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The Secretary to the Code Committee
The Takeover Panel

Submitted by email to
supportgroup@thetakeoverpanel.org.uk

26 May 2011

Dear Sirs

ICSA response to the Takeover Panel Consultation on Proposed Amendments to the Takeover Code

Thank you for the opportunity to comment on this important issue. The Institute of Chartered Secretaries and Administrators (ICSA) is the professional body that qualifies chartered secretaries and our members have extensive practical experience of working through takeover situations as both offerors and offerees.

We responded to the first consultation on the Takeover Code and highlighted the need to consider any proposed changes to the UK rules within the international context to ensure they did not adversely impact the UK's position. ICSA is very pleased to note that the proposed changes set out in this second consultation should strengthen the position of UK offeree companies.

In our response we focus on the areas where our members have direct experience. ICSA members have a wealth of practical experience from companies within the FTSE100 and 250 and our response points out the practical realities of some of the proposals, despite the good intentions (which we support). Our members would be happy to discuss individual experiences of the disruption caused by virtual bids or the practical issues that can result from proposals for the provision of advice for employee representatives.

We make some general points followed by some responses to your specific questions.

1. General points

In our response to the first consultation we expressed support, in principle, to offer documents and offeree board circulars including additional information on the financing of a bid and future intentions, to address the information inequality that exists currently. We also expressed the view that additional information would provide greater opportunities for other stakeholders, such as employees, to comment on the disclosed intentions of the offeror company. We are generally supportive of the proposed changes; however, we have some comments and, in particular we have concerns regarding the proposals for advice to employee representatives set out in this consultation. Our specific comments are detailed below.

2. Specific points

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

We are very supportive of the proposed changes to this section and believe it is helpful to have "virtual bids" covered by the Code. From our members' experience, the position of a target company is identical, or even more challenging, in a virtual bid situation to that when a firm intention to bid has been announced. Being in receipt of a virtual bid can be extremely disruptive for companies and has a detrimental effect on the management of the business during this time. This is particularly true where the offeree has a significant proportion of its assets and business operations outside the UK as defending a bid requires the presence of senior management in London, leaving the management of the business in the hands of local management overseas. Management attention becomes focussed on defence of the bid and in allaying the fears of employees, customers and other stakeholders who are distracted by takeover rumours and business performance can suffer as a result. The offeree company is suddenly incurring substantial costs from lawyers, banks and other advisers, having had little or no opportunity to negotiate these costs from a satisfactory bargaining position. In addition business decisions ranging from the allotment of shares for employee share plans to the appointment of new executive directors need to be considered in the light of a possible takeover and many have to be referred to the Takeover Panel in advance to ensure that a decision would not be regarded as frustrating action. These all take management time and focus away from core business activities and, if protracted, could be seriously damaging to the business.

Part B: Strengthening the position of the offeree company

Questions 10 and 11

We are also supportive of the proposed changes to this section but would raise a couple of points in relation to Questions 10 and 11. We would query the suggestion that there should be a dispensation in limited circumstances so that the offeree company can agree an inducement fee with one competing offeror at the time that the competing offeror announces a firm intention. This proposal appears to assume that *any* competing bid would be considered by the board to be a better option for the company and its stakeholders but this may not be the case as it is impossible to envisage all situations that may arise in relation to competing bids. It is also suggested that inducement fees under this dispensation should be *de minimis*, which is set at no more than 1% of the value of the offeree company. However, 1% of the value of the company could be a very large sum indeed where a bid involves an offeree company with a large market capitalisation and such amount would not be regarded as insignificant by the recipient of the inducement fee or by the offeree's stakeholders.

We consider that inducement fees are not compatible with the board's fiduciary duties to the company and therefore should not be permitted, regardless of the circumstances. However, we understand that there may be difficulties in a target company securing a competing offer from a "white knight" offeror without being able to offer any assistance with the costs incurred. We suggest that an alternative solution would be for the offeror company to be able to offer an indemnity against the direct costs incurred by the competing offeror.

Question 15

We would highlight the proposed change introducing a new Note 1 on Rule 25.1, which states that 'the board of the offeree company ... is not precluded by the Code from taking into account any other factors which is considers relevant'.

The wording used appears to be much wider than that discussed under paragraph 4.3 on page 56 and we would argue that it is too broad. We suggest that the Rule should highlight the duty to promote the success of the company over the longer term and refer specifically to s172 Companies Act 2006, which sets out those factors that directors must take into account.

Part C: Increasing transparency and improving the quality of disclosure

Question 16

We have some concerns regarding the proposed changes under Part C and Question 16. We agree that fees overall are far too high and this issue needs to be addressed. We also support greater transparency in all areas of Corporate Governance and Corporate Reporting. Whilst reiterating our support for transparency in general, our members' experience of the effect of increased transparency in executive pay does not lead us to think it will result in a reduction of fees.

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

Question 27

The consultation document suggests that statements of the offeror's intentions in the offer documents would be expected to hold true for a period of 12 months or such other time period as may be specified. We agree that offerors should be held to such statements made and support the inclusion of new Note 3 on Rule 19.1. However we do not think it is unreasonable that an offeror should be held to their stated intentions for a period of 12 months and therefore we would remove the option for 'such other time period as may be specified'. Recognising that economic circumstances can change, however, we also think the Note should include a 'caveat' that the statements of intention are subject to any material adverse change that impacts directly on the offeror's ability to fulfil its intentions. We feel this strengthens the rule as the term 'material adverse change' has a well-understood meaning.

We would also highlight the question of how this Rule could be enforced. It would be difficult to envisage any sanction that would be a deterrent to an overseas company who may have limited scope or ambition for future M & A activity in the UK, unless the Panel is prepared to take stronger action against a company's advisers in such circumstances.

Question 28

We would like to highlight one point on the wording used in new Rule 24.1(a), The Offer Document. In this section, and elsewhere in the consultation document there are references to 'sending' documentation to shareholders etc. Rule 19.8 of the current Code provides for electronic communications and we would highlight the importance of retaining this provision in the new Code.

Questions 29 and 31

We agree in principle with employee consultation but we are concerned about the proposal that the offeree company should pay the costs incurred by employee representatives in obtaining advice and verification of information contained in an employee representatives' opinion. There is no rationale for why these costs should automatically fall to the offeree company rather than the offeror company (the opinion may be in favour of the offer), and it

would seem particularly unfair when an offeree company has received an unwelcome approach from the offeror.

In addition, the definition of employee representative in 8.4(b) is very wide as it includes *any other person who had been elected or appointed to a position in which that person is expected to receive, or where it is appropriate for that person to receive, information on behalf of employees*. This definition would seem to apply to multiple employee bodies. An international company would have difficulty identifying all the people in various countries who might reasonably expect to receive information on behalf of employees, and it is very likely that employees in different jurisdictions would have different views and conflicting interests. This could cause major practical difficulties for an offeree company and could be divisive. Providing separate advice for each representative group in every jurisdiction would be both time consuming and expensive, with no certainty of a consensus view being reached. This would seem to be an unreasonable burden on an offeree company who may not necessarily have solicited the offer or be recommending it to its shareholders.

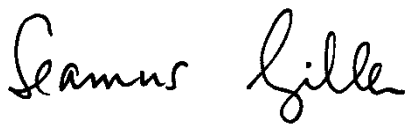
The current position is that, in practice, employee representatives would cover their own initial costs and, should advice and verification be needed, the party that was supported by the employee representatives' statement (whether the offeror or offeree) would help to fund the advice and verification needed before publication of the statement. We believe that the current Code provisions work well in practice and do not need to be changed.

We also have concerns about the proposal that the employee representatives' separate opinions on the offer (potentially with conflicting views) be appended to the offeree board circular. There would be huge difficulties in providing information, in confidence and in advance of an offer being made public, to multiple employee representatives of an international company, in a number of jurisdictions.

The Code Committee has already given detailed thought to the question of employee representatives' opinions received too late for inclusion in the offeree circulars. We would suggest that it would be more appropriate for all employee representatives' separate opinion(s) to be made available on the offeree company's website and announced via a RIS. This would facilitate any number of different opinions being made public and it would be clear that the offeree company's board did not take responsibility for the statements made.

We hope you find our comments useful and would be happy to discuss any of the points made in more detail.

Yours faithfully



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