

GUIDANCE NOTE 13: BROKER HANDLING FEES

Overview

Broker handling fees are offered by bidders to brokers who solicit acceptances of offers under a bid from their clients.

To the extent that a broker handling fee encourages brokers to inform their clients about the existence of the bid and to discuss the merits of the bid, the fee may facilitate the acquisition of shares taking place in an efficient, competitive and informed market. In this instance a broker handling fee would further the objectives set out in section 602(a) of the *Corporations Act 2001* (Cth). The Panel does not, therefore, consider that broker handling fees are unacceptable in themselves.

There are, however, concerns that arise if broker handling fees are excessively high, or are only available for a limited period of time. The concerns arise because the fee may induce brokers to pressure their clients to accept an offer under a bid where they would not otherwise give such advice. Broker handling fees in these circumstances have the potential to:

- distort the market for control over shares in the target which would detract from the objective of having an efficient, competitive and informed market;
- cause shareholders to accept an offer under the bid before they have had a reasonable time, and adequate information, to assess the bid; and
- constitute a collateral benefit, or offend the equal opportunity principle.

This Guidance Note sets out guidelines in relation to the quantum of broker handling fees and the timing of their availability. Whether or not a particular broker handling fee gives rise to unacceptable circumstances will depend on the particular facts and the effects of the fee on target shareholders and the market, in the light of the policy of sections 602 and 657A of the *Corporations Act*. Generally, however, the Panel considers that a broker handling fee should not exceed 0.75% of the consideration payable to an accepting target shareholder and that it should be capped at \$750 for each acceptance. A minimum payment should generally not exceed \$50 for each acceptance.

Further, once a broker handling fee offer has been made, it should generally be available for the balance of the bid period.

Contents

OVERVIEW.....1

CONTENTS2

INTRODUCTION.....3

REGULATION OF BROKERS3

FEES THAT ARE NOT TIED TO ACCEPTANCE.....4

THE POLICY UNDERLYING THE GUIDANCE NOTE.....4

QUANTUM.....5

TIMING6

OTHER TERMS OF THE OFFER.....7

DISCLOSURE.....8

REMEDIES9

Introduction

1. A bidder may, in some cases, offer to pay a fee, commission or other benefit to brokers whose stamp appears on an acceptance form or, in respect of CHESSE holdings, who have initiated acceptances of offers under its takeover bid. These benefits are generally known, and are referred to in this Guidance Note, as “broker handling fees”.
2. In this Guidance Note, the Panel indicates when it may find that a broker handling fee gives rise to unacceptable circumstances.¹
3. Whether circumstances are unacceptable depends on their effect on shareholders and on the market, in the light of the policy of sections 602 and 657A of the *Corporations Act 2001 (Cth)*.² It does not require an intention to bring about an objectionable state of affairs.
4. Although the practice of bidders offering to pay broker handling fees is not new, until recently, there has been little focus on this practice from a regulatory or policy point of view. The Panel intends to continue to monitor this practice and is prepared to adapt this Guidance Note to keep it relevant in the light of developments in the broking industry and other relevant considerations.

Regulation of brokers

5. Some of the Panel’s concerns with broker handling fee offers are already addressed in the Corporations Act. For example, one concern relating to broker handling fees is that they may create a conflict between brokers’ interests and their duties to their clients, particularly where the fee is excessive. The Corporations Act, however, imposes obligations on brokers in their dealings with their clients, including:
 - (a) the obligation to have a reasonable basis for any personal advice that is given to a retail client³; and
 - (b) the obligation to provide information to retail clients about any remuneration (including any commission) or other benefits that the broker (or any related entity or associate) is to receive that might reasonably be expected to be or have been capable of influencing the broker in providing the advice at the time of giving the advice.
6. This Guidance Note assumes that brokers are complying with the above obligations although it is not the Panel’s role to enforce these legislative provisions. However, the Panel is properly concerned with broker handling

¹ This Guidance Note has been specifically formulated to address broker handling fees offered in connection with a takeover bid conducted under Chapter 6 of the Corporations Act. Fees which are similar in nature to a broker handling fee may also be offered in other types of control transactions which may come within the Panel's jurisdiction. They are not, however, directly considered in this Guidance Note.

² Except where otherwise specified, legislative references are to the *Corporations Act 2001 (Cth)*.

³ Section 945A.

fees because of the effects that such fees may have on shareholders and on the market in the context of a takeover bid.

Fees that are not tied to acceptance

7. As an alternative, or in addition, to broker handling fees, a bidder may engage a person (e.g. a communications firm or a telemarketing agent) to notify shareholders of the existence of the bid, and agree to pay that person a fee or other benefit that is not tied to acceptances under the bid. The Panel considers that such fees are different in nature to broker handling fees. The absence of a link between payment of the fee and acceptance by a shareholder means that there is much less scope for the fee itself to result in undue pressure being placed on shareholders to accept an offer under the bid. Unless they are licensed to do so, such persons may not give advice to shareholders about whether or not they should accept the offer.
8. The guidelines set out in this Guidance Note do not, therefore, apply to fees that are not tied to acceptances. The Panel notes, however, that the communications *themselves* between communications firms, telemarketing agents and the like and shareholders will be of concern to the Panel where they detract from the purposes set out in section 602 or contravene Chapters 6, 6A, 6B or 6C. There are also provisions in the Corporations Act relating to misleading or deceptive conduct and telephone tape recording which may be relevant.

The policy underlying the Guidance Note

9. Section 602 sets out the purposes of Chapter 6 of the Corporations Act. They include, relevantly for the purposes of this Guidance Note, that:
 - (a) the acquisition of control over shares takes place in an efficient, competitive and informed market (paragraph 602(a));
 - (b) the holders of the shares, and the target directors, have a reasonable time to consider the proposal, and are given enough information to enable them to assess the merits of the proposal (paragraph 602(b)); and
 - (c) as far as practicable, the holders of shares all have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest in the target (paragraph 602(c)).
10. To the extent that a broker handling fee encourages brokers to inform their clients about the existence of the takeover bid and to discuss the merits of the bid, the fee may facilitate the acquisition of control over shares taking place in an efficient, competitive and informed market. The Panel does not, therefore, regard broker handling fees to be unacceptable in and of themselves.
11. However, a broker handling fee which is excessively high, or which is available only for a limited period of time may lead brokers to place their interests ahead

of the interests of their clients and may be contrary to the purposes of Chapter 6. This may give rise to unacceptable circumstances.

12. An excessive broker handling fee may detract from an efficient, competitive and informed market if it causes shareholders to accept an offer under a bid for a reason other than that the bid offers the highest price or is otherwise in their best interests, or at a time or in circumstances where, absent the fee, they would not choose to accept. For example, a broker may advise its clients to accept an offer under a bid that does not offer the highest price or best outcome for the shareholder, but the highest broker handling fee. Alternatively an excessive broker handling fee may create incentives for a broker to advise its clients to accept a bid prematurely, for example, before the target's recommendation is released or before a higher competing bid has had a reasonable opportunity to be made.
13. If brokers agree to split or pass through the fee completely to their client shareholders, those shareholders may accept in order to receive the fee where they would not have otherwise accepted. In such a case the fee may constitute a collateral benefit prohibited by section 623, or offend the equal opportunity principle set out in paragraph 602(c). This may also occur where the broker or an associate of the broker is the accepting shareholder.
14. In addition, if the fee is available for a limited period of time, brokers may advise shareholders to accept early, before shareholders have had a reasonable time, and adequate information, to consider the merits of the bid. By accepting early, shareholders may lose the opportunity of considering another bid.

Quantum

15. In assessing whether a broker handling fee offer is unacceptably high, the Panel will consider whether:
 - (a) the fee has the potential to induce brokers to place undue pressure on their clients to accept an offer under the bid; or
 - (b) the fee has the potential to cause shareholders to accept an offer which they would not otherwise choose to accept or to accept sooner than they would choose to accept.

Guidelines

16. A broker handling fee should not exceed reasonable recompense for the time and expense that brokers incur in:
 - (a) processing acceptances (through CHESSE or by paper transfer); and
 - (b) informing clients about the existence of the bid and discussing the merits of the bid with them.

17. Having regard to the above, the Panel considers that, in general, a broker handling fee should not exceed 0.75% of the consideration payable to an accepting shareholder, and that the maximum amount paid for any single acceptance should not exceed \$750.
18. Bidders may choose to set a minimum amount for any single acceptance. One reason for doing this may be to encourage brokers to contact clients with small holdings. The Panel does not object to this practice. However, if a minimum amount is to apply, the Panel considers that, in general, it should not exceed \$50 for each acceptance. Measures to guard against share splitting in order to take advantage of minimum or maximum payments are discussed in **paragraph 28** below.
19. The quantitative guidelines set out in **paragraphs 17** and **18** above are consistent with other types of fees and commissions that are normally charged by brokers to their clients for performing various advisory and transaction-related services. The Panel considers, therefore, that a broker handling fee which is within those guidelines is not likely to result in brokers placing their own interests ahead of their clients or placing undue pressure on their clients to accept a bid. Similarly, the Panel considers that shareholders are not likely to accept a bid in order to receive all or a part of this fee in circumstances where they would not otherwise accept.

Sliding scales

20. A bidder might wish to offer a different rate of broker handling fee depending on the number of shares that are the subject of the acceptance. For example, a bidder might want a higher rate to apply to acceptances for smaller parcels in order to encourage brokers to target retail shareholders who are often slower to move and display stickier tendencies. However, sliding scales may be objectionable because they may induce brokers to apply greater pressure on their retail clients than on their institutional clients, although it is the former who need greater protection. The Panel does not rule out the use of sliding scales altogether. However, if a sliding scale is used, the upper and lower ends of the scale should come within the guidelines set out in this Guidance Note.

Changing the Broker Handling Fee

21. A bidder may increase a broker handling fee during the takeover bid so long as it remains within the quantitative guidelines set out in this Guidance Note. Generally, however, broker handling fees should not be decreased during the takeover bid, as this practice may lead to the same type of pressure being applied to clients as when a fee is available for only a limited period.

Timing

22. The period during which a broker handling fee offer is open may give rise to unacceptable circumstances if it :

- (a) may induce brokers to place undue pressure on their clients to accept an offer under the bid early; or
 - (b) may induce shareholders to make a decision before they have had a reasonable time, and adequate information, to assess the merits of the bid.
23. The Panel does not seek to limit when the bidder may offer a broker handling fee. However, once the offer is made, the Panel considers that the fee should generally be available for the balance of the bid period. This includes all extensions of the bid period unless the bidder has expressly and clearly stated in its offer of the broker handling fee that the fee will not be available during any extended period.
24. In special circumstances, it may be permissible for the broker handling fee to cease to apply before the end of the offer period. One situation where this may be permissible is where the bid period has been of a relatively long duration and where ample notice has been given of the bidder's intention to withdraw the fee. In this situation the withdrawal of the broker handling fee before the end of the offer period is unlikely to create any *additional* coercive pressure on shareholders.
25. Once withdrawn, the broker handling fee offer should not later be reinstated on either the same or different terms.

Other terms of the offer

Collateral benefit and equality of opportunity

26. As stated in **paragraph 13** above, a broker handling fee offer may constitute a prohibited collateral benefit or offend the equal opportunity principle (or both) if the broker or an associate of the broker is a target shareholder who accepts an offer under the bid, or if the broker splits the fee with, or passes it through completely to, its client shareholder.
27. In order to minimise this concern, the Panel considers that in all cases where a broker handling fee offer is proposed, the offer should:
- (a) expressly not apply to acceptances of an offer under the bid by the broker or an associate of the broker; and
 - (b) include an express term that an acceptance by a broker constitutes a representation that:
 - (i) neither it nor its associate is the accepting shareholder; and
 - (ii) the fee will not be passed on or otherwise shared directly or indirectly with the accepting shareholder.

Share splitting

28. It is possible that a minimum or maximum broker handling fee may induce brokers to advise shareholders, or may induce shareholders themselves, to split their holding so as to maximise the amount of the fee that is payable by the bidder in respect of a particular holding.
29. In order to address this issue, the Panel considers that it is not unacceptable for a bidder to expressly reserve its right to aggregate any acceptances in determining the handling fees payable to any broker if it reasonably believes a party has structured holdings to take advantage of the broker handling fee.

Requirement for a minimum level of acceptance

30. A bidder might wish to impose a minimum aggregate level of acceptance requirement before a broker is eligible to receive any handling fee. Such a requirement, however, once a broker is close to attaining the minimum level of acceptances, could provide an incentive for the broker to achieve the remaining number of acceptances. This structure therefore may result in brokers imposing unacceptable pressure on their clients to accept an offer under a bid. Therefore, the Panel considers that broker handling fee offers should generally not be subject to such a requirement.

Disclosure

Disclosure by the bidder

31. The Panel requires that a broker handling fee offer should be disclosed:
 - (a) in the original bidder's statement, if the decision to make the offer is made in time for it be to be included in that document; or
 - (b) in a supplementary bidder's statement and in an announcement to the respective home exchanges of the bidder and target (if they are listed), if the decision to make the offer is made at any other time.
32. In both cases, the full terms of the broker handling fee offer should be disclosed, including the offer period for the fee.

Disclosure by the broker

33. As previously mentioned, the Corporations Act imposes certain obligations on brokers to disclose to their clients about any benefit that they will receive in connection with any advice they may give to the client. The broker is required to disclose this information at the time of giving the advice.
34. The Panel's policy on broker handling fees is partly based on the expectation that brokers will comply with their disclosure obligations in respect of broker handling fees. The Panel expects that disclosure will be made in a way that is meaningful, and not merely constitute a blanket disclosure about the possibility

of receiving benefits in relation to transactions generally at the beginning of a client relationship. Disclosure should be made at the time the broker recommends acceptance or rejection of the fee and certainly *before* the client accepts the takeover offer.

Remedies

35. The Panel has wide powers to make orders under section 657D if it finds that a broker handling fee gives rise to unacceptable circumstances. The orders it may make include (but are not limited to):
- (a) giving shareholders who accepted after the broker handling fee offer was made the right to withdraw their acceptances;
 - (b) canceling contracts resulting from acceptances after the broker handling fee offer was made;
 - (c) restraining payment by the bidder of the broker handling fee; and
 - (d) varying the terms of the broker handling fee offer.
36. In accordance with subsection 657D(2), any orders made by the Panel will be aimed at:
- (a) protecting the rights or interests of any person affected by the circumstances, including the target shareholders and actual or potential rival bidders; and
 - (b) ensuring that a takeover proceeds (as far as possible) in a way that it would have proceeded if the circumstances had not occurred.

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