTS FOR QUANTIFIED FINANCIAL BENEFITS STATEMENTS**

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NOTES ON RULE 28.6

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2. Statements by the offeree company

(a) The Panel will not normally permit an offeree company to publish a statement quantifying the financial benefits expected to accrue from an offer by a particular offeror unless the statement is published with the consent of that offeror, in which case the requirements of Rule 28.1 will apply. However, the offeree company will be permitted to publish its views on any quantified financial benefits statement published by an offeror.

(b) In relation to a statement made in the circumstances described in the Note on the definition of “quantified financial benefits statement”, the Panel will normally consider that the requirements of Rules 28.6(a), (b), (f) and (h) are applicable to that statement.

Rule 31.5**31.5 NO EXTENSION STATEMENTS**

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(c) If an offeror wishes to include a reservation to a no extension statement, the Panel must be consulted. See also Rule 35.1(f) and Note 1(a)(i) on Rules 35.1 and 35.2.

Rule 32.2**32.2 NO INCREASE STATEMENTS**

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(c) If an offeror wishes to include a reservation to a no increase statement, the Panel must be consulted. See also Rule 35.1(f) and Note 1(a)(i) on Rules 35.1 and 35.2.

Rule 35.1

35.1 DELAY OF 12 MONTHS

Except with the consent of the Panel, where an offer has been announced or made but has not become or been declared wholly unconditional and has been withdrawn or has lapsed otherwise than pursuant to Rule 12.1, neither the offeror, nor any person who acted in concert with the offeror in the course of the original offer, nor any person who is subsequently acting in concert with any of them, may within 12 months from the date on which such offer is withdrawn or lapses ~~either:~~

...

(c) acquire any interest in, or procure an irrevocable commitment in respect of, shares of the offeree company if the shares in which such person, together with any persons acting in concert with ~~him~~ it, would be interested and the shares in respect of which ~~he~~ it, or they, had acquired irrevocable commitments would in aggregate carry 30% or more of the voting rights of the offeree company;

(d) ...; ~~or~~

(e) ...; or

(f) purchase, agree to purchase, or make any statement which raises or confirms the possibility that it is interested in purchasing assets which are significant in relation to the offeree company.

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NOTES ON RULES 35.1 and 35.2

1. When consent may be given

(a) *The Panel will normally only give its consent under this Rule if:*

(i) ~~the new offer is recommended by the board of the offeree company~~ so agrees. Such consent will not normally be given within three months of the lapsing of an earlier offer in circumstances where the offeror was prevented from revising or extending its previous offer as a result of a no increase statement or a no extension statement;

(ii) ~~the new offer follows the announcement by a third party of~~ announces a firm intention to make an offer for the offeree company;

(iii) ~~the new offer follows the announcement by the offeree company of~~ announces a "whitewash" proposal (see Note 1 of the Notes on Dispensations from Rule 9) or a reverse takeover which has not failed or lapsed or been withdrawn; or

(iv) *the Panel determines that there has been a material change of circumstances.*

...

2. Significant asset purchases

In assessing whether assets are significant for the purpose of Rule 35.1(f), the Panel will have regard to the tests set out in Note 5 on Rule 2.8.