



The Secretary to the Code Committee
The Takeover Panel
10 Paternoster Square
London
EC4M 7DY

28 September 2012

Dear Sirs

BVCA response The Takeover Panel consultation PCP2012/2: Pension scheme trustee issues

The British Private Equity and Venture Capital Association ('BVCA') is the industry body for the UK private equity and venture capital industry. With a membership of over 500 firms, the BVCA represents the vast majority of all UK based private equity firms and their advisers.

This submission has been prepared by the BVCA's Legal & Technical committee, which represents the interests of BVCA members in legal, accounting and technical matters relevant to the private equity and venture capital industry.

This response sets out, on behalf of the BVCA, the answers to those questions which are considered to be most pertinent to BVCA members.

General comments

Our concern with the proposals in PCP 2012/2 is that they will undoubtedly give pension scheme trustees greater leverage for a "seat at the table" during the early days of a bid, and thus may result in imposing a de facto requirement of approval by the trustees before a recommended bid can be agreed.

Q1 Do you have any comments on the proposed amendments to Rule 24.2(a) and (b) relating to the requirement for an offeror to disclose, among other matters, its intentions with regard to the offeree company's pension scheme(s)?

Q4 Do you have any comments on the proposed amendments to Rules 25.9 (and Note 1 on that Rule) and to Rule 32.6 regarding the rights of the trustees of an offeree company's pension scheme(s) to make known their views on the effects of the offer on the scheme(s)?

Under the proposed new Rule 24.2(a)(iii) the offeror will be required to state its intentions with regard to the pension scheme and the likely repercussions of its strategic plans on the scheme. The trustees will be analysing the impact of the takeover on the ability of the group to fund the scheme and any security for the scheme on insolvency. This is a financial analysis and the views of the trustees may conflict with the interests of employees and/or shareholders.

Any likely increase in debt or dividend pressures from the offeror would weaken security for the scheme and on-going funding; the trustees are therefore likely to carry out a covenant review of the offeror and the target (both pre and post-takeover) for the purposes of finalising their opinion on the effects that the takeover may have on the pension scheme. In effect, the trustees (and their advisers) are being given an opportunity to publish financial comments from the perspective of a creditor rather than a shareholder.



The statements required by proposed new Rule 24.2(a)(iii) may also potentially provide evidence to enable the Pensions Regulator to impose contribution notices and financial support directions on parties to a bid, not only when a detriment to the scheme is identified but also if there is a failure to provide information, to spot the obvious or to have sufficient regard to the trustees' analysis of the bid.

We consider that the proposals carry a further risk that the trustees' opinion may be used as a first step by the Pensions Regulator to test whether any of its anti-avoidance powers may be engaged by the takeover. Where the Trustees' opinion indicates that the takeover is materially detrimental to the pension scheme, the offeror and offeree are less likely to be able to defend themselves successfully against the exercise of anti-avoidance powers by the Pensions Regulator. This could lead to a change in the Pensions Regulator's practice in policing takeovers.

In consequence, we are concerned that the practical effect of the proposals may be to impose an extra step that requires an offeror to seek approval from the pension trustees as well as the target board before proceeding with a bid. The target board may be unlikely to proceed with a recommended offer if the trustees are not in agreement. This potentially gives trustees significant leverage in the bid process and goes well beyond the Code Committee's impact assessment in part 4 of the PCP, and the stated objective to facilitate a debate during the course of the offer.

Other comments

We remain available to discuss this response and our views on the consultation more generally at any time.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'S. Witney'.

Simon Witney
Chairman, Legal & Technical Committee