

THE TAKEOVER PANEL

CODE COMMITTEE

Instrument 2015/3

Dividends; Restrictions and suspensions of voting rights; Additional presumptions to the definition of acting in concert

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 23 November 2015, in accordance with the Appendix to this instrument.

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

Guy Elliott
Chairman of the Code Committee
for and on behalf of the Code Committee

23 October 2015

APPENDIX

DEFINITIONS

Acting in concert

Without prejudice to the general application of this definition, the following persons will be presumed to be persons acting in concert with other persons in the same category unless the contrary is established:

(2) a company with any of its directors (together with their close relatives and the related trusts of any of them);

(3) a company with any of its pension schemes and the pension schemes of any company covered described in (1);

(5) a person, the person's close relatives, and the related trusts of any of them, all with each other;

(6) the close relatives of a founder of a company to which the Code applies, their close relatives, and the related trusts of any of them, all with each other;

(57) a connected adviser with its client and, if its client is acting in concert with an offeror or with the offeree company, with that offeror or with that offeree company respectively, in each case in respect of the interests in shares of that adviser and persons controlling#, controlled by or under the same control as that adviser (except in the capacity of an exempt fund manager or an exempt principal trader); and

(68) directors of a company which is subject to an offer or where the directors have reason to believe a bona fide offer for their company may be imminent. (See also Note 5 on this definition.); and

(9) shareholders in a private company who sell their shares in that company in consideration for the issue of new shares in a company to which the Code applies, or who, following the re-registration of that company as a public company in connection with an initial public offering or otherwise, become shareholders in a company to which the Code applies.

Close relatives

A person's close relatives will normally include:

- (1) the person's spouse, civil partner or cohabitant;
 - (2) the person's children, parents, brothers, sisters, grandchildren and grandparents, and those of any person described in (1); and
 - (3) the spouse, civil partner or cohabitant of any person described in (2).
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Exempt fund manager/Exempt principal trader

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NOTES ON EXEMPT FUND MANAGER AND EXEMPT PRINCIPAL TRADER

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3. *The effect of a principal trader or fund manager having exempt status is that presumption (57) of the definition of acting in concert will not apply. However, the principal trader or fund manager will still be regarded as connected with the offeror or offeree company, as appropriate. Connected exempt principal traders, but not connected exempt fund managers, must comply with Rule 38. Connected exempt principal traders and connected exempt fund managers must comply with the relevant provisions of Rule 8.*

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Treasury shares

All percentages of voting rights, share capital and relevant securities are to be calculated by reference to the relevant percentage held and in issue outside treasury. A transfer or sale of shares by a company from treasury will normally be treated in the same way as an issue of new shares.

Where shares in a company are held by, or on behalf of, the company itself, or by a subsidiary, and the voting rights in respect of those shares are not exercisable by virtue of the operation of applicable legislation, those shares will be treated as if they were treasury shares.

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Voting rights

Voting rights of a company means all the voting rights attributable to its share capital which are currently exercisable at a general meeting.

Except for treasury shares, any shares which are subject to:

(a) a restriction on the exercise of voting rights:

(i) in an undertaking or agreement by or between a shareholder and the company or a third party; or

(ii) arising by law or regulation; or

(b) a suspension of voting rights implemented by means of the company's articles of association or otherwise,

will normally be regarded as having voting rights which are currently exercisable at a general meeting.

[The existing definition of “voting rights” to be deleted.]

Rule 2.5

2.5 TERMS AND PRE-CONDITIONS IN POSSIBLE OFFER ANNOUNCEMENTS

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NOTES ON RULE 2.5

1. Reservation of the right to set a statement aside or to vary the form and/or mix of consideration

(a) The first announcement in which a statement subject to Rule 2.5(a) is made must contain prominent reference to any reservation to set it aside (precise details of which must be included). Any subsequent mention by the potential offeror of the statement must be accompanied by a reference to the reservation.

(b) Where a potential offeror has reserved the right to vary the form and/or mix of the consideration referred to in a statement subject-to which Rule 2.5(a)(i) applies (but remains bound to a specified minimum level of consideration) and exercises that right, the value of any offer that is made subsequently must be the same as or better than the value of the consideration referred to in that statement, calculated as at the time of the announcement of the firm intention to make an offer. If, during the period ending when the market closes on the first business day after the announcement of the firm intention to make an offer, the value is not maintained, the Panel will be concerned to ensure that the offeror acted with all reasonable care in determining the consideration. If there is a restricted market in the securities offered, or if the amount of securities to be issued of a class already admitted

to trading is large in relation to the amount already issued, the Panel may require justification of prices used to determine the value of the offer.

(c) Once it has announced a firm intention to make an offer, an offeror will not be permitted to exercise any right it had previously reserved either to ~~set aside a statement in relation to reduce~~ the level of consideration that it might offer or to vary the form and/or mix of the consideration. However, the offeror's ability to reduce the offer consideration by the amount of a specified dividend (or other distribution) will not be affected.

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4. Dividends

(a) When an offeror makes a statement to which Rule 2.5(a)(i) applies, the offeror must state that it will have the right to reduce the offer consideration by the amount of any dividend (or other distribution) which is paid or becomes payable by the offeree company to offeree company shareholders, unless, and to the extent that, the statement provides that offeree company shareholders will be entitled to receive and retain all or part of a specified dividend (or other distribution) in addition to the offer consideration.

(b) Where an offeror has made a statement to which Rule 2.5(a)(ii) applies and a dividend (or other distribution) is subsequently paid or becomes payable by the offeree company to offeree company shareholders, the offeror will normally be required to reduce the offer consideration by an amount equal to the dividend (or other distribution) so that the overall value receivable by the offeree company shareholders remains the same, unless, and to the extent that, the offeror has stated that offeree company shareholders will be entitled to receive all or part of a specified dividend (or other distribution) in addition to the offer consideration.

Rule 2.7

2.7 THE ANNOUNCEMENT OF A FIRM INTENTION TO MAKE AN OFFER

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(c) When a firm intention to make an offer is announced, the announcement must state include:

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(x) ... ; and

(xi) ... ; and

(xii) a statement that the offeror will have the right to reduce the offer consideration by the amount of any dividend (or other distribution) which is paid or becomes payable by the offeree company to offeree company shareholders, unless, and to the extent that, the announcement provides that offeree company shareholders will be entitled to receive and retain all or part of a specified dividend (or other distribution) in addition to the offer consideration;

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NOTES ON RULE 2.7

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4. Reservations to a previous statement in relation to the terms of a possible offer

Once it has announced a firm intention to make an offer, an offeror will not be permitted to exercise any right it had previously reserved either to reduce the level of consideration that it might offer or to vary the form and/or mix of the consideration. However, the offeror's ability to reduce the offer consideration by a specified dividend (or other distribution) which is subsequently paid by the offeree company to offeree company shareholders will not be affected.

Rule 6

RULE 6. ACQUISITIONS RESULTING IN AN OBLIGATION TO OFFER A MINIMUM LEVEL OF CONSIDERATION

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NOTES ON RULE 6

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5. Cum dividend

When accepting shareholders are entitled under the offer to retain a dividend declared or forecast by the offeree company but not yet paid, purchases in the market or otherwise by an offeror or any person acting in concert with it may be made at prices up to the net cum dividend equivalent of the offer value without necessitating any revision of the offer. Where the offeror or any person acting in concert with it proposes to acquire an interest in shares in reliance on this Note other than by purchasing shares, the Panel should be consulted.

5. Dividends

(a) Dividends which accepting shareholders are entitled to receive and retain

When accepting shareholders are entitled under the offer to receive and retain, in addition to the offer consideration, a dividend which has been announced by the offeree company but the “ex dividend” date has not yet occurred:

(i) the offeror, in establishing the minimum level of the offer, may deduct from the highest price paid by it (or any person acting in concert with it) during the period to which the Rule applies the amount of the dividend to which offeree company shareholders are entitled; and

(ii) once an offer value has been announced, purchases in the market or otherwise during the “cum dividend” period by the offeror (or any person acting in concert with it) may be made at prices up to the aggregate of the offer value and the amount of the dividend without necessitating any revision of the offer.

However, purchases in the market or otherwise after the “ex dividend” date by an offeror (or any person acting in concert with it) may only be made at prices up to the amount of the offer value without necessitating any revision of the offer.

(b) Dividends which accepting shareholders are not entitled to receive and retain

When accepting shareholders are not entitled under the offer to receive and retain, in addition to the offer consideration, a dividend which has been announced by the offeree company:

(i) the offeror, in establishing the minimum level of the offer, may not deduct from the highest price paid by it (or any person acting in concert with it) during the period to which the Rule applies the amount of the dividend; and

(ii) once an offer value has been announced, purchases in the market or otherwise during the “cum dividend” period by the offeror (or any person acting in concert with it) may be made at prices up to the offer value without necessitating any revision of the offer.

However, purchases in the market or otherwise after the “ex dividend” date by an offeror (or any person acting in concert with it) may only be made at prices up to the offer value less the amount of the dividend without necessitating any revision of the offer.

Rule 8**RULE 8. DISCLOSURE OF DEALINGS AND POSITIONS**

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NOTES ON RULE 8

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5. Details to be included in the disclosure

- (a) ***Public disclosures (other than Dealing Disclosures by exempt principal traders with recognised intermediary status dealing in a client-serving capacity)***

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The interests, short positions, rights to subscribe, dealing arrangements, and securities borrowing and lending positions and irrevocable commitments and letters of intent to be disclosed under (ii), (iii), (vi) and (vii) above are those determined in accordance with Note 7(d) below.

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(f) Owner or controller details

For the purpose of disclosing identity, the owner or controller of any interest or short position in securities disclosed must be specified, in addition to any other details. The naming of nominees or vehicle companies is insufficient. If the owner or controller of the interest or short position is a trust, details of the trustee(s), the settlor, the protector and the beneficiaries of the trust must be disclosed. Where the beneficiaries are a connected group, for example, members of a family, a description of the group will normally be sufficient.

Rule 9.5**9.5 CONSIDERATION TO BE OFFERED**

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NOTES ON RULE 9.5

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4. — Cum dividend

When accepting shareholders are entitled under the offer to retain a dividend declared or forecast by the offeree company but not yet paid, the offeror, in

~~establishing the level of the cash offer, may deduct from the highest price paid the net dividend to which offeree company shareholders are entitled. Where the offeror or any person acting in concert with it has acquired any interest in shares to which this Note may be relevant other than by purchasing shares, the Panel should be consulted.~~

4. Dividends

Note 5 on Rule 6 also applies to acquisitions made during the period to which Rule 9.5 applies.

Rule 9.6

9.6 OBLIGATIONS OF DIRECTORS

When directors (~~and/or~~ their close relatives ~~and/or~~ the related trusts ~~of any of them~~) sell shares to a person (or enter into options, derivatives or other transactions) as a result of which that person is required to make an offer under ~~this~~-Rule 9.1, the directors must ensure that as a condition of the sale (or other relevant transaction) the person undertakes to fulfil his obligations under the Rule. In addition, except with the consent of the Panel, such directors should not resign from the board until the first closing date of the offer or the date when the offer becomes wholly unconditional, whichever is the later.

Rule 9.7

9.7 VOTING RESTRICTIONS AND DISPOSAL OF INTERESTS

(a) Where the Panel agrees to the disposal of interests in shares by a person as an alternative to making an offer pursuant to Rule 9.1, the Panel must be consulted as to:

(i) the interests required to be disposed of; and

(ii) the application, pending completion of the disposal, of restrictions on the exercise of the voting rights (or the procurement of the exercise of the voting rights) attaching to the shares in which that person and persons acting in concert with that person are interested.

(b) Similarly, where an offer made pursuant to Rule 9.1 lapses for a reason other than the acceptance condition not being satisfied, or where a new offer is required pursuant to Note 2 on Rule 9.3, the Panel must be consulted regarding the ability of the offeror and any persons acting in concert with it to exercise, or procure the exercise of, the voting rights attaching to the shares of the offeree company in which they are interested.

NOTES ON RULE 9.7

1. Calculation of the number of interests in shares to be disposed of

Where a disposal of interests in shares is permitted as an alternative to making an mandatory offer, the interests in shares required to be disposed of must be sufficient to take the total number of shares carrying voting rights in which the offeror and persons acting in concert with it are interested either, if Rule 9.1(a) applies, to below 30% or, if Rule 9.1(b) applies, to the percentage in which they were interested prior to the triggering acquisition being made.

2. Calculation of the number of shares to which voting restrictions will be applied and the number of interests to be disposed of

Where voting restrictions are applied pending completion of a disposal of interests in shares permitted as an alternative to making an obligation under Rule 9.1-a mandatory offer has arisen by virtue of under:

- (a) Rule 9.1(a), the number of shares in relation to which voting restrictions, if any, will be applied will normally be such number of shares as results in the person to whom Rule 9.1(a) applies (together with persons acting in concert with that person) being able to vote-exercise less than 30% of the voting rights attaching to shares in the offeree company; or
- (b) Rule 9.1(b), the number of shares in relation to which voting restrictions, if any, will be applied will normally be such number of shares as results in the person to whom Rule 9.1(b) applies (together with persons acting in concert with that person) being able to vote no more than the exercise a percentage of interests voting rights attaching to shares in the offeree company held by those persons which is no more than the percentage of shares carrying voting rights in which that person (together with persons acting in concert with that person) was interested prior to the triggering acquisition being made.

In each case, the calculation of the number of shares in relation to which voting restrictions will be applied will be made by reference to the reduced maximum number of shares entitled to be voted voting rights which may be exercised following the application of the voting restrictions by the Panel.

[The ordering of the paragraphs in Notes 1 and 2 on Rule 9.7 has been changed from the current Note on Rule 9.7. However, this has not been shown in the marked-up text.]

Rule 11

11.1 WHEN A CASH OFFER IS REQUIRED

Except with the consent of the Panel in cases falling under (a) or (b), a cash offer is required where:

- (a) the shares of any class under offer in the offeree company in which interests are acquired for cash (but see Note 5) by an offeror and any person acting in concert with it during the offer period and within 12 months prior to its commencement ~~represent carry 10% or more of the shares voting rights currently exercisable at a class meeting of that class in issue~~, in which case the offer for that class shall be in cash or accompanied by a cash alternative at not less than the highest price paid by the offeror or any person acting in concert with it for any interest in shares of that class acquired during the offer period and within 12 months prior to its commencement; or
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NOTES ON RULE 11.1

1. Price

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~~The Panel should be consulted in advance if it is proposed to acquire the voting rights attaching to shares, or general control of them.~~

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4. Equality of treatment

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Rule 11.1(c) may also be relevant when interests in shares representing carrying 10% or more of the voting rights of a class in issue have been acquired in the previous 12 months for a mixture of securities and cash. The Panel should be consulted in all relevant cases.

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8. Allotted but unissued shares

When shares of a company carrying voting rights have been allotted (even if provisionally) but have not yet been issued, for example, under a rights issue when the shares are represented by renounceable letters of allotment, the Panel should be consulted. Such shares are likely to be relevant for the purpose of calculating percentages under this Rule.

9. *Cum dividend*

~~When accepting shareholders are entitled under the offer to retain a dividend declared or forecast by the offeree company but not yet paid, the offeror, in establishing the level of the cash offer, may deduct from the highest price paid the net dividend to which offeree company shareholders are entitled. Where the offeror or any person acting in concert with it has acquired any interest in shares to which this Note may be relevant other than by purchasing shares, the Panel should be consulted.~~

9. *Dividends*

Note 5 on Rule 6 also applies to acquisitions made during the period to which Rule 11.1 applies.

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11.2 WHEN A SECURITIES OFFER IS REQUIRED

Where interests in shares of any class of the offeree company ~~representing carrying 10% or more of the shares voting rights currently exercisable at a class meeting of that class in issue~~ have been acquired by an offeror and any person acting in concert with it in exchange for securities in the three months prior to the commencement of and during the offer period, such securities will normally be required to be offered to all other holders of shares of that class.

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NOTES ON RULE 11.2

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5. *Acquisitions for a mixture of cash and securities*

The Panel should be consulted where interests in shares representing carrying 10% or more of any the voting rights of a class of shares in issue have been acquired during the offer period and within 12 months prior to its commencement for a mixture of securities and cash.

6. *Acquisitions in exchange for securities to which selling restrictions are attached*

Where an offeror and any person acting in concert with it has acquired interests in shares representing carrying 10% or more of the voting rights of any class of shares in issue in the offeree company during the offer period and within 12 months prior to its commencement and the consideration received or receivable by the vendor or other party to the transaction giving rise to the interest includes shares to which selling restrictions of the kind set out in the second sentence of Rule 11.2 are attached, the Panel should be consulted.

Rule 19.2**19.2 RESPONSIBILITY**

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NOTES ON RULE 19.2**1. Delegation of responsibility**

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If detailed supervision of any document or advertisement has been delegated to a committee of the board, each of the remaining directors of the company must reasonably believe that the persons to whom supervision has been delegated are competent to carry it out and must have disclosed to the committee all relevant facts directly relating to himself (including his close relatives and his and their related trusts) and all other relevant facts known to him and relevant opinions held by him which, to the best of his knowledge and belief, either are not known to any member of the committee or, in the absence of his specifically drawing attention thereto, are unlikely to be considered by the committee during the preparation of the document or advertisement. This does not, however, override the requirements of the UKLA Rules relating to the acceptance of responsibility for a prospectus or equivalent document where applicable.

Rule 24**24.3 FINANCIAL AND OTHER INFORMATION ON THE OFFEROR, THE OFFEREES COMPANY AND THE OFFER**

Except with the consent of the Panel:

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(d) the offer document (including, where relevant, any revised offer document) must include:

...

(iv) details of each class of security for which the offer is made, including whether those securities will be transferred “cum” or “ex” any dividend and the maximum and minimum percentages of those securities which the offeror undertakes to acquire;

...

24.17 DIVIDENDS

- (a) **It must be a term of the offer that the offeror has the right to reduce the offer consideration by the amount of any dividend (or other distribution) which is paid or becomes payable by the offeree company to offeree company shareholders, unless, and to the extent that, offeree company shareholders are entitled to receive and retain all or part of a specified dividend (or other distribution) in addition to the offer consideration.**
- (b) **It must also be a term of the offer that, if the offeror exercises the right to reduce the offer consideration by all or part of the amount of a dividend (or other distribution) that has not been paid, offeree company shareholders will be entitled to receive and retain that dividend (or other distribution).**

Rule 32.2

32.2 NO INCREASE STATEMENTS

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NOTES ON RULE 32.2

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6. Dividends

Where an offeror has made a no increase statement and a dividend (or other distribution) is subsequently paid or becomes payable by the offeree company to offeree company shareholders, the offeror will normally be required to reduce the offer consideration by an amount equal to the dividend (or other distribution) so that the overall value receivable by offeree company shareholders remains the same, unless, and to the extent that the offeror has stated that offeree company shareholders will be entitled to receive and retain all or part of a specified dividend (or other distribution) in addition to the offer consideration.