

PRACTICE NOTE - VARIATIONS OF CODE OFFERS

Rule 27 of the Code provides that an offeror may vary a takeover offer:

- to increase an existing component or components of the consideration;
- to add a cash component to the consideration;
- to include in the offer a cash alternative (if the directors of the target company have given their prior written approval).

The Panel has been asked to clarify whether an offeree who has accepted a particular alternative of a takeover offer, such as a cash or scrip alternative, can amend or revoke that acceptance in the event that the takeover offer is varied in accordance with the Code.

The Code does not require that acceptances be irrevocable but the terms of most takeover offers provide that all acceptances, once received by the offeror, are irrevocable. This provides certainty for offerors, particularly given that the offer may be conditional upon receiving a certain level of acceptances.

The Code provides (in rule 31(1)) that if a variation made to an offer increases the consideration being offered, the increased consideration must be provided to all those accepting the offer, regardless of when they accepted.

Where a scrip offer is varied by adding a cash alternative, the Code specifically requires the offeror to give all offerees, including those who have accepted the offer before the variation was made, the opportunity to take the cash alternative (rule 31(2)).

There is no equivalent requirement in the Code where there is a cash and scrip alternative and one or both are increased.

Accordingly if an offer provides that acceptances are irrevocable and a scrip component of an offer is increased, those who have already accepted the scrip component will have the benefit of this increase, but no offeree who had already accepted a cash alternative would be able to switch his acceptance to the scrip alternative. Likewise if an existing cash component is increased, any offeree who had already accepted the cash component would have the benefit of the increased consideration, but no offeree who had already accepted a scrip alternative would be able to switch his acceptance to the cash alternative.

The above follows from rule 31 which will require amendment. There are two consequences of the foregoing.

Firstly, the Panel considers that it is open to offerors, when making a takeover offer, to provide in the terms of the offer that acceptances are irrevocable unless there is a variation to the offer that increases the amount of one or more alternative types of consideration. In those circumstances the offeree can be given the ability to switch his acceptance and accept the alternative form of consideration. An offeror is not able to contract out of the Code. The suggested contractual term does not conflict with any rule of the Code.

Secondly, rule 20 provides:

20. Same terms and consideration-

An offer must be made on the same terms and provide the same consideration for all securities belonging to the same class of equity securities under offer.

In circumstances where there is a cash and scrip alternative and one or both are increased it is unlikely that rule 20 is being complied with if offerees are unable to switch their acceptances. Consequently it would be advisable for offerors to enable offerees to switch their acceptances in these circumstances if rule 20 is to be complied with.

This Practice Note is provided for guidance only. While it signals the attitude of the Panel at this time the Panel is not bound by this or any other guidance note.

20 December 2002