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UK Takeover Panel Publishes Review of Takeover Rules

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Editor's Note: Andrew J. Nussbaum is a member of the Wachtell, Lipton, Rosen & Katz Corporate Department. This post is based on a Wachtell Lipton firm memorandum by Mr. Nussbaum, Adam O. Emmerich, David A. Katz and Steven A. Cohen.

The UK Panel on Takeovers and Mergers yesterday published the conclusions of its review, commenced in June 2010, regarding possible amendments to the UK Takeover Code, which governs the conduct of takeover bids involving UK listed companies. The review, conducted by the Code Committee of the Takeover Panel, was prompted by Panel, investor and governmental criticism of certain takeover practices in recent years, including in a number of highly publicized and controversial takeover situations in the UK market.

While the proposed amendments are not yet published, the tone and direction of the Committee's paper suggests a significant shift in the approach to hostile bids for UK listed companies. The Code Committee generally concludes that "*hostile offerors have, in recent times, been able to obtain a tactical advantage over the offeree company to the detriment of the offeree company and its shareholders.*" Further, in a significant departure from long-accepted UK practice that in a contested situation the target's board should accept the highest bid with priority to shareholder interests, the Code Committee specifically states that the amendments to the Code will clarify that target boards may "*take more account of the position of persons who are affected by takeovers in addition to offeree company shareholders*," primarily employees of the target company. Offeree companies will "*not be limited in the factors they may take into account in giving their opinion*" on a bid, and the Code will be amended to require disclosure of additional information so that "*the offeree company board and all other interested constituencies [can] consider the long term effects of an offer on the merged business in all circumstances*."

The review contains other significant proposals, including: formalizing the "put up or shut up" period, currently discretionary under Rule 2.2, to require that a rumored bidder, within 28 days of the published rumor, either launch a bid, or state that it will not bid and be subject to the 6-month "shut up" period; a strict prohibition on inducement (or break) fees, currently generally capped at 1% of the value of the offeree company; as well as required disclosure of financing arrangements, the offeror’s financial condition *pro forma* for the bid (even in cash deals), the terms of any financing for the offer (including documentation) and detailed information regarding advisory fees payable to lawyers, bankers, brokers, accountants, public relations and other advisors. These, when taken together with the traditional requirement to have committed certain funds and the new accelerated “put up or shut up” deadline, may increase bidder costs (without reimbursement) and reduce the time that bidders will have to arrange transactions.

The amendments will no doubt spark renewed interest in the strategy and tactics central in any takeover bid, friendly or hostile, for a UK listed company. It remains to be seen whether the proposed changes will result in a more level playing field between hostile bidders and their targets in the UK , but it cannot be doubted that the Code Committee’s recommendations will significantly affect future UK takeover bids. More broadly, and of great significance for market participants in all markets, is whether these fundamental changes in outlook and orientation in the UK will herald an era in which hostile takeovers become more difficult, in which greater deference is given to non-shareholder interests and constituencies, including state interests in preventing or limiting cross-border change in control transactions and transactions that are perceived to have a material impact on domestic employment or product markets.