

Practice Note 10 (PN10) – Reservation of right to waive a whitewash condition (Note 1 on dispensations from Rule 26)

Under Note 1 on dispensations from Rule 26 of the Takeovers Code the Executive may waive an obligation to make a general offer (“**whitewash waiver**”) which arises as a result of an issue of new securities as consideration for an acquisition, or a cash subscription, or the taking of a scrip dividend if there is an independent vote at a shareholders’ meeting (“**whitewash**”). A party that triggers a mandatory general offer obligation as a result of this type of transaction often structures the transaction so that it is conditional on the Executive granting a whitewash waiver. The question of whether or not a whitewash applicant reserves its right to waive this condition may impact the voting of independent shareholders and is therefore relevant information which must be disclosed in the announcement setting out details of the transaction.

Treatment in the event a reservation is made

If the whitewash applicant reserves its right to waive the whitewash condition then the possibility of shareholders receiving a general offer as a result of completion of the transaction cannot be ruled out. In such circumstances:

1. an offer period will commence on the date the transaction is announced;
2. the provisions of the Takeovers Code would apply including the requirement under Rule 3.8 of the Takeovers Code to announce numbers of relevant securities in issue;
3. the Executive will not require a confirmation from the financial adviser that sufficient resources are available to the whitewash applicant to satisfy full acceptance of the offer nor will it require evidence to support this confirmation given the whitewash applicant will not have, at this stage, expressed a firm intention to make an offer;
4. if independent shareholders disapprove the whitewash waiver at the shareholders’ meeting, the whitewash applicant will be required to disclose in the announcement of the results of the shareholders’ meeting (“**Results Announcement**”) whether it intends to complete the transaction in the absence of the whitewash waiver, and hence make an offer upon completion of the transaction;

5. if the applicant has formed a firm intention to complete the transaction in the absence of the whitewash waiver and hence make an offer, it must be in a position to fully comply with Rule 3.5 of the Takeovers Code prior to the shareholders' meeting (including the requirement for financial advisers to confirm that sufficient financial resources are available to the applicant to satisfy full acceptance of the offer) so that an appropriate announcement can be made as soon as reasonably practicable thereafter;
6. if the applicant does not intend to complete the transaction in light of the failure to obtain the whitewash waiver, the Results Announcement should inform shareholders of this decision and the offer period which commenced on the date of the initial announcement would end on the date of publication of the Results Announcement; and
7. if the applicant has not determined whether to complete the transaction in the absence of the whitewash waiver, it must disclose in the Results Announcement that it is still contemplating the possibility of completing the transaction and making general offer. Under such circumstances, the Results Announcement would constitute an announcement under Rule 3.7 of the Takeovers Code.

Treatment in the event a reservation is not made

If the whitewash applicant does not reserve its right to waive the whitewash condition and hence the transaction will not complete unless independent shareholders approve it and the whitewash waiver is granted, an offer period will not commence on the date the transaction is announced. The reason for this is that the announcement would not constitute an announcement of a proposed or possible offer within the meaning of the Takeovers Code. In such circumstances the requirement to disclose numbers of securities in issue under Rule 3.8 of the Takeovers Code would not apply. Other relevant provisions of the Takeovers Code would apply (see Whitewash Guidance Note in Schedule VI to the Codes).

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