



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 11

Disclosure of offerors' intentions in takeover documents

Chapter 6 — Acquisition of shares

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From 5 July 2007, this document may be referred to as Regulatory Guide 11 (RG 11) or Practice Note 35 (PN 35). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 11.1) or their practice note number (e.g. PN 35.1).

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Purpose

RG 11.1 This guide sets out the views of the ASC on the operation of cl 20 in Pt A and cl 15 in Pt C in s 750 of the Corporations Law (Law) in relation to an offeror's intentions about the business, assets and employees of a target company (intentions clauses).

RG 11.2 This guide supersedes NCSC Release 155.

Background

RG 11.3 Subclause (1) of the intentions clauses requires disclosure of:

“particulars of the offeror's intentions regarding:

- (a) the continuation of the business of the target company;
- (b) any major changes to be made to the business of the target company, including any redeployment of the fixed assets of the target company; and
- (c) the future employment of the present employees of the target company.”

RG 11.4 The intentions clauses differ from their predecessors (para 5A of Pt A and para 5 of Pt C of the Schedule to the *Companies (Acquisition of Shares) Act* and Codes (CASA)) by the inclusion of a subcl (2):

“(2)Without limiting the generality of subcl (1), if the offeror has not made a decision on a matter referred to in paragraph (1)(a), (b) or (c) but is considering a possible course of action, or two or more possible courses of action, in relation to that matter, the statement shall set out that fact and specify the course of action or courses of action concerned and the reason why the offeror has not made a decision on the matter.”

Intentions disclosure

Vague expressions insufficient

RG 11.5 Subclause (2) of the intentions clauses incorporates expressly into the legislation the decision of Beach J in *Cumberland Credit Corporation Ltd v TNT Australia Pty Ltd* (1988) 13 ACLR 371 (approved in *Samic Ltd v Metals Exploration Ltd* (Supreme Court of

South Australia, DeBelle J, 28 May 1993, unreported). Beach J ruled that non-committal or undecided statements of intention are insufficient to satisfy the disclosure requirements of subcl (1).

RG 11.6 The ASC supports the criticisms by Bryson J in *ICAL Ltd v County Natwest Securities Australia Ltd* (1988) 6 ACLC 467 of the use of vague and indeterminate expressions to describe an offeror's intentions. Statements that the offeror would "rationalise" the "operations" of the target and conduct a "strategic review", without any indication of action to follow making the review, do not amount to "intentions" for the purpose of satisfying the intentions clauses.

RG 11.7 Disclosure of intentions in general terms is insufficient. In *Samic* DeBelle J held that disclosure of intentions in terms of identification of "investments" for the target "which will earn a higher yield than existing bank deposits, with the ultimate objective of increasing shareholders' interests" was not sufficient to satisfy the intentions clauses:

"... 'investment' is a word of very wide import. There are a number of different forms of investments. To state that it is the intention to identify investments which will earn a higher yield than existing bank deposits tells the reader very little. The fact that investments may take many forms requires the offeror company to specify more precisely what is intended. In this case, it is the intention to use the funds of *Samic* for either corporate acquisition or investment in substantial holdings in companies. Such an investment is altogether different in approach from, say, passive investment in listed securities and should, therefore, be stated. A shareholder in *Samic* is not in a position to evaluate the offer by simply being told that MEX will identify better investments".

Alternative courses of action

RG 11.8 In *Cumberland* the court held that if an offeror is considering alternative plans for the future of the target company it must disclose them even if it has not chosen between them. However, the offeror may reserve the right to make final decisions until it is in possession of all relevant information after the acquisition.

RG 11.9 Subclause (2) requires an offeror that is considering possible courses of action regarding a matter in subcl (1) to disclose in its Pt A or Pt C statement:

- (a) that fact; and
- (b) the course or courses of action being considered.

In this context, the ASC considers the expression “possible courses of action” to be of wide import. This means that an offeror must make the requisite disclosure if it takes account of, or makes allowance for, a course of action that it may or may not carry out concerning its intentions for a target’s business, assets or employees. However, an offeror must actually be contemplating a possible course of action before disclosure is required. If a course of action has no material foundation or little prospect of being realised, disclosure is not required.

Course of action determined

RG 11.10 If an offeror has formed “intentions” regarding a matter in subcl (1), then it must disclose the state of affairs it has decided to bring about in relation to that matter. For example, an offeror may disclose in its Pt A statement that it intends to procure the merger of the business operations of it and the target after the takeover scheme has closed. If so, the Pt A statement should disclose intentions of the offeror’s as to:

- (a) how it proposes to deal with the business of the target:
 - (i) between the close of the takeover scheme and completion (or failure) of the merger; and
 - (ii) if the merger does not take place (*QIW Retailers Ltd v Davids Holdings Pty Ltd* (Supreme Court of Queensland, No 848 of 1992, unreported)); and
- (b) how it intends to fund the merger, even if a decision has not been made as between a number of possible courses (*QIW Retailers Ltd v Davids Holdings Pty Ltd* (1992) 10 ACLC 1158).

RG 11.11 If an offeror has actions in mind, but has made no decision to bring about any particular state of affairs regarding a matter in subcl (1), then it must disclose the reasons why it has not made a decision on the matter.

RG 11.12 If an offeror bases its intentions or its reasons for making a bid on an analysis or analyses of the costs and benefits of merging the activities of the offeror and the target, this should also be disclosed together with the means by which the merger may be achieved most effectively.

Cash box target

RG 11.13 While, in *Samic*, DeBelle J recognised that “an offeror company bidding for a cash box can do little more than indicate, in a general way, its intention”, his Honour held that “where a specific intention has been identified, it should be stated and that when referring to ‘possible courses of action’, para 15(2) [of Pt C in s750] is not referring only to specific proposals but to possible avenues of activity”.

Agreements with third parties

RG 11.14 Where intentions or a possible course of action involve any understanding or agreement with third parties, particulars of that understanding or arrangement should be disclosed.

General disclosure

RG 11.15 If an entity sends a takeover offer — as agent or nominee for another person — the other person is an offeror and the intentions clauses require disclosure of that person’s intentions also (see the definition of “offeror” in s603).

RG 11.16 An offeror must disclose information that is material to an offeree making a decision on whether to accept an offer even if it is not required to be disclosed under the intentions clauses. This disclosure is required by cl 17 in Pt A or cl 14 in Pt C, unless the information has previously been disclosed to the shareholders of the target company. This will often include the intentions of an associate of the offeror, although the offeror was neither an agent for, nor a nominee of, the associate. For example, an offeror that is a wholly owned subsidiary will be expected to disclose the intentions of its ultimate holding company and an offeror in a reverse takeover will be expected to disclose the intentions of the target company.

[*Historical note:* RG 11.16 amended 26/7/1993 by replacing the word “offeree” with the word “offeror” in the first instance.]

RG 11.17 An offeror is only required to disclose in its Pt A or Pt C statement the impact of its intentions on its own business and operations where it is offering its own securities as consideration or where it intends to merge its business operations with those of the target.

Surveillance and enforcement

RG 11.18 The intentions clauses are pivotal to the promotion of an informed market and the ASC will interpret the provisions accordingly. To this end, the information disclosed in a Pt A or Pt C statement should accord with the information contained in related documentation. For example, disclosures should be consistent with information provided to statutory authorities such as the Foreign Investment Review Board and the Australian Competition and Consumer Commission and to financiers and other credit providers financing the bid. The ASC will take a serious view if an inspection of the offeror's records reveals a discrepancy.

RG 11.19 In line with its strict views of the requirements set by the intentions clauses, the ASC considers that inadequate disclosure of intentions or possible courses of action, or the disclosure of intentions that have no material foundation or little prospect of being realised, may be false or misleading. The ASC will take appropriate enforcement action against such conduct to ensure adherence not only with the Law but with the policy of promoting an informed market.

RG 11.20 As part of its takeovers surveillance program the ASC may consider the accuracy and appropriateness of intentions disclosure some months after a takeover scheme or announcement is complete. Post-vetting of takeover documentation in this way (including the requisition and review of board minutes, business plans etc) will be an effective means of determining compliance with cl 20 in Pt A and cl 15 in Pt C.