LATHAM & WATKINS : RESPONSE TO PCP 2011/1

General comments

Before responding to the Code Committee's specific questions, we would make the following general comments.

We believe that the proposed changes to the Code go much further than, and are potentially contrary to, the Panel's stated objectives set out in section 2(a) of the Introduction to the Code. First, some of the proposed changes (such as the naming of all potential offerors) may deny shareholders "the opportunity to decide on the merits of a bid" by putting off potential bidders and, second, some of the changes seem to stray into territory which, the Panel states in the Introduction to the Code, is neither its, nor the Code's, concern. For example, the prohibition of offer related agreements between offeror and offeree and the ban generally on inducement fees, seem to be matters better left to those paid to make decisions in the best interests of their respective stakeholders.

Our response, set out below, is limited to those points where we disagree with or wish to amend the proposed changes.

Q1 Do you have any comments on the proposed new Rule 2.4 and the proposed new Note 3 on Rule 2.2?

We strongly oppose the requirement that a potential offeror "with whom the offeree company is in talks or from whom it has received an approach" should be named when an announcement by an offeree company commences an offer period, as well as the proposal that all potential offerors are identified publicly at this time. We believe that the current rule 2.2 deals adequately with this area.

If another bidder emerges, particularly after a firm intention to make an offer has been announced by an offeror, target shareholders can decide at that point on the credibility or otherwise of such an alternative offer.

Also, the requirement to name all potential offerors because of one potential offeror's leak seems disproportionate and unnecessary. There is also a danger that an advanced potential offeror could be incentivised to leak its interest as a way of flushing out other approaches that have been received. In extreme cases, this could arguably lead to offeree shareholders receiving a lower offer than might otherwise have been available.

The proposed 28 day timetable/2.8 obligation could still apply to an unnamed potential offeror who has made an approach.

Q2 Do you have any comments on the proposed new Rule 2.6(a)?

We believe the 28 day deadline is too short, particularly for potential offerors with smaller executive teams. The potential offeror will be conducting diligence and, possibly, arranging third party financing concurrently. If there is to be a deadline, it should be extended to 42 days, particularly if the Code Committee adopts the new Rule 2.4(a) requiring all potential offerors to be named at the commencement of the offer period.

Q3 Do you have any comments on the possible alternative approach to the identification of potential offerors?

We believe the alternative approach is preferable (see response to Question 1).

Q6 Do you have any comments on the proposed new Rule 2.6(c) and Note 1 on Rule 2.6?

In certain circumstances, we believe the Panel should be able to grant an extension to the 28 day deadline at the request of a potential offeror. For example, where the offeree board is reluctant to engage with a potential offeror, it may take that potential offeror longer to receive investment committee approval and/or obtain third party financing. Offeree shareholders should not be denied the opportunity to decide on the merits of a bid for six months where a potential offeror is nearly ready to announce a firm intention to make a bid but needs a week or two more before doing so.

Q9 Do you have any comments on the proposed new Rule 21.2?

We disagree that "packages of contractual protections…might deter competing offerors". With the existing cap of 1% on inducement fees, we do not believe that such amounts deter competing offerors. Also, by removing an offeree's ability to negotiate inducement fees with potential offerors, it could actually weaken an offeree's position by limiting the number of bids notwithstanding the proposed "white knight"/auction exceptions.

Further, the general prohibition on implementation agreements goes beyond a prohibition on deal protection measures. Implementation agreements often deal with other matters, some minor, such as agreement by the offeror not to amend the Scheme document, and others which are more important, such as agreed anti-trust solutions, commitments in relation to defined benefit pension schemes and conduct of business matters. Anti-trust solutions can actually be in offeree shareholders' interests if it ensures greater deal certainty and/or avoids the need for a pre-conditional bid. Also, as part of the price of securing a target board's recommendation, offerees can often obtain meaningful anti-trust concessions from bidders. Conduct of business provisions can be important, especially in relation to matters which may be strategically important to a bidder but below the materiality threshold in rule 21.1.

Q16 Do you have any comments on the proposed new Rules 24.16(a) and 25.8?

Whether or not shareholders wish to accept an offer will almost always be determined by the level of the offer price. It is difficult to see how the disclosure of adviser fees is going to influence their decision one way or another. Equally, in deciding whether or not to recommend an offer, the directors of an offeree company already know how much their advisers are being paid and can decide for themselves if the reason their adviser is advocating that the target board recommend the offer is simply so that that adviser can earn its advisory fee. Similarly, what purpose does the obligation to disclose offerors' financing fees actually serve? It is of no concern to offeree shareholders.

Q27 Do you have any comments on the proposed new Note 3 on Rule 19.1?

We are generally supportive of the need for statements of intention to hold true for a certain period of time. There is a danger that the new focus on this area will lead to increasingly anodyne statements. One suggestion, which may encourage fuller disclosure, would be to make clear in the notes to Rule 19.1 the Code's requirements in relation to statements of belief (i.e. the subjective and objective tests referred to in the public criticism of Kraft).