

TRAVERS SMITH

Takeover Panel clarifies relationship between shareholder activism and mandatory offer regime



The Takeover Panel has this week issued a Practice Statement to address concerns that certain provisions of the Takeover Code act as a barrier to co-operative action by fund managers and institutional shareholders. The statement says "Concerns have been expressed that collective shareholder action (for example, shareholders jointly seeking to bring influence to bear on the board of a company) could be constrained by the Executive's application of the Code's "acting in concert" provisions and mandatory offer requirements. The Executive does not believe that the relevant provisions of the Code have [this effect]."

The purpose of the statement is therefore to clarify the Panel's position on these matters.

When might a mandatory offer be triggered?

The Panel's statement makes it clear that a mandatory offer may only be triggered by activist shareholders if both of the following tests are satisfied:

- those shareholders requisition a general meeting to consider a "board control-seeking" resolution or threaten to do so; and
- after an agreement or understanding is reached between the activist shareholders that a "board control-seeking" resolution should be proposed or threatened, those shareholders acquire interests in shares so that the shares in which they are interested together carry 30 per cent. or more of the voting rights in the company or, if they are already interested in shares carrying 30 per cent. or more of the voting rights, they acquire further interests in shares.

The Panel has also said that it would not normally require a mandatory offer to be made if share acquisitions were made as a result of inadvertent mistake, the interests acquired were disposed of within a limited period and appropriate voting restrictions were put in place pending the completion of such disposal.

What is a board control-seeking resolution?

A resolution will not normally be considered to be "board control-seeking" unless it seeks to replace existing directors with directors who have a significant relationship with the requisitioning shareholders, with the result that those shareholders would effectively be in a position to control the board.

A resolution would also not normally be considered to be "board control-seeking" if the directors to be appointed are independent of the activist shareholders or if the primary purpose of the proposal is to appoint additional non-executive directors in order to improve the company's corporate governance.

"Concerns have been expressed that collective shareholder action....could be constrained by the Takeover Code"

When there is no concert party relationship

The Panel Executive has confirmed that it would not normally conclude a concert party had come together on the basis of:

- discussions between shareholders about possible issues which might be raised with the company's board;
- joint representations by shareholders to the board;
- the agreement by shareholders to vote in the same way on a particular resolution at a general meeting; or
- a situation where a proposal to change the manner in which a company is managed does not involve changes to the board, unless the activist shareholders make it known that, if their initial proposals are not implemented, they will put forward board control-seeking proposals.

Examples of board control-seeking proposals

The Panel's Practice Statement sets out the following factors to assess whether a resolution might be interpreted to be seeking control of the board:

- where there is a "significant relationship" between the proposed directors and the shareholders proposing them or their supporters. Relevant factors will include:
 - whether there is, or has been, any prior relationship between any of the activist shareholders (or their supporters) and any of the proposed directors;
 - whether there are any agreements, arrangements or understandings between any of the activist shareholders (or their supporters) and any of the proposed directors as regards their proposed appointment;
 - whether any of the proposed directors will be remunerated in any way by any of the activist shareholders (or their supporters) as a result of or following their appointment.

In determining whether a significant relationship exists the Panel Executive will seek to understand the likelihood of the proposed directors acting under the influence of the activist shareholders (or their supporters) rather than exercising their own independent judgment as to how the interests of shareholders generally may be advanced.

- the number of directors to be appointed or replaced compared with the total size of the board – proposals to replace one director will not normally be treated as board control-seeking but there may be exceptions eg. the executive chairman of a small board;
- the board position held by the directors being replaced and to be held by the proposed directors - proposals to replace two or more of the chairmen, chief executive or finance director would be more likely to be considered to be board control-seeking;
- the nature of the mandate, if any, of the proposed directors - if the intention is to improve corporate governance, this is unlikely to be considered board control-seeking;
- whether the activist shareholders/their supporters will benefit as a result of the implementation of the proposal other than through their interest in shares in the company;
- the relationship between the proposed directors and the existing directors and/or between the existing directors and the activist shareholders/their supporters;
- whether the proposals relate to management of the company or, if the resolution is voted down, what the consequences of that might be.

A significant relationship between the proposed directors and the shareholders proposing the resolution may lead to a conclusion that the resolution is a "board control-seeking" resolution

Other issues

The Statement also makes it clear that:

- discussions between shareholders on particular matters are not likely to give rise to a presumption that a concert party relationship exists. The concert party relationship is only presumed to have arisen once an agreement or understanding is reached between the parties in respect of the board control-seeking proposal;
- soliciting of support by the activist shareholders does not mean any shareholders who are approached will be considered to be a member of the concert party.

If you would like more information on the topics discussed in this note please contact Spencer Summerfield or your usual contact at the firm.

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