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The Secretary to the Code Committee
The Takeover Panel
One Angel Court
London EC2R 7HJ

By email to: supportgroup@thetakeoverpanel.org.uk

13 January 2023

Dear Secretary,

Panel Consultation 2022/4 ("PC22/4")
Comment from the Share Plan Lawyers Group ("SPL")

This letter contains the comments of SPL on PC22/4. SPL was formed by lawyers whose main practice is employee share plans. SPL has more than 290 members, representing some 70 law firms, and a number of specialist practitioners. Our members include senior lawyers from the major UK firms.

One of the principal objects of SPL is to discuss matters of interest with public and private sector bodies and, where appropriate, to lobby on behalf of members and their clients on issues affecting employee share plans.

Given SPL's role, we have concentrated on those elements of PC22/4 that relate specifically to employee share plans. Our response relates to the questions set out within Q6:

Q6 Should there be a requirement for the board of the offeree company to make a recommendation to shareholders and to holders of Rule 15 securities as to the action that they should take in respect of an offer (including any alternative offers) or a Rule 15 offer or proposal? Do you have any comments on the proposed amendments to Rule 25.2 and Rule 15.2 and the related provisions of the Code?

Background

In practice, there are up to four courses of action open to holders of Rule 15 securities constituted by rights granted under an employees' share plan (that is, those rights that do not crystallise without action on the part of the holder – the Panel has previously accepted that those that automatically crystallise would not be Rule 15 securities) ("**Options**"). The courses open in the context of any particular transaction will depend at least partly on the proposal(s) made by the offeror.

The courses are:

1. *Exercise rights and accept the offer* (or participate in a scheme of arrangement). The ability to exercise, if it arises at all, will arise under the rules of the relevant share plan so, to this extent, no Rule 15 proposal is required. An "exercise and accept" proposal effectively shortcuts the process for acceptance of the offer. Normally, this is the only proposal made by offerors, usually with exercise of Option(s) occurring just after the Court sanction of the scheme of arrangement (in the case of takeovers by way of a scheme) or just after the

change of control (in the case of takeovers by way of offer). In both cases, participants are normally given the opportunity to set off their exercise price against the consideration payable under the offer rather than make an up-front payment.

2. *Roll rights over into new rights over the offeror's share capital*. For a variety of reasons, it may not suit an offeror to offer rollover and, where rollover is offered, it may not be attractive to certain classes of share plan participant. In practice, therefore, this is rarely offered as a proposal.

3. *Accept a cash payment for the surrender/cancellation of rights*. As with rollover, it may not suit an offeror to offer cash cancellation and, where it is offered, it may not be attractive to certain classes of share plan participant. Again, therefore, this is rarely offered as a proposal.

4. *Do nothing*. Assuming that the rights have value, this value would be lost if the share plan participant takes no action and, in accordance with the relevant share plan rules, the rights lapse.

Quite apart from any Rule 15 proposal, any participant whose Options become exercisable under the share plan rules may choose to exercise and, depending on the circumstances and timing, either sell the resulting shares in the market or have them compulsorily acquired.

There is fairly settled wording to explain the participant's rights and each of the three proposals, described in paragraphs 1 to 3 above, that might be made by the offeror in its Rule 15 Letter(s) ("**R15 Letters(s)**"), it being understood that the fourth course of action described above is simply a default position.

The description of the underlying offer and the Rule 15 proposals made will indicate facts from which the participant, or the participant's personal financial adviser, should be able to assess:

(a) the economic value of the participant's Rule 15 Securities;

(b) the action(s) by which this value may be realised; and,

(c) the merits or demerits of each course of action in the context of the participant's personal circumstances.

In relation to item (c), one factor will be the participant's personal tax position. This will not be known in any detail, if at all, to either the offeror or the offeree. Tax implications are, therefore, described in broad terms in Rule 15 Letter(s), and, for example, are usually qualified by the express assumption that the participant is subject to tax in only one jurisdiction.

To go beyond this level of detail is not practical and would also risk straying into the realm of providing investment advice. Depending on the circumstances, an exemption from the prohibition on providing investment advice may apply, and/or the R15 Letter(s) may be approved by an authorised person. Nonetheless, companies prefer, and are normally advised, to avoid making statements that might be construed, in particular by the employees concerned, as giving investment advice, even if lawful.

General comment

On balance, we think that the proposed amendments to Rule 15 represent largely the codification of existing best practice in relation to Rule 15 securities in the form of Options. As such, they are unobjectionable.

An offeree board can and does make recommendations as regards an offer, any alternative offer and proposals. Where there is more than one offer or proposal made, the offeree board need not recommend one course of action over another, so long as all proposals or offers are "recommendable".

The offeree board does not provide more detailed recommendations for each sub-set of Option holders (of which there could be a number, even within a single share plan, depending on the facts). To do so would involve a significant lengthening and complication of the Rule 15 Letter(s) which would not be in the interests of either companies or share plan participants, and it would be difficult for Rule 3/15 advisers to become appropriately engaged to support the offeree.

When the Panel response to the consultation is issued, it would be helpful if it makes clear that no substantive change to generally understood practice on Rule 15 Letter(s) is intended.

Rule 15 and Rule 25

We consider that Rule 15 should be subject to an equivalent Note as is proposed to apply under Note 2 to Rule 25.

Rule 3 adviser

Paragraph 5.10 of the consultation recites that, under Rule 15.2, the board of the offeree company must obtain independent advice on any Rule 15 offer or proposal; that the substance of that advice must be made known to the holders of the Rule 15 securities, together with the board's views on the offer or proposal; and further that, in practice, the advice on the Rule 15 offer or proposal will normally also be given by the financial adviser appointed for the purposes of Rule 3.1.

If the Panel is still concerned that companies are not including appropriate wording in their Rule 15 letters, we wonder whether the need for a separate Rule 15 recommendation process should be further reinforced, by Note or otherwise, in Rule 15.

Contact with SPL

If you have any questions on the above, please contact either Paul Randall of Hogan Lovells at paul.randall@hoganlovells.com or Hannah Needle of Tapestry Compliance at hannah.needle@tapestrycompliance.com.

Yours faithfully

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