

## Practice Note 4 (PN4) – Can the offer price be increased after a “no increase” statement?

### What is a “no-increase” statement?

1. Under Rule 18.1 parties to an offer or possible offer and their advisers must take care not to issue statements which, while not factually inaccurate, may mislead shareholders and the market or may create uncertainty. In particular, an offeror must not make a statement to the effect that it may improve its offer without committing itself to doing so and specifying the improvement.

2. Rule 18.3 clarifies the position regarding no increase statements as follows:

*“If statements in relation to the value or type of consideration such as “the offer will not be further increased” or “our offer remains at \$x per share and it will not be raised” (“no increase statements”) are included in documents sent to offeree company shareholders, or are made by or on behalf of an offeror, its directors, officials or advisers, and not withdrawn immediately if incorrect, only in wholly exceptional circumstances will the offeror be allowed subsequently to amend the terms of its offer in any way even if the amendment would not result in an increase of the value of the offer (e.g. the introduction of a lower paper alternative) **except where the right to do so has been specifically reserved.**” (emphasis added)*

3. Similar provisions also apply to no “extension statements” (see Rule 18.2).

4. The main rationale for Rule 18.3 is to maintain an orderly framework for the conduct of takeovers and mergers and to ensure that statements made by offerors are accurate and not misleading. This rationale reflects General Principle 6 of the Codes which requires parties who are concerned with offers to make every effort to avoid the creation of a false market. The overriding concern is that statements are not made which may mislead shareholders or the market or create uncertainty. It follows that offerors should exercise caution when making statements during the offer period which might be construed as a statement of finality regarding the offer (Note 1 to Rule 18 provides further guidance on this point).

5. An offeror is under no obligation to make a no increase statement. However if one is made it is normally issued with a view to emphasising the finality of the terms of the offer. In these circumstances shareholders should be able to place the highest possible reliance on the offeror's (and its adviser's) statement and accordingly reach an informed decision in respect of the offer.

### **Right to set aside statement to be specifically reserved**

6. If an offeror decides to issue a no increase statement it may at the same time reserve the right to increase the offer so long as the circumstances in which the offer might be increased are clearly set out. If an offeror reserves its right in this way it may choose not to be bound by a no increase statement in the event that one of the specified circumstances occurs.

7. Offerors and their advisers should be aware that Notes 2 and 3 to Rule 18 provide additional guidance if an offeror wishes to set aside a no increase statement in the case of a competing situation or a recommendation by the board of the offeree company.

8. Note 2 provides that in the event of a competitive situation arising the offeror may choose not to be bound by its no increase statement only if:

- (i) it has specifically reserved the right to set the no increase statement aside in such circumstances; and
- (ii) an announcement is issued providing details of the revisions as soon as possible and in any event within 4 business days after the announcement of the competing offer and a circular is sent to shareholders at the earliest opportunity; and
- (iii) any shareholders of the offeree company who accepted the offer after the date of the no extension or no increase statement are given a right of withdrawal for a period of 8 days following the date on which the circular is sent.

9. Note 3 clarifies that, again only in the event that the offeror has reserved the right to do so, the offeror may choose not to be bound by a no increase statement which would otherwise prevent the posting of an increased or improved offer recommended for acceptance by the board of the offeree company.

10. As already mentioned Rule 18.3 permits revision of a no increase statement in “**wholly exceptional circumstances**” even if the right to set the no increase statement aside has not been specifically reserved. The question of what might amount to “**wholly exceptional circumstances**” would depend on a detailed analysis of the circumstances of the particular case. If in doubt the Executive should be consulted at the earliest opportunity.

### Deduction of dividends

11. There may be situations where the offeror makes a no increase statement, and a regular dividend (or other distribution) that is not linked to the offer is subsequently paid or becomes payable by the offeree company to shareholders. In such situations, the offeror must reduce the offer price by an amount equal to that dividend (or other distribution) such that the overall value receivable by the shareholders remains the same and to give effect to the no increase statement made by the offeror. See Note 11 to Rule 23.1.

12. For the avoidance of doubt, the offeror would not be required to reduce the offer price if it has stated that shareholders will be entitled to receive all or part of a specified dividend (or other distribution) in addition to the offer consideration.

2729 September 20072023