CLEARY GOTTLIEB

ALERT MEMORANDUM

JUNE 5, 2013 clearygottlieb.com

UK Takeover Panel Confirms Reforms to Companies Subject to the UK Takeover Code

1. Introduction

In July 2012, the Code Committee of the UK Takeover Panel (the "Code Committee") published a consultation paper entitled *"Companies Subject to the Code"* in which it proposed reforms of the provisions of the UK Takeover Code (the "Code") which relate to companies to which the Code applies (the "Consultation Paper"). Principally, the Code Committee proposed to remove the "residency test" from the rules that determine the companies to which the Code applies[1].

On 15 May 2013 the Code Committee published its response statement (the "Response"), confirming that it has adopted the removal of the "residency test" in relation to one class of company, but retained it in respect of all others.

2. Executive Summary

The key amendment to the Code set out in the Response is that the residency test (described below) will no longer apply for companies which have their registered offices in the UK, the Channel Islands or the Isle of Man (each a "Relevant Jurisdiction") and which have securities admitted to trading on a multilateral trading facility (a "MTF"[2]) in the UK.

The residency test will continue to apply to all other companies to whom it currently applies, including those whose registered office is in a Relevant Jurisdiction but whose securities are admitted to trading solely on an overseas market, i.e. one which is not a regulated market in the UK, a MTF in the UK, a stock exchange in the Channel Islands or the Isle of Man or a regulated market in another EEA member state (an "Overseas Market").

3. Residency Test

3.1 *Current Code Position*

Section 3 of the Introduction to the Code sets out the rules as to the companies, transactions and persons to which the Code applies. Currently, an offer for a public company

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1 A summary of the Consultation Paper can be found in our Alert Memorandum dated 11 July 2012.

2 Defined in the Directive on Markets in Financial Instruments ("MiFID") as being a multilateral system, operated by an investment firm or market operator, which brings together multiple third party buying and selling interests in financial instruments in a way that results in a contract. This includes the London Stock Exchange's AIM market and the ISDX Growth Market.

which has its registered office in a Relevant Jurisdiction and whose securities are not admitted to trading on a "regulated market" in the UK[3] or on any stock exchange in the Channel Islands or the Isle of Man will be subject to the Code only if the company is also considered by the Panel to have its place of central management and control in a Relevant Jurisdiction[4]. This is commonly referred to as the "residency test"[5].

3.2 *Consultation and Responses*

The Consultation Paper included a proposal to amend the Code to remove the residency test for all companies, bringing AIM listed companies incorporated within a Relevant Jurisdiction but whose "residency" is outside a Relevant Jurisdiction within the jurisdiction of the Panel for the first time.

The Response explains that there was unanimous support for the proposed removal of the residency test insofar as it applies to companies whose registered offices are in a Relevant Jurisdiction and whose securities are admitted to trading on a MTF in the UK (a "Relevant Company")[6]. However, the majority of respondents queried the appropriateness of removing the residency test for companies whose registered offices are in a Relevant Jurisdiction but whose securities are admitted to trading solely on an Overseas Market (an "Overseas Listed Company"). Respondents noted that shareholders in a Relevant Company can legitimately expect to be protected by the Code, regardless of the Relevant Company's place of central management and control, whereas shareholders in an Overseas Listed Company may expect to be protected by the regulatory requirements (if any) in that overseas jurisdiction (the "Overseas Regulations"). Additionally, the Code and such Overseas Regulations might overlap or conflict, potentially causing confusion and increasing compliance costs for a target.

3.3 *Amended Code Position*

The Code Committee confirms in the Response that:

- the residency test will no longer apply to Relevant Companies; and
- in light of the concerns expressed in the responses received, the residency test will continue to apply to an Overseas Listed Company.

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3 Here "regulated market" has the meaning given to it in MiFID. The Main Market of the London Stock Exchange is a regulated market, but AIM is not.

4 Section 3(a)(ii) of the Introduction to the Code.

5 A summary of the factors taken into account by the Panel in applying the residency test and the rationale put forward for removal of that test is set out in paragraph 4 of the Alert Memorandum dated 11 July 2012.

6 The Code Committee notes in the Response that it received comments on the Consultation Paper from 17 respondents. The 13 responses submitted on a non-confidential basis are available on the panel's website.

The Code will continue to apply to all other companies which fell within its remit other than pursuant to application of the residency test[7].

4. Consequential Amendments

The Panel proposed to make certain consequential amendments to the "ten year rule"[8] by removal of the residency test and extension of its terms to a Relevant Company, or companies whose securities are listed on any stock exchange in the Channel Islands or the Isle of Man (rather than just the Official List).

The Response confirms that the residency test will be retained for private companies subject to the ten year rule, but that the extension of its terms to Relevant Companies and companies whose securities are listed on any stock exchange in the Channel Islands or the Isle of Man will be adopted.

5. Implementation

The amendments introduced as a result of the Response will take effect on 30 September 2013, applying to all companies and transactions to which the Code then relates (including those transactions which straddle that date). The Code Committee specifically notes in the Response that they do not consider there to be a need for detailed transitional arrangements, nor a lengthy transitional period, although they recognise that some companies who will come to fall within the Panel's jurisdiction may wish to amend their articles of association to remove any provisions which seek to replicate the current provisions of the Code so as to avoid any conflict.

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If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under Mergers, Acquisitions and Joint Ventures in the "Practices" section of our website at http://www.clearygottlieb.com.

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[7] I.e. companies whose securities are admitted to trading on a regulated market in the UK (i.e. the Main Market of the London Stock Exchange) or any stock exchange in the Channel Islands or the Isle of Man or a regulated market in one or more member states of the EEA.

[8] Rule which determines that an offer for a private company will only be subject to the Code if, at any time during the 10 years prior to the relevant date, (i) any of its securities have been admitted to the Official List[8], (ii) dealings/prices at which persons were willing to deal in any of its securities have been published on a regular basis for a continuous period of at least six months, (iii) any of its securities have been subject to a "marketing arrangement"[8] or (iv) it has been required to file a prospectus for the issue of securities with the registrar of companies, or any other relevant authority in a Relevant Jurisdiction, or to have a prospectus approved by the UK Listing Authority.

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