Does the Takeover Code apply? A look at which companies will be subject to the Takeover Code from 30 September 2013

In the summer of 2012, the Code Committee of the Takeover Panel (Panel) issued a consultation examining which companies should be subject to the Takeover Code. The Panel has now published its response together with the detailed rule changes, which will take effect from 30 September 2013.

There are two key points: (1) The residency test will no longer be relevant for companies which have their registered office in the UK, Channel Islands or Isle of Man (a home territory) if any of their securities are admitted to trading on a multilateral trading facility (MTF) in the UK. AIM is an MTF. (2) The residency test has not been removed in its entirety, however; the test will still apply to certain other companies such as public companies whose securities are admitted to trading solely on an overseas market.

So, will the Takeover Code apply?

This table looks at how the Takeover Code will apply to a company registered in a home territory from 30 September 2013.

<table>
<thead>
<tr>
<th>Company</th>
<th>Are the rule changes being adopted as proposed?</th>
<th>Will the Takeover Code apply?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Company with securities admitted to trading on a UK regulated market (e.g. the LSE) or Channel Island or Isle of Man stock exchange</td>
<td>Position unchanged – no rule changes were proposed.</td>
</tr>
<tr>
<td>2</td>
<td>Company with securities admitted to trading on an MTF in the UK (e.g. AIM)</td>
<td>Yes.</td>
</tr>
<tr>
<td>3</td>
<td>Company with securities admitted to trading on an EEA regulated market (but not a UK regulated market)</td>
<td>Position unchanged – no rule changes were proposed.</td>
</tr>
<tr>
<td>4</td>
<td>Company with securities admitted to trading on a public market other than a company referred to in 1, 2 or 3 above (e.g. NYSE)</td>
<td>No – the residency test will not be removed.</td>
</tr>
<tr>
<td>Company</td>
<td>Are the rule changes being adopted as proposed?</td>
<td>Will the Takeover Code apply?</td>
</tr>
<tr>
<td>---------</td>
<td>-----------------------------------------------</td>
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</tr>
<tr>
<td>5</td>
<td>Public company whose securities are not admitted to trading on a public market</td>
<td>No – the residency test will not be removed.</td>
</tr>
</tbody>
</table>
| 6       | Private company | In part. The changes relating to the residency test are not being adopted as proposed. The changes relating to the “10 year rule” are being adopted (see below). | The residency test will continue to be relevant for these companies, and the Takeover Code will apply if:  
• the residency test; and  
• the “10 year rule” are satisfied. |

**Changes to the “10 year rule”**

A private company is only subject to the Takeover Code if it satisfies both the residency test and the “10 year rule”. The Panel proposed a couple of changes to the 10 year rule. These are not intended to affect the application or effect of the Takeover Code, and are being adopted as proposed. The changes are summarised below.

<table>
<thead>
<tr>
<th>10 year rule as it is now</th>
<th>Changes being made</th>
</tr>
</thead>
<tbody>
<tr>
<td>A private company is only subject to the Takeover Code if:</td>
<td></td>
</tr>
<tr>
<td>1 any of its securities have been admitted to the Official List in the 10 years before the relevant date;</td>
<td>This will be extended to include where any securities have been admitted to trading on a regulated market or an MTF in the UK or on any stock exchange in the Channel Islands or Isle of Man at any time in the 10 years before the relevant date. In reality, such a company probably satisfies one of the other criteria and is already subject to the Takeover Code.</td>
</tr>
<tr>
<td>2 dealings and / or prices at which people are willing to deal in its securities have been published on a regular basis for a continuous period of at least six months in the 10 years before the relevant date;</td>
<td>No change.</td>
</tr>
<tr>
<td>3 any of its securities have been subject to a marketing arrangement at any time in the 10 years before the relevant date; or</td>
<td>No change.</td>
</tr>
<tr>
<td>4 it was required to file a prospectus for the issue of securities, or to have a prospectus approved by the UKLA at any time in the 10 years before the relevant date.</td>
<td>This will be amended to focus on whether a company has actually filed a prospectus or had one approved – rather than whether it was required to do so. Whether a company is required to file a prospectus or have one approved may be subject to some debate – but whether a company has actually filed a prospectus is a question of fact that is easily checked. A filing with an authority other than the registrar of companies will only count if the filing is on a public record.</td>
</tr>
</tbody>
</table>

2 Does the Takeover Code apply?
Comment
Removing the residency test for AIM companies is, on the whole, a welcome move which will give some much needed clarity in this area. Prospective bidders for UK incorporated AIM companies will no longer need to apply the residency test and shareholders in those companies will have the certainty that they have the benefit of the protection offered by the Takeover Code.

It remains to be seen however whether any of the many foreign-managed companies quoted on AIM may seek to avoid being brought within the jurisdiction of the Takeover Code by listing a non-UK top company instead.

The rules take effect on 30 September without transitional arrangements. In the run up to that date, it will be important to keep the Takeover Code in mind, particularly on transactions which are not currently subject to the Takeover Code, but which will become subject to the Takeover Code on 30 September.

What’s next?
The Panel issued a further two consultations last summer, relating to (i) pension scheme trustee issues; and (ii) profit forecasts, quantified financial benefits statements and material changes in information. See our update “New rights for pension scheme trustees under the Takeover Code” for changes made to the Takeover Code in response to the consultation on pension scheme trustee issues. A response to the consultation on profit forecasts has yet to be published.

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