

CLEARER GUIDANCE PROVIDED: THE TAKEOVERS PANEL'S NEW EQUITY DERIVATIVES GUIDANCE NOTE

29 May 2020 | Australia

Legal Briefings - By **Andrew Rich and Ken Ooi**

The Takeovers Panel has finally issued its updated guidance on the public disclosure of equity derivatives. This update guidance was published almost a year to the day after the Panel's public consultation process closed. This article outlines what has changed.

IN BRIEF

In line with the [draft GN20](#), the final revised GN 20:

- makes it clear that all long positions (whether capable of physical or cash settlement) over 5% should be publicly disclosed, importantly, irrespective of whether a control transaction has commenced, and also provides examples that are likely to give rise to unacceptable circumstances;
- sets out the factors the Panel may take into account in determining whether an acquisition of a long position in excess of 20% will constitute unacceptable circumstances; and
- will come into effect from three months after the Takeovers Panel gives notice to market participants. The Panel had not yet publicly indicated when this will be.

KEY POINTS FROM THE UPDATED DRAFT GUIDANCE NOTE

Disclosure expected whether or not there is a control transaction

In its newly released revised Guidance Note 20 (**GN20**), the Takeovers Panel makes it clear that it now expects public disclosure to be made where the long position of a person and their associates

- is 5% or more; and
- if so, changes by at least 1% or falls below 5%.

Importantly, the Panel now expects such public disclosure, whether or not a control transaction has commenced. Previously the Panel only expected such disclosure if a control transaction had commenced.

Disclosure of equity derivatives

A number of examples have been given to provide guidance on when the Panel will consider the effect of a failure to make such a disclosure to give rise to “unacceptable circumstances”. Relevantly in the M&A context, this includes where:

- the taker with an undisclosed long position over 5% has attempted to exercise control or influence over the entity or proposes a control transaction after the time that disclosure should have been made; and
- someone other than the taker proposes a control transaction and is unaware of the equity derivative (which has not been disclosed).

This guidance is helpful because it addresses the need for greater transparency and certainty, but also specifically addresses the effect of non-disclosure relevant to the Takeovers Panel’s jurisdiction.

Long positions over 20%

The revised GN20 also sets out factors the Panel may consider where the acquisition of a long position that would breach the 20% rule (if it were comprised entirely of a physical holding) could also give rise to unacceptable circumstances. These factors include:

- if the taker has attempted to exercise control or influence over the entity;
- if and when the long position was disclosed; and
- whether the acquirer of the long position could have relied on an exemption to the 20% rule if the acquirer had made the acquisition as a physical holding (such as the “3% creep” exemption).

Timing of implementation of the revised GN20

Due to the market disruption caused by the COVID-19 pandemic, the Panel has communicated that the changes set out in the final revised GN20 will only come into effect with three months’ notice from when the Panel notifies the market of the change. For now, the current GN20 will continue to apply.

COMMENTARY

As previously noted, the Panel’s proposed amendments are, in our view, generally welcome changes, and the revised draft provides clearer guidance and is an improvement of the earlier version.

Although the revised GN20 will not come into effect for a little while yet, we expect to start to see enhanced disclosure of equity derivative positions ahead of the formal commence date of the revised GN20, particularly from persons who amass significant long positions in ASX-listed entities but who have not yet decided whether or not to attempt to exercise control over, or undertake a control transaction in respect of, that entity.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



ANDREW RICH



KEN OOI

PARTNER, SYDNEY

+61 2 9225 5707
andrew.rich@hsf.com

SENIOR ASSOCIATE,
SYDNEY

+61 2 9225 5392
ken.ooi@hsf.com

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