PROPOSED AMENDMENTS TO THE TAKEOVERS CODE

Recommendations to the Minister of Commerce and Consumer Affairs from the Takeovers Panel

March 2017

TAKEOVERS PANEL

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INTRODUCTION

1. The Takeovers Panel (the "Panel") has the function, among other things, of reviewing the law relating to takeovers of Code companies and recommending to the Minister of Commerce and Consumer Affairs (the "Minister") any changes to that law that the Panel considers necessary.[1]

2. The Takeovers Code (the "Code") came into force on 1 July 2001. The Panel has administered the Code since then, and periodically becomes aware, through its interaction with the market, of problems (often of a minor technical drafting nature) which leave the Code less efficient and effective than it could be. This is the fourth time that the Panel has made recommendations to the Minister on changes to the Code.

3. In October 2016, the Panel issued a discussion document titled, "Proposed Amendments to the Takeovers Code" ("Discussion Document"). The Discussion Document was open for public comment and was sent to more than 2000 lawyers and firms and had a consultation period of six weeks. The consultation period closed on 2 December 2016.

4. These recommendations broadly follow the same format as the Discussion Document. They are divided into two main sections:

   (a) Section One contains three substantive subsections, they are: *Small Code Companies, "Days" in the Code,* and *Electronic Access for Shareholders.*

   (b) Section Two contains technical amendments of low policy content, most of which are drafting anomalies or minor inconsistencies in the wording of the Code and would not result in any substantive changes to the Code. The six subsections in Section Two are: *Offer documents, Target company statements, Notices of meeting, Compulsory acquisition, Communications,* and *Timing*.

5. The Panel received ten submissions in response to the Discussion Document. The submissions were made by a number of major law firms, the New Zealand Law Society, the New Zealand Shareholders Association, Chartered Accounts Australia/NZ, interested individuals, small finance firms and crowd funding platforms. Some submissions addressed only one or two aspects of the Discussion Document, with most of the submissions focusing on Section One.

6. Most of the Panel's proposals relate to amendments to the Code and may be implemented by regulations made by way of an Order-in-Council. However, two of the proposals would require amendments to the Takeovers Act 1993. The Panel's recommendations include drafting suggestions for clarity. However, the Panel is, of course, aware that the Parliamentary Counsel Office is ultimately responsible for drafting the amendments to the Code and the Act, and, accordingly the final form of the amendments may differ from those shown in these recommendations.

[1] Takeovers Act 1993, section 8(1)(a).

Regulatory impact

7. The Panel is committed to having the Code work well. To this end, the large majority of amendments are of 'low policy content' and mostly address technical anomalies. Amongst the more substantive recommendations in Section One, the proposal to change the threshold for being subject to the Code is a policy decision for Parliament. None of the other proposals extend to the fundamental policy underlying the Code.

Compliance costs

8. The public consultation undertaken by the Panel indicated that the proposed amendments would result in a marginal reduction in compliance costs for market participants and a significant reduction for the companies that would no longer be subject to the Code. The Panel believes that the benefits of the proposed amendments will exceed any increases in compliance costs.

Recommendation

9. The Panel recommends, under section 8(1)(a) of the Takeovers Act, to the Minister that the Takeovers Act and the Takeovers Code be amended as proposed in this Paper.

Andy Coupe
Chairman
Takeovers Panel

SECTION ONE: SUBSTANTIVE AMENDMENTS

Policy Objectives

10. The Panel's objectives for considering the three substantive issues are the statutory objectives for the Code, as set out in section 20 of the Takeovers Act, namely:

    (a) encouraging the efficient allocation of resources;

    (b) encouraging competition for the control of Code companies;

    (c) assisting in ensuring that the holders of financial products in a takeover are treated fairly;

    (d) promoting the international competitiveness of New Zealand's capital markets;

    (e) recognising that the holders of financial products must ultimately decide for themselves the merits of a takeover offer; and

    (f) maintaining a proper relation between the costs of compliance with the Code and the benefits resulting from it.

11. All options set out in Section One of the Discussion Document were analysed in respect of the above objectives.

REDUCING THE COST OF CODE COMPLIANCE FOR "SMALL CODE COMPANIES"

The Problem

12. The Panel sought feedback on whether the Code prevents small companies from raising the capital they need to survive, thrive, and grow, or undertake other share transactions cost-effectively, and if so, specific examples of how.

13. The Code applies to "Code companies". The definition for being a Code company is set out in both the Takeovers Act and the Code. A company is a Code company if it is a New Zealand incorporated company that:

    (a) is listed with financial products that confer voting rights (e.g., ordinary shares) that are quoted on a licensed market, e.g, an NZX market; or

    (b) was within paragraph (a) at any time during a 12 month period before a transaction or event covered by the Code; or

    (c) has 50 or more shareholders (with voting rights) and 50 or more share parcels.

14. The Takeovers Code was introduced in 2000 in order to improve investor confidence in the New Zealand market. It was seen as a response to concerns of shareholders (particularly minority or overseas shareholders) being treated unfairly. The enactment of the Code aligned New Zealand's takeover regime with regimes internationally by ensuring that all shareholders receive fair and equal treatment and by providing participation rights in control-change transactions, such as takeovers. The threshold of

50 or more shareholders and share parcels for being a Code company draws the line between smaller companies where shareholders can have a close connection with management and directors, and larger, widely held, companies where shareholders may not have the same ability to influence control outcomes.

15. Up until 2006, when an amendment was made to the Takeovers Act and the Code, small-by-value unlisted companies were excluded from being subject to the Code. There was a value threshold of "$20,000,000 or more of assets" required to be met before an unlisted company was a Code company. This threshold reflected the Code's aims of seeking to only regulate changes of control in companies of economic significance. The asset threshold was removed in 2006 (under a suite of securities law reforms) to more closely align the New Zealand Takeovers Code with Australia's takeovers legislation.

16. Code companies are estimated to be fewer than 1% of New Zealand's c.500,000 companies. The number of Code companies is unknown, given the lack of available data, but is estimated to be between 300 and 1400 companies. Of these, some 130 are listed (on the NZX Main Board, NZAX, or NXT).

17. In 2015 the Panel granted a limited class exemption to help reduce compliance costs for small Code companies. In 2016, the Panel undertook further consultation, and extended the reach of the Takeovers Code (Small Code Companies) Exemption Notice 2016 ("small Code companies Class Exemption"). The effect of the exemption is to allow unlisted companies with total assets of $20 million or less to opt out of Code compliance where a person increases their holding or control of voting rights (i.e., their share ownership) as a result of an allotment, acquisition or buyback of voting securities by the Code company.

18. The purpose of the exemption is to lower the disproportionate cost barriers to capital-raising for small Code companies, by potentially enabling the company to avoid the costs of holding a shareholders' meeting, obtaining an independent adviser's report, and obtaining legal advice to facilitate the process. At the time of writing, the exemption has been relied on just once.

19. The Panel received anecdotal evidence, and submissions in relation to the Panel's consultations for the small Code companies Class Exemption, that the costs of Code compliance are out of proportion to the value of some transactions for small Code companies. The strongest arguments about this have come from crowdfunding platforms. The Panel accepts that if this is in fact true for crowdfunded companies it must also be the case for all small Code companies.

20. The exemption was, in part, a response to recent Letters of Expectations from the Panel's responsible Minister, which included a focus on ensuring that businesses, including small Code companies, can efficiently access the capital they need to grow.

21. For takeovers of small Code companies, the costs are unlikely to be less than $100,000 and can be several times this figure. For other Code-regulated transactions in small Code companies that require shareholder approval (e.g., allotments, acquisitions and buybacks), the costs may be similar to those of a takeover if the transaction is complex, or between $50,000 and $80,000 for smaller transactions. These costs are associated with legal advice, an independent adviser's report and holding a shareholders' meeting. For small Code companies, these costs may outweigh the benefits of Code compliance.

22. There are a number of existing protections for shareholders of all companies, whether a company is also subject to the Code or not. These are found in the Companies Act, and include directors' duties to act in the best interests of the company, rights found in company constitutions, and, for shareholders who vote against a major transaction, minority buy-out rights.

The Panel's Solution

23. In response to the problem, the Panel suggests that an amendment to the definition of "Code company" in the Takeovers Act and Code be made, to include the additional threshold that an unlisted company has either total revenue of $15 million or more, or total assets of $30 million or more. These thresholds are an adaptation of the ratios found in the Financial Reporting Act 2003 for defining 'large' companies ($60 million of assets and $30 million of revenue). This amendment would mean that companies that are not listed and do not meet the asset or revenue threshold do not need to comply with the Code.

24. There is considerable uncertainty around the number of Code companies and the number of "small" Code companies. Based on the assumptions noted by TDB Advisory, the number of "small" firms that would be excluded from the Code pursuant to this proposed solution may be between around 30 and 300 firms. These are indicative estimates only.[2]

Recommendation

25. The Panel recommends that section 2A of the Takeovers Act and rule 3A of the Code be amended by adding, as additional thresholds for being a Code company, that the company has:

    (a) total annual revenue, together with its subsidiaries, of $15 million or more at the end of the most recently completed accounting period; **or**

    (b) assets, together with its subsidiaries, of $30 million or more at the end of the company's most recently completed accounting period, or, if the company has not completed its first accounting period, at the end of the most recently completed calendar month.

26. The Panel's proposed amendments could be drafted as follows (suggested amendments shown in bold):

Meaning of code company

(1) Code company means a company that—

(a) is a listed issuer that has financial products that confer voting rights quoted on a licensed market; or

(b) was within paragraph (a) at any time during the period of 12 months before a date or the occurrence of an event referred to in this code; or

(c) has:

*i) 50 or more shareholders and 50 or more share parcels; **and***

[2] The Panel engaged TDB Advisory to undertake an analysis of the likely impact of the proposal. The figures provided are based on the assumptions provided in a report to the Panel by TDB Advisory.

(ii) total annual revenue, together with its subsidiaries, of $15 million or more at the end of the most recently completed accounting period; or

(iii) assets, together with its subsidiaries, of $30 million or more:

(A) at the end of the most recently completed accounting period of the company; or

(B) if the company has not completed its first accounting period, at the end of the most recently completed calendar month.

Comment

27. Seven submitters (out a total of eight submitters who addressed the question of the costs of Code compliance) considered that the Code imposes a level of cost, complexity and delay that increases the difficulty of capital raising for small companies. In other words, the Code is seen to impose undue restrictions on small companies, and the costs of compliance tend to outweigh the benefits for investors.

28. Seven out of nine submitters on the Panel's solution, including law firms and the NZ Shareholders Association, were in favour of the Panel's proposed amendment.

29. One submitter, a large national law firm, did not agree with the Panel's preferred solution, arguing that takeovers regulation is designed for listed companies and should not apply to any unlisted companies. This submitter proposed that, in the absence of the Code, shareholders have alternative means of protecting their interests in the event of an attempt to change control of the company and suggested that the Code should only apply to listed companies. However, voluntary and company-driven mechanisms will not always provide shareholders with adequate protection, and without Code protection, there is (as another submitter pointed out), the risk that majority owners benefit at the expense of minority shareholders.

30. The Panel initially proposed an asset threshold of $20 million in the Discussion Document. Four submitters disagreed with that threshold. Suggested thresholds ranged from $10 million to $100 million. The Panel, in recognising the need to draw the line somewhere, has settled on the threshold of $30 million.

31. Two submitters suggested that the Panel add a revenue test to the threshold. The Panel agreed with this suggestion as some companies are trending towards fewer tangible assets.

32. The Panel considers that the proposed solution provides a bright line test for clearly identifying the threshold at which unlisted companies would be subject to the Code, and removes and reduces the disproportionate compliance costs for small unlisted companies, while retaining the appropriately balanced settings for larger and listed companies.

"DAYS" IN THE CODE

The Problem

33. Occasionally, concerns have been expressed to the Panel regarding the potential difficulties caused when takeovers occur over holiday periods. These difficulties are said to occur because timing requirements in the Code are stated and defined as "days" – meaning calendar days and not working days. The Panel, taking heed of these concerns, sought submissions on the matter. Under the common law, a day means a whole day up until midnight.

34. The Code's timing requirements are contained within some 37 rules scattered throughout the Code. They set out timeframes within which things must or must not occur during takeovers and compulsory acquisitions. For instance, in respect of a takeover, under rule 24, the offer period "must not be shorter than 30 days and not longer than 90 days." Similarly, under rule 29(1) "an offer may not be varied, and a variation notice may not be sent, later than 14 days before the end of the offer period."

35. Lawyers involved in Code transactions will be familiar with other corporate legislation, such as the Companies Act, which uses working days, and defines the term "working day" to exclude weekends and national public holidays, as well as the period between Christmas and New Year.

36. It has been said that the Code's use of calendar days has the potential to be impractical for shareholders, potential competing bidders, target companies, and independent advisers, particularly in situations where takeovers occur over the Christmas holidays. These problems become clear when considering the application, during holiday periods, of the various rules that have short timeframes.

37. For example, rule 46 of the Code requires the target company statement to be sent within 14 days after the target company receives the takeover notice or despatch notice. More critical is rule 42A, which requires a "class notice" to be sent by the target company no later than two days after receiving a takeover notice. For example, if the target company receives a takeover notice sometime during a Monday, it must send a class notice to the offeror by no later than midnight on Thursday.

38. As a regulator, the Panel is concerned that the Code's use of calendar days means that takeover offers made over the Christmas holiday period or Easter break can leave shareholders with less time to consider the information provided to them. Moreover, during holiday periods shareholders may be away on holiday, and they may be unaware of an offer, not be able to access offer information and/or less likely to have access to financial and legal advisers, whose firms may be closed for part of the holiday period.

39. The application of these rules in the context of a takeover offer near to or during a holiday period may cause company directors, and also legal and financial professionals, unnecessary urgency over the holiday period.

40. To date the Panel has little evidence that the use of "days" rather than "working days" for Code transactions causes a problem. Doubtless this reflects the fact that in almost all cases the bidder will have a common interest with shareholders that adequate time for bid

assessment exists. However, from time to time practitioners have expressed the view that the Code's timing rules should be expressed as "working days".

The Panel's Solution

41. The Panel's preferred solution is to recommend that the Code be amended to state timing obligations in "working days", in line with the definition found in the Companies Act, and to make corresponding changes to the number of days stated in the Code's timing rules.

Recommendation

42. The Panel recommends the addition of a definition of "working day" in the Code, referenced to the definition of "working day" in the Companies Act, and that the Code's timing rules be amended to reflect this, so that the number of days within which things must or must not occur remains effectively the same as under the status quo (except for during holiday periods). This is set out in the table below:

Days under status quo rules in the Code	**Days under amended rules in the Code**
90 days	60 working days
60 days	40 working days
30 days	20 working days
21 days	15 working days
14 days	10 working days
10 days	8 working days
7 days	5 working days
3 days	3 working days
2 days	2 working days
1 day	1 working day

43. Rule 43A of the Code provides an example of the proposed change (suggested amendments shown in bold):

(1) The offeror must send to the target company a notice in writing that specifies the record date for the purposes of the offer.

(2) The record date must not be more than ***~~10 days~~ 8 working days*** *before the date of the offer.*

(3) The notice referred to in subclause (1) must be sent no later than ***~~2 days~~ 2 working days*** *before the record date*

Comment

44. Responses were mixed in relation to whether submitters have experienced detrimental effects because of takeovers occurring over holiday periods. The NZ Shareholders Association stated that, in their experience, the inconvenience experienced by shareholders has related to the delays in postal services, and not the use of "calendar days" per se.

45. Similarly, one large law firm stated that their advisers had been inconvenienced by the Code's approach to "days", but did not link this to holiday periods. They further added that they have not been aware of any evidence of a problem in terms of holiday periods and Code compliance, but acknowledge that a logical argument to that effect could be constructed, as the Panel had done in its Discussion Document.

46. All submissions received on this matter (six in total) were in support of the Panel's preferred solution of using working days instead of calendar days. The NZ Shareholders Association suggested effectively increasing all time frames under the Code given delays in postal services. The Panel believes this would unduly extend takeover periods, which already impact on target companies' business operations, and that the Panel's solution adequately addresses the issue of inconvenience associated with holiday periods. Moreover, the Panel has proposed an additional solution (see below) that seeks to reduce the problems associated with postal delivery.

47. Three submissions recognised the benefits of creating consistency with other important legislation in New Zealand, such as the Companies Act.

ELECTRONIC ACCESS FOR SHAREHOLDERS

The Problem

48. A further concern relates to the reducing speed of postal services and correspondingly to the limited use of electronic communication by target companies and offerors during takeovers, and the limited accessibility of Code documents for shareholders of Code companies.

49. The Code was drafted at a time when written communications, including Code documents such as notices of meeting, takeover notices, offer documents, and target company statements, were expected to be made through the post in hard copy. Postal services were rapid, with next day delivery being the norm, at least in urban areas. In recent times, however, postal delivery can take much longer, particularly over the Christmas holiday period.

50. The Code does not regulate whether Code companies and takeover offerors communicate with shareholders by post or electronically. Nor does the Code prevent electronic communications.[3] In respect of their own shareholders, companies must provide documents by electronic means if the shareholder so notifies the company.[4]

51. Informal discussions with one of the main registry providers for companies in New Zealand indicate that the percentage of shareholders whose email addresses are held by the company varies dramatically from company to company, from as much as 80% for some companies to as little as 20% for others.

52. Rule 42B of the Code requires a target company to send the offeror a copy of the target company's share register. The share register may or may not include shareholders' email addresses. The offeror therefore may be unable to access the email addresses of the target

[3] Section 20 of the Electronic Transactions Act 2002 enables legal requirements to deliver information to be met by giving the information in electronic form. However, this is subject to the requirement that the person to whom the information is required to be given consents to the information being given in electronic form.
[4] Section 391(3A) and (3B) of the Companies Act.

company's shareholders and so its only option is to send the takeover offer and any subsequent communications by post.

53. The Code company is able to send documents by email to those shareholders who have opted for electronic communication. However, the Panel understands that target companies still mostly use only postal services during takeovers, and not email. Accordingly, shareholder communications can be very slow, and it is the Panel's view that this is unsatisfactory.

54. The problem is partly mitigated by the fact that the NZX requires all NZX-listed companies to publish material information on the NZX website as part of its continuous disclosure regime. Shareholders with access to the internet will have access to Code documents in respect of listed companies through the NZX website regardless of whether they or the company have opted for electronic communication.

55. Since 2011, approximately 67% of all Code-regulated transactions that have occurred have been in respect of NZX-listed companies, and 70% of takeovers regulated by the Code have been of listed companies. Of those Code companies not listed (and whose documents are therefore not available on the NZX website), many publish Code documents on their own websites.

56. While these practices mitigate the problem to a certain extent by reducing the instances in which Code documents are not available to shareholders electronically, not all unlisted companies make their documents available on their website.

The Panel's Solution

57. The Panel's proposed solution is that the Code be amended to facilitate electronic communication, by offerors under a takeover, and by the Code company with shareholders for Code-regulated transactions, and to facilitate the Panel's publication of Code-regulated documents.

58. To illustrate the proposed solution, the Panel envisages the following scenario. A shareholder, who has given their email address to a Code company for the purposes of receiving company documentation would receive all takeover notices and other documents in relation to a Code-regulated transaction by email. Should the shareholder wish to receive a particular document in hard copy, he or she may request the Code company to send that document. The Code company, upon receiving this request, will need to comply with that request within 1 working day. This means that if, for instance, the request is received by the Code company at 4.30 p.m. on a Monday, the Code company will need to ensure that the hard copy document is dispatched to the shareholder by midnight on Tuesday.

Recommendation

59. The Panel recommends amendments to the Code that would facilitate electronic communication and the public availability of Code documents, as follows:

    (a) a target company be required to provide to an offeror, when it provides its share register, the email address of every shareholder (holding equity securities or voting

securities the subject of the offer) who has provided their email address to the target company for the purposes of electronic receipt of documents ("e-shareholder");

(b) every Code-regulated communication made by a Code company or an offeror to each other or to an e-shareholder be required to be made electronically. Such communication is to be in place of, not in addition to, postal delivery. However, a Code company, offeror, or an e-shareholder can request to also receive communications in hard copy, and the offeror or Code company, as the case may be, must comply with that request;

(c) the Panel be empowered to publish Code-regulated documents on the Takeovers Panel website;

60. The Panel also recommends investigation into whether amendments are needed to the Unsolicited Electronic Messages Act 2007 and other legislation so as to ensure that Code-regulated electronic communications are not inadvertently prohibited.

61. In line with the above, the Panel recommends the following drafting changes (suggested amendments shown in bold):

19A Documents for Panel in respect of shareholder meetings

(1) A code company that sends a notice of meeting for the purposes of rule 15 or 16 must at the same time send to the Panel, ***in electronic form*** ~~***in hard copy and (if possible) electronic form***~~*, a copy of that notice and any document accompanying it that relates to the meeting to be held for the purposes of rule 7(c) or 7(d).*

(2) A person who publishes or sends to any holder of voting securities, in respect of a meeting held for the purposes of rule 7(c) or (d), a statement or information that is not required to be published or sent by the rules of this code must at the same time send to the Panel, ~~***in hard copy and (if possible)***~~ ***in electronic form,*** ~~***,***~~ *a copy of that statement or information.*

(3) ***The Panel may publish code-regulated documents on the Takeovers Panel website.***

19AA Electronic communication

(1) A notice, statement, or other document given or sent under this code by a code company to a shareholder of the code company must be sent electronically if that shareholder has provided an electronic address to the code company for the purposes of electronic receipt of documents.

(2) Nothing in subclause (1) prevents a shareholder who has provided an electronic address for the purposes of electronic receipt of documents, from requesting to also receive a notice, statement or other document in hard copy, and the code company must comply with that request free of charge and within 1 working day of its receipt.

(3) Nothing in subclause (1) prevents a code company from providing a notice, a statement or other document in hard copy to shareholders.

42B Target company must send offeror copy of financial products register

*Not later than **2 working days** ~~days~~ after the record date, the target company must send to the offeror, in electronic form (or in such other form as the target company and the offeror may agree), a copy of the target company's financial products register, **and the electronic address of every shareholder that is held by, or held on behalf of, the target company,** relating to the financial products to which the offer relates as at the record date.*

47 Documents that must be sent to Panel or that Panel may require

*(1) A copy of a notice, statement, or other document that must be given or sent under rules 41 to 46 (excluding rule 42B) and rule 48 must at the same time be given or be sent to the Panel **in electronic form.** **~~in hard copy and (if possible) in electronic form.~~***

[…]

*(4) An offeror or target company or person acting on behalf of any of them who, in relation to an offer or a takeover notice, publishes or sends to any offeree any statement or information that is not required to be published or sent by the rules of this code must, at the same time that the statement or information is published or sent, also send a copy of it to the Panel **~~in hard copy and (if possible~~) in electronic form.***

*(5) **The Panel may publish code-regulated documents on the Takeovers Panel website.***

47A Electronic communication

(1) A notice, statement, or other document given or sent under this code by a target company or by an offeror to each other must be sent electronically and by a target company or by an offeror to a shareholder of the code company must be sent electronically if that shareholder has provided an electronic address to the code company for the purposes of electronic receipt of documents.

(2) Nothing in subclause (1) prevents a shareholder who has provided an electronic address for the purposes of electronic receipt of documents, from requesting to also receive a notice, statement or other document in hard copy, and the target company or offeror must comply with that request free of charge and within 1 working day of its receipt.

(3) Nothing in subclause (1) prevents a target company or an offeror from also providing a notice, a statement or other document in hard copy.

Comment

62. All submissions indicated support for the preferred option. The NZ Shareholders Association did note, however, that many shareholders prefer reading larger documents (such as Annual Reports and takeover documents) in hard copy. The Panel's proposal facilitates this by requiring a speedy response to a request for a hard copy.

63. Two submissions (both by law firms) raised the issue of the need for compliance with the Privacy Act 1993, as well as the need to ensure that the email addresses are only used for Code-related purposes. In September 2016 the Panel's executive, prior to publishing the

Discussion Document, discussed the potential privacy implications with the Office of the Privacy Commissioner.

64. The executive of the Office of the Privacy Commissioner agreed with the Panel executive's view that privacy implications are immaterial in respect of the proposed solution, on the basis that:

    (a) shareholders' full names and postal addresses are already public information under the status quo, and shareholders expect to receive, and companies expect to be able to send, communications regarding the company;

    (b) email addresses are only held by the company where the shareholder has actively opted to provide their email address in order to receive company documents electronically; and

    (c) the proposal only provides for speedier communications to persons who would already be receiving those communications by post.

65. The Panel notes that companies collecting shareholder information already need to ensure compliance with the Privacy Act.

66. In addition, taking on board a comment from a submitter, the Panel considers that amendments might need to be made to the Unsolicited Electronic Messages Act and other legislation in order to ensure that electronic communication from an offeror or target company is not prohibited. One submission queried whether the Panel should maintain Code-related documents on its website for unlisted companies. The submission did not suggest why this would be problematic, and the Panel is of the view that the accessibility of such documents would potentially significantly benefit shareholders of unlisted companies. This addition would likely also enable increased market commentary on unlisted Code company transactions.

SECTION TWO: TECHNICAL AMENDMENTS OF LOW POLICY CONTENT

Policy objectives for low policy content technical amendments

67. The Panel's policy objectives for considering the technical issues with the Code are:

    (a) investors in New Zealand Code companies are fully informed in respect of an offer for their equity securities and voting securities;

    (b) the market for takeovers of Code companies is efficient and competitive; and

    (c) the confidence of investors in the integrity of New Zealand's takeovers market is maintained.

68. The Panel also wishes to improve clarity and certainty about the requirements of the Code through removing inconsistencies in the wording of the Code and other drafting anomalies. This section does not raise any substantive policy issues. All options in Section Two of the Discussion Document were analysed in respect of the above objectives.

Offer documents

A. Identifying the controller of the offeror in the offer document

The Problem

69. Clause 2 of Schedule 1 of the Code requires an offer document to state the name and address of the offeror and the names of the directors. However, there is no requirement to state the name of the person or persons who control the offeror.

70. This is a problem because an offeror is often a special purpose entity that has been set up for making the takeover offer. This means that shareholders of a Code company in a takeover might not be fully informed about who the offeror is, especially where the offer vehicle is an overseas entity, a joint venture or limited partnership. Even where the offeror is a subsidiary of a New Zealand company, it arguably should not be left to shareholders to have to search the Companies Office Register simply to determine who the "real" offeror is.

71. By contrast, rule 15(a) of the Code, which relates to notices of meeting for acquisitions of parcels of shares, requires the controller of the relevant acquirer to be disclosed. Accordingly, the disclosure requirements for an acquisition under a takeover offer do not match up with those of an acquirer under a notice of meeting.

72. Takeover transactions are already very complex for retail investors to consider, and leaving those shareholders to do further research for themselves to find out the controller of the offeror is unreasonable and might be overwhelming. The Panel believes that such important information should be required by the Code to be provided to shareholders.

The Panel's Solution

73. The Panel's suggested resolution to this problem is to recommend that the Code be amended to include a new requirement in Schedule 1 of the Code that would require the identity of the person or persons controlling the offeror to be contained in, or accompany, a takeover notice and offer document.

Recommendation

74. The Panel recommends that clause 2 of Schedule 1 of the Code be amended to include a requirement to disclose in the offer document the identity of the person or persons controlling the offeror, as follows (suggested amendments shown in bold):

2 Offeror and its directors

(1) The name and address of the offeror.

(2) The names of every director of the offeror (if the offeror is not an individual).

(3) The names of every person who controls the offeror (if the offeror is not an individual).

Comment

75. Three out of four submissions commenting on this proposal expressed support for the proposed solution. Two of these submissions, including the one submission that did not state any express support for the solution, queried the meaning of "control" and "controller" in the context of the offeror, and suggested that the Panel clarify what it means by such terms.

76. The Panel has not altered its recommendation in response to these submissions, as 'control' is already defined in the Code and there has been no suggestion that the requirement to name controllers under rule 15(a) has been problematic.

B. Clarifying statement of consistency of information to regulators – Clause 14, Schedule 1 of the Code

The Problem

77. The statement that is required by clause 14(3) of Schedule 1 of the Code has been found to contain a drafting anomaly. It states:

> *"*[the offer document and takeover notice must contain…] *A statement that statements made under this clause* [i.e., statements about the offeror's intentions] *are 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."*

78. The only exception to this requirement is given in clause 14(4). Clause 14(4) states that the clause 14 disclosures are not required if the offer is a full offer that is conditional on a 90% minimum acceptance condition that cannot be waived. In all other circumstances, the clause 14(3) statement must be included in the takeover notice and offer document.

79. The problem arises when the clause 14(3) statement is required to be made when no information has been given by the offeror to any regulatory body other than the Panel (not every takeover offer is subject to oversight by another regulator). Making the clause 14(3) statement in these circumstances not only does not provide any useful information to the offerees, it is also confusing.

80. In October 2015, the Panel granted a class exemption (clause 25C of the Takeovers Code (Class Exemptions) Notice (No 2) 2001) ("the clause 25C class exemption") to temporarily resolve the drafting anomaly. The clause 25C class exemption is an exemption from having to make the statement required by clause 14(3) for every offeror that has not given (and was not required to give) any information to any regulatory body (in New Zealand or in an overseas jurisdiction), except the Takeovers Panel, in relation to the offer.

81. The Panel considers it to be appropriate to resolve the drafting in the Code itself rather than rely on practitioner's knowledge of the availability of the class exemption to enable offerors to avoid making the clause 14(3) statement where to do so would be irrelevant and confusing.

The Panel's Solution

82. The Panel's suggested resolution to this problem is to recommend that the Code be amended by effectively incorporating the clause 25C class exemption into the Code.

Recommendation

83. The Panel recommends that clause 14 of Schedule 1 of the Code be amended to allow offerors to make either the statement required by clause 14(3), or, if relevant, to state that the offeror has not given, and was not required to give, any information to any regulatory body in New Zealand or overseas, except to the Takeovers Panel, as follows:

14(5) The statement referred to in subclause (3) is not required if:

(a) the person is not required to give, and has not given, any information to any regulatory body (in New Zealand or in an overseas jurisdiction), other than the Panel, in relation to the offer; and

(b) the takeover notice or offer document (whichever is applicable) contains, or is accompanied by, a statement to the effect that the person is not required to give, and has not given, any information to any regulatory body (in New Zealand or in an overseas jurisdiction), other than the Panel, in relation to the offer.

Comment

84. Two out of three submitters that addressed this proposal were in support. The third suggested that the proposed solution seemed more complex than the problem being solved. The Panel is open to Parliamentary Counsel finding a simpler drafting solution, however, to date, the clause 25C class exemption, which uses the wording as recommended above, has not appeared to cause confusion.

C. Disclosure of the date on which multiple transactions took place under clause 7, Schedule 1 of the Code

The Problem

85. Clause 7 of Schedule 1 of the Code contains a drafting anomaly. Clause 7 requires the offeror to disclose whether certain persons have, during the six month period before the date of the takeover notice or the offer document (as relevant), acquired or disposed of any equity securities in the target company. Clause 7(1) requires a disclosure of the following:

(a) the total number and designation of each class of the securities acquired or disposed of; and

(b) for single transactions, the number of securities, the consideration paid and the date of the transaction; and

(c) for multiple transactions on any day, the total number of securities acquired or disposed of on that day and the weighted average consideration per security per class.

86. As it is currently worded, although clause 7(1)(c) refers to "that day", it does not require the disclosure of the date on which the multiple transactions took place. In comparison, clause 7(1)(b) requires the date on which a single transaction is made.

87. The disclosure of dates is appropriate for shareholders to make sense of the information provided, by seeing when transactions took place. The date may be material in order to compare the consideration for the transactions, and it may be useful to know whether they took place six months ago or closer to the date of the takeover offer.

88. Generally, it has been common practice for the offeror to disclose the date of multiple transactions even though the offeror is not technically required to do so. However, the drafting anomaly should be amended to clarify the requirements under clause 7.

The Panel's Solution

89. The Panel's suggested resolution to this problem is to recommend that clause 7(1)(c) be amended to require the date to be stated for multiple transactions.

Recommendation

90. The Panel recommends that clause 7(1)(c) of Schedule 1 of the Code be amended to require, in the case of multiple transactions on any day to which subclause (1) applies, the total number of securities acquired or disposed of on that day, in each class, the weighted average consideration per security per class, and the date on which the multiple transactions occurred. The Panel recommends drafting as follows (suggested amendments shown in bold):

7 Trading in target company equity securities

(1) If any of the persons referred to in clause 6(1)(a) to (d) has, during the 6-month period referred to in subclause (3), acquired or disposed of any equity securities of the target company, in respect of each such person—

[…]

(c) in the case of multiple transactions on any day to which this subclause applies, the total number of securities acquired or disposed of on that day, in each class, and the weighted average consideration per security per class, ***and the date on which the multiple transactions occurred.***

Comment

91. Two submitters considered and agreed with the Panel's proposed solution.

D. <u>Amending Additional Information – Rule 44(1)(d)(iii)</u>

The Problem

92. A drafting anomaly was identified by the Panel during the course of a hostile takeover that took place over the consultation period for the Discussion Document.

93. The problem relates to the ability to amend "additional information" contained in an offer document (or accompanying an offer document) that was originally contained in, or accompanied, the takeover notice.

94. Rule 44(1)(d)(iii), as it currently stands, requires that any additional information contained in, or accompanying, the takeover notice under rule 41(4) must be contained in, or accompany, the offer document. That is, under the Code, an offeror does not have the ability to change, update, or correct any "additional information" it had initially included with the takeover notice, even if that information is potentially misleading or deceptive. Many practitioners became aware of this anomaly in the Code because of the hostile takeover, and the Panel believes a concerning trend will ensue whereby any "additional information" the bidder wants to provide shareholders with will only be inserted in the offer document, and not at the outset in the takeover notice.

95. In contrast to this, under rule 44(1)(b) amendments or variations to the terms and conditions in the draft offer document that accompanies the takeover notice are allowed to be made and changed in the formal offer document that gets sent to shareholders. In other words, rule 44(1)(b) provides that the offer document be on the same terms and conditions as those contained in or accompanying the takeover notice, except for –

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

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

    (iii) certain other technical variations or amendments; and

    (iv) consequential amendments.

96. The Panel considers that the lack of mechanism available to enable amendments to "additional information" under rule 44(1)(d)(iii) is an unintended anomaly, particularly in contrast to the mechanism provided for under rule 44(1)(b) in respect of amendments to terms and conditions.

The Panel's Solution

97. The Panel's suggested solution is to amend rule 44(1)(d)(iii) so as to enable additional information to be corrected, updated or removed, similar to the process allowed by rule 44(1)(b).

98. In the meantime, the Panel intends to resolve the issue by granting a class exemption that will enable amendments to additional information to occur.

Recommendation

99. The Panel recommends amending rule 44(1)(d)(iii) so that the offer document must contain or be accompanied by any additional information contained in, or that accompanied the takeover notice in rule 41(4), except for:

    (a) corrections to, or the removal of, factual errors or information that may be misleading or deceptive;

(b) updates of additional information; or

(c) consequential amendments.

100. The Panel recommends drafting as set out below (suggested amendments shown in bold):

44 Offer document

(1) The offer must –
[…]
(d) contain, or be accompanied by,-
[…]
(iii) any additional information contained in, or that accompanied, the takeover notice under rule 41(4), ***except for –***

A corrections to, or the removal of, factual errors or information that may be misleading or deceptive; or

B updates of additional information; or

C consequential amendments;

Comment

101. This problem and recommendation were not consulted on. The issue was only identified after the consultation period on the Discussion Document, however, the Panel considers it to be technical in nature and without controversy.

Target company statements

E. Disclosure of equity holdings of target company in related company of offeror

The Problem

102. Schedule 2 of the Code sets out the information to be contained in or accompany a target company statement.

103. Clause 8 of Schedule 2 of the Code requires the target company to disclose, if the offeror is a company, the ownership of equity securities in the offeror held or controlled by the target company and each director and senior officer of the target company and their associates.

104. Clause 9 of Schedule 2 requires the target company to disclose, if the offeror is a company, the number and designation of any equity securities of the offeror that were acquired or disposed of by the persons referred to in clause 8 during the six month period before the date of the target company statement.

105. Clauses 8 and 9 do not require disclosure of ownership or trading in equity securities of any related company of the offeror by the persons referred to in clause 8.

106. It is not uncommon for a special purpose subsidiary to be formed to undertake an offer. Although it is not expressly required by the Code, general practice has been for the target company to include in the clause 8 and 9 disclosures, any interests in the holding company or other related company of the offeror.

107. Shareholders may not be fully informed about relevant relationships between controllers or associates of the offeror and the target company if this information is not disclosed. Although general disclosure rules in the Code require all material information to be disclosed, a specific Code requirement would ensure this information was not overlooked.

The Panel's Solution

108. The Panel's suggested resolution to this problem is to recommend that clauses 8 and 9 of Schedule 2 of the Code be amended to require the target company to disclose directors' and senior officers' ownership of shares in any related company of the offeror. Under the definitions in the Companies Act (which the Code relies on), the reference to "related company" would also ensure that offerors' controllers who were bodies corporate other than companies would also be covered by this change and disclosed to shareholders.

Recommendation

109. The Panel recommends that clause 8 (and similarly, clause 9) of Schedule 2 of the Code be amended to require disclosure in the target company statement, if the offeror is a company, of the number, designation, and percentage of equity securities of any class of the offeror, *or any related company of the offeror*, held or controlled by the target company and each director and senior officer of the target company and their associates.

Comment

110. Two submitters considered and agreed with the Panel's proposed solution.

F. Half-year and interim reports not to be sent with target company statement

The Problem

111. Clause 18 of Schedule 2 of the Code sets out the following financial information that must be referred to in, or accompany, a target company statement, including:

    (a) the requirement to state in the target company statement that a copy of the most recent annual report is available on request (there is no requirement to actually provide a copy of the most recent annual report with the target company statement);

    (b) the requirement that a copy of the half-year report accompany the target company statement; and

    (c) the requirement that a copy of any interim report accompany the target company statement.

112. The requirement to send a copy of a half-year report or interim report with the target company statement to every offeree may impose unnecessary printing and mailing costs on target companies with wide shareholdings and arguably, the inclusion of hard copies of the half-year and interim reports provides only marginal benefits to shareholders.

113. Listed Code-companies are required to publish their half-year reports through the market announcements platform on NZX and most listed companies also publish their half-year and interim reports on their respective company websites.

114. Given the availability of half-year and interim reports online, compliance costs for target companies could be reduced by not requiring those reports to be sent with the target company statement. However, of course shareholders should be able to ask for a copy of these reports to be sent to them.

The Panel's Solution

115. The Panel's suggested resolution to this problem is to recommend that clause 18 of Schedule 2 of the Code be amended to only require the target company, if its documents are available on its website, to state in the target company statement that a copy of the half-year or interim report (as applicable) is available on request in hard copy or electronic form.

Recommendation

116. The Panel recommends that clause 18 of Schedule 2 of the Code be amended to enable a target company, whose half-year report and most recent interim report (if any) are on its website , to state in the target company statement that the offeree is entitled to obtain from the target company a copy of the most recent half-year or interim report (if any) in hard copy or in electronic form.

117. The Panel further recommends an additional rule be inserted into the Code that would require the target company to send the report request (whether the annual report, half-year report or interim report) to the offeree within one working day of the request and free of charge.

118. The Panel recommends that an additional subclause be added to clause 18 of Schedule 2, as follows (suggested amendments shown in bold):

18 Financial information

(1) A statement that the offeree is entitled to obtain from the target company a copy of the most recent annual report of the target company.

(2) ***Subject to subclause 3(A),*** *a copy of the most recent half-yearly report of the target company, if any, since the annual report referred to in subclause (1).*

(3) ***Subject to subclause 3(A),*** *a copy of the most recent interim report of the target company, if any, since the annual report referred to in subclause (1), or, if a copy of a half-yearly report has been disclosed under subclause (2), a copy of any interim report of the target company relating to a period after that half-yearly report, if any.*

(3A) If the target company has the documents referred to in subclauses (2) and (3) available to offerees on the target company's website, and has informed shareholders where to access these documents, a statement -

(a) that the offeree is entitled to obtain, in hard copy or electronic form, from the target company a copy of the most recent half-yearly report of the target company, if any, since the annual report referred to in subclause (1);

(b) that the offeree is entitled to obtain, in hard copy or electronic form, from the target company a copy of the most recent interim report of the target company, if any, since the annual report referred to in subclause (1) or, if a copy of a half-yearly report has been disclosed under subclause (2), a copy of any interim report of the target company relating to a period after that half-yearly report, if any.

119. The Panel further recommends that an additional rule be inserted in the Code, as follows:

The target company must send a copy of any report requested under subclause (1) or subclause (3a) of clause 18 of Schedule 2 –

(a) free of charge; and

(b) within 1 working day of receipt of the request.

Comment

120. Two submitters considered and agreed with the Panel's proposed solution. One submission requested that the hard copy reports requested are sent by the target company to shareholders within one working day. The Panel agreed with this suggestion and recommended the insertion of an additional rule to ensure this will occur.

Notices of meeting

G. Rule 15(g) and rule 16(g) statement to apply to any person increasing control

The Problem

121. Where an acquisition or allotment of shares must be approved by the shareholders of the Code company, a notice of meeting must be sent to the shareholders that includes the information required by rule 15 (for an acquisition) or rule 16 (for an allotment).

122. For convenience, the problem is described as it applies to rule 16, however, the problem also arises in rule 15, which is worded similarly.

123. Rule 16(a) was broadened in 2013. Rule 16(a) now requires that, as well as the name of the allottee, the identity of *any person increasing their control* in the Code company must also be disclosed in the notice of meeting. This is because the allotee may be, for example, a nominee of the actual controller, or a bare trustee.

124. Rule 16(g) requires a statement by the allottee setting out the particulars of any agreements and arrangements between the allotee and any other person in respect of the allotment.

125. As it currently stands, rule 16(g) does not capture the intended effect of the broader disclosure requirement in rule 16(a), as amended in 2013. This is because the allottee may not be the controller identified in rule 16(a). This means that any agreements or arrangements entered into by the controller do not need to be disclosed in the notice of meeting under rule 16(g), and such information may be material to shareholders when voting on the relevant resolution.

126. Although rule 64 of the Code (which prohibits misleading or deceptive conduct) provides an overlay effectively requiring all material information to be disclosed, it would be sensible to make rules 15 and 16 internally consistent by having the paragraph (g) disclosure requirement match the paragraph (a) disclosure requirement.

The Panel's Solution

127. The Panel's suggested resolution to this problem is to recommend that the Code be amended to require the statements at rules 15(g) and 16(g) to be made by all of the persons identified in rules 15(a) and 16(a) (whichever applies).

Recommendation

128. In addition to the current requirements under rules 15 and 16, the Panel recommends that the notice of meeting sent by the Code company should contain, or be accompanied by, the particulars of the arrangements referred to in rule 15(g) relating to the controller or controllers identified in rule 15(a), and the particulars of the arrangements referred to in rule 16(g) relating to the controller or controllers identified in rule 16(a).

129. The Panel recommends that rule 15(g) and rule 16(g) are amended as follows (suggested amendments shown in bold):

15 Notice of meeting: acquisition of voting securities

(g) a statement by ***each person identified in paragraphs (a)(i) and (a)(ii)*** ~~*the person acquiring the voting securities*~~ *setting out particulars of any agreement or arrangement (whether or not legally enforceable) that has been, or is intended to be, entered into between the person and any other person (other than between that person and the person disposing of the voting securities in respect of the matters referred to in paragraphs (a) to (e)) relating to the acquisition, holding, or control of the voting securities to be acquired, or to the exercise of voting rights in the code company;*

16 Notice of meeting: allotment of voting securities

(g) a statement by ***each person identified in paragraph (a)*** ~~*the allottee*~~ *setting out particulars of any agreement or arrangement (whether legally enforceable or not) that has been, or is intended to be, entered into between the allottee and any other person (other than between the allottee and the code company in respect of the matters referred to in paragraphs (a) to (e)) relating to the allotment or allotments,*

holding, or control of the voting securities to be allotted, or to the exercise of voting rights in the code company;

Comment

130. Two submitters considered and agreed with the Panel's proposed solution.

Compulsory acquisition

H. Rule 3A(2) be clarified so it clearly only applies to Code regulated transactions which result in a person becoming the "dominant owner" of a company

The Problem

131. Rule 3A of the Code (and section 2A of the Takeovers Act) defines the companies that are subject to the Code. It currently states:

> *"(1) Code company means a company that—*
>
> *(a) is a listed issuer that has financial products that confer voting rights quoted on a licensed market; or*
>
> *(b) was within paragraph (a) at any time during the period of 12 months before a date or the occurrence of an event referred to in this code; or*
>
> *(c) has 50 or more shareholders and 50 or more share parcels.*
>
> *(2) However, if, as a result of a transaction or an event regulated under this code, a company that previously satisfied subclause (1)(c) ceases to have 50 or more shareholders and 50 or more share parcels, that company continues to be a code company for the purposes of Part 7.*"

132. Rule 3A(2) was an amendment added to the Code and Act in 2012 because some practitioners had interpreted the definition as allowing a company to cease being a Code company mid-takeover. That is, they suggested the Code could apply at the start of the transaction but cease to apply (along with all of the shareholder protections given by the Code) before the transaction concluded, on the basis that acceptances of an unconditional takeover offer resulted in the company having fewer than 50 shareholders – even though the takeover may still have some days or weeks to run.

133. The intention was that rule 3A(2) would clarify that Code regulated transactions which result in a person becoming a dominant owner of the company (that is, holding or controlling 90% or more of the voting rights in the company), must be completed under the Code's Part 7 compulsory acquisition procedure; what starts with the Code, ends with the Code.

134. On the other hand, if, at the conclusion of a transaction, a Code company has dropped below the "50 shareholders/50 share parcels" threshold in rule 3A(1)(c) of the Code without any person becoming a dominant owner, then rule 3A(2) does not apply to that company and that company has ceased to be a Code company.

135. Some practitioners are now suggesting that rule 3A(2) means the company will continue to be a Code company regardless of how few shareholders it has, until any

such time when the provisions in Part 7 can be applied. In other words, they argue that even though a transaction such as a takeover may have resulted in the offeror acquiring less than 90% of the company, but the company having fewer than 50 shareholders (possibly as few as ten or two), it would not cease to be a Code company at the conclusion of the takeover.

136. The Panel published a statement in November 2013 which explains how rule 3A(2) should be interpreted. However, the Panel considers an amendment is necessary to clarify the language of rule 3A(2) as it is still confusing for some.

The Panel's Solution

137. The Panel's proposed solution is to recommend an amendment to the Code and the Act to refer to a person becoming a dominant owner as a result of the transaction, and after the compulsory acquisition process in Part 7 of the Code has been utilised, the company is no longer a Code company.The Panel understands that this proposal is being considered for addition to the Regulatory Systems Bill.

Recommendation

138. The Panel recommends that, if this proposal has not already been addressed in one of the Regulatory Systems omnibus bills, that rule 3A(2) of the Code and section 2A(2) of the Act which contains the same wording as rule 3A(2) of the Code, be amended to clarify that Code regulated transactions which result in a person becoming a dominant owner of the company must be completed under the Code's Part 7 compulsory acquisition procedure, as follows (suggested amendments shown in bold):

> *However, if as a result of a transaction or an event regulated under this code, a company that previously satisfied subclause (1)(c) ceases to have 50 or more shareholders and 50 or more share parcels* ***and either $30 million or more of assets or $15 million or more of revenue****, that company continues to be a code company for the purposes of Part 7* ***if a person or persons become the dominant owner as a result of the transaction or event, and then that person or persons can rely on Part 7 only once and thereafter the company is no longer a code company.***

Comment

139. Two submitters considered and agreed with the Panel's proposed solution.

Communications

I. Shareholder access to target company share register

The Problem

140. Shareholders of a Code company sometimes want to communicate with each other, (e.g., during a takeover – especially if there is a strong view that the offer is undervalued). However, it can be difficult, at best, to obtain an electronic copy of the share register from the target company without delay during a Code-regulated transaction. Although it might be thought that the target company would want to assist its shareholders to communicate during a takeover offer, this is not always the case.

141. Shareholders have the power to request a copy of the company's share register under section 218 of the Companies Act and section 223 of the Financial Markets Conduct Act 2013 ("FMC Act"), but neither of these Acts specifies the format that the share register should be provided in and the company may provide it in a format that is difficult to use.

142. In the event that a shareholder wants to communicate with other shareholders regarding a Code-regulated transaction, he or she is at a disadvantage to the offeror (who is provided with a copy of the share register under rule 42B of the Code in their preferred form) if he or she cannot obtain an electronic copy of the share register without delay. The Companies Act provisions are inadequate for this purpose, as they do not have Code transactions, particularly takeovers which can be of relatively short duration, in mind.

The Panel's Solution

143. The Panel's suggested resolution to this problem is to recommend that the Code be amended to include a new rule, similar to rule 42B, for shareholders to request a copy of the financial products register and in respect of any Code-regulated transaction or event.

Recommendation

144. The Panel recommends that a new rule be inserted into the Code to:

(a) enable a shareholder of a Code company to request a copy of the financial products register *solely* for the purposes of contacting other shareholders in respect of a Code-regulated transaction or event which has been notified by or to the Code company;

(b) require the Code company, on receiving the request, to send the financial products register (including any electronic addresses held by, or on behalf of the Code company) relating to the transaction within one working day of the request, in whatever form the shareholder requests (i.e., electronic or hard copy); and

(c) require the Code company to notify the Panel at the same time as it sends the financial products register.

145. The Panel recommends drafting as follows:

(1) A shareholder of a code company may request a copy of the code company's financial products register solely for the purposes of contacting other shareholders in respect of a code-regulated transaction or event which has been notified by or to the code company.

(2) If a shareholder requests the code company's financial products register under subclause (1), the code company must send, within 1 working day of receipt of the request, to the shareholder, in electronic form (or in such form as the shareholder reasonably requests), a copy of the company's financial products register relating to the class or classes of financial products to which the transaction or event relates, including any electronic addresses held by, or on behalf of, the code company.

(3) The code company must notify the Panel of the sending of the company's financial products register at the same time as it sends the financial products register to the requesting shareholder.

Comment

146. Three out of four submitters considered and broadly agreed with the Panel's proposed solution.

147. Two submissions (including the fourth submitter), both from law firms, questioned whether the Panel's proposed solution would conflict with the Companies Act and FMC Act. The fourth submitter was concerned that the FMC Act, which allows an issuer to (with the permission of the FMA) withhold access to the financial products register, may override the proposed amendments to the Code. The Panel is of the view that the FMC Act provisions relate to broad requests for non-Code purposes and which are specifically made "under section 223(1)" of the FMC Act. The proposed amendment specifically only allows requests "solely" for Code-regulated transactions and events.

148. A related concern raised by the fourth submitter was the risk that the solution could be abused by disgruntled shareholders who may not use it for a proper purpose. The Panel considers that any communication that goes beyond "solely for the purposes of contacting other shareholders in respect of a code-regulated transaction…" would be a breach of the Code, and that, as a consequence, the Panel could take action in response to such a breach. Furthermore, the Unsolicited Electronic Messages Act 2007 already covers unwanted commercial communications and therefore the Panel does not see any need to deal with this in the Code.

J. <u>Full copy of the independent adviser's report on company's website</u>

The Problem

149. The Panel has identified another rule in the Code in need of an update. Rule 18(3) requires a full copy of an independent adviser's report to be available at the registered office of the Code company on and after the date of the notice of meeting. Similarly, clause 19(2) in Schedule 2 provides that if only a summary of the full independent adviser's report is provided to shareholders, the offeror must state that the full report is available for inspection at a specified address.

150. In light of the increasing reliance on the internet to both find and view documents, the Panel considers that the references to "registered office" in rule 18(3) and "specified address" in rule 19(2) are outdated and not in line with technological advances.

The Panel's Solution

151. The Panel's proposed solution is to amend rule 18(3) and clause 19(2) in Schedule 2 of the Code so as to ensure that that full copies of independent advisers' reports are also placed on the company's website, in addition to being at a registered office or specified address.

Recommendation

152. The Panel recommends that the Code be amended to ensure that independent advisers reports are available on the Code company's website, as well as at a registered office or specific address.

153. The Panel recommends drafting of rule 18(3) and clause 19(2) be as follows (suggested amendments shown in bold):

18 Independent adviser's report

[…]

(3) If only a summary of the independent adviser's full report is contained in, or accompanies, the notice of meeting,-

*(a) the full report must be available **on the code company's website** and for inspection at the registered office of the code company on and after the date of the notice of meeting.*

Schedule 2

19 Independent advice on merits of offer

[…]

(2) If only a summary of the full report is provided under subclause (1)

*(a) a statement that the full report is available for inspection **on the target company's website and** at a specified address*

Comment

154. This problem and recommendation were not consulted on. The issue was only identified after the consultation period on the Discussion Document, however, the Panel considers it to be technical in nature and without controversy.

Timing

K. Standardising 'timing' rules in the Code

The Problem

155. The timing rules in the Code refer to various numbers of days. These rules are currently worded in non-uniform fashion in two respects. Most significantly, how the days are counted depends upon whether the rule is:

(a) 'exclusionary' in nature (the first or last day (or both) referred to in the rule is not counted in the number of days); or

(b) 'inclusionary' in nature (the first or last day referred to in the rule is counted in the number of days); or

(c) a combination exclusionary/inclusionary rule (one of the days referred to in the rule is not counted, and the other day referred to is counted, in the number of days).

156. For instance, rule 10(2) requires that a copy of a shareholders' approval or objection to a partial offer must be sent by the target company to the offeror within 2 days of receipt of the approval or objection. "Within" is interpreted as being a combination of exclusionary and inclusionary, as the day on which the approval or objection is received is excluded from the specific time period (for example, it arrived at midday on a Monday), but the day on which the approval or objection must be sent is included (so, it must be sent no later than midnight on Wednesday). The rule therefore covers, effectively, three days.

157. Compare this with rule 42A(2) which stipulates that the target company must send the offeror a class notice no later than 2 days after receiving the takeover notice. This is an example of an exclusionary rule as both the day the target company receives the notice (for example, at 10.00 a.m. on a Monday) and the day the target company sends a class notice (which must be sent no later than midnight on Thursday) are excluded from the time period. This rule therefore covers, effectively, four days.

158. The other respect within which there is a lack of uniformity in the wording of the rules is in the expression of the time. For example, some rules say "no later than" and others, "not later than". It is accepted that inconsistences of this nature have no impact on the meaning of the expressions of time; however, ideally, there should be consistency.

159. The Panel's Guidance Note on Timing Rules, first published in 2010, has been successful in removing almost all the uncertainty that used to prevail in respect of how to count days referred to in the Code. Moreover, the Panel has improved on this guidance by providing a Timing Rules Calculator on its website that allows users to see, on a digital calendar, the dates in 'real time' when things can or must occur.

160. Nevertheless, these are piecemeal solutions. It would be beneficial to standardise the wording of the timing rules to make timeframes consistent.

The Panel's Solution

161. The Panel's solution is to standardise the timing rules language in the Code by using the inclusionary/exclusionary language combination.

Recommendation

162. The Panel's recommends that the timing rules in the Code are standardised, using the combination inclusionary/exclusionary wording, so that, leaving aside the rules that simply express a duration of time, the rules mandating when a thing is to be done or not done use just one type of timing wording (similar to that used in rule 10(2) of the Code, as an example).

Comment

163. Two submitters considered and agreed with the Panel's proposed solution.