20 July 2010.

The Secretary to the Code Committee
The Takeover Panel
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Dear Sirs,

PCP 2010/2 – Review of the regulation of takeover bids

Thank you for you invitation to participate in the Panel's consultation on certain aspects of the regulation of takeover bids. Standard Life Investments is one of the UK's leading institutional investors. As at 31st March 2010 it had £145.8bn of assets under management, including over £62bn of third party funds. The majority of these assets comprise UK listed securities. It thus has a strong incentive to ensure that Panel rules remain appropriate and effective.

We note and welcome the high level of public interest that has been generated by the recent transaction involving Cadbury plc. The public statements made by, amongst others, Lords Myners and Mandelson in respect of that transaction require a reasoned and robust debate. We hope that our submission will allow the Panel to frame such a response. We address the issues raised in the consultation document as follows:

<u>The "50% plus one" minimum acceptance condition</u>
The shareholder who either singly, or in combination with another, controls more than 50% of the equity of a company controls that company. Raising the threshold for acceptances of a takeover beyond this level is therefore illogical. Furthermore, by raising the threshold it places the power of decision in the hands of the minority and risks entrenching those boards that may have their own conflicted reasons for hostility to a bid. Similarly, it invalidates the authority delegated by shareholders to the board in situations where the board has recommended the terms of a bid.

Raising the threshold would also make it more difficult for shareholders to take advantage of the opportunity for disposal provided by rule 9.1 pertaining to mandatory offers.

<u>Differential voting rights</u>
Shares in an offeree company may be acquired during the course of an offer period for reasons that are wholly unconnected with a desire to influence the outcome of a bid. An example is portfolio re-balancing by a passive investor. The difference between speculative and long-term investment is also highly subjective.

The more important objection to the imposition of differential voting rights on shares acquired during the course of an offer period is that it would fundamentally undermine the principles attached to the title and ownership of a share of a company's equity that had hitherto been undivided. As well as reducing market liquidity during an offer period it would have the longer term effect of raising the cost of capital to all companies as the collateral value attached to equity would be undermined.

Disclosure of dealings during an offer period

The threshold for disclosure under rule 8.3 is already lower than that mandated in the EU Transparency Directive. The arguments for the further lowering of the threshold to below 1% neither show how this would enhance the quality of current Panel rules nor convincingly explain how such disclosures could improve the exit terms received by shareholders of an offeree company. In any event, the Companies Act of 2006 empowers companies to discover interests in their equity at whatever level of ownership.

Information during an offer period

Rule 24.2 already requires an offeror to describe how an offer is to be financed and the source of that finance. In the case of contested bids, such information is routinely subjected to forensic examination by the board of the offeree company and its advisers. In addition, the proposed amendments to Panel rules on "Quantified Effects Statements" should also allow shareholders to evaluate more fully bids which are settled other than solely in cash.

There may be some scope to improve the quality and quantity of disclosure by an offeror company where the consideration is solely in cash or otherwise by an offeree board where the bid is recommended. Although Panel rules do not exhaustively specify matters to which the board of an offeree company must have regard when framing their recommendation or opinion (other than set out in rule 25.1.b), the Companies Act of 2006 makes clear that they have fiduciary duties that include consideration of factors other than the value of a bid. However, the giving of such a recommendation or opinion should not imply that the board of an offeree company has residual fiduciary duty once control has passed.

We would welcome greater disclosure of the likely residual interests of board members of offeree companies once control has passed. This is particularly relevant in the case of management buy-outs and other private equity bids where the advice given by the offeree board may be conflicted by the assumption of a fiduciary role by some or all of its members in the acquiring company or entity.

Advice, advisers and fees

Rule 3.1 already provides a fundamental protection for shareholders in an offeree company by requiring the board to obtain independent advice on the takeover bid. The Panel also has the authority to determine whether the advisers to the parties of such a transaction are conflicted. In practice, there are no impediments to shareholders seeking additional sources of independent advice should they require them.

The fees paid by the boards of offeror and offeree companies to their advisers should be a matter of commercial judgement. In the case of offeree companies, such fees (including "success" fees) can be understood to have the purpose of maximising value for their shareholders as the Panel already has the authority to intervene in cases where the reverse is true (Note 3 to rule 3.3). However, a higher level of disclosure of both the nature and quantum of costs incurred in relation to an offer would be desirable.

One fee that that is potentially detrimental to the achievement of value by the shareholder in an offeree company is the so-called "break fee". This works in favour of an offeror by raising the cost of a potentially competing bid. Offeree boards sometimes feel obliged to accept these as a sign of good faith. However, they are a serious impediment to the operation of a free market and handicap shareholders in an offeree company.

Protection for offeror company shareholders

The Panel's rules only apply to offeree companies that are registered in a jurisdiction in which the Takeover Code applies. By supplementing the protections given by the Code to offeror companies in the same jurisdiction, the Panel would logically invalidate many of those protections whose purpose is to achieve the same exit terms for all shareholders in an offeree company. As offeror companies can anyway be assumed to be acting on a voluntary basis, it would also be illogical for the Panel to give the same protections to the shareholders of offeror as of offeree companies.

"Put up or shut up"

The longer the period between the disclosure of an intention to bid and the posting of an offer document, the greater the chance of the creation of a false market in the relevant securities. Consideration should be given by the Panel to the treatment of a disclosure that constitutes an intention to bid, as firm. This would discourage speculative bids, minimise the chance of the development of a false market and limit the period of uncertainty that can be seriously destabilising for offeree companies in contested situations.

SARS

As the circumstances and considerations that gave rise to the abandonment of SARS in 2006 have not materially altered, there seem to be no reasons to re-introduce them.

In offering these views we seek to uphold the purpose of the Panel rules, which is to ensure that all shareholders of the same class should be entitled to receive the premium for control of their company and that they should receive the same terms. The rules are not there as a device to frame, inter alia, issues relating to competition or national interest. There are other properly constituted bodies (e.g. the OFT) that are empowered to do this. Additionally, we would not support the extension of the Code in a way that provided a framework against which the financial or other merits of a bid could be judged. This is a matter for shareholders.

Yours sincerely

Jonathan Cobb
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Standard Life Investments