Governance for Owners

The Secretary to the Code Committee
The Takeover Panel
10 Paternoster Square
London EC4M 7DY

27 May 2011

Dear Sir

Proposed amendments to the Takeover Code

Thank you for the opportunity to submit comments in relation to the proposed amendments to the Takeover Code.

By way of background, and to put our comments in context, Governance for Owners (GO) is an independent partnership between its executives and long term investors such as Railpen, CalPERS and IPGL. GO offers a number of investment management and shareowner services products, two of which will be directly affected by the proposed changes:

- The GO European Focus Fund that invests in a small number of European public companies where value can be added through exercising owners' rights to address key structural or strategic governance issues that have historically impaired company performance.

- GO Stewardship Services that offer independent voting, corporate engagement and other advisory services on environmental, social, and corporate governance (ESG) matters.

Our comments are set out below.

Part A: Increasing the protection for offeree companies against protracted "virtual bid" periods

As long term shareholder, GO supports the introduction of measures that minimise the destabilising effect that a protracted offer clearly has on an investee company's business and its management. Such destabilising effect will ultimately reflect in poorer prospects for the business and thus a lower value for the company's shares, and as such, it is clearly not in the interest of long term investors.

We would, however, ask the Panel to clarify whether a potential offeror would continue to be allowed to name possible takeover candidates when meeting investors as this is standard practice in the investment community.

Part B: Strengthening the position of the offeree company

We appreciate the Panel's concerns that the boards of target companies may feel pressured to accept deal protection measures and inducement fees which could be heavily skewed in favour of the bidder.

In our view, however, such measures often ensure that management will only seek out alternative bids if there is a material increase in the offer price. They may also encourage a potential bidder to make a bid if they can be re-assured that they will be able to offset some of the costs of carrying out some due diligence and securing financing arrangements if the offer does not go ahead.

As investors we want to make sure that, if a company is going to be acquired, then the offer price is as close as possible to its intrinsic fair value. Ensuring competing bids can go ahead is an important factor in achieving such fair value.

On the other hand, we agree with the Panel's view that, in recent times, some break up fees have been so excessive as to prevent a counter offer.

Accordingly, our view is that the proposed new Rule 21.2(a) should be amended to allow a target to enter into a break fee arrangement of up to 1% of the value of the target company (as determined by the bid price) with both the initial bidder and any white knight. Such arrangements should not be at the discretion of the Panel.

Part C: Increasing transparency and improving the quality of disclosure

Our view is that the proposed amendments by the Panel should be adopted.

Disclosure of advisers' fees will ensure greater accountability. The disclosure of financial information and financing of the offer will give investors in the bidder company a sense of the financial undertakings being taken on, thus allowing a better assessment of the risk/reward profile of the deal.

Part D: Providing greater recognition of the interests of the offeree company

We appreciate the rationale behind the Panel's proposal to take a tougher line on public statements made during bids in connection with the bidder's plans regarding the target's employees, location of business and fixed assets. We wonder though whether the proposed amendments to the Code will achieve the required results.

We believe that an important aspect of most acquisitions is cost rationalisation, and companies should pursue these unfettered. Whereas the protection of target employees is the intention, it is difficult to impose restrictive covenants on new owners post acquisition, even for 12 weeks let alone 12 months. There may be legitimate factors at the parent company board level that result in, for example, closure of plants in the acquired target company.

With Kraft/Cadbury very much in mind however, there is every reason to interrogate potential bidders before the deal approval is given in order to ensure that their intentions are honourable and ethical. Perhaps the Panel could take an active role on this during the bid period (for example by giving advance clearance of statements to be made or seeking clarification by interrogating bidders that make relevant statements that have not been pre-cleared). There should then be a 12 month period post bid when successful bidders have to justify to the Panel any actions that are contrary to what was said during the bid period.

The Panel would then be in a position to publicly criticise bidders that unreasonably disregard statements made in the bid period. The Panel should also explore ways of holding advisors accountable for statements made by their client during the bid period that are unreasonably disregarded.

We hope you find these comments helpful. Please contact us if you would like to discuss any of the points made above. Further information or eventual clarifications can be directed in the first instance to Paola Perotti, Partner (Tel: +44 20 7614 4750, E-mail: p.perotti @g4owners.com).

Yours sincerely

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