

Review

March 2009



Are you prepared for takeover offers conducted and communicated electronically?

BACKGROUND

Following a consultation process which completed in October 2008, some major changes to the Takeover Code are due to come into effect on 30 March 2009 dealing with: (1) the ability and, in certain cases, the requirement to communicate by electronic means with Target shareholders during a takeover offer; (2) the ability to incorporate into offer documentation, by reference to other sources, information previously required to be set out in full in such documentation; and (3) the granting of rights under the Takeover Code to those persons who would have "information rights" under the Companies Act 2006 (the 2006 Act) to receive the same information as shareholders.

These changes impact significantly on the documentary and announcement procedures for effecting takeovers. Bidders and Targets in public offers will need to be ready for those changes and there may be some preparatory work required to make best use of the new provisions. These changes do not directly mimic the changes made in the 2006 Act in relation to electronic communications.

The Takeover Code changes, together with an explanation as to why they are being made and how they are to operate in practice, are set out in full in the [Public Consultation Paper 2008/3](#) and [Response Statement 2008/3](#), both available on the Takeover Panel's website.

ELECTRONIC COMMUNICATIONS

The changes focus on and distinguish between electronic communications:

- by means of a website – this will be a compulsory obligation under the Takeover Code (rather than permissive) for the general communication of certain offer related information by the Bidder and Target during an offer; and
- by any other electronic form – this will most likely relate to communication by email – the use of which will be permissive rather than compulsory under the Takeover Code.

TARGETED ELECTRONIC COMMUNICATIONS WITH SPECIFIC TARGET SHAREHOLDERS

Bidders and Targets will be able to use electronic forms of communication (eg email and websites) to make available information, announcements and documents about offers (Code documents) to Target shareholders and (others such as persons with "information rights" and Target optionholder (relevant persons)). This means that a Code document will be treated as being "sent" to a relevant person if it is (i) sent in hard copy form (as is currently the case), (ii) sent in electronic form (eg by email); or (iii) published on a website, provided that the intended recipient is sent a notification in respect of its publication setting out certain specified information (this notification could itself be sent in hard copy or by email) (a website notification – see further below).

Code documents will include all documents, announcements and other information in relation to offers, whitewash transactions and other transactions regulated by the Takeover Code, other than forms of acceptance/withdrawal/proxy/election etc, which will continue to have to be sent in hard copy form only.

The new regime will be permissive and a party to an offer will be free to choose (subject to the points below) whichever of these forms of communication is most convenient (or a combination of them).

Bidders and Targets will be able to use electronic forms of communication to make available information, announcements and documents about offers to Target shareholders and other relevant persons

There will be no requirement for either Target shareholder approval to be obtained (either from individual shareholders or in general meeting) or any permissive provisions to be included in a Target's articles of association or other procedural requirements to be followed, in order for a Bidder to be able to publish Code documents in electronic form or by means of website publication.

The Target (not the Bidder) will still be bound by any obligations/restrictions found in, for example, the Target's articles of association, the 2006 Act and other regulations (eg the Disclosure and Transparency Rules, if applicable). A potential Target should ensure that it has any necessary authorities in place (eg to make offer documentation and announcements available to their shareholders by website notification under the Companies Act 2006 and, if applicable, the Disclosure and Transparency Rules) in advance of a bid since, particularly in the context of a hostile bid, a Target may otherwise be at a disadvantage to the Bidder in relation to the means by which it can communicate with its shareholders.

Any Code document that is sent to a relevant person in electronic form or by means of being published on a website and any related website notification, must contain a statement that the person to whom it is sent may request a hard copy of the Code document (as well as a hard copy of any information incorporated into it by reference to another source) and may also request that all future Code documents sent to that person in relation to the offer should be in hard copy form (an "election").

Pre-existing elections (a pre-election) from Target shareholders given to their company to receive communications *generally* from the Target in hard copy form (as opposed to requests for only certain *specific types of information* to be in hard copy – eg report and accounts), will apply equally to Code documents published by any other party to an offer (ie the Bidder) as well as to the Target.

Any elections or pre-elections received by any party to an offer, must be communicated to the other party so that an up-to-date record can be kept by all parties (or their registrars) as to how shareholders and other relevant persons wish to be contacted.

Despite these elections or pre-elections by Target shareholders, shareholders and other relevant persons who live in certain foreign jurisdictions outside the EEA may not, in certain cases, be entitled to receive a hard copy version of such documents, announcements or information. This may be the case where the advisers to the relevant party publishing such information determine that the information should not be sent into such jurisdictions, in circumstances allowable under Rule 30.3 of the Takeover Code – eg where to do so may result in a breach of foreign securities laws.

Where an election has been received from a relevant person for a Code document to be sent in hard copy form, that hard copy must be despatched within 2 business days.

In order to receive a copy of a Code document in electronic form, a shareholder or other relevant person must have provided the Target or Bidder with an electronic address. Electronic addresses provided to the Target to receive communications from the Target *generally* and not only for certain *specific types of information* will be required to be provided to the Bidder by the Target's registrar upon request following the announcement of a firm intention to make an offer. Other information (eg non-electronic addresses and the elections/pre-elections referred to above) whether in relation to Target shareholders or other relevant persons, must also then be provided by the Target's registrar to the Bidder on request.

The provision of information by the Target or its registrars to the Bidder may result in data protection issues relating to the use of that information. Provided that the information is only used by the Bidder for the purposes of the offer and in accordance with the restrictions in the Takeover Code, these data protection issues should be avoided. The Target will also be required, in the copy of any announcement or circular published by it to shareholders under Rule 2.6 of the Takeover Code (ie at the commencement of an offer period), to include a warning that information (including addresses and electronic addresses of shareholders and other relevant persons) may be passed to a Bidder during the offer period.

A Bidder will not generally be permitted to send a relevant person a copy of a Code document in electronic form if it has obtained that person's electronic address other than through its rights under the Code. This means that electronic addresses must either be provided by the Target (or its registrars) or by the shareholder (or other relevant person) directly.

The Bidder will not need to receive positive proof (eg an electronic receipt) that a Target shareholder has received an electronic communication (say, by email) for a Code document to be deemed as "sent", provided that "the sender reasonably considers that the form in which it is sent, and the means by which it is sent, will enable the recipient to read and retain a copy of it."

The Target (not the Bidder) will still be bound by any obligations/restrictions found in, for example, the Target's articles of association, the 2006 Act and other regulations

WEBSITE NOTIFICATIONS

Website notifications (which contain information about the documents and information available on a website) must comply with the highest standards of care and accuracy, must include a responsibility statement from the Bidder or Target as appropriate and should comply with all other relevant requirements of the Takeover Code in relation to the publication of Code documents.

Information contained in a website notification should be confined to non-controversial information about an offer (eg giving details of the website on which a Code document is published and how a hard copy may be obtained) and should not include argument or invective or be used as a means of conveying substantive information on an offer.

To ensure parties do not use website notifications as a means of conveying substantive information on an offer, parties will not be permitted to include any other documentation in the same envelope or email as a website notification other than forms of acceptance/withdrawal/proxy and other forms allowing a decision to be taken by a shareholder in relation to an offer.

PUBLICATION OF CODE DOCUMENTS, ANNOUNCEMENTS AND OFFER-RELATED INFORMATION ON WEBSITES

All Code documents published by any party in relation to an offer will also need to be published on a website, by 12 noon on the business day following the time of publication. This may be quite onerous if an offer is being made by a private company or individual who would not normally have a website in place. Arrangements may need to be made by such parties to have a website put in place before an offer is firmly announced. A party may be able to use the website of another party to publish this information, with the consent of the Panel. It may be, for example, that in recommended offer situations, the Bidder will be permitted by the Panel to use the Target's website (where it does not have its own website) to publish information. Alternatively the Panel may, on request, be willing to grant the Bidder a "grace period" to put its own website in place.

The website is intended to form a single point of reference for all information published by a party in relation to the offer. All Code documents sent to shareholders or other relevant persons and all announcements that are issued by a party by means of a Regulatory Information Service during the course of an offer, whether related to an offer or not (apart from announcements in relation to certain specified matters eg disclosures under the DTRs) must be posted on it.

Documents posted on websites must not be capable of being amended by readers (they must be read-only) but must be capable of being printed and saved by the reader.

A party to an offer who makes announcements or sends Code documents to Target shareholders and other relevant persons, must include in such announcements or documents details of the website on which a copy will be published.

The website will need to be maintained during the course of an offer (and any related competition reference period) although the obligation to continue to publish new documents, announcements and information on the website will cease at the end of the offer period.

Documents and information which are incorporated by cross-reference (see below) in offer documentation will also need to be posted on the party's designated website.

If there are concerns about the availability of website access to Target shareholders and other relevant persons located in jurisdictions outside the EEA – eg because access to an offer related website from outside the EEA would or may constitute a breach of local securities laws – the website may contain prohibitions on access to such shareholders provided parties comply with the requirements in Rule 30.3 of the Takeover Code.

No responsibility statements will be required from directors for information posted on the website of a party to an offer.

DISTRIBUTION OF CODE DOCUMENTS TO OTHER PARTIES AND TO THE PANEL THROUGH ELECTRONIC MEANS

A copy of the offer document and all other documents published by a party in relation to an offer must be sent to the Panel and to the advisers to all other parties to an offer in electronic form as well as in hard copy form. Copies of all announcements and information published by a party in relation to an offer and copies of all cross-referenced documents must also be sent to the Panel and to the advisers to all other parties to an offer but can be in electronic form only.

All Code documents published by any party in relation to an offer will also need to be published on a website, by 12 noon on the business day following the time of publication.

ELECTRONIC COMMUNICATION OF DISPLAY DOCUMENTS

Display documents (covered by Rule 26 of the Takeover Code) should continue to be made available for inspection only in hard copy form (at an address in the City of London). The Code Committee of the Takeover Panel will consult further on whether such documents should also be required to be posted on the website of the relevant party to an offer but the Takeover Code will not change on 30 March 2009 to cover this.

INCORPORATION BY CROSS-REFERENCE

Certain information required to be included in a Code document will be permitted to be incorporated into the relevant document by reference to other sources of information. Information which can usually be included by cross-reference as a matter of right would include financial information in relation to the party or parties issuing a document and, in certain circumstances, other information which is sent to shareholders at the same time as the offer document (ie in the same envelope). Any other information may be capable of being cross-referenced, but the Panel's consent would be required.

Any cross-referenced information will be required to be published on a website, at the same time as the document in which it is cross-referenced is itself published. Cross-referenced documents published on websites should be capable of being read, printed and saved but not amended.

Any person sent a Code document which incorporates information by cross-reference will be able to request a hard copy of the relevant information within 2 business days of their request (the Code document must spell out this right). This would constitute a separate request from a request to receive offer documentation itself in hard copy form.

If information is cross-referenced in a Code document, the Code document must also include a consolidated list of such cross-referenced information and sources. This list must contain precise details of where copies of such information can be found including the website address and details of the relevant document, page number and, where relevant, paragraph number.

It will be best practice for:

- offer documents sent electronically to relevant persons or posted on websites to contain hyperlinks to the cross-referenced documents;
- source documents made available on websites to be published in separate electronic files, not in one larger file;
- the website address for cross-referenced information to be the precise website address where all the cross-referenced information can be found and should not be the general website address for the party concerned; and
- offer related cross-referenced information to be referred to in a link on the party's home page.

PERSONS WITH "INFORMATION RIGHTS" AND OPTIONHOLDERS

Persons nominated to enjoy information rights pursuant to the provisions of the 2006 Act will have the same right to receive information in relation to offers as that enjoyed by shareholders. This applies whether those persons enjoy such rights under section 146 of the 2006 Act (as persons nominated by registered shareholders in a company whose shares are traded on a regulated market) or under section 145 of the 2006 Act (where nominated persons enjoy such information rights as a result of express provisions in the articles of association of a company which is not listed on a regulated market). This means that any Code document sent to Target shareholders will need to be sent to "persons with information rights" also.

Parties to offers will be able to send Code documents to persons with information rights in the same way as to Target shareholders (whether by hard copy, in electronic form or by website notification). Persons with information rights will similarly be entitled to elect (or may have pre-elected) to receive offer documentation and information in hard copy form.

A record of persons with information rights and optionholders, together with any elections or pre-elections made by them to receive information in hard copy form will be kept by the registrars to the Target and will need to be made available to a Bidder on request, once it has announced a firm intention to make an offer, in a similar way to the provision of other shareholder information (as referred to above).

Certain information required to be included in offer documents will be permitted to be incorporated into such documents by reference to other sources of information

To reflect current market practice, the Takeover Code will be clarified to make it clear that all relevant Code documents (including announcements and other information) sent to Target shareholders or persons with information rights in connection with an offer must also, where practicable, be sent to optionholders.

SOME OF THE TAKEOVER TRANSACTIONS ON WHICH HAMMONDS HAS ADVISED OVER THE PAST TWELVE MONTHS INCLUDE:

<p>May 2008</p> <p>ENODIS PLC</p> <p>Transaction value £1.03bn</p> <p>Advising Illinois Tool Works Inc. on its proposed competitive takeover offer for Enodis plc.</p>	<p>July 2008</p> <p>SSP HOLDINGS PLC</p> <p>Transaction value £162m</p> <p>Advising the management of SSP Holdings plc on a buyout of the company backed by Hellman & Friedman LLC.</p>
<p>September 2008</p> <p>REDHALL GROUP PLC</p> <p>Transaction value £18.6m (takeover); £20m (placing)</p> <p>Advising Redhall Group plc on its recommended cash offer for Chieftain plc and associated placing of shares in Redhall</p>	<p>December 2008</p> <p>FAYREWOOD PLC</p> <p>Transaction value £29.3m</p> <p>Advising Fayrewood plc on the recommended offer (cash offer with part share alternative) for the company by Letchworth Investments Limited, implemented by scheme of arrangement.</p>
<p>December 2008</p> <p>ECI PARTNERS LLP</p> <p>Transaction value £33.3m</p> <p>Advising ECI Partners LLP on the public to private takeover of Ascribe plc by Scroll Bidco Limited</p>	<p>December 2008</p> <p>MACRO4 PLC</p> <p>Transaction value £28m</p> <p>Advising Macro4 plc on the recommended cash offer for the company by UNICOM Systems, Inc.</p>

FURTHER INFORMATION

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