

Practice Note 15 (PN15) - Confirmation of financial resources in cash offers

Rule 3.5 of the Takeovers Code provides “[t]he announcement of an offer should include confirmation by the financial adviser or by another appropriate third party that resources are available to the offeror sufficient to satisfy full acceptance of the offer.”

Note 3 to Rule 3.5 of the Takeovers Code provides “[t]he Executive may require evidence to support a statement that resources are available to satisfy the offeror’s obligations in respect of the offer. The Executive may also require evidence that the offeror has sufficient resources to complete the purchase of shares which gives rise to the offer obligation.

A financial adviser, in discharging its duties under Rule 3.5 to confirm financial resources, should observe the highest standard of care to satisfy itself of the adequacy of resources, including performance of due diligence. The financial adviser confirming that resources are and will continue to be available will not be expected to produce the cash itself if, in giving the confirmation, it acted responsibly and took all reasonable steps to assure itself that the cash was available.

This confirmation will be required not only when the consideration is in cash, or includes an element of cash, but also when the consideration consists of, or includes, any other assets except new securities to be issued by the offeror.”

In 2008, in view of the credit crunch and the then market conditions the Executive sought the Panel’s views on possible additional safeguards which might be adopted regarding a financial adviser’s confirmation of sufficiency of financial resources. Taking into account the then prevailing uncertainties in the financial market the Panel recommended the following:

- (i) The Executive should make rigorous enquiries to satisfy itself that the financial adviser has performed the necessary due diligence in providing the financial resources’ confirmation.
- (ii) Market practitioners should be mindful of the importance of the requirement in paragraph 11 of Schedule 1 of the Codes that the financial adviser should confirm in the offer document that there have been no material changes to the availability of financial resources since the date of the confirmation was first given.

- (iii) No subjective conditions should be attached to any financing in the context of the financial adviser's confirmation of financial resources in a Rule 3.5 announcement.

The Executive continues to apply these safeguards.

As a matter of practice the financial adviser to the offeror should provide the Executive with a signed letter:

- (i) confirming that the financial adviser is satisfied that there are sufficient resources available to satisfy the offer in full;
- (ii) setting out the basis for the financial adviser's confirmation and details of the due diligence steps taken by the financial adviser (including but not limited to a list of the documents that it has reviewed) in satisfying itself that sufficient financial resources are and will be available; and
- (iii) confirming, where relevant, that no subjective conditions are attached to the financing.

The financial adviser is not expected to provide the Executive with copies of related loan documentation or other relevant documents such as bank facility letters relating to the cash required unless requested to do so by the Executive. In cases of difficulty the Executive should be consulted at the earliest opportunity.

In cases where an acquisition of shares would give rise to a mandatory offer obligation, the Executive also expects the confirmation provided by the financial adviser in relation to sufficient financial resources to cover the necessary resources required to complete the acquisition (see Note 3 to Rule 3.5).

The Executive reminds market practitioners that it is the sole responsibility of financial advisers to ensure sufficient financial resources are available to satisfy an offeror's obligations in respect of an offer. The provision of the financial resources' confirmation and/or other related documents to the Executive will not absolve a financial adviser's responsibility in this respect. Financial advisers should observe the highest standard of care to satisfy themselves of the sufficiency of financial resources.

Reconfirmation prior to despatch of offer document

Paragraph 11 of Schedule I of the Codes provides that “[w]here the offer consists of, or includes, cash or any other assets except new securities to be issued by the offeror company, the offer document must include confirmation by a financial adviser or by another

appropriate independent party that resources are available to the offeror sufficient to satisfy full acceptance of the offer.”

As a matter of practice, the financial adviser to the offeror should provide the Executive with an updated signed confirmation of sufficiency of financial resources before the offer document is despatched to the shareholders of the offeree company. This confirmation may be in a similar form to the one provided to the Executive for the purpose of Rule 3.5.

Financing conditions

The making of offers, whether voluntary or mandatory, must not be subject to financing conditions.

When an offeror announces a firm intention to make a cash offer under Rule 3.5, it is required to have in place the necessary financing arrangements to satisfy full acceptance of the offer. It would not be acceptable for such an offer to be subject to a condition that the offeror is able to obtain relevant financing to proceed with the offer or any other condition to similar effect.

Similarly, in cases where an acquisition of shares would give rise to a mandatory offer obligation, it will not be acceptable for the sale and purchase agreement in respect of the acquisition to contain a condition that the offeror is able to obtain relevant financing to make the mandatory offer following completion of the acquisition or any other condition to similar effect.

In cases of doubt the Executive should be consulted at the earliest opportunity.

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