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Proposed Extension of UK Takeover Code Jurisdiction

On 5 July, the U.K. Takeover Panel (the Panel) published a consultation paper setting out its proposal to extend the jurisdiction of the U.K. Takeover Code (the Code) to cover all public companies that have their registered office in the U.K., the Channel Islands or the Isle of Man. Currently, companies whose securities are not traded on a “regulated market” are only subject to the Code if they have their registered office in, and are centrally managed and controlled in, the U.K., the Channel Islands or the Isle of Man. If the proposed changes are implemented, the location of central management and control would become irrelevant and a number of companies listed on non-regulated markets, such as AIM, will become subject to the Code.

The Panel until now has applied a residency test to determine whether a company is centrally managed and controlled in the U.K. The residency test has typically been applied by looking where the majority of the directors reside, and then taking into consideration other factors, such as the roles of the individual directors and the history of the company.

The consultation period on the proposed removal of the residency test ends on 28 September, after which the Panel is expected to publish a response statement describing comments received, its views thereon and any final proposed rule changes. Such changes would normally be effective one month later.

The jurisdiction of the Code would be extended to cover all transactions with effect from the implementation date, including transactions that straddle that date, unless that would result in the new rules having retrospective effect.

Many companies that would be affected by the proposed changes currently have Code-like protections built into their constitutional documents, including the requirement to make a mandatory bid to all shareholders upon certain acquisitions of shares. Such provisions typically afford directors significant discretion as to when and how the Code-like protections are enforced. If the proposed changes are implemented, directors would lose that element of discretion. Such provisions should be reviewed to determine whether they (and indeed other aspects of their constitutional documents) are consistent with the Code. Public statements about Code applicability should also be considered.

Bidders contemplating offers for such companies around the time any changes are implemented will need to carefully consider the impact the Code would have on their transaction. Shareholders in such companies with stakes approaching the mandatory bid threshold of 30 percent (or who hold between 30 percent and 50 percent, such that the acquisition of a single share would trigger a mandatory bid) should be prepared to put safeguards in place to ensure dealings do not occur inadvertently.

The Panel has also indicated that it will look at the applicability (perhaps on a reduced basis) of the Code to companies whose securities are admitted to trading in the U.K. but have re-domiciled to overseas jurisdictions such as Bermuda.

Also on 5 July, the Panel published two other consultation papers: PCP 2012/2 (“Profit forecasts, quantified financial benefits statements, material changes in information and other amendments to the Takeover Code”) and 2012/3 (“Pension scheme trustee issues”).

Panel consultation papers can be found at <http://www.thetakeoverpanel.org.uk>.