

29 April 2013

Takeover Code Amendments Extend the Rights of Pension Scheme Trustees

Amendments include new requirements regarding offerors' intentions, documents provided to trustees, trustees' opinions on offers, and publication of agreements between offerors and trustees.

On 22 April, the Code Committee of the UK Panel on Takeovers and Mergers (the Panel) published response statement RS 2012/2 (the Response Statement), which introduces amendments to the City Code on Takeovers and Mergers (the Code).¹ The Response Statement follows a consultation to consider extending the rights of trustees of offeree company pension schemes. Broadly, the amendments to the Code provide the following:

- An offeror is required to state its intentions with regard to the offeree company's pension scheme.
- Certain information is required to be published in the offer document or otherwise provided to pension scheme trustees.
- Trustees are allowed to provide an opinion on the effects of an offer on the company's pension scheme.
- Agreements between an offeror and pension scheme trustees that relate to pension scheme funding may be required to be published if they are material.

Background

On 19 September 2011, significant changes were made to the Code, including an extension of the obligations of the offeror and offeree in relation to information to be provided to, and the obligation to publish opinions of, the offeree company's employees and employee representatives. During the Panel's consultation on those changes, the pensions industry lobbied significantly for similar provisions to be added to the Code in relation to trustees of pension schemes. Proposed amendments to the Code were published in public consultation paper PCP 2012/2 (the PCP)² on 5 July 2012, and a period of consultation followed. The Response Statement sets out the Panel's response to that consultation and the resulting changes to be made to the Code. Although many of the changes will be adopted as originally proposed in the PCP, certain modifications have been made.

In determining the new regime, the Panel has been mindful that the intended effect of the changes is to create a framework within which the effects of an offer on an offeree company's pension scheme can become (i) a debating point during the course of the offer and (ii) a point on which the relevant parties can express their views.

Application of New Code Provisions to Defined Benefit Schemes

The new provisions of the Code are limited to funded pension schemes sponsored by the offeree (or any of its subsidiaries) that (i) provide pension benefits (either in whole or in part) on a defined benefit basis—and (ii) have trustees (or managers, in the case of non-UK schemes). The Code provisions are not limited to UK pension schemes and apply to all such schemes, regardless of size or materiality in the context of the offeree's group.

1. View the Response Statement at <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/RS2012021.pdf>.

2. View the PCP at <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PCP201202.pdf>.

The new provisions do not apply to pension schemes that provide pension benefits only on a “defined contribution” basis, as the Panel believes that the provisions of the Code granting rights to employees and employee representatives already create an appropriate framework for discussion in relation to the impact of an offer, and the offeror’s intentions, in relation to such schemes.

Publication of Offeror’s Intentions in Relation to Pension Scheme

An offeror will now be required to include in the offer document a statement of its intentions with regard to relevant offeree pension schemes, including with respect to employer contributions and arrangements for deficit funding, benefits accruals for current members, and the admission of new members to the scheme. However, the Panel has not required that the offeror include a statement on the likely repercussions of its strategic plans for the offeree company on relevant pension schemes. Similarly, the Panel has confirmed that such statements do not need to include an assessment of the future ability of the offeree company to meet its funding obligations to its pension scheme.

The Panel also confirmed that the general rule under Note 3, Rule 19.1 of the Code will apply to statements of intention made in respect of pension schemes. This means that an offeror will be considered to be committed by any such statements for 12 months after the offer ends (or such other period of time as is specified in the offeror’s statement), unless there has been a material change of circumstances.

Under the PCP, the Panel originally proposed to require the offeree to include in its offeree circular its views on the effects of the implementation of the offer—and the offeror’s strategic plans for the offeree—on the offeree’s pension schemes. However, following the consultation, the Panel did not make these changes but did confirm that the offeree board may include its views on these subjects in the offeree circular should it wish to do so.

Provision of Information to Pension Scheme Trustees

The amendments to the Code provide that trustees of the offeree company’s pension scheme will be entitled to receive the same documents that offerors and offerees are required to make available to employee representatives. These documents include the following:

- The announcement that commences the offer period
- The announcement of a firm intention to make an offer
- The offer document
- The offeree board circular in response to the offer document
- Any revised offer document
- The offeree board circular in response to any revised offer document

Pension Scheme Trustees’ Opinion on the Offer

Under the revised Code, pension scheme trustees will have the right to require the offeree’s board of directors to publish the trustees’ opinion on the effects of the offer on the pension scheme, and the offeree will be obliged to notify such trustees of this right at the commencement of the offer. As with employee representatives’ opinions, if the trustees’ opinion is received in good time, the opinion must be appended to the offeree board circular. If it is not received in good time, it must be published on a website, with such publication to be announced on a Regulated Information Service.³ The Panel has confirmed that the trustees’ opinion may cover more than the impact of the offer on the benefits that the scheme provides to members (and other matters to be included in the offeror’s statement in the offer document) and that the opinion may also extend to the trustees’ views on the impact of the offer on the post-offer ability of the offeree company to make future contributions to the pension scheme (i.e., the strength of its funding covenant).

3. The UK Financial Conduct Authority has published a list of information services that are approved Regulated Information Services in Appendix 3 of the Listing Rules, which is available at <http://fshandbook.info/FS/html/handbook/LR/App/3/1>.

Unlike employee representative opinions, the offeree will only be responsible for the costs incurred in the publication of the trustees' opinion and not for any other costs incurred in relation to its preparation or verification.

Agreements Entered into Between an Offeror and Pension Scheme Trustees

The revised Code also contains certain provisions relating to any agreements between an offeror and the trustees of an offeree pension scheme, for example, in relation to the future funding of that scheme. Following the consultation, the Panel determined that any such agreements should be treated in the same manner as any other offer-related agreement, with certain variations. As a result, the amendments contain the following requirements for agreements between offerors and pension scheme trustees:

- Where any such agreement is a material contract for the offeror within the meaning of the Code, it should be published on a website in the same manner as any other material contract.
- Where such an agreement is not material, but is nevertheless referred to in the offer document, there will be no requirement to publish it on a website.
- Where such an agreement relates only to the future funding of the pension scheme, it will be excluded from the general prohibition on offer-related agreements contained in Rule 21.2(a).⁴

Pensions Regulator

The Panel has confirmed, following discussions with the UK Pensions Regulator, that there will be no obligation under the Code for the offeror or offeree to send offer-related documentation to the Pensions Regulator, nor will there be any obligation on the Panel to notify the Pensions Regulator of takeover offers. Accordingly, it is for the offer parties (and any other interested parties) to decide whether they wish to engage with, or seek clearance of the offer from, the Pensions Regulator.

Entry into Force

The amendments introduced by the Response Statement will take effect on 20 May 2013, and an amended version of the Code will be published on this date.

Contacts

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact the following Morgan Lewis lawyer:

London

Iain Wright

+44 (0)20 3201 5630

iwright@morganlewis.com

About Morgan, Lewis & Bockius

With 24 offices across Europe, the United States, and Asia, Morgan Lewis provides comprehensive litigation, corporate, transactional, regulatory, intellectual property, and labour and employment legal services to clients of all sizes—from globally established industry leaders to just-conceived start-ups. Our international team of lawyers, patent agents, benefits advisers, regulatory scientists, and other specialists—more than 1,600 legal professionals total—serves clients from locations in Almaty, Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Moscow, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some jurisdictions. Please note that the prior results discussed in the material do not guarantee

4. The Panel, however, emphasised that any obligations or restrictions on the trustees regarding any other offeror or potential offeror would not be permissible.

Morgan Lewis

similar outcomes. Links provided from outside sources are subject to expiration or change. © 2013 Morgan, Lewis & Bockius. All Rights Reserved.