Redacted by the Code Committee in accordance with the Procedures for Amending the Takeover Code

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Sent by Email on 21st July 2023

[redacted]

The Takeover Panel
One Angel Court
London
EC2R 7HJ

By Email only to [redacted]

21st July 2023

Dear [redacted]

Please find enclosed my answers for your consideration I have also copied in the Takeover Panel the support group with my answers.

Reply to PCP 2023 Review of Rule 21 Restrictions on frustrating action.

INTRODUCTION

Please see below answers to certain of the questions posed in the public consultation by the Code Committee in respect of its review of Rule 21 (Restrictions on Frustrating Action) and other matters. Within this review, the Committee is proposing certain amendments to Rule 21 so as to provide increased flexibility for offeree companies to carry on their ordinary course activities.

Whilst I agree that offeree companies should not be unduly restricted from undertaking their normal operations during the period of any offer, what is of a concern is ensuring that Rule 21 is not diluted to the extent that it can be ignored by boards when confronted with an offer that is not palatable to them personally. Namely, requiring offerors to be restricted by the Rule 9 obligations, but not ensuring that any reciprocal obligations on the board under Rule 21 are adhered to.

[redacted]

This specific example of breaches has been communicated to the Panel separately under submissions made to the Senior Assistance Secretary today, but you will see from the theme of my responses to the public consultation below that any amendments must not dilute Rule 21 to the point that it is easier for boards not to comply or interpret the provisions favourably to avoid compliance.

Q1 Should the new definition of "restricted action" be introduced in the new Rule 21.1(c) as proposed?

Answer

No this would be to the detrimental to Shareholders interests where a board can transfer and sell shares from treasury that are not voteable in to an EBT even when they are not required and get the trustees (with a indemnity) to vote against the beneficiaries wishes and the trustees instead vote in the favor of the majority of board of directors (or Committee formed) and vote against a concert party or board control seeking party at any AGM or EGM and frustrate a vote without shareholder approval, 2. It allows shares to be sold out of the EBT by the majority of the board of directors (or Committee formed) using it brokers to sell them shares to related parties or friendly shareholders to make sure they will be voted in their favor and against the Concert Party or Board Control seeking Party that has been restricted by the Executives from trading in shares in the offeree company and allowing the directors to frustrate any action, shareholders should have the choice to vote on at any AGM or EGM as 21 (c) allows the right that it should have shareholder approval. [redacted]

[redacted]

Q2 Should issuing shares or convertible securities, granting options or awards over shares, or redeeming or buying back shares or convertible securities by the offeree company, other than in the ordinary course of business, in any amount be a restricted action, as proposed in the new Rules 21.1(c)(i) to (iii)?

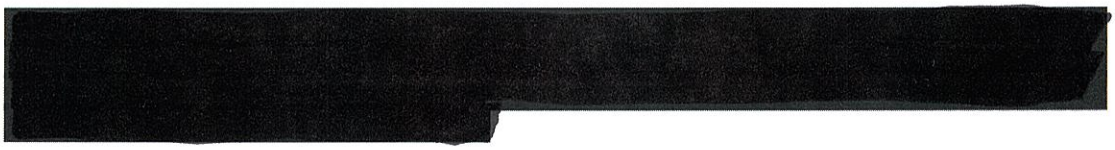
Answer

Yes if this can be done without any controls in place. The board must not be able to rely on a loophole with a more relaxed drafting of Rule 21.1 that enables them to take actions that can frustrate and dilute any potential offers from shareholders if the directors just personally do not agree with them as this is detrimental to the shareholders as a whole.

Q3 Should the current Note 5 on Rule 21.1 be amended as proposed with regard to employee incentivisation arrangements?

Answer

There needs to be provision for the presumption that it is in the ordinary course of business to be rebutted if evidence if provided to the contrary. Also, needs to consider not just the fact that an option or vesting is occurring, but also that the board's handling and administration of it are in accordance with scheme rules, usual precedent etc. [redacted]



Q4 Should a redemption or purchase of its own shares by the offeree company in line with defined limits announced or established before the relevant period normally be in the ordinary course of the offeree company's business, as proposed in the new Note 2 on Rule 21.1?

Answer

No comment or preference

Q5 Should the Panel be able to have regard to additional or alternative indicators of materiality that it considers appropriate either in the context of the relevant industry or in order to take into account the particular circumstances of the offeree company when determining whether a disposal or acquisition of assets is of a material amount, as set out in the proposed new Note 3(c) on Rule 21.1?

Answer

Yes as these may be indicators that are outside of the ordinary course and allows the Panel then to consider every matter on its own merits and relative to the context

Q6 Should only disposals and acquisitions that are outside the ordinary course of the offeree company's business be included in the calculation when determining if the relevant assets are, in aggregate, of a material amount, as set out in the proposed new Note 3(e) on Rule 21.1?

Answer

No, as there may be a number of disposals/ acquisitions that are in the ordinary course, but when taken together and viewed as a whole, are in fact outside the ordinary course. E.g a business may ordinarily dispose of a particular type of asset periodically, but disposing of multiple assets in quick succession is outside the ordinary course.

Q7 Do you have any comments on the matters that the Executive will consider when determining whether a disposal or acquisition of assets is in the ordinary course of the offeree company's business, as set out in the draft new Practice Statement No 34?

Answer

No

Q10 Should the Panel be consulted to determine whether entering into offer-related employee retention arrangements that relate to a period that is prior to the end of the offer period would be a restricted action, as proposed in the new Note 1(c) on Rule 21.1?

Answer

Yes if they relate to statutory directors and so could be used as an inducement to swing a board vote

Q18 Should presumption (7) of the definition of "acting in concert" be amended to provide that

the directors of a company that is subject to an offer or a possible offer (together with their close relatives and the related trusts of any of them) are presumed to be acting in concert with each other from the beginning of the relevant period or, where the proposed new Note 9 on Rule 21.1 applies, the beginning of the offer period?

Answer

From the earliest opportunity. The board has the utmost power and so are able to undertake whatever action and measures they may want to in order to frustrate an offer and so they should be subject to restrictions at the earliest opportunity

Yours sincerely

Andrew Tinkler

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