

## DEVELOPMENTS IN THE LONDON LISTING MARKETS: TAKEOVER CODE AND FINANCIAL PROMOTION EXEMPTIONS

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In this briefing, we look at (i) recent and proposed changes to the Takeover Code administered by the Panel on Takeovers and Mergers ("Panel"), and (ii) HM Treasury's proposals to reform exemptions relating to high net worth individuals and sophisticated investors under the UK financial promotion regime.

Our previous three briefings outlining various recent and proposed developments relevant to the London listing markets can be found [here](#).

## CHANGES TO THE TAKEOVER CODE

"The function of the Takeover Code is to provide an orderly framework within which takeovers are conducted and to promote, in conjunction with other regulatory regimes, the integrity of the financial markets."

In recent months, certain changes to the Takeover Code have come into force and further miscellaneous amendments have been published for consultation. The Panel has also announced that, with effect from 2 December 2021, it will only accept offer documentation in electronic form.

### Background

The function of the Takeover Code is to provide an orderly framework within which takeovers are conducted and to promote, in conjunction with other regulatory regimes, the integrity of the financial markets. Two key aims are to ensure that shareholders of an offeree company are treated fairly and not denied an opportunity to decide on the merits of a takeover offer and that shareholders in the offeree company of the same class are afforded equivalent treatment by an offeror. In light of this, and developments in the market, the Panel regularly reviews and proposes

changes to the regime set out in the Takeover Code.

### July 2021 amendments

The Takeover Code was amended with effect from 5 July 2021, following the Panel's consultation in October 2020 on proposed changes relating to conditions to offers and the offer timetable, with changes also made to incorporate gender neutral wording. Whilst the amendments significantly amended many rules of the Code, it is not thought that they will impact on the conduct of bids to any great extent, in practice.

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The key changes include:

- Certain changes to the operation of the offer timetable to simplify the timetable and to accommodate the potentially lengthy timeframes required to satisfy conditions relating to official authorisations and regulatory clearances;
- Removal of the special treatment given to conditions and pre-conditions relating to clearance of an offer by the Competition and Markets Authority or the European Commission and the ability to request suspension of the offer timetable if one or more conditions relating to an official authorisation or regulatory clearance have not been satisfied two days prior to Day 39;
- The introduction of a single date by which all of the conditions to an offer must be satisfied, so that there is no longer a distinction between the date by which the acceptance condition must be satisfied and the date by which the other conditions must be satisfied or waived;
- The introduction of acceptance condition invocation notices, with an offeror being required to serve such a notice if it wishes to invoke the acceptance condition and lapse its offer prior to the "unconditional date". Accordingly, offers no longer have "closing dates" ahead of the unconditional date;
- A requirement for an offeror to set a "long-stop date" for a contractual offer, similar to the long-stop date typically included in a scheme of arrangement;
- Offeree company shareholders who have accepted an offer are able to withdraw their acceptance at any time prior to satisfaction of the acceptance condition; and
- Clarifying the provisions on the invocation of conditions and pre-conditions to offers.

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## Proposed amendments to the Takeover Code

On 2 December 2021, the Panel published a consultation paper (PCP 2021/1) seeking views on miscellaneous proposed amendments to the Takeover Code (most of which are minor in nature). The deadline for comments is 18 February 2022 and the Panel expects to publish a response statement in Spring 2022, with the final amendments expected to come into force a month later.

The key proposed amendments include:

- Requiring a publicly identified potential offeror to announce any minimum level, or particular form, of consideration it is obliged to offer to offeree company

shareholders;

- Restricting a mandatory offeror, and any person acting in concert with it, from acquiring additional interests in shares in the offeree company in the 14 days up to and including the unconditional date of a mandatory bid and also in the 14 days prior to the expiry of an acceptance condition invocation notice. The aim is to prevent a mandatory bidder from consolidating its control during this 14 day period, allowing target shareholders to make an acceptance decision knowing the maximum percentage of target shares in which the mandatory bidder and its concert party would be interested if the bid lapsed. In addition, a bidder will not be permitted to flip its voluntary offer into a Rule 9 mandatory bid unless that offer can remain open for acceptance for at least 14 days;
- Clarifying the application of the look-back period for determining the minimum price of a mandatory offer;
- Amending the notes to Rule 9.1 so that there is only a single test for determining whether a chain principle offer is required, other than in exceptional circumstances, and reducing from 50% to 30% the threshold for the purposes of the test; and
- The requirement for a Rule 9 waiver circular to include the offeree board's opinion on the offeror's plans, the timing of the publication of documents on a website and the removal of the requirement to send documents to the Panel and to advisers to the other parties to an offer in hard copy form.

## Documents in electronic form

As noted above, from 2 December 2021, the Panel will only accept offer documentation in electronic form, so documents should no longer be sent in hard copy. Pending the changes to the Takeover Code itself in relation to hard copy documents (see above) coming into effect, the Panel encourages advisers to the parties to an offer to agree between themselves whether they wish to be sent offer documentation in hard copy form in addition to electronic form.

## Commentary

The proposed amendments in PCP 2021/1 relate to various different provisions of the Takeover Code and the Panel states that there is no over-arching theme to the proposals. However, the Panel is of the view that the various amendments will either be of benefit to offeree company shareholders and the market or will clarify, improve or create certainty in relation to the existing rules and the amendments will not place any significant new burdens on parties to an offer.

## PROPOSED REFORM OF FINANCIAL PROMOTION EXEMPTIONS

On 15 December 2021, HM Treasury published proposals to update the exemptions for high net worth individuals and sophisticated investors under the UK financial promotion regime. This is in response to economic, social and technological changes that have occurred since the exemptions were first introduced in 2001, and to instances of misuse of the exemptions identified by the Financial Conduct Authority ("FCA").

In particular, the government has identified that:

- Inflation has eroded the value of certain financial thresholds in real terms, meaning thresholds have become easier to satisfy;

**"The Panel is of the view that the various amendments will either be of benefit to offeree company shareholders and the market or will clarify, improve or create certainty in relation to the existing rules."**

- Pension freedoms introduced in 2015 mean individuals can withdraw assets from their pensions and so are more likely to meet financial thresholds related to net assets;
- The rise of online investing, and in particular the emergence of the crowdfunding market, has made it much easier for ordinary retail investors to invest in unlisted securities – in fact, a survey conducted in October 2020 by the FCA indicates that at least 1.6m consumers hold investments in unlisted companies; and
- Misuse can occur in different forms e.g. ranging from instances in which firms undertake only superficial checks to cases where ordinary retail investors are coached to answer questions about the exemptions in order to meet relevant criteria or where statements required to be signed by investors are hidden within other detailed information.

## Background

A financial promotion is a communication that contains an invitation or inducement to engage in a financial product or service. In the UK, the communication of financial promotions is subject to regulatory safeguards which seek to ensure consumers are appropriately protected so that they can make informed and appropriate decisions.

In general, an individual or business cannot communicate a financial promotion unless the content of the promotion is approved by a firm which is authorised by the FCA or Prudential Regulation Authority, or the individual or business is authorised itself, or an exemption to the regime applies. Breach is a criminal offence.

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A number of exemptions exist which enable unauthorised persons to communicate financial promotions in certain circumstances, including to defined groups or individual investors. The exemptions for certified high net worth individuals, sophisticated investors and self-certified sophisticated investors were introduced to help small and medium sized enterprises (SMEs) raise finance from sophisticated private investors, or “business angels”, without the cost of having to comply with the financial promotion regime.

## Proposed changes

The government believes that the high net worth individual and sophisticated investor exemptions continue to have a role to play, and so should be retained, but they should be updated to reflect current circumstances and to reduce the potential for misuse. It is proposing:

- *Increasing the thresholds for high net worth individuals* – the government’s view is that the current net income and net asset thresholds of £100,000 and £250,000 should be increased in line with inflation as a minimum, but it seeks views on the appropriate levels. It cites, by way of example, that earning an income of over £100,000 would have in 2001 placed an individual in the top 1% of earners, whereas in 2019 this would have put the individual in the top 3% of earners. No change is proposed to the assets in scope of the net asset calculation (which currently, for example, exclude an investor’s primary residence and pension benefits);

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- *Amending the criteria for self-certified sophisticated investors* – of the four possible criteria that can be met, the government is proposing to (i) remove the criteria that an investor has made more than one investment in an unlisted company in the previous two years, as the rise in online investing, as illustrated by the survey data above, means that this is no longer considered a reliable way to demonstrate sophistication, and (ii) amend the criteria that an individual has been in the last two years a director of a company with an annual turnover of at least £1m to raise the threshold to £1.4m to reflect inflation;
- *Placing a degree of responsibility on firms to ensure individuals meet the criteria to be deemed high net worth or sophisticated* – currently, firms that make promotions under the high net worth individual and self-certified sophisticated investor exemptions are only required to “believe on reasonable grounds” that the individual

they are communicating to has signed the requisite investor statement. There is no obligation on the firm to check that the individual actually meets the criteria. To try and ensure that prospective investors do satisfy the thresholds, it is proposed that firms communicating the financial promotion must have a reasonable belief that an individual meets the criteria, not simply that they have signed a relevant statement. The consultation states that it will be for firms to determine how they come to this conclusion and how to document this, although, as the investor would still be required to sign the investor statement, there would be a responsibility on both the investor and firm to ensure the relevant conditions have been met;

- *Updating the high net worth individual and self-certified sophisticated investor statements* – it is proposed to update the format, simplify the language (e.g. with fewer references to financial services legislation) and require investors to select the specific criteria that they meet in order to be classified as high net worth or sophisticated and to set out how they meet these criteria. For example, in the case of the high net worth individual exemption, an investor could be required to fill in their income and/or the value of their net assets to demonstrate how they meet the tests (although they would not be required to prove their answer). The aim is to increase engagement with the statement to ensure investors correctly certify themselves and to limit the information that gets “clicked through” without having been read or understood – as is frequently the case with terms and conditions or cookie consent notices – and to increase awareness of the regulatory protections investors are giving up when receiving promotions subject to the exemptions; and
- *Updating the name of the high net worth individual exemption to remove the reference to “certified”* – this reflects that third-party certification is not required for this exemption.

"These changes will be relevant in the context of pre-IPO fundraisings, which frequently feature in IPO planning, as well as fundraisings for SMEs in earlier stages of development."

Any reforms to the financial promotion regime are also intended to apply to similar exemptions under the regime restricting promotion of collective investment schemes. The consultation closes on 9 March 2022.

## Commentary

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The review considers the three existing exemptions for certified high net worth individuals, sophisticated investors and self-certified sophisticated investors, but the specific proposals only relate to the exemptions for high net worth individuals and self-certified sophisticated investors. These two exemptions can only be used to market investments related to unlisted companies (and not listed shares or those traded on AIM or the AQSE Growth Market). These changes will be relevant in the context of pre-IPO fundraisings, which frequently feature in IPO planning, as well as fundraisings for SMEs in earlier stages of development. The effect of the proposals, if introduced, will be to increase financial tests for inflation and tighten certain criteria around the experience of investors within those two exemptions. While this may slightly reduce the available investor pool, it should come with increased assurance that those who can invest have the requisite experience and ability to absorb losses.

## CONCLUSION

In both cases, we will wait to see the outcome of the current consultations and the impact any changes will have on the market.

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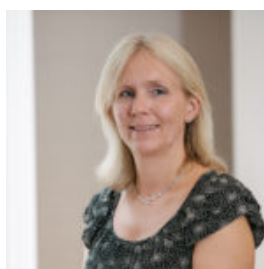
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