



ASIC

Australian Securities & Investments Commission

Level 5, 100 Market Street, Sydney
GPO Box 9827 Sydney NSW 2001
DX 653 Sydney

Telephone: (02) 9911 2000
Facsimile: (02) 9911 2414

3 February 2012

Mr Allan Bulman
Director, Takeovers Panel

By email: takeovers@takeovers.gov.au

Dear Mr Bulman,

RE: ASIC's response to Panel Consultation Paper - Rewrite of GN 18 Takeover Documents

We would like to thank the Takeovers Panel for giving ASIC the opportunity to provide comments on the Consultation Paper regarding the rewrite of Guidance Note 18 *Takeover Documents*. This letter sets out ASIC's response to some of the issues raised in the Consultation Paper and the attached draft Guidance Note (GN).

ASIC Comments

Accessibility

ASIC supports the Panel's inclusion of a section on 'Accessibility' and welcomes the reference to ASIC Regulatory Guide 228 *Prospectuses: Effective disclosure for retail investors (RG 228)*. In addition to the guidance about 'clear, concise and effective' disclosure, ASIC considers that RG 228 could be a useful reference point if the Panel were to give further guidance about documents issued in scrip-based control transactions.

Premia

In the context of presenting a bid price as being at a premium to the pre-bid price, paragraph 27 of the draft GN sets out the cases that in the Panel's view may give rise to unacceptable circumstances. In ASIC's experience, bid prices have often compared to the target's share price as at the date immediately before the announcement of an offer (which may be more than a few days or weeks before the date of the bidder's statement). The utility of this type of comparison could also be addressed in the GN.

Recommendations

Paragraph 31 provides that the Panel encourages target directors to make a recommendation but directors do not need to value the target's shares to do so.

ASIC considers it is undesirable for there to be general guidance that, irrespective of the nature of the bidder and the target's businesses and level of information available to target shareholders, target directors need not value the target's shares when making a recommendation. Rather, a valuation will be important and of benefit to shareholders in many cases. For example, paragraph 12 of Guidance Note 22 *Recommendations and Undervalue Statements* states that (emphasis added):

*“However, not all ‘reject’ recommendations will include an undervalue statement since it may be possible in **unusual** situations to recommend that a bid be rejected for other, qualitative reasons. Directors should bear in mind that the market is likely to assume in this situation that there has been no quantification of a premium or discount to the bid.”*

ASIC also notes that paragraph 18 of Guidance Note 22 states that “[r]egardless of whether a recommendation is made, directors must provide shareholders with some guidance as to the value of the target.”¹

In some cases it may not be possible to provide shareholders with useful guidance about the value of the target without engaging an expert to undertake a valuation (e.g. where the target has no earnings history or short term revenue prospects and where the equity or enterprise values in the financial accounts may not have a close correlation with the target's share price). For companies in the mining/exploration or biotechnology sectors with these features, it is common for a technical specialist to be engaged in light of the difficulties in valuing them based only on the available financial information. Given the challenges for shareholders in assessing the value of such companies, it will often be appropriate for their directors of these companies to provide shareholders with a valuation, rather than simply giving them financial information.

Accordingly, we recommend that paragraph 31 and GN 22 be amended to make it clear that whether target directors need to provide a valuation is to be determined on a case by case basis keeping the above factors in mind.

Expert's report

ASIC supports the Panel's position on the desirability of expert's reports and the view that such reports should be as clear, concise and effective as possible.

In this context, ASIC considers that it would be helpful to refer to ASIC's Regulatory Guides 111 and 112 in relation to the preparation of expert's reports and the independence of experts, in addition to the comments on ‘clear, concise and effective’ reports. For example, Regulatory Guide 111 provides guidance on the practice of providing conclusions as to fairness and reasonableness of takeover bids and its comments are consistent with the suggestion in the draft GN that ‘*the basis of the*

¹ *Tully Sugar Ltd* [2009] ATP 26 is noted in this context.

valuation should be set out sufficiently to allow an assessment of its reliability'
(paragraph 38 of the draft GN).

ASIC also considers that it would be useful for completeness to state in this section that the consent of the expert will be required in order to include an expert's report in the takeover document, as required under s636(3) and s638(5) of the *Corporations Act 2001*.

Contact

If you wish to discuss these issues further, please contact Anthony Graham, Senior Manager – Corporations on (03) 9280 3506.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Kate O'Rourke', with a long horizontal flourish extending to the right.

Kate O'Rourke
Senior Executive Leader - Corporations
Australian Securities and Investments Commission