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TAKEOVERS PANEL

IN THIS ISSUE

Update to Guidance Notes

The Panel has recently updated its Guidance Note on Independent Advisers and the Code (the **IA Guidance Note**) and Guidance Note on Target Company Statements (the **TCS Guidance Note**). The changes were made following recent consultation with representatives of institutional and retail investors, independent advisers, and other market participants.

Guidance relating to the disclosure of principal assumptions underlying financial forecasts in target company statements was previously contained only in the TCS Guidance Note. However, it applies equally to independent adviser's reports prepared in respect of Code-regulated transactions. Consequently, the guidance on principal assumptions has been updated and replicated (with consequential changes) in the IA Guidance Note. The guidance in the TCS Guidance Note has also been updated.

The updated guidance can be found in paragraphs 22 to 27 of the IA Guidance Note, which is set out below:

<u>Disclosure of principal assumptions underlying forecasts</u>

22. Independent adviser reports will ordinarily set out prospective financial information, comprising financial forecasts of the target company for one or more years, as it could reasonably be expected to be material to the decision of offerees to accept or reject an offer. Prospective financial information usually comprises forecasts that are based on information provided by the company appointing the independent adviser.

23. The Code requires an independent adviser's report to state the principal assumptions on which any prospective financial information is based. The Panel expects that the assumptions will directly accompany the relevant prospective financial information in the document and be set out in a way that is helpful and relevant for shareholders reading the report.

24. Prospective financial information will usually be based on many assumptions about future conditions and events which may or may not occur. The quality of the information will be dependent largely on the appropriateness of the assumptions. Providing shareholders with these assumptions assists them to make their own informed judgement on the quality and reliability of the information.

25. Assumptions can range from being reasonably certain to very uncertain. In setting out assumptions in a useful and relevant way it is likely to be helpful to address, among other things:

(a) the degree of certainty/risk associated with particular assumptions and the key factors that could cause them to be incorrect;

(b) the extent to which assumptions relate to matters within or outside the control of the entity; and

(c) source material that has been used in deriving assumptions (e.g. past performance, third party reports or research, other market data).

26. For shareholders to make their own informed judgement, it may also be necessary to provide information which assists them in assessing the sensitivities of prospective financial information, where appropriate (for example, where there may be significant risks that could render those assumptions invalid and therefore alter key financial information and impact valuation or merits).

27. In determining what information to provide, the key question is whether it could reasonably be expected to be material to the making of a decision by the offerees to accept or reject the offer.

The Panel's guidance on clear, concise and effective independent adviser's reports (paragraphs 20 and 21 of the IA Guidance Note) states that reports should highlight important information in balanced summaries. That guidance has been updated, and now states that reports should include a summary of the adviser's conclusions on the merits of the transaction near the front of the report.

Finally, the Panel's guidance on conflicts of interest in respect of independent adviser applications (paragraphs 10 to 12 of Appendix A to the IA Guidance Note) has been updated to remove *"current auditor for any party to the transaction"* from the list of types of relationship which may lead the Panel to conclude that the proposed adviser is not independent when considering an application to act as independent adviser in respect of a Code-regulated transaction. The Panel has decided that excluding advisers with an auditor relationship is unnecessarily restrictive and unrealistic, particularly given the small size of the New Zealand market.

If you have any queries about the updated guidance, please feel free to contact the Panel executive.

Class Exemption from Rule 46(1)

The Takeovers Panel has granted an exemption from rule 46(1)(a)(ii)(A) of the Code which requires a target company to send a target company statement (**TCS**), including an independent adviser's report (**IA report**), to shareholders within 14 days after it receives notice that a takeover offer has been despatched.

The new exemption (clause 25F of the Takeovers Code (Class Exemptions) Notice (No 2) 2001) grants the exemption on the condition that the TCS is instead made available on the company's website in a prominent position within that 14-day period. The company must also send the TCS to its shareholders as soon as practicable in the case of shareholders who receive documents electronically or within 3 further days in any other case.

The exemption was proposed after a wider discussion with independent advisers about their role, and specifically the time constraints imposed by the Code on independent advisers preparing IA reports in respect of surprise takeovers. Given that time must be allowed for the appointment process of the independent adviser, the Panel's approval process, and printing and posting of the TCS and IA report, independent advisers could be under considerable time pressure when preparing IA reports for these types of transactions. The new exemption allows target companies an additional three days for printing and posting of hard copy TCS.

The Panel considered it was appropriate and consistent with the objectives of the Code to grant the exemption as it would increase confidence and integrity in the takeovers market by increasing the time available to target companies and independent advisers to prepare the TCS and IA reports. It would also support an efficient takeovers market by ensuring that shareholders continue to have access to the TCS within 14 days of the takeover offer being despatched. The Panel considered that these benefits outweighed the impact on shareholders who may have to wait an additional period of time before they receive a TCS by post.

Electronic sending of documents is consistent with the policy of facilitating the use of technology in every day transactions. The Panel encourages shareholders who have not already done so to register their email address with the companies they invest in, and ensure that their contact details on the share register are updated as needed.

Takeovers Panel welcomes new General Counsel

The Panel recently announced the appointment of Mark Cunliffe as General Counsel to the Panel.

Mr Cunliffe joins the Panel from Bell Gully, where he held the position of Senior Associate in the corporate department since 2012. Prior to joining Bell Gully, he practised in Simpson Grierson in Wellington and Travers Smith in London.

Mr Cunliffe has extensive experience in corporate and commercial law, with a particular focus on M&A and takeovers as well as commercial agreements. In terms of industry sectors, Mr Cunliffe's private practice experience focused on the ICT and energy sectors.

As General Counsel, Mr Cunliffe helms the Panel's legal and enforcement team. He also works closely with Mr Andrew Hudson, the Panel's Chief Executive, on the Panel's policy and public understanding functions. Mr Hudson, the Panel's former General Counsel, was appointed as Chief Executive in October 2017.

Said Mr Hudson, "We are pleased to have someone of Mark's calibre join our team. We're confident that Mark's extensive experience in corporate and commercial transactions will strengthen our team's expertise".

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