PRINCIPAL CHANGES TO THE UK TAKEOVER CODE

19 September 2011

To Our Clients and Friends:

Today, a new version of the Takeover Code comes into force. With few exceptions, it governs all offers and possible offers made from this date. The amendments are the result of the year-long consultation process initiated by the Takeover Panel after widespread criticism and concern following Kraft Food Inc.'s hostile takeover of Cadbury plc. The amendments are designed to address the concern that hostile bidders have recently been able to acquire a tactical advantage over the target company to the detriment of the target and its shareholders and that the outcome of hostile offers is often unduly influenced by short-term investors that do not take into account the long-term interest of the target. The amendments introduced today are intended to redress the balance in favour of the target. This note provides a brief update of the principal changes.

- **Requirement for a potential bidder to be identified.** There are enhanced disclosure requirements in the first public announcement of a possible offer, including identifying by name any potential bidder(s) from whom the target company has received an approach or with whom it is in talks.

- **Requirement for a potential bidder to "put up or shut up," or obtain a deadline extension.** Prior to the amendments, many offerors were testing the market via "virtual bids," *i.e.*, statements about potential intent that did not invoke any announcement deadlines. The new changes provide target companies greater protection against protracted virtual bids, and will require a bidder to be well prepared to proceed at the time of its approach to the target. This is particularly relevant for private equity and other bidders reliant upon third party financing, which will need to be in place sooner than might previously have been the case.

  Any publicly named potential bidder must (except with the Panel's consent), within four weeks of the date on which the potential bidder is publicly named, take one of the following actions:

- make a firm offer announcement under Rule 2.7; or
- announce that it will not make an offer, following which it will be subject to the restrictions in Rule 2.8.

As a consequence, a bidder will have a strong incentive to avoid leaks to the market about its interest in the target, as a leak triggering an announcement will mean a shorter period of time to formulate its offer.

Other points of note:

  - **Extensions.** The Panel expects the parties to have very substantive reasons for extending the 28-day deadline (*e.g.*, third party consent not obtained) and such reasons will be very carefully considered by the Panel. In particular, it will not be receptive to such an application at the beginning of the four-week period; the Panel will only consider it in the last few days.
  - **Controlled sale procedure.** The amendments to the "put up or shut up" regime do not extend to cover situations where the target board has started a formal process to sell the company by way of public auction, so long as such process begins before a formal offer is announced. Additionally, bidders need not be individually named during an auction.
  - **Multiple offerors.** In the event that the target has been approached by more than one offeror and there is a leak in respect of any one of them, they must all be named and each will have its own four-week deadline.

- **Prohibiting deal protection measures.** The Code now includes a general prohibition against inducement fee arrangements (including break fees) and undertakings given to a bidder by a target board to take any action to implement a transaction to which the Code applies, or to refrain from taking any action which might facilitate a competing transaction. However, where an offer is hostile, certain inducement fees of up to 1% are permitted with white knight bidders. The Panel may also allow such inducement fees in connection with a formal sale process initiated by the target, or where the target is in financial distress. Furthermore, the Panel will allow specific undertakings from the offeree company board, for example in relation to confidentiality, non-solicitation of the bidder's customers or employees, provision of information required to obtain regulatory approvals, and agreements relating to existing employee incentive arrangements. Bidders concerned by interloper risk

may make increased use of alternative deal protection methods, including stakebuilding and solicitation of irrevocable undertakings. The greater effectiveness of stakebuilding in a takeover offer, as compared with a scheme of arrangement, may result in potentially competitive bid situations in a shift away from schemes in favour of traditional offer structures. For the avoidance of doubt, the changes to the Code do not prevent the imposition of obligations on the bidder alone, such as a reverse break fee or standstill arrangement.

- **Disclosure of offer financing and other financial information.** Detailed financial information on a bidder must be disclosed. Where the offer is material, a pro forma balance sheet of the combined group must be included in offer documents, as well as details of the ratings given to the bidder by rating agencies (plus any changes that arise due to the offer). Greater disclosure of the debt facilities or other instruments entered into by a bidder to finance the offer is required, regardless of whether the payment of interest, repayment or security is dependent to any significant degree on the target's business. All documents regarding the financing arrangements must be put on display. Note that there is an exception regarding disclosure of provisions relating to possible increases in available financing resulting from an increase in price.

- **Disclosure of offer-related fees and expenses.** The estimated aggregate fees of each party's advisers on both the offeror and the offeree side (including financial advisers, corporate brokers, accountants, lawyers and PR advisers) must now be disclosed and broken down by category of adviser. If success fees are paid to investment banks, the minimum and maximum amounts of such success fees should be disclosed (but not in a way that discloses commercially sensitive information about the offer). Fees in relation to the financing provided to a party should be disclosed separately from advisory fees.

- **Employee protections.** Bidders should continue to disclose details of any plans regarding the target company's employees, locations of business and fixed assets. In addition, bidders must make negative statements if there are no such plans. The bidder must ensure that any open-ended statements made in offer documents about a bidder's intentions for the target company, its employees, locations of business and fixed assets (or the absence of any such plans) remain true for at least one year after the offer becomes or has been declared wholly unconditional (unless another period is stated).

In addition, the provisions enabling offeree company employees to make their views known have been strengthened. In particular the target company board must (i) inform the employee representatives at the earliest opportunity of their right to give their opinion on the effects of the offer on employment, (ii) publish the opinion of the employee representatives at the target company's expense and (iii) pay the employee representatives' costs incurred in obtaining advice which may be needed for the verification of the information in the employee representatives' opinion.

- **Schemes of arrangement.** While many of the changes discussed above apply equally to takeover offers and schemes, the following additional changes have been made with respect to schemes of arrangement.
  - If a bid is recommended, the target board must post the scheme documents to shareholders within four weeks.
  - Scheme conditions may include deadlines for shareholders meetings, court sanction and implementation of the scheme.
  - The offeree is responsible for implementing the scheme timetable, with limited exceptions.

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