The Secretary to the Code Committee
The Takeover Panel
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Email to: supportgroup@thetakeoverpanel.org.uk

27th September 2012

Dear Sir,

GC100 Response to the Takeover Panel consultations PCP 2012/1, 2012/2 and 2012/3.

Introduction

The GC100 welcomes the opportunity to respond to these consultations. As you will be aware, the GC100 is the association for the general counsel and company secretaries of companies in the UK FTSE 100. There are currently over 120 members of the group, representing some 80 companies. Please note, as a matter of formality, that the views expressed in this letter do not necessarily reflect those of each and every individual member of the GC100 or their employing companies.

Consultation PCP 2012/1: Profit forecasts, quantified financial benefits statements, material changes in information and other amendments to the Takeover Code

The GC100 generally supports the proposals outlined in the paper. We have not sought to answer all of the questions, but only those where we have particular comments or which raise particular concerns.
Against that background, we have the following comments to make in response to the questions numbered in the paper:

Q1. We suggest that the note on the Definition of "profit forecast" also state that a reference to a budget would also be regarded as a profit forecast.

Q2. We agree with the basic proposition that if a profit forecast is made specifically in the context of an offer it should be reported on.

Q4. We see the new proposals as the nub of the reforms – we believe they should mean that boards can make forward looking statements in the normal course (usually at the time of other announcements, such as interim management statements or pre-close trading updates) without worrying about having to have them reported on if there is a subsequent offer. We support this principle.

We do, however, have one major concern. The new rule says, in effect, that if there is a forecast on the record and subsequently an offer is announced, the target board must:

(i) confirm the forecast is still valid (and that policies and assumptions are consistent); or

(ii) explain why it is not; or
(iii) include a new one with a full report.

Our concern is that companies which measure their performance on the basis of forecast profit (which are those companies which are likely to give market guidance on current profits as outlined above) tend to review their internal forecasts at least monthly. So if more than a month has passed since a company has given guidance to the market, its internal forecast will probably have changed and (depending on how definite the earlier public forecast or guidance was) the earlier public forecast or guidance may not still be "valid". In normal circumstances (that is outside the context of an offer) the company will compare the previous guidance, the current internal forecast and the latest external analysts' reports and take a view as to whether the information available to the market is broadly in line with internal forecasts. If it were not, then the company might have to consider making a further announcement to prevent the creation of a false market, but such announcements are rare in the usual course, which would suggest that in most cases companies are able to satisfy themselves a monthly change to an internal forecast does not automatically require a public announcement to avoid false markets, even though strictly speaking (depending on how definite the earlier public forecast or guidance was) the earlier public forecast or guidance is not still "valid".

Under the proposals currently contained in the paper, if an offer were announced at this point, the board of the target would have to either:

(a) explain why the previous guidance was no longer valid but otherwise leave nothing on the record – which is not much help; or
(b) include a new forecast, which would have to be reported on. This would then have all the downsides of the current rules. It would be time consuming and expensive. To satisfy advisers it would probably have to be done on a more conservative basis than the published guidance, so would give a misleading impression of actual performance and trend.

Our suggestion is therefore that in this situation the board should be able to revise the forecast, giving the confirmations required by the new Rule 28.1(c), but that it would not be treated as a new one for the purposes of Rule 28.1(a) unless it were materially different. We are concerned that without tempering the proposals in this way, the reforms could become ineffective.

But what if the revised forecast were materially different? We think it is highly unlikely that a forecast would be wildly different, since in the normal course the target board should have reviewed the forecast, and if it were widely adrift from market expectations an announcement should have been required. However, a defence strategy could include actions which would change a current forecast. To avoid abuse, and to reflect the fact that circumstances do change, we would therefore suggest that if there is a variance between the target's current internal forecast and the publicly announced one of a sufficient magnitude to trigger an announcement under DTR 2.2.1R, the new Rule 28.1(c) as proposed in the paper should apply. If the variance would not give rise to such a disclosure obligation, the target should, if it so chooses be permitted to clarify without the need for a full report, as we propose above. In each case a company seeking to rely on this provision should first consult with the Panel.

Q9. We suggest that it would be helpful to the market to include additional guidance, as described in the paper, by inserting a new second sentence to note 5 on Rule 28.1 as follows:

"In particular, the Panel will wish to be satisfied that there is no benefit to the company or the management announcing the profit ceiling."

Q11. We suggest it should be made clear that all relevant assumptions should be covered by changing note 7(a) on Rule 28 as follows: in line two change “any assumptions” to “the assumptions”.

Q12. Similarly, we suggest changing Rule 28.3 (b) as follows: in lines two/three, change “draw attention to any assumptions” to “describe all assumptions”.

Consultation PCP 2012/2: Pension scheme trustee issues

We support these proposals, and have no specific comments.

Consultation PCP 2012/3: Companies subject to the Takeover Code

We support these proposals, and have no specific comments.

Yours faithfully

Mary Mullally
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