Guidance Note

OFFER DOCUMENTS AND VARIATIONS

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TAKEOVERS PANEL
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www.takeovers.govt.nz

Contents

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This Guidance Note sets out various aspects of the Panel's approach to the Code's requirements in respect of offer documents. Key aspects of this Guidance Note include the Panel's approach to:

- conditions of offers;
- the "same terms and consideration" requirement in rule 20;
- calculation of the specified percentage for partial offers;
- varying an offer;
- disclosures; and
- the Panel's expectations for clear, concise and effective offer documents.

1 Introduction

1.1 This Guidance Note has been prepared to assist market participants with understanding the Panel's approach to the Code's requirements in offer documents.

1.2 The Guidance Note consolidates and updates previous guidance given by the Panel on selective issues and includes guidance on new rules in the Code.

1.3 As with all matters that come before the Panel, any examples referred to in this Guidance Note are illustrative only and the Panel is not bound by its own precedent.

2 Panel executive available

2.1 As many market participants are already aware, the Panel executive routinely reviews takeover notices and takeover offer documents in draft for compliance with the Code. In 2010, the High Court stated that the Panel executive may properly assist market participants by reviewing draft documents with a view to ensuring compliance with the Code.[1]

2.2 The Panel executive is also available to discuss takeover compliance issues with the legal advisers to offerors before documents are finalised. However, the comments and suggestions made in such circumstances are the opinions of the Panel executive only and do not bind the Panel. Accordingly, statements in the vein of "*this document has been approved by the Panel*" are incorrect and should not be included in any offer document.

3 Approach of the Panel

3.1 In cases where the Panel identifies, or it is brought to the Panel's attention, that an offeror may not have complied with the Code, the Panel will, if appropriate, and having regard to interests of the target company shareholders, work with the parties involved to find a pragmatic solution. An example of the Panel's approach to non-compliance can be found in its determination relating to Dominion Retail Fund Property Limited (2003) takeover offer for all of the shares and bonds issued by Tri-City Properties Limited.

[1] *Marlborough Lines Limited v Takeovers Panel* HC Wellington CIV 2010-485-1150 [2010] NZHC 1863 (12 October 2010) at [48].

4 Offer conditions

4.1 Rule 25 of the Code states:

> *(1) An offer may be subject to any conditions, except those that depend on the judgement of the offeror or any associate of the offeror, or the fulfilment of which is in the power, or under the control, of the offeror or any associate of the offeror.*
>
> *(1A) An offeror may not allow an offer to lapse—*
>
> *(a) in unreasonable reliance on a condition of the offer; or*
>
> *(b) in reliance on a condition of the offer that restricts the target company's activities in the ordinary course of the target company's business during the period that begins with the sending of a takeover notice and ends on the specified date referred to in subclause (2) (or on the latest specified date referred to in subclause (3A), whichever is later).*
>
> *(2) An offer that is subject to any conditions must specify a date by which the offer is to become unconditional.*
>
> *(3) The specified date referred to in subclause (2) may be changed to a later specified date if the offer is varied under rule 27(e).*
>
> *(3A) The latest specified date referred to in subclause (2) or (3) must be within 10 working days, or, if the acquisition requires statutory approval, 20 working days, after the end of the offer period (excluding any part of the offer period that is extended beyond the maximum period under rule 24B or 24C).*
>
> *(4) No condition contained in the offer has effect beyond the specified date referred to in subclause (3A), and the offer lapses if it does not become unconditional by that specified date.*
>
> *(5) See rule 49C.*

Restrictive conditions

4.2 Conditions often seek to restrict the business activities of the target company during the period of the offer. There will often be legitimate reasons for some restrictions on the business activities of the target company during an offer. For example, an offer condition may restrict the target company from entering into a major transaction. In many cases this condition is appropriate as it protects an offeror who, having made an offer for a company, finds that the company's business has changed significantly during the offer period.

4.3 If the directors of the target company ignore conditions relating to the business activities of the target company they run the risk that their actions constitute a defensive tactic under rule 38 of the Code.

4.4 However, the purpose of the limitation in rule 25(1) is to promote a level of certainty in takeover offers and prevent an offeror from circumventing the provisions of the Code by the capricious lapse of an offer.

Conditions relating to approval of the offer by the offeror's shareholders

4.5 The Panel considers that a takeover offer which is expressed as being subject to a condition that the offer itself is subject to approval by the shareholders of the offeror (bidder), for example, under section 129 of the Companies Act 1993 (or any other legislative or regulatory provision) is not permissible under rule 25(1). This is because satisfaction of the condition is effectively within the control of the offeror, in breach of rule 25(1).

4.6 Although it is the shareholders of the offeror who will vote on the relevant resolution, it is difficult to separate the offeror company from its shareholders. The directors have to call the shareholder meeting and advise the shareholders of the merits of the proposal. They also have a duty to act in good faith and to act in the best interests of the company i.e., the offeror. If an adverse event were to occur that resulted in the takeover no longer being in the best interests of the offeror, the directors could well be obliged to recommend that shareholders do not approve the takeover offer and it would lapse.

4.7 To allow offers to be made subject to shareholder approval could in effect allow an offeror to have an option over the shares of the target company. This would be inconsistent with the objectives of the Code. The effect of the Panel's view is that, if the offer must be approved by shareholders of the offeror, the approval will need to be obtained before the offer is sent to offerees. This does not mean that approval need be obtained before the takeover notice is given. The period between the giving of the takeover notice and the last date by which an offer must be sent to shareholders provides some flexibility to the offeror in the timing of the meeting.

4.8 However, where the takeover notice is given before shareholder approval is obtained, it should be made clear to the target company that the takeover offer cannot be dispatched if shareholder approval is not obtained by the time the offer is required to be sent. The terms of the offer accompanying the takeover notice itself are required to be the same as the offer document and therefore cannot include a condition related to shareholder approval.

4.9 In certain limited circumstances, it may be possible to allow an offer to be made subject to shareholder approval. In July 2015, Briscoe Group Limited made a full takeover offer for Kathmandu Holdings Limited. The offer was a major transaction for Briscoe and was conditional upon approval by the shareholders of Briscoe under section 129 of the Companies Act.

4.10 Briscoe sought an exemption from rule 25(1) of the Code in respect of the approval condition in its offer. The Panel declined to grant the exemption (because the condition would not breach rule 25(1)), on the basis that irrevocable undertakings, in favour of, and enforceable by the Takeovers Panel and Kathmandu, were given by Briscoe, to convene its shareholders' meeting before the latest date by which the offer could be declared unconditional and by the shareholders holding more than 75% of the voting rights in Briscoe appointing a proxy and irrevocably instructing that proxy holder to vote in favour of the major transaction resolution at the shareholders' meeting.

4.11 Interests associated with Rod Duke (who together held and controlled more than 75% of the voting rights in Briscoe) provided such enforceable undertakings to the benefit of the Panel and Kathmandu. The effect of the undertakings was to eliminate the risk that the resolution could in effect allow Briscoe to have an option over the shares of Kathmandu.

4.12 Finally, the Panel also wishes to draw attention to the timing provisions in the Code. These provisions are fundamental to the effective operation of the Code and the Panel will not grant exemptions from them to facilitate a meeting of the offeror's shareholders for the purposes of approving a proposed takeover offer.

Third party finance

4.13 Where an offer is conditional on the provision of finance or financial support from a third party, whether or not the condition is permissible under rule 25(1) turns on whether the condition is "in the power or under the control" of the offeror or any associate of the offeror.

4.14 Firm financing arrangements would need to be in place at the time the offer is made with the ability to terminate the arrangements being within the control of the third party alone and not the offeror. The conditions in the financing arrangements that allow termination by the third party are of critical importance. If the conditions are limited to conditions that are bona fide required to protect the third party and cannot be used as a device to avoid the takeover offer (such as normal conditions precedent to drawdown - provided they are not within the control of the offeror or its associates), then the finance condition in the offer should be permissible under rule 25(1). However, the facts of each case must be considered in terms of the requirements of rule 25(1).

Clause 9 of Schedule 1

4.15 Clause 9 of Schedule 1 of the Code provides that the takeover offer must contain confirmation by the offeror that resources will be available to the offeror sufficient to meet the consideration to be provided on full acceptance of the offer and to pay any debts incurred in connection with the offer (including debts arising under rule 49).

4.16 Here again, with an offer conditional on finance, the question of whether clause 9 will be satisfied depends on the terms and conditions of the financing arrangements. In the Panel's view the important words in clause 9 are that "resources will be available to the offeror". Hence the grounds upon which the financial arrangements would be

withdrawn would need to be very limited so that the offeror can be confident that the finance will in fact be available.

Waivable offer conditions

4.17 Many offers have conditions which can be waived by the offeror. This allows an offeror to protect itself from unforeseen circumstances while enabling it to decide to proceed with an offer even if all the conditions of the offer are not met. This means that an event which prevents a condition from being satisfied will not automatically cause the offer to lapse.

4.18 The only condition which cannot be waived by the offeror is the minimum acceptance condition required by rule 23(1) of the Code. All full offers are subject to the condition that the offeror receives acceptances that, when taken together with voting securities already held or controlled by the offeror, confer more than 50% of the voting rights in the target company. Partial offers must be subject to the same condition (although they may be conditional on a lesser percentage approved in accordance with rule 10(b) of the Code).

4.19 The ability to waive conditions can be abused. For example:

(a) a waivable offer condition could be used by the offeror to provide an option to not continue with an offer for reasons not connected with that condition; and

(b) waivable offer conditions can be coercive. If an offeror has the ability to waive an offer condition after an offer closes, shareholders may feel compelled to accept the offer before the closing date (when it is not known whether the offer will succeed) to avoid being a minority shareholder in a company controlled by the offeror.

4.20 The Panel encourages market participants to consider the effect of conditions made waivable by the offeror, and what action they might take on conditions they consider unacceptable or coercive. The markets can influence the behaviour of bidders on the use of waivable offer conditions. Offerees can decide not to accept an offer while it is subject to conditions which they consider should be waived or satisfied before the end of the offer period.

4.21 Directors of target companies and independent advisers appointed under rule 21 of the Code can, and should, help shareholders by highlighting unacceptable conditions and taking them into account in their recommendations to shareholders.

"Material adverse change" conditions and unreasonable reliance

4.22 The Panel executive has reviewed a number of offers that have been subject to conditions that there is no "*material adverse change*" or "*material adverse effect*" in respect of the business of the target company during the offer period. Such offers have stated that where any condition requires a determination of whether the threshold of materiality has been met it will be determined by a third party not associated with the offeror.

4.23 The Panel prefers the inclusion of a clear statement, such as that set out above, regarding the use of a third party, because it provides transparency about the process that will be used. Under the requirements of rule 25(1) of the Code, the offeror cannot rely on its, or an associate's, judgement regarding the triggering of conditions. Accordingly, even if an offer document does not specifically state that the determination of whether the threshold of materiality has been met will be made by a non-associated third party, the offeror would still need to use such a third party to make that decision.

4.24 However, the Panel may need to determine whether the invocation of the material adverse change condition would constitute unreasonable reliance on the condition or was in fact in accordance with the Code.

4.25 Rule 25(1A) (included in the Code from June 2013) restricts the ability of an offeror to discontinue an offer as a result of breach of a condition. The rule provides that an offeror may not allow an offer to lapse:

(a) in unreasonable reliance on a condition of the offer; or

(b) in reliance on a condition of the offer that restricts the target company's activities in the ordinary course of the target company's business during the period that begins with the sending of a takeover notice and ends on

the specified date referred to in subclause (2) (or on the latest specified date referred to in subclause (3A), whichever is later).

4.26 The Panel will decide whether an offeror is placing "unreasonable" reliance on a condition of the offer on a case by case basis. The standard of reasonableness is an objective standard and the Panel will ask whether a reasonable person, in the specific circumstances, would allow the offer to lapse in reliance on the condition.

4.27 The following scenarios may constitute unreasonable reliance if the triggered condition is not waived by the offeror:

(a) if the condition that is triggered is not commercially critical to the offer (for example, a condition which prevents the sale by the target company of any asset is triggered by the sale of an asset which is immaterial both financially and commercially); or

(b) if the condition that is triggered requires the target company's cooperation (for example, that the target company directors recommend the takeover offer or allow the offeror to undertake due diligence).

4.28 The Panel has considered whether a target company had frustrated an offer by declining to provide information required by conditions of an offer in the Rubicon Limited determination (2004). In that matter, Rubicon submitted that Tenon had contravened rule 38 of the Code (the restriction on defensive tactics) by declining to provide confirmations required by conditions of the offer within the stipulated time period, and stating publicly that it did not intend to provide information to an independent expert appointed by Rubicon in respect of conditions attached to the offer.

4.29 The Panel noted in that determination that:

> *"The restriction on defensive tactics cannot be seen as the basis for imputing to directors of target companies any positive obligation to provide information required by an offeror. The board of a target company should not be manoeuvred by the wording of conditions included by an offeror in its offer, into a position where it can be suggested that it is in breach of the rule 38 restriction on defensive tactics, merely by reason of its refusal to provide information or afford access to information."*

4.30 The Rubicon determination pre-dated the inclusion of rule 25 (1A) in the Code. With the addition of this rule, and although it depends on the circumstances of each case, if an offeror attempts to rely on a condition that requires the target company's cooperation, the offeror may be found to be relying on a condition of an offer unreasonably.

4.31 These examples are illustrative only.

Due diligence conditions

4.32 Questions of due diligence will usually arise before any takeover offer is made or as part of the Board negotiations in advance of proceeding with a scheme of arrangement. However, occasionally takeover offers include a condition that the offeror be given an opportunity to undertake due diligence of the target company or otherwise be provided with non-public information about the company (**due diligence conditions**).

4.33 While the parties are free to negotiate any form of offer or pre-offer conditions for a scheme of arrangement, this is not the case with conditions in a draft offer that accompanies a takeover notice under rule 41 of the Code.[2]

Take care with due diligence conditions

4.34 Rule 25(1) of the Code provides that an offer may be subject to conditions except those that:

(a) depend on the judgement of the offeror (or any associate of the offeror); or

[2] See the *Guidance Note on Schemes of Arrangement* under Part 15 of the Companies Act 1993 for more information about the Panel's role in a scheme involving a Code company.

(b) the fulfilment of which is in the power, or under the control, of the offeror (or any associate of the offeror).

4.35 Care needs to be taken when drafting due diligence conditions for Code offers. For example, a due diligence condition that required the offeror to be "satisfied" with the outcome of the due diligence would amount to a condition that depends on the judgement of the offeror and the fulfilment of that condition would likely also be within the power and control of the offeror. Such a condition would breach rule 25(1) of the Code.

4.36 A due diligence condition requiring only an opportunity to undertake due diligence or to be given non-public information about the target company would depend on actions by the target company's directors, so would not be in breach of rule 25(1) (unless the directors were associates of the offeror).

Target company can refuse due diligence

4.37 Because due diligence includes the release of confidential financial and other information to a third party, a target company may wish to refuse to allow due diligence, particularly if the offeror is a potential competitor of the target company.

4.38 Defensive tactics are prohibited by rule 38 of the Code and include any action that is taken or permitted by the directors of a target company, once the company has received a takeover notice or has reason to believe that a bona fide offer is imminent, in relation to the affairs of the Code company, that could effectively result in:

(a) a takeover offer being frustrated; or

(b) the shareholders in the target company being denied an opportunity to decide on the merits of a takeover offer.[3]

4.39 The Panel considered the issue of due diligence conditions in the Rubicon Limited determination 2004. The Panel decided that refusal by the target company directors to provide information to an offeror does not constitute a defensive tactic for the purposes of the Code. The Panel does not accept that rule 38 imposes an obligation to provide specific information going beyond the target board's other obligations to disclose information (such as continuous disclosure under the NZX Listing Rules or arising out of fiduciary duties of directors), merely because the offeror has crafted a condition to its offer in terms suggesting that relevant information needs to be provided.

4.40 If an offer is subject to a due diligence condition and the target company refuses to provide the information, then the offeror may choose to rely on the condition and allow the offer to lapse (or not make the offer, if the condition required the due diligence information to be provided during the takeover notice period).

Offer price cannot be reduced

4.41 Finally, rule 27 of the Code sets out the permissible variations of offers under the Code. Rule 27 allows the offer price to be increased, but reducing the price offered is not permissible. If the offeror undertakes due diligence on the target company, and as a result, the offeror changes its mind about the value of the target company, the offeror cannot reduce the offer price once the offer has been made.

5 Offer terms and consideration

5.1 Rule 20 of the Code requires that:

> *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.*

5.2 This can lead to difficulties depending on the nature of the offer consideration.

[3] See the *Guidance Note on Defensive Tactics* for more information on defensive tactics.

Scrip offers

Unmarketable parcels – class exemption (2003/234)

5.3 An offeror who makes a takeover offer with consideration that includes securities listed on a stock exchange may be obliged to provide some smaller security holders with an unmarketable parcel of securities. Unmarketable parcels of securities may be difficult for security holders to deal with and are expensive for companies to administer.

5.4 The Panel has granted a class exemption to allow offerors to limit the consideration offered to small security holders to cash.

Overseas shareholders

5.5 The Panel is aware that compliance with securities law requirements in overseas jurisdictions can be expensive and time-consuming for bidders. Most jurisdictions have rules or regulations governing the offer of scrip under a takeover offer and many jurisdictions impose prospectus-type requirements in respect of such offers. Compliance with such overseas requirements as well as New Zealand securities law requirements increases the cost and complexity of making a scrip offer for a New Zealand Code company.

5.6 The Panel has a policy on granting limited exemptions from rule 20 of the Code in relation to scrip offers and overseas shareholders. See the *Guidance Note on Exemptions*.

Variable pricing

5.7 Some offerors wish to provide for the consideration payable to be increased if a pre specified higher acceptance level is reached than the minimum required by the offeror. The Panel considers that offers of this nature can comply with the Code.

5.8 An example of an offer containing variable pricing would be one which offers say $1.00 per share if an acceptance level of more than 50% is reached and $1.20 per share if the compulsory acquisition threshold of 90% is reached.

5.9 The Panel considers that this kind of pricing variation in an offer does not breach the Code as all shareholders receive the same consideration. The offer would of course need to comply fully with rule 20 and all other provisions in the Code. Importantly, it is not permissible to put timing pressure on offerees by only offering the increased consideration if the higher acceptance level is achieved by a time which is earlier than the end of the offer period.

5.10 However, care does need to be taken with such terms. In the Rank Group Investments Limited determination (2006), the Panel found that an offer that provided for additional consideration to be paid if the offeror received acceptances within seven days of the offer date that, when aggregated with its existing holding, would confer control of 90% or more of the voting rights in the target company did not comply with rules 24(1) and (2) of the Code.

Payment of consideration

5.11 Rule 33 of the Code provides that an offer document must specify the date by which the consideration for accepting the offer must be sent to those persons whose securities are taken up under the offer. The rule requires that the date specified in the offer document must be within 5 working days after the latest of:

(a) the date on which the offer becomes unconditional;

(b) the date on which an acceptance is received; or

(c) the end of the offer period first specified in the offer.

5.12 The intention of this rule is to ensure that offerees who accept a takeover are paid promptly. For example an offeror cannot postpone the time of payment of consideration for an offer that is unconditional simply by extending the offer period.

5.13 Some offer documents have included, as part of the rule 33 statement, a statement that the date that is specified in the offer document as the last day for the payment of consideration may change "*if the offer's closing date is subsequently extended in accordance with the Code*." The Panel considers that such a statement is not inconsistent with the requirements of rule 33.

5.14 Rule 34 of the Code provides that, if the consideration is not sent to persons whose securities are taken up under the offer within the period specified in the offer, then the offeree may withdraw acceptance by:

(a) giving written notice to the offeror of the intention to withdraw; and

(b) no less than 5 working days after giving the notice of intention, giving a further notice of withdrawal.

5.15 The right to withdraw acceptance of the offer does not apply if the offeree receives the consideration before the written notice of withdrawal is given.

5.16 Some offer documents received by the Panel have included a statement to the effect that "*the offeror's obligations in respect of settlement will be subject to the registration of the transfer of the relevant securities from the offeree to the offeror*." Some of these offer documents have also included a further statement to the effect that *"the offeror will present all forms of acceptance and transfer to the target company for registration as soon as possible following the offer being declared unconditional or the conditions being waived in respect of the offer by the offeror*".

5.17 Confusion has arisen as to whether statements of the kind referred to in the preceding paragraph are a condition of the offer which must be satisfied before the offer can become unconditional for the purposes of rule 25 of the Code. One view is that such statements merely prescribe the requirements of settlement between the offeror and the offerees and are not a condition of the offer. The other view is that the statements are a condition of the offer.

5.18 The Panel considers that such statements are a condition of the offer. As such the offer cannot become unconditional until the condition contained in the statements is either satisfied or waived. The Panel takes this view because the statements have the effect of making the offeror's obligations under rule 33 of the Code subject to registration of the transfer by a third party – the target company's directors.

5.19 The view has been expressed that the Panel's approach may mean that any offeror would be required to waive the requirement of registration and pay accepting shareholders by the end of the 5 working day period even if registration of particular transfers is denied. The Panel considers that it is a matter for the offeror to formulate in the offer protections against the failure of the target company to register the share transfers so that the offer can be made unconditional and the consideration paid in compliance with the requirements of the Code. This does not of course require payment where the seller itself is in breach of any of the terms of the contract formed by acceptance of the offer, e.g., by not providing the documentation required by the contract or where the existence of a charge means that the seller is not delivering unencumbered title to the shares.

Rule 30 of the Code and changes to the capital structure of the target company during the offer period

5.20 The Panel wishes to clarify the application of rule 30 of the Code (which relates to certain cases where the offeror wishes to vary the terms of the offer) where there have been changes to the capital structure of the target company during the offer period. For example, a change to the capital structure of a company could occur due to the conversion of one class of securities to another, or by an allotment of shares or a buyback in the middle of a takeover offer.

5.21 A full takeover offer made under the Code must extend to each class of equity securities (if there is more than one) in the target company. In such cases, rule 8 of the Code provides:

(a) if there is more than 1 class of voting securities included in a full offer, the consideration and terms offered for each class of voting securities must be fair and reasonable as between the classes of voting securities; and

(b) if non-voting securities are included in a full offer, the consideration and terms for non-voting securities must be fair and reasonable in comparison with the consideration and terms offered for voting securities and as between the classes of non-voting securities.

5.22 If there is more than one class of equity securities under offer, the offeror must obtain an independent adviser's report that certifies the fairness and reasonableness of the consideration as between the different classes of securities (rule 22 of the Code).

5.23 Rules 27 to 32 of the Code prescribe various requirements in respect of the variation of offers. Briefly, the offeror may vary the offer to either: increase components of the consideration; add a cash component to the consideration; add a cash alternative to the consideration; or extend the offer period. The offeror must issue a variation notice if it varies the offer.

5.24 Rule 30 of the Code provides, in effect, that if the offeror varies the offer consideration, and the offer includes offers for more than one class of securities, the offeror must obtain a further report from an independent adviser certifying that the offer is (still) fair and reasonable as between the classes of securities included in the offer. The purpose of the further report is to ensure that offerees in one class of security are treated fairly vis-à-vis the offerees in another class of security, following the variation.

5.25 There may be circumstances, however, where it would be redundant for the offeror to obtain a further report from an independent adviser. For example, consider a target company which, at the time that a takeover offer is made, has on issue two classes of securities: ordinary shares and convertible notes. These convertible notes are set to convert into ordinary shares on a date that falls during the takeover offer period. The offeror, in this example, would be required by rule 8(4) of the Code to make its offer for both the ordinary shares and the convertible notes issued by the target company.

5.26 The terms of the offer would likely provide that any acceptances in respect of convertible notes that convert into shares become acceptances in respect of the resulting shares. The offeror would be required to obtain an independent adviser's report that the consideration offered for each class of security was fair and reasonable as between the classes.

5.27 During the offer period the convertible notes expire and convert into new ordinary shares in the target company. At some time following the conversion, the offeror elects to increase the consideration in its offer (which had commenced as an offer for two classes of securities). The offeror would be required to issue a variation notice in respect of the increased consideration. Rule 30 of the Code requires that when an "offer" to which rule 8(4) of the Code applies is varied by the offeror to increase the consideration, the offeror must obtain a further report from an independent adviser that the varied offer is fair and reasonable as between the classes of securities under offer. In this example, however, the report would be redundant because, at the time of the variation, only one class of security in the target company is extant.

5.28 The Panel considers the offeror should not be required to obtain a further independent adviser's report when to do so would be unnecessary. Rule 30 of the Code can be interpreted purposively in order achieve this outcome. The purpose of rule 30 of the Code – to ensure that the consideration remains fair and reasonable as between the classes following a variation – relates to an offer that could ultimately settle in respect of more than one class of security.

Payment of takeover consideration in foreign currency

5.29 The Panel considers that the terms of an offer may provide target company shareholders with an option to be paid the offer consideration in a currency other than New Zealand Dollars. A number of past offers have included this facility.

5.30 The key issue for offerors to be aware of when including options for payment of any type of consideration is that any such offer must comply with rule 20 of the Code.

5.31 This means that all offerees must be given the option to be paid under any of the consideration options. For example, it would likely result in a breach of rule 20 of the Code if, say, only Australian resident target company shareholders were offered the option of being paid in Australian Dollars.

5.32 Where consideration in a foreign currency is offered, the Panel's expectation is that the terms of the offer will clearly indicate how the exchange rate will be calculated at which the offer consideration is to be converted from New Zealand Dollars into foreign currency. This may include a reference to an objectively determined formula for calculating the exchange rate. For example, the formula might be the spot rate for buying the relevant foreign currency with New Zealand Dollars quoted by a reputable financial institution at a specified time before the date of payment.

5.33 It is possible for the offer document to accommodate payments to accepting offerees at different times (for example, where the offer has been declared unconditional before the close of the offer period). The key concern is that each offeree is offered the same terms. Accordingly, the offer could state that in the event of early payment, the consideration will be converted into foreign currency calculated at a fixed time (for example, 3 working days) before the date of payment. In this case the same terms are offered to all offerees.

5.34 Prospective offerors and legal advisers are encouraged to discuss with the Panel executive any questions they may have about offering payment of foreign currency as consideration.

Calculating the specified percentage for a partial takeover offer

5.35 Market participants have encountered difficulty with the application of rule 9 of the Code. Rule 9 provides that a partial offer under the Code must be made for a "specified percentage" of a target company's voting securities not already held or controlled by the offeror.

5.36 There have been quite a number of instances where the specified percentage was misstated by the offeror in its takeover documentation. As a result, and in order to avoid a repeat of these misstatements, rule 9(6) has been amended by the addition of a formula by which the specified percentage may be calculated. The formula is:

$$\text{Specified percentage} = \frac{\text{number of voting securities of the particular class sought by offeror}}{\text{number of voting securities of that class not already held or controlled by offeror}} \times 100$$

5.37 To assist market participants, the Panel has prepared the following example of the calculation of a specified percentage for a hypothetical partial offer:

The target company has 100,000,000 voting securities on issue, all of which are of the same class. The offeror already holds or controls 19,000,000 (19%) of the total voting securities. The offeror wishes to increase its total holding to 50,100,000 voting securities (50.1%).

To obtain the desired total holding, the offeror must acquire a further 31,100,000 voting securities (31.1%). The specified percentage for the partial offer will be:

$$\text{Specified percentage} = \frac{\text{number of voting securities sought}}{\text{number of voting securities not already held or controlled}} \times 100$$

$$= \frac{31{,}100{,}000}{81{,}000{,}000} \times 100$$

$$= 38.39506\%$$

Broker handling fees

5.38 Broker handling fees are sometimes offered to brokers in connection with a takeover offer made under the Code.

5.39 Generally, the offeror, or an associate of the offeror, pays the fee to brokers for "handling" target company shareholders' acceptances of the offer. Evidence is provided of the broker having handled the shares, for example, by the broker's stamp appearing on the acceptance form relating to the shares.

5.40 The Code does not prevent the payment of broker handling fees. However, the Panel considers that the commitment by an offeror, or an associate of the offeror or any other person, to pay brokers fees for handling target company shareholders' acceptances constitutes important information for shareholders. Failure to disclose arrangements to pay broker handling fees could result in a breach of rule 64 of the Code, which prohibits misleading or deceptive conduct in relation to a Code-regulated transaction. Therefore the terms and conditions of any arrangement to pay a broker handling fee should be fully disclosed to shareholders.

5.41 If the terms and conditions of a broker handling fee are not included in the terms of the offer, any announcement of an intention to pay such a fee may, in addition to being a breach of rule 64, amount to a variation of the offer which is not permissible under rule 27 of the Code.[4] The Panel considers that broker handling fees are not simply a matter between the offeror and the brokers. The payment and the conditions pertaining to the arrangement have implications for shareholders because shareholders will necessarily be approached by brokers and may be invited to pursue a particular course of action, involving use of the broker in relation to their acceptance of the offer.

5.42 Advisers should ensure that if broker handling fees are to be paid by an offeror, or any third party, that that fact is fully disclosed to shareholders.

Conditional acceptance facilities

5.43 Conditional acceptance facilities enable shareholders to conditionally accept an offer. However, offerors need to take care to meet all of the Code's requirements, including those under rule 64.

5.44 Offers that include a minimum acceptance condition that cannot be waived can languish if shareholders are unwilling to commit their shares. This may be because of the risk of the shares being locked into the bid for a long time when there is no guarantee that the bid will succeed. Similarly, if an offer is contested, shareholders may be unwilling to accept either offer because of the risk that their shares are locked into the losing bid and they cannot then accept into the winner's bid. These are situations where having a conditional acceptance facility can provide flexibility for shareholders and, as a result, the bid can be more attractive.

5.45 A conditional acceptance facility can be included in the terms of a takeover offer. Under such a facility, conditional acceptances are generally held in "escrow", that is, by a third party until certain conditions are met. Usually, the condition which has to be satisfied to trigger the actual acceptance will be the offer reaching a particular acceptance threshold, such as more than 50% (or a lesser percentage for a partial offer approved under rule 10) or 90% of the shares in the target company. Before the relevant conditions are met, a shareholder can withdraw its conditional acceptance.

5.46 The Code does not prevent conditional acceptance facilities being included in the offer terms when a takeover offer is made, if the facility is available to all shareholders and complies with rule 20. Rule 20 requires that an offer be made on the same terms and provide the same consideration for all securities in each class under offer.

5.47 If a conditional acceptance facility is included in the terms of an offer, details about how the facility will operate must be clearly explained in the offer document. Disclosures made during the offer period about the number of shares that have been accepted under the facility must be clear and accurate.

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[4] Rule 27 provides that an offeror may vary its offer only if the variation is to add cash to, or increase the consideration of, the offer; extend the offer period; extend the unconditional date.

5.48 Rule 49A of the Code requires the offeror to give written notice to the Panel and the target company (and the Exchange if the offeror or the target is a listed company) in writing every time the level of acceptances received for each class of securities increases by 1% or more. Disclosures about the level of acceptances received under the offer should clearly state the percentage of acceptances that are irrevocable, and the percentage received under the conditional acceptance facility.

5.49 Accuracy is critical in the disclosure of the level of acceptances received under a conditional acceptance facility. A failure to accurately disclose the level of acceptances received under a conditional acceptance facility and the level received directly into the offer could be regarded as being misleading or deceptive conduct in breach of rule 64.

6 Variation of partial offers

6.1 There are potential risks associated with extending a partial offer if the offer is likely to become unconditional before the end of the extended offer period.

6.2 A partial offer is an offer made by a bidder to all shareholders in a target company for less than 100% of those persons' voting securities. A partial offer made under the Code is subject to the same rules as those which apply to a full offer, apart from the special provisions in relation to partial offers set out in subpart 2 of Part 3 of the Code.

6.3 A partial offer must specify the period for which it will remain open and it must remain open for that period. The offer period must commence with the date of the offer and be not shorter than 20 working days and not longer than 60 working days (rule 24 of the Code). The offer period may be extended by way of a variation of the offer but must not be extended beyond the maximum 60 working day period (rule 24A).

6.4 A shareholder in the target company may accept a partial offer in respect of any number of their voting securities. The Code (rules 11 to 13) prescribes how the offeror is to scale acceptances to ensure that voting securities are taken up under the partial offer appropriately as between acceptors when excess acceptances have been received.

Issues relating to when consideration must be paid

6.5 Any scaling of acceptances can only occur after the close of the offer period, once all acceptances have been received. This has important implications for:

(a) setting the date for payment; and

(b) declaring the offer unconditional.

6.6 In each case, the primary concern is that the offeror may be put in the position of having to pay accepting shareholders at a time when other shareholders may be yet to accept the offer. This will make it impossible to accurately calculate scaling. Therefore, it is recommended that offerors ensure that the offer is structured in such a way that scaling can be calculated prior to any payment of consideration.

6.7 Rule 33 of the Code provides that the offer must state a date by which the consideration for the offer must be sent to those persons whose securities are taken up under the offer. The date must be within 5 working days after the latest of:

(a) the date on which the offer becomes unconditional; or

(b) the date on which an acceptance is received; or

(c) the end of the offer period as first specified in the offer document.

6.8 In the case of a partial offer, it is wise to use the full rule 33 formulation in the terms of the offer so that even if the offer becomes unconditional during the initial offer period, consideration is not payable until 5 working days after the end of the offer period as first specified in the offer document.

6.9 An offeror who has indicated in the offer document that they may extend the partial offer beyond the initial closing date first specified, needs to consider the potential risk in declaring the offer unconditional before the new closing date. In this case, the offeror should ensure that the offer is not declared unconditional until the new closing date or unless the offeror is certain that scaling can be completed, and payment can be made, in compliance with rule 33.

6.10 The Panel advises offerors to set a realistic initial offer period, and if it is necessary to extend that period, to ensure that the offer does not become unconditional. Offerors should also minimise the risk of the offer going unconditional earlier than 5 working days before the end of the offer period. An offeror may also consider making its intentions clear about the date by which the offer will definitely close, by way of a last and final statement. The Panel expects that last and final statements will be adhered to as to a promise (refer to *Guidance Note on Misleading or Deceptive Conduct*). Such a last and final statement can help shareholders (who may want to delay accepting the offer until just before the offer closes) to understand that the offeror will not keep extending the offer period.

Acquiring on-market between the takeover notice and making a partial offer

6.11 Acquiring shares on-market during an offer period is only permitted under a full offer in accordance with rule 36 of the Code (subject to certain conditions) – rule 36 does not apply to partial offers. However, there is no express restriction in the Code which prevents an offeror making a partial offer from acquiring shares in the time between issuing a takeover notice and making the offer.

6.12 Despite the lack of an express restriction, an offeror who has issued a takeover notice for a partial offer, must take care if they wish to make on-market purchases. If an offeror acquires shares on market after issuing a takeover notice, the specified percentage disclosed in the notice may change. Any such change could mean that the offeror would not satisfy rule 44(1)(b) of the Code, as the terms of the offer would be different to the terms outlined in the takeover notice; namely, the specified percentage may need to be revised.

6.13 Acquisitions during the notice period could be permitted if the offeror has obtained prior written approval from the target company directors to amend the specified percentage disclosed in the takeover notice in accordance with rule 44(1)(b)(ii). If director approval is not obtained, an offeror would likely have to issue a new takeover notice with a revised specified percentage.

7 Disclosure under Schedule 1 of the Code

7.1 Schedule 1 of the Code prescribes information that must be included in an offeror's takeover notice and offer document.

Clauses 6 and 7 of Schedule 1 of the Code

7.2 Clause 7(1) of Schedule 1 provides (by reference to clause 6) that if any of:

(a) the offeror;

(b) any related company of the offeror;

(c) any person acting jointly or in concert with the offeror; and

(d) any director of any of the persons described in paragraphs (a) to (c);

have, during the 6-month period before the date of the offer, acquired or disposed of any equity securities of the target company then:

(e) the number and designation of the equity securities; and

(f) the consideration for, and the date of, every such acquisition or disposition,

must be stated in the offeror's takeover notice and offer document.

7.3 The 6-month period referred to is:

(a) if the information is specified in the takeover notice, the 6-month period before the date of the takeover notice; or

(b) if the information is specified in the offer document, the 6-month period before the date of the offer.

Related companies

7.4 An issue the Panel has encountered in respect of clause 7 concerns the separate disclosure of the holders and controllers of shares in the target company. The particular issue concerns disclosures about "the offeror" and "any related company of the offeror" in categories (a) and (b). The Code uses the Companies Act 1993 definition of "related company", which generally means all holding companies, sister subsidiaries and subsidiaries of the offeror.

7.5 For example, Able Limited owns all the shares of Beta Limited which in turn owns all the shares in Candy Limited. Candy Limited owns 19% of the shares in Dragon Limited and is making a full takeover offer for Dragon Limited.

7.6 In its takeover notice, Candy Limited will disclose that it is the holder of 19% of the shares in Dragon Limited. However, the Panel interprets clause 7 of Schedule 1 to mean that both Able Limited and Beta Limited should be disclosed in the takeover notice as the controllers of the parcel of shares held by Candy Limited.

7.7 Care needs to be taken to ensure there is no confusion as to the level of shares held by the offeror and its related companies. However the Panel considers it is important, and consistent with the requirements of clause 7 and the philosophy of the Code, that upstream parties of actual shareholders are disclosed in offer documents.

Offeror's intentions for the business activities of the target company

7.8 Clause 14 of Schedule 1 of the Code requires that the offer document must contain, or be accompanied by:

(1) A statement of the offeror's intentions about—

(a) material changes to the business activities of the target company or its subsidiaries; and

(b) material changes to the material assets of the target company or its subsidiaries; and

(c) material changes to the capital structure of the target company (including the target company's dividend policy, raising capital, and taking on debt); and

(d) any other information about the likelihood of changes to the target company or its subsidiaries that could reasonably be expected to be material to the making of a decision by an offeree to accept or reject the offer.

7.9 If the offeror has no intentions in respect of the particulars listed in subclause (1), a statement to that effect, and statements made must be consistent with any information that has been given by the offeror to any regulatory body (in New Zealand or in an overseas jurisdiction) in relation to the offer. The statements are not required if the offer is a full offer conditional on the offeror receiving acceptances that will result in the compulsory acquisition threshold of 90% of voting rights being reached and the condition cannot be waived.

7.10 Practice for making disclosures under clause 14 in the past was variable. Some offer documents included quite detailed disclosures, others were light on their disclosure under this provision. Accordingly, the Code was amended in June 2013 to improve the quality of the information disclosed.

7.11 The Panel expects that the disclosure obligation under clause 14 be met robustly. The statement must specifically address each of the matters under clause 14(1). If no positive statement is made, then a negative statement must be made in respect of each of the relevant matters.

8 General comments in relation to offer documents

8.1 This section of the Guidance Note discusses general issues that relate to offer documents.

Signing of certificates for offer documents

8.2 The Code prescribes the certificate that must be signed for the offeror in the offer document. The certificate requires a combination of executive and board-level responsibility to be taken for the contents of the offer document (clause 19 of Schedule 1).

8.3 The executives who must sign the certificate in the offer document are specified in clause 19(2)(b)(i) of Schedule 1. This clause states that the certificate must be signed by the chief executive officer and the chief financial officer of the offeror, or its respective agents authorised in writing, or if there is no chief executive officer or chief financial officer, the person or persons fulfilling those roles respectively, or their respective agents authorised in writing.

8.4 In several instances takeover notices reviewed by the Panel executive indicated that the subsequent takeover offer document would not be signed by a person in one or other of the executive capacities. In these instances the Panel executive usually talks to the offeror's legal advisers to ascertain who is filling the executive roles. In one or two instances the offeror's advisers have overlooked that there are incumbent executives filling these roles although they don't have the requisite job titles. In other instances the offeror has been a small investment holding vehicle with only one or two directors and no executive staff. In these cases the directors must be filling the executive roles and should sign the certificates. The issue is the role and not the title. Those who fulfil the roles have to sign the certificates.

The requirements for "particulars" in offer documents

8.5 The offer document must include the particulars of agreements or arrangements entered into, or of interests in contracts, or of restrictions in company constitutions that are relevant to the takeover transaction (clauses 10-12, 15 and 16 of Schedule 1). There is a tendency in takeover documents for responses to the requirements of these clauses to be general rather than particular.

8.6 In the Panel's view, "particulars" means names and amounts and other material details.

8.7 The offeror must disclose details of any agreement or arrangement, made or proposed, under which the target company or its related companies will give direct or indirect financial assistance in connection with the offer (clause 12 of Schedule 1).

8.8 In some instances where takeovers are virtually bound to succeed (e.g., a majority owner increasing its stake with pre-bid agreements in place) the response to this clause has been a vague statement about existing financing arrangements possibly being extended to cover the assets of the target company if the takeover succeeds. This does not comply with the requirement to disclose particulars of arrangements under which the target company will give financial assistance in connection with the offer. The Panel will insist on disclosure that identifies the parties with whom the financing arrangements have been made and the nature of those arrangements.

Offer acceptance and transfer forms and powers of attorney

8.9 The Panel executive makes comments regularly to offerors regarding their acceptance and transfer forms and powers of attorney.

8.10 It is common for offers to contain a term that states that by accepting an offer, a shareholder would appoint the offeror (or its agent) as its attorney, to exercise voting and other rights attaching to shares in respect of which the offer is accepted. However, if an offeror acquires or exercises voting rights on the receipt of a signed acceptance and transfer form under an offer that it is not entitled to, it may not be acting in compliance with the fundamental rule in the Code. Acceptance and transfer forms must make it clear that the offeror will not exercise any powers granted by the powers of attorney in the acceptance and transfer form until the offer becomes unconditional.

8.11 Also, in relation to acceptance and transfer forms for partial offers, the acceptance and transfer forms should clarify that the power of attorney is limited to the number of shares that will be taken up by the offeror after the scaling process. Otherwise, a power of attorney may be given in respect of more shares than the bidder has the right to acquire.

Notification of altered offer documents

8.12 The Panel has noticed that rule 48 of the Code is not always being fully complied with. Rule 48 provides that an offeror must notify the target company, before it sends its offer document, of all the information in the offer document that has been altered from, or is additional to, the information that was contained in, or accompanied, the takeover notice.

8.13 Offer document is defined as the offer and all accompanying information referred to in rule 44. The reference in rule 48 to "information in the offer document" therefore includes any documents that will accompany the offer document when it is sent to the target company and the target's shareholders (such as letters from the board, acceptance transfer forms etc.).

8.14 There is a link between rule 48 and rule 44 which requires the offer to be on the same terms and conditions as those contained in or accompanying the takeover notice, except for –

(a) conditions that have been satisfied or waived; and

(b) any variations to which the directors of the target company have given their prior written approval; and

(c) any variation or amendment made in accordance with rule 44(3); and

(d) consequential amendments.

8.15 On occasion, acceptance transfer forms are not sent with the takeover notice. However, acceptance transfer forms include terms of the offer, and therefore must be sent with the takeover notice. In addition, any alterations to an acceptance transfer form will need to be approved by the directors of the target company in writing, before they can be sent with the offer document. In these circumstances, such clarifications also need to form part of the rule 48 notification.

8.16 As a practical point, showing all additions and amendments as track changes is generally how the notification is achieved.

Clear, concise, and effective offer documents

8.17 The Panel expects user-friendly offer documents for shareholders. Drafting should follow a clear and concise style, with minimal use of jargon and repetition, and plain English used where possible. If information is summarised, a balanced view of any advantages and disadvantages should be provided.

8.18 More specifically, offer documents should be:

(a) Clear:

(i) use plain language;

(ii) use a font and font size that are easily readable;

(iii) be logically ordered and easy to navigate;

(iv) highlight important information; and

(v) explain complex information in plain language and include a clear explanation of any necessary jargon;

(b) Concise:

(i) use short sentences;

(ii) avoid unnecessary repetition;

(iii) highlight important information in balanced summaries;

(iv) use diagrams and graphs effectively; and

(v) minimise the use of brand information, photographs and other images;

(c) Effective:

(i) give adequate and accurate information about the offer; and

(ii) convey an accurate and balanced impression.