

PRACTICE STATEMENT 28

RULES 2.8 AND 35.1 – ENTERING INTO TALKS DURING A RESTRICTED PERIOD

1. Introduction

- 1.1 This Practice Statement explains the Panel Executive’s practice with regard to consenting to a person who is subject to the restrictions set out in Rule 2.8 or Rule 35.1 making a single confidential approach to the board of the offeree company during the restricted periods of six months and 12 months respectively (each a “restricted period”) in order to ascertain whether the board of the offeree company would be interested in entering into talks with regard to a possible offer. The Practice Statement also explains how the Executive applies the provisions of Rule 2.2, Rule 2.6, Rule 2.8 and Rule 35.1 if a potential offeror and the board of the offeree company enter into talks during a restricted period.

2. Making a single confidential approach during a restricted period

(a) Where a “no intention to bid” statement has been made under Rule 2.8

- 2.1 Under Rule 2.8(e), a person who has made a “no intention to bid” statement (a “potential offeror”) may not, except in the circumstances specified in the statement or with the consent of the Panel, within six months from the date of the statement, take any steps in connection with a possible offer for the offeree company where knowledge of the possible offer might be extended outside those who need to know in the potential offeror and its immediate advisers. The Executive considers that making an approach to the offeree company would be restricted by Rule 2.8(e).
- 2.2 Paragraph (a)(i) of Note 2 on Rule 2.8 provides that, subject to paragraph (b) of the Note, a potential offeror may specify the agreement of the board of the offeree company as a circumstance in which its “no intention to bid” statement may be set aside. However, where a “no intention to bid” statement is made after a third party has announced a firm intention to make an offer:
- (a) paragraph (b) of Note 2 on Rule 2.8 provides that the statement may specify the agreement of the board of the offeree company as a circumstance in which the statement may be set aside only to the extent that such agreement is given after that third party offer has been withdrawn or lapsed; and
 - (b) paragraph (c) of Note 2 on Rule 2.8 provides that, if the potential offeror or any person acting in concert with it acquires an interest in any shares in the offeree company in the period following the

making of the statement and before the third party offer has been withdrawn or lapsed, the agreement of the board of the offeree company may not be relied on as a reason to set aside the statement after the third party offer has been withdrawn or lapsed.

- 2.3 Where a potential offeror has made a “no intention to bid” statement which may be set aside with the agreement of the board of the offeree company, the Executive will normally consent to a relaxation of the strict requirements of Rule 2.8(e) in order to enable a potential offeror or its adviser to make a single confidential approach (which may or may not include terms) to the board of the offeree company during the restricted period in order to ascertain whether the board would be interested in entering into talks with regard to a possible offer.
- 2.4 A potential offeror must consult the Executive in order to obtain its consent before making a single confidential approach to the board of the offeree company.
- 2.5 If a single confidential approach is made but is rejected by the board of the offeree company, the potential offeror will not normally be permitted to make any further approach to the board of the offeree company for the remainder of the restricted period under Rule 2.8, in accordance with the restriction in Rule 2.8(e). Only the board of the offeree company will be permitted to initiate any further contact between the parties during the remainder of the restricted period.
- 2.6 If the board of the offeree company agrees to enter into talks with the potential offeror, the restrictions set out in Rule 2.8 will not apply for the period of time that such talks continue. If the offeree company or the potential offeror subsequently decide at any time to end those talks, the potential offeror will then be bound by the restrictions set out in Rule 2.8 (which will prohibit, amongst other things, any further approaches to the board of the offeree company) for the remainder of the restricted period.
- (b) *Where the restrictions set out in Rule 2.8 may not be set aside with the agreement of the board of the offeree company***
- 2.7 The Executive will not consent to a potential offeror making a single confidential approach during the restricted period if the potential offeror is not permitted to rely on the agreement of the board of the offeree company as a reason to set aside its “no intention to bid” statement. Accordingly, a potential offeror will only be permitted to make a single confidential approach to the board of the offeree company during the restricted period:

- (a) if the potential offeror reserved the right to set its “no intention to bid” statement aside with the agreement of the board of the offeree company; and
- (b) where the “no intention to bid” statement was made after a third party announced a firm intention to make an offer:
 - (i) if the third party offer has been withdrawn or lapsed; and
 - (ii) if, in the period following the making of the “no intention to bid” statement and prior to the third party offer being withdrawn or lapsing, neither the potential offeror nor any person acting in concert with it acquired an interest in any shares in the offeree company.

(c) *Where a dispensation has been granted under Note 3 on Rule 2.2*

2.8 Where the Panel has granted a dispensation from the requirement to make an announcement under Note 3 on Rule 2.2, the potential offeror will be subject to the restrictions set out in Rule 2.8 for a period of six months. Under paragraph (a)(ii) of Note 3 on Rule 2.2, for the first three months of the restricted period the potential offeror will also not be permitted:

- (a) actively to consider making an offer for the offeree company;
- (b) to approach the board of the offeree company; or
- (c) to acquire an interest in shares in the offeree company.

2.9 The Executive will not normally consent to these restrictions, or the restrictions set out in Rule 2.8, being set aside with the agreement of the board of the offeree company during the first three months of the restricted period. However, in accordance with paragraph (b) of Note 3 on Rule 2.2, during the second three months of the restricted period, the restrictions set out in Rule 2.8 may be set aside with the agreement of the board of the offeree company (and the restrictions set out in paragraph (a)(ii) of Note 3 on Rule 2.2 will no longer apply). Accordingly, during the second three month period only, the Executive will normally consent to a potential offeror which has been granted a dispensation under Note 3 on Rule 2.2 making a single confidential approach to the board of the offeree company subject, if relevant, to the restrictions referred to in paragraph 2.7(b).

3. Obligations to make announcements

- 3.1 If, following a single confidential approach, the board of the offeree company agrees to enter into talks with the potential offeror, the provisions of Rule 2.2(c) will apply in the normal way.
- 3.2 If a possible offer announcement is made pursuant to Rule 2.2(c) before the expiry of the restricted period, the announcement will not normally be required to specify a “put up” or “shut up” deadline under Rule 2.6(a). This is because the Executive considers that the imposition of such a deadline would be unnecessary given that the board of the offeree company would be able to end the talks at any time during the restricted period and thereby re-impose the restrictions set out in Rule 2.8 upon the potential offeror for the remainder of the restricted period. The Executive would normally expect the announcement to explain why a “put up” or “shut up” deadline is not required to be specified and to state the date upon which the restricted period will end.
- 3.3 If an offer period commences and talks are continuing at the end of the restricted period, the Executive will require a “put up” or “shut up” deadline to be announced by the offeree company at that time. The deadline will be 5.00 pm on the 28th day following the end of the restricted period.
- 3.4 If, alternatively, talks are terminated following an announcement of a possible offer but before the end of the restricted period, the offeree company will be required to make an announcement of that fact. Such an announcement will end the offer period and the potential offeror will then be bound by the restrictions set out in Rule 2.8 for the remainder of the restricted period. The announcement will not, of itself, have the effect of extending the restricted period or commencing a new restricted period. However, if the potential offeror voluntarily makes a further “no intention to bid” statement, a new restricted period will commence from the date of that statement.
- 3.5 Once a restricted period under Rule 2.8 has expired, Rules 2.2 and 2.6 will apply in the normal way to any obligation to make an announcement in relation to talks which may occur or continue after that date.

4. Application to Rule 35.1

- 4.1 Rule 35.1 imposes substantially similar restrictions to those set out in Rule 2.8 where an offeror has announced or made an offer but that offer has not become or been declared unconditional and has been withdrawn or has lapsed. The restrictions set out in Rule 35.1 apply for a period of 12 months from the date on which the offer is withdrawn or lapses.

- 4.2 Similarly to Rule 2.8(e), Rule 35.1(e) provides that a former offeror may not take any steps in connection with a possible offer for the offeree company where knowledge of the possible offer might be extended outside those who need to know in the former offeror and its immediate advisers. In addition, paragraph (a) of Note 1 on Rule 35.1 provides that, save in certain specified circumstances, the Panel will normally consent to setting aside the restrictions in Rule 35.1 if the board of the offeree company so agrees.
- 4.3 The Executive will normally apply the same approach to Rule 35.1 as set out above in relation to Rule 2.8. Accordingly, the Executive will normally consent to a relaxation of the strict requirements of Rule 35.1(e) in order to enable a former offeror which is subject to the restrictions set out in Rule 35.1 to make a single confidential approach to the board of the offeree company during the 12 month period in order to ascertain whether the board would be interested in entering into talks with regard to a possible offer. The other points set out above in relation to Rule 2.8 (other than paragraphs 2.7, 2.8 and 2.9) will apply equally in relation to Rule 35.1.

Practice Statements are issued by the Panel Executive to provide informal guidance to companies involved in takeovers and practitioners as to how the Executive normally interprets and applies relevant provisions of the Takeover Code in certain circumstances. Practice Statements do not form part of the Code. Accordingly, they are not binding on the Executive or the Panel and are not a substitute for consulting the Executive to establish how the Code applies in a particular case.

14 November 2014

Last amended 22 May 2023