

PCP 2012/1 5 July 2012

THE TAKEOVER PANEL

**CONSULTATION PAPER ISSUED BY
THE CODE COMMITTEE OF THE PANEL**

**PROFIT FORECASTS, QUANTIFIED
FINANCIAL BENEFITS STATEMENTS,
MATERIAL CHANGES IN INFORMATION AND
OTHER AMENDMENTS TO THE TAKEOVER CODE**

The Code Committee of the Takeover Panel (the “**Panel**”) invites comments on this Public Consultation Paper. Comments should reach the Code Committee by 28 September 2012.

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All responses to formal consultation will be made available for public inspection and published on the Panel’s website at www.thetakeoverpanel.org.uk, unless the respondent explicitly requests otherwise. A standard confidentiality statement in an e-mail message will not be regarded as a request for non-disclosure. Personal information, such as telephone numbers or e-mail addresses, will not be edited from responses.

Unless the context otherwise requires, words and expressions defined in the Takeover Code have the same meanings when used in this Public Consultation Paper.

CONTENTS

	Page
1. Introduction	1
Part A: Profit forecasts and quantified financial benefits statements	
2. Definitions	14
3. Profit forecasts and quantified financial benefits statements published during an offer period and profit forecasts published following an approach with regard to a possible offer	19
4. Profit forecasts published before an approach with regard to a possible offer	24
5. Ordinary course profit forecasts	28
6. Profit forecasts for future financial periods	30
7. Management buy-outs and offers by controllers	35
8. Profit ceilings	37
9. Where the offer is not material for the offeror	38
10. Compilation of profit forecasts and quantified financial benefits statements	41
11. Assumptions	42
12. Profit estimates	44
13. Quantified financial benefits statements	49
14. Profit forecast for part of a business	56
15. Profit forecasts published by persons other than the party to the offer to whose profits the forecast relates	57
Part B: Material changes in information	
16. Proposed new Rule 27	66

Part C:	Other amendments in relation to documents published by an offeror and the offeree company	
17.	Proposed amendments to the current Rule 28.4	77
18.	Documents on display	79
Part D:	Assessment of the impact of the proposals	
19.	Proportionality, benefits and cost implications	82
APPENDIX A	Summary of the application of the principal provisions of the proposed new Rule 28	86
APPENDIX B	Current Note 9 on Rule 19.1, Rule 27 and Rule 28	87
APPENDIX C	Respondents to PCP 2010/1 (excluding those who submitted comments on a confidential basis)	95
APPENDIX D	Proposed amendments to the Code	96
APPENDIX E	List of questions	116

1. Introduction

(a) *Summary of proposals*

1.1 In this Public Consultation Paper (“**PCP**”), the Code Committee of the Takeover Panel (the “**Code Committee**”) proposes amendments to the provisions of the Takeover Code (the “**Code**”) which relate to profit forecasts, merger benefits statements and material changes in information previously published during an offer period.

1.2 In summary, the Code Committee is proposing:

- (a) the introduction of a revised Rule 28 in relation to profit forecasts, with the aims of:
 - (i) applying more proportionate requirements than at present to certain profit forecasts, including, in particular, profit forecasts which have been published before an approach with regard to a possible offer has been made;
 - (ii) adopting a more logical framework for the regulation of profit forecasts than the current Rule 28; and
 - (iii) achieving a greater consistency with other legislation, standards and guidance than is currently the case;
- (b) the incorporation into Rule 28 of the current requirements of Note 9 on Rule 19.1 in relation to merger benefits statements (which would be renamed as “quantified financial benefits statements”) and, at the same time:

- (i) extending the application of those provisions to statements made by the offeree company with regard to measures providing cost saving or other financial benefits that it proposes to implement if the offer does not succeed (in addition to the current application of those provisions to statements made by the parties to an offer with regard to the financial benefits expected to arise if the offer is successful); and
 - (ii) adopting more detailed requirements than at present; and
- (c) the amendment of Rule 27 in relation to the disclosure of material changes in information published in an offer document or an offeree board circular, so as to require an offeror and the offeree company to disclose any such material changes promptly after their occurrence, and not only in the event that a subsequent document is published.

A table summarising the application of the principal provisions of the proposed new Rule 28 is set out in Appendix A.

(b) Summary of current provisions of the Code

(i) Current requirements in relation to profit forecasts

1.3 Rule 28 requires (broadly) that, if an offeree company or offeror (other than an offeror offering solely cash) publishes a profit forecast during an offer period, then:

- (a) the assumptions upon which the profit forecast is based must be stated; and

- (b) the party concerned must obtain and publish reports on the profit forecast from both (i) reporting accountants, and (ii) its financial advisers.
- 1.4 Rule 28 further provides that, if an offeree company or offeror (other than a cash offeror) has published a profit forecast prior to the commencement of the offer period, that profit forecast must be repeated in the offer document or offeree board circular (as the case may be). The repeated profit forecast is, in effect, treated as if it had first been published during the offer period and the requirements for assumptions and reports described in the preceding paragraph apply in the same way.
- 1.5 The requirements of Rule 28 apply regardless of whether a profit forecast relates to the current financial year or to a subsequent financial period. However, Rule 28.3(e) does acknowledge that, exceptionally, it may not be possible for a previously published forecast to be reported on.
- 1.6 For ease of reference, the current Rule 28 is set out in Appendix B.
- (ii) *Current requirements in relation to merger benefits statements*
- 1.7 In certain circumstances, Note 9 on Rule 19.1 imposes specific requirements (in addition to the general requirements of Rule 19.1) where a party to an offer makes a quantified statement about the expected financial benefits of a proposed takeover or merger (for example, a statement by an offeror that it would expect the offeree company to contribute an additional £x million of profit post acquisition). The additional requirements are that the party to the offer must publish:
- “(a) the bases of the belief (including sources of information) supporting the statement;*

(b) *reports by financial advisers and accountants that the statement has been made with due care and consideration;*

(c) *an analysis and explanation of the constituent elements sufficient to enable the relative importance of these elements to be understood; and*

(d) *a base figure for any comparison drawn.”.*

1.8 Note 9 on Rule 19.1 provides that these requirements apply only in a securities exchange offer, and that they will not normally apply in the case of a securities exchange offer which is recommended by the board of the offeree company unless a competing offer is made and the merger benefits statement is subsequently repeated by the party which made it or the statement otherwise becomes a material issue.

1.9 For ease of reference, the current Note 9 on Rule 19.1 is set out in Appendix B.

(iii) *Current requirements in relation to material changes in information*

1.10 Rule 27 requires that any material change in information published in an offer document or an offeree board circular must be disclosed in the event that a party to the offer publishes a subsequent document. In this event, Rule 27.1 requires that:

(a) details of the material change(s) must be disclosed in the subsequent document (and if there have been no such changes, this must be stated). This requirement is repeated in Note 1 on Rule 23.1; and

(b) in relation to certain specific matters, as set out in paragraphs (a) to (h) of Rule 27.1, those matters must be “updated”.

1.11 For ease of reference, the current Rule 27 is set out in Appendix B.

(c) *PCP 2010/1*

(i) *Background*

1.12 On 5 March 2010, the Code Committee published PCP 2010/1 (“Profit forecasts, asset valuations and merger benefits statements”), in which it proposed a number of amendments to the Code “with a view to improving the coherence and consistency of the approach in the Code towards the requirement for certain financial information ... to be accompanied by a report from one or more third parties”.

1.13 The principal proposed amendments were summarised in paragraph 1.2 of PCP 2010/1, as follows:

- “(i) the relaxation, normally in the context of a recommended offer, of the reporting requirements in relation to a statement which would be treated as a profit forecast under Rule 28 or regarded as an asset valuation given in connection with an offer under Rule 29 but which is in fact published in the “normal course” of a company’s business and not in connection with the offer and which is neither used in the debate on the offer nor otherwise a material issue ... ;
- (ii) the extension of the exemptions currently included in Rule 28.6(c) in relation to certain unaudited interim and preliminary results which comply with the UKLA Rules to, in certain circumstances, profits reported in interim management statements and unaudited interim and preliminary results reported by companies traded on the AIM and PLUS markets ... ;
- (iii) a requirement for reports to be provided when a profit forecast is made for a part of a business ... ; and
- (iv) the extension of the requirements in Note [9] on Rule 19.1, relating to merger benefits statements, to other quantified statements of the potential financial effects of a course of action which is put forward in the course of an offer, such as cost savings published by the offeree company as part of its defence, and an extension of the circumstances in which reports on such statements would be required”.

1.14 In addition, PCP 2010/1 included a number of proposals for technical and drafting changes to Rules 28 and 29 to improve their consistency and clarity, to bring the Rules up to date and, in some cases, to codify existing practice.

(ii) *Responses to PCP 2010/1*

1.15 Comments on the consultation questions in PCP 2010/1 were received from 12 respondents. The ten respondents who submitted comments on a non-confidential basis are listed in Appendix C. Six responses were from respondents from, or related to, the accountancy profession. The other six respondents represented various other constituencies.

1.16 Broadly, the respondents to PCP 2010/1 welcomed the proposals put forward and endorsed their general purpose and direction, although several respondents considered that the proposals did not go far enough in certain respects. One respondent considered that the requirements for reports to be obtained on profit forecasts might be removed in their entirety and that this would help to “level the playing field” for all parties to an offer. In addition, some of the respondents suggested other areas, not covered in PCP 2010/1, where Rule 28 might be modernised or extended so as to give clearer guidance to reporting accountants. Certain of those respondents also suggested ways in which Rule 28 could be more logically organised.

1.17 The Code Committee understands that the Panel Executive (the “**Executive**”) subsequently met a number of the respondents to PCP 2010/1 in order to discuss the issues which they had raised. However, the process in relation to PCP 2010/1 was then put on hold following the initiation by the Code Committee in June 2010 of its review of certain aspects of the regulation of takeover bids following the takeover of Cadbury plc by Kraft Foods Inc.

1.18 Given that the proposals in relation to profit forecasts and merger benefits statements have been superseded by the proposals put forward in this PCP, the Code Committee is not publishing a formal Response Statement to PCP 2010/1. However, the points of substance raised by respondents can be summarised as follows:

- (a) that the proposed ability for the Panel to withdraw any dispensation from the requirement to obtain reports on a profit forecast or “quantified effects statement” in the event of a change of circumstances (for example, if a profit forecast was subsequently used in the debate on the merits of the offer, or if an expected recommendation of the offer by the board of the offeree company was not obtained) would reduce the value of any dispensation, since a party might consider it necessary to commission the work necessary to meet the reporting requirements should the dispensation subsequently be withdrawn;
- (b) in relation to the proposal that a “normal course” profit forecast would have to have been made more than one month prior to the commencement of the offer period in order to qualify for a potential dispensation from the reporting requirements, that a period of one month was too short and should be extended (or that the Panel should apply its own judgement as to whether an offer could reasonably be regarded as having been in contemplation at the relevant time);
- (c) that various provisions of Rule 28 should be brought more into line with, amongst other things: the EU Prospectus Directive; Commission Regulation (EC) No 809/2004 implementing the Prospectus Directive (the “**PD Regulation**”); the Prospectus Rules and Listing Rules of the Financial Services Authority (the “**FSA**”); the European Securities and Markets Authority’s recommendations for the consistent implementation of the PD Regulation (the “**ESMA recommendations**”); the guidance

entitled “Prospective Financial Information: Guidance for UK directors” published by the Institute of Chartered Accountants in England and Wales (the “**ICAEW Guidance**”); the Investment Reporting Standards Applicable to Public Reporting Engagements on Profit Forecasts (“**SIR 3000**”) published by the Auditing Practices Board of the Financial Reporting Council (the “**APB**”); and the APB’s Ethical Standards for Reporting Accountants;

- (d) that the proposed application of Rule 28 to a profit forecast for part of a business should be subject to a materiality threshold (or that the Code should expressly envisage that a dispensation might be available on grounds of immateriality);
- (e) that the requirements in relation to the contents of quantified effects statements should be made more detailed; and
- (f) that further consideration might be given to the proposed requirement for reports to be obtained when a party to an offer makes reference to profit forecasts by analysts or other third parties, and to the treatment of “consensus” profit forecasts.

(iii) The Code Committee’s conclusions

1.19 Having considered the various suggestions made by the respondents to PCP 2010/1, and following a review of the relevant provisions of the Code by the Executive on the Code Committee’s behalf, which review included informal consultation by the Executive with a number of interested parties, the Code Committee believes that:

- (a) Rule 28 should be retained, i.e. it should not (as proposed by one respondent) be deleted. However, the Code Committee believes that

Rule 28 should be restructured into a more logical framework and that various amendments should be made in order to make it more consistent with the legislation, standards and guidance referred to in paragraph 1.18(c) above;

- (b) the existing requirements of Rule 28 should generally continue to apply to profit forecasts published during an offer period and to profit forecasts published following an approach with regard to a possible offer being made;
- (c) Rule 28 should no longer require reports to be obtained from reporting accountants and financial advisers where a profit forecast was published before an approach with regard to a possible offer was made;
- (d) Rule 28 should provide the Panel with the explicit ability to grant a dispensation from its requirements in circumstances where:
 - (i) a profit forecast is published by a party to an offer in the ordinary course of its communications with its shareholders and the market and in accordance with an established practice; or
 - (ii) the profit forecast published by a party to the offer relates to a period ending more than 15 months from the date on which it is first published; or
 - (iii) the offer could not result in the issue of securities representing 10% or more of the enlarged equity share capital of the offeror and, in addition, the application of the Rule would be disproportionate; or

- (iv) a profit forecast states a maximum figure for the likely level of profits for a particular period;
- (e) if, during an offer period, a party to an offer publishes or repeats a profit forecast for a future financial year, Rule 28 should provide that it must also publish corresponding profit forecasts for the current financial year and any intervening financial years. Where, during an offer period, this leads to the publication for the first time of a new profit forecast for the current financial year or any intervening financial year, the Code Committee believes that Rule 28 should apply as usual to that new profit forecast. However, as a result of the proposed ability for the Panel to grant a dispensation for profit forecasts for periods ending more than 15 months from the date on which the forecast is first published, a party to the offer would be able to publish long term profit forecasts without triggering the reporting requirements of Rule 28;
- (f) except with the consent of the Panel, the reporting requirements of Rule 28 should always apply where the offer is a management buy-out or similar transaction or is being made by the existing controller or group of controllers;
- (g) Rule 28 should incorporate more detailed requirements than at present in relation to “quantified financial benefits statements”;
- (h) Rule 28 should apply to a profit forecast which relates to a part of a business of a party to an offer; and
- (i) the approach proposed in PCP 2010/1 to profit forecasts published by third parties, including consensus forecasts, should be modified in certain respects.

These issues are addressed in Part A of this PCP.

(d) *Rule 27 and material changes in information*

1.20 In paragraph 3.11 of Response Statement 2011/1, the Code Committee stated as follows:

“The Code Committee recognises that an offeror may wish to be provided with:

- (a) information regarding the satisfaction of, or its ability to waive, the conditions to its offer, including a confirmation that no material adverse change has occurred in relation to the offeree company; and
- (b) notification of any material changes in the conduct of the offeree company’s business since the announcement of its offer.

Indeed, in the context of a recommended offer, the Code Committee would expect the offeree company normally to provide the offeror with any such information or notification, regardless of whether it had entered into an agreement to do so. The Code Committee does not believe that the list in Rule 21.2(b) should be expanded so as to permit the offeree company to enter into an agreement to provide such information or notification. However, the Code Committee intends to bring forward in due course proposals to amend Rule 27 so as to require the parties to an offer to disclose any material changes to information published during the offer period promptly and on a continuing basis, and not only upon the publication of a document sent to shareholders of the offeree company and persons with information rights.”.

1.21 Further to this commitment, the Code Committee has reviewed the operation of Rule 27 from first principles. In particular, the Code Committee has considered three principal issues, as follows:

- (a) in what circumstances should a party to an offer be required to disclose details of material changes to information which it has published previously;
- (b) in the event that a party to an offer is required to disclose details of material changes to information it has published previously, how should

those details be disclosed – e.g. by means of an announcement and/or by means of a document; and

- (c) in the event that a further document is published by a party to an offer, either voluntarily or because this is required by the Code, to what extent should the party to the offer be required to update information which it has published previously?

These issues are addressed in Part B of this PCP.

(e) *Other amendments*

- 1.22 Various other consequential amendments, and minor issues with regard to documents published by an offeror and the board of the offeree company, are addressed in Part C of this PCP.

(f) *Rule 29 and asset valuations*

- 1.23 In addition to the matters referred to above, PCP 2010/1 also included certain proposed amendments to Rule 29, which requires a valuation of assets given in connection with an offer to be supported by the opinion of a named independent valuer. Broadly, the proposed amendments to Rule 29 were designed to be consistent with certain of the amendments to Rule 28 that were proposed in PCP 2010/1. The Code Committee has asked the Executive to undertake a more comprehensive review of the purpose and operation of Rule 29 following the finalisation of the amendments to Rule 28 proposed in this PCP. Once it has had an opportunity to discuss that review with the Executive, the Code Committee intends to publish a separate consultation on proposed amendments to Rule 29.

(g) *Proportionality, benefits and cost implications*

1.24 An assessment of the impact of the proposals is set out in Part D of this PCP.

(h) *Invitation to comment*

1.25 The Code Committee invites comments on the amendments to the Code proposed in this PCP. Comments should reach the Code Committee by 28 September 2012 and should be sent in the manner set out at the beginning of this PCP. The full text of the proposed amendments is set out in Appendix D. Underlining indicates proposed new text and striking-through indicates text that is proposed to be deleted. However, since the Code Committee is proposing to delete in their entirety the current Note 9 on Rule 19.1, Rule 27 and Rule 28, and since they are set out in full in Appendix B, those provisions of the Code are not repeated in “strike-through” text in Appendix D.

1.26 For ease of reference, a list of the questions that are put for consultation is set out in Appendix E.

(i) *Other consultations*

1.27 The Code Committee has today also published PCP 2012/2 (“Pension scheme trustee issues”) and PCP 2012/3 (“Companies subject to the Takeover Code”). The amendments to the Code proposed in this PCP take into account the amendments proposed in PCP 2012/2. The amendments to the Code proposed in PCP 2012/3 do not affect the amendments proposed in this PCP.

A: PROFIT FORECASTS AND QUANTIFIED FINANCIAL BENEFITS STATEMENTS

2. Definitions

(a) “Profit forecasts” and “profit estimates”

2.1 At present, the Code does not define what a “profit forecast” is. Instead, Rule 28.6 (“Statements which will be treated as a profit forecast”) describes, and provides examples of, statements which will and will not normally be treated as profit forecasts. For example, the third sentence of Rule 28.6(a), which has remained substantively unchanged since it first appeared in a Practice Note in 1970, provides as follows:

“Whenever a form of words puts a floor under, or a ceiling on, the likely profits of a particular period or contains the data necessary to calculate an approximate figure for future profits, it will be treated by the Panel as a profit forecast ...”,

and the first sentence of Rule 28.6(a) provides as follows:

“Even when no particular figure is mentioned or even if the word “profit” is not used, certain forms of words may constitute a profit forecast, particularly when considered in context.”

These two sentences closely resemble the definition of “profit forecast” in the PD Regulation, which has been copied into the Glossary of the FSA Handbook, which provides that a profit forecast is:

“a form of words which expressly states or by implication indicates a figure or a minimum or maximum figure for the likely level of profits or losses for the current financial period and/or financial periods subsequent to that period, or contains data from which a calculation of such a figure for future profits or losses may be made, even if no particular figure is mentioned and the word “profit” is not used.”

2.2 As regards “profit estimates”, Rule 28.6(b) provides that:

“An estimate of profit for a period which has already expired should be treated as a profit forecast.”,

whereas the PD Regulation and the FSA Handbook include a separate definition of a “profit estimate”, as follows:

“A profit forecast for a financial period which has expired and for which results have not yet been published.”.

2.3 As indicated in section 1 above, the Code Committee considers that Rule 28 should be restructured and made more consistent with other rules and guidance in relation to profit forecasts. As was suggested by certain respondents to PCP 2010/1, the Code Committee considers that this should include introducing into the Code new definitions of “profit forecast” and “profit estimate”, consistent with (although not identical to) the definitions of those terms which are included in the PD Regulation and the FSA Handbook.

2.4 The Code Committee therefore proposes to introduce new definitions of “profit forecast” and “profit estimate” into the Definitions Section of the Code, as follows:

“Profit forecast

A profit forecast is a form of words which expressly states, or by implication indicates, a figure, or a minimum or maximum figure, for the likely level of profits or losses for a particular period, or contains data from which a calculation of such a figure for profits or losses may be made, even if no particular figure is mentioned and the word “profit” is not used.”; and

“Profit estimate

A profit estimate is a profit forecast for a period which has expired and for which audited results have not yet been published.”.

- 2.5 The Code Committee considers that those provisions of Rule 28.6 which provide examples of statements which may constitute profit forecasts should, in effect, be deleted, on the basis that they are either statements of the obvious or examples of points that are rarely relevant in practice. Separately, Rule 28.6(c), which addresses the question of when profit estimates should be exempted from the reporting requirements of Rule 28, is considered in section 12 below.
- 2.6 In addition, the Code Committee considers that a party to an offer should not be able to avoid the requirements of Rule 28 by, for example, describing a statement in relation to future profits as a “target” and making a statement that the target does not constitute a forecast of future profits. The Code Committee believes that the Code should expressly provide that a “target” for profits (or losses) will normally be treated as a profit forecast.
- 2.7 Accordingly, the Code Committee proposes to introduce a Note on the new definition of “profit forecast”, as follows:

“NOTE ON PROFIT FORECAST

A statement in relation to a target for profits (or losses) will normally be treated as a profit forecast.”.

- The Code Committee notes that a company’s long-term incentive plan will often set targets for the directors or employees being incentivised with respect to the company’s profits or earnings per share and does not consider that such targets should fall to be treated as profit forecasts.
- 2.8 The Code Committee recognises that, in most respects, the proposed new definition of “profit forecast” will not provide greater specificity than at present as to whether or not a particular statement would be likely to be regarded by the Panel as a profit forecast. However, the Code Committee believes it is important

that, as is currently the case with Rule 28.6(a), the definition should be drafted broadly so as to cover any statement which contains data from which a calculation of a figure for future profits or losses may be made, including any forecast of, for example: earnings per share; earnings before interest, tax, depreciation and amortisation (EBITDA); operating profit; cash earnings; or other similar financial measures used in the market to assess a company's value.

(b) “Quantified financial benefits statements”

2.9 In PCP 2010/1, the Code Committee proposed the introduction of a new definition of “quantified effects statement”. This was in the context of the proposals to broaden the scope of Note 9 on Rule 19.1 (the amended version of which, it was proposed, should be moved to Rule 28) so as to cover not only “merger benefits” statements, but also other statements, such as statements in relation to cost savings measures which the offeree company intended to put in place in the event that it remained independent. The Code Committee's revised proposals in relation to such statements are set out in section 13 below.

2.10 The Code Committee now proposes that the definition put forward in PCP 2010/1 should be recast as a definition of a “quantified financial benefits statement”, as follows:

“Quantified financial benefits statement

A quantified financial benefits statement is either:

(a) a statement by an offeror or the offeree company quantifying any financial benefits expected to arise from the proposed transaction if the offer or possible offer is successful; or

(b) a statement by the offeree company quantifying any financial benefits expected to arise from cost saving measures and/or an alternative transaction proposed to be implemented if the offer or possible offer is withdrawn or lapses.”.

2.11 In addition, the Code Committee is proposing minor amendments to Note 1 on Rule 32.1 and to paragraph (o) of Section 4 of Appendix 1 to the Code, so as to refer to the new definition, as set out in Appendix D.

(c) ***“Cash offerors”***

2.12 Rule 28.3(a) provides as follows:

“A forecast made by an offeror offering solely cash need not be reported on. With the consent of the Panel, this exemption may be extended to an offeror offering a non-convertible debt instrument.”.

2.13 The Code Committee considers that the revised Rule 28 proposed in this PCP should similarly not apply to profit forecasts and quantified financial benefits statements which are published by an offeror offering solely cash. A “cash offeror” is currently defined in the Definitions Section of the Code and the Code Committee believes that an offeror offering solely cash should be referred to in the revised Rule 28 by means of that defined term. In order to make clear that, consistent with the current Rule 28.3(c), it would normally be appropriate to treat an offeror which is offering a non-convertible debt instrument as a cash offeror, the Code Committee is proposing to amend the definition of “cash offeror”, as follows:

“Cash offeror

A cash offeror is an offeror (or potential offeror) which has announced, or in respect of which the offeree company has announced, that its offer is, or is likely to be, solely in cash. A non-convertible debt instrument will normally be treated as cash.”.

(d) ***“Offer period”***

2.14 A number of the Rules discussed in this PCP refer to an “offer period”, which is a defined term in the Definitions Section of the Code.

- 2.15 Prior to 19 September 2011, when various amendments to the Code came into effect, the definition of an “offer period” provided that where a contractual offer was made for the offeree company, the offer period would always run until the first closing date of the offer, even if the offer was unconditional from the outset or had become or been declared unconditional as to acceptances prior to that date. This aspect of the definition of “offer period” was unintentionally deleted on 19 September 2011 and the Code Committee is proposing to reintroduce it by means of the introduction of a new Note 3 on the definition of “offer period”, as follows:

“3. First closing date

Where an offer is unconditional from the outset, or becomes or is declared unconditional as to acceptances prior to the first closing date, the offer period will nevertheless continue until the first closing date.”.

Q1 Do you have any comments on the proposed new definitions of “profit forecast”, “profit estimate” and “quantified financial benefits statement” and the proposed amendments of the definitions of “cash offeror” and “offer period”?

3. Profit forecasts and quantified financial benefits statements published during an offer period and profit forecasts published following an approach with regard to a possible offer

3.1 Notwithstanding the requirements of Rule 19.1, which provides that:

“Each document or advertisement published, or statement made, during the course of an offer must be prepared with the highest standards of care and accuracy and the information given must be adequately and fairly presented”,

additional requirements are, in certain circumstances, imposed by, respectively, Rule 28 and Note 9 on Rule 19.1 when a party to an offer (other than a cash offeror) publishes a profit forecast or a statement as to expected financial benefits.

3.2 In the case of a profit forecast, the Code has imposed these additional requirements in view of:

- (a) the particular significance of profit forecasts to offeree company shareholders in reaching their decisions on an offer; and
- (b) the risk that the circumstances of the offer might result in the likely level of profits being over-stated or in profit forecasts being made without due care.

The imposition of additional requirements with respect to a statement as to expected financial benefits is similarly justifiable, given the significance of such a statement and the risk of the benefits being over-stated.

3.3 Notwithstanding its view, as explained later in this PCP, that the additional requirements currently imposed by the Code with respect to profit forecasts might be made less stringent in certain circumstances, the Code Committee believes that the reasons given in paragraph 3.2 continue to provide valid justification for the Code generally imposing additional requirements with respect to profit forecasts first published during an offer period and with respect to quantified statements of expected financial benefits. Such forecasts or statements are likely to have been made for a reason related to the offer or possible offer and, even where this is not the case, will have been made in the knowledge of its existence. The Code Committee believes that, given the significance of such statements in the context of the offer, the additional requirements represent a proportionate means of ensuring that they have been prepared to an appropriate standard.

3.4 Accordingly, the Code Committee believes that, if a party to an offer (other than a cash offeror) first publishes a profit forecast or a quantified financial benefits

statement during an offer period, the document or announcement in which the forecast or statement is first published should include:

- (a) the assumptions on which the profit forecast or quantified financial benefits statement is based (see section 11 below);
- (b) a report from reporting accountants as to the proper compilation of the forecast or statement and as to the basis of accounting used; and
- (c) a report from its financial advisers confirming that, in their opinion, the forecast or statement has been prepared with due care and consideration.

3.5 In addition, the Code Committee considers that the concerns with regard to a profit forecast being over-stated will be relevant where the offeree company or an offeror has published a profit forecast before an offer period commences but following:

- (a) an approach by a potential offeror to the offeree company with regard to a possible offer; or, potentially
- (b) the first active consideration of a possible offer for the offeree company (in the case of an offeror).

The Code Committee therefore proposes that the additional requirements which would apply with respect to profit forecasts first published during the offer period should also apply with respect to profit forecasts published prior to the offer period but after an approach has been made and, where the Panel considers it appropriate, after the first active consideration of a possible offer by an offeror. However, as no offer period will yet have commenced, it would clearly be inappropriate for the additional requirements imposed to be complied with in the document or announcement in which the forecast was first published. The Code

Committee therefore considers that, as is currently required under Rule 28.3(d), the relevant party to the offer should be required to repeat the profit forecast in the offer document or offeree board circular (as appropriate) and to include in that document the assumptions on which the profit forecast was based and the reports from the reporting accountants and financial advisers.

- 3.6 The Code Committee recognises that it might not always be easy for the Panel to judge the exact point in time at which an offeror might be said to have “first actively considered” an offer. However, the Executive is currently required to make such a judgement in deciding whether a potential offeror has triggered a requirement to make an announcement under Rule 2.2(d). The Code Committee notes that, in Practice Statement No. 20, the Executive lists the factors to be taken into account in determining whether an offer has been “first actively considered” for the purposes of Rule 2.2 as including whether:

- “(a) the possible offer has been considered by the board, investment committee or senior management of the offeror;
- (b) work is being undertaken by external advisers; and
- (c) external parties, such as potential providers of finance (whether equity or debt), shareholders in the offeror or the offeree company, pension fund trustees, potential management team candidates, significant customers of, or suppliers to, the offeree company or potential purchasers of assets, have been approached.”.

- 3.7 In the light of the above, the Code Committee proposes to introduce a new Rule 28.1(a), and a new Note 1 on Rule 28.1 as follows:

**“28.1 REQUIREMENTS FOR PROFIT FORECASTS AND
QUANTIFIED FINANCIAL BENEFITS STATEMENTS**

- (a) Except with the consent of the Panel, and subject to Rule 28.4, if, during an offer period (or in an announcement which commences an offer period), a party to an offer (other than a cash offeror) publishes a profit forecast or a quantified financial benefits statement,**

the document or announcement in which the profit forecast or the quantified financial benefits statement is first published must include:

(i) the assumptions on which the profit forecast or the quantified financial benefits statement is based (see Rule 28.3);

(ii) a report from reporting accountants stating that, in their opinion, the profit forecast or the quantified financial benefits statement has been properly compiled on the basis stated and that the basis of accounting used is consistent with the accounting policies of the party to the offer; and

(iii) a report from its financial advisers stating that, in their opinion, the profit forecast or the quantified financial benefits statement has been prepared with due care and consideration.

(b) Except with the consent of the Panel, and subject to Rule 28.4, if a party to an offer (other than a cash offeror) has published a profit forecast prior to the commencement of an offer period but following an approach by or on behalf of an offeror to the offeree company with regard to a possible offer, the offer document or offeree board circular (as appropriate) must repeat the profit forecast and must include the assumptions and reports described in paragraphs (i) to (iii) of Rule 28.1(a).

...

NOTES ON RULE 28.1

1. Profit forecasts published following the first active consideration of a possible offer

If an offeror published a profit forecast prior to the commencement of the offer period but following the first active consideration of a possible offer, the Panel may apply Rule 28.1(b) to that profit forecast.”

Q2 Do you agree that the requirements for assumptions to be stated and for third party reports to be obtained should be retained for profit forecasts and quantified financial benefits statements which are first published during an offer period? Do you have any comments on the proposed new Rule 28.1(a)?

Q3 Do you agree that the requirements for assumptions to be stated and for third party reports to be obtained should be retained for profit forecasts which have been published following an approach or, in appropriate circumstances, the first active consideration of a possible offer? Do you have any comments on the proposed new Rule 28.1(b) and Note 1 on Rule 28.1?

4. Profit forecasts published before an approach with regard to a possible offer

4.1 As mentioned in section 3 above, Rule 28.3(d) currently requires any outstanding profit forecast published by a party to an offer (other than a cash offeror) before the commencement of the offer period to be repeated and reported on in the offer document or offeree board circular (as appropriate).

4.2 The Code Committee is concerned that, given the perceived difficulties of obtaining reports on pre-offer period profit forecasts, the current requirements of the Code may have the effect, in circumstances where there is no reason to believe that an offer is in contemplation, of:

- (a) deterring companies from publishing forward-looking guidance on future expected profits, which guidance shareholders and other market participants might otherwise find useful (and which is commonly provided in various overseas jurisdictions); or
- (b) encouraging companies, which would otherwise wish to publish a profit forecast, to give forward-looking guidance using language intended to circumvent the requirements of Rule 28.

Given that a profit forecast published prior to a potential offeror having approached the offeree company with regard to a possible offer is highly unlikely to have been influenced by the possibility of a future offer, the Code Committee believes that continuing to require reports to be obtained on such a profit forecast would be disproportionate.

4.3 The Code Committee therefore considered whether such profit forecasts should be excluded entirely from the scope of Rule 28 but rejected this option, on the basis that an outstanding profit forecast is likely to be a statement on which shareholders and other market participants will place particular reliance in the

context of an offer. Therefore, whilst the current reporting requirements might be regarded as disproportionate, the Code Committee considers that the Code should nevertheless continue to include specific provisions with regard to outstanding profit forecasts.

4.4 One option considered by the Code Committee was whether an outstanding profit forecast should have to be reported on only if the party in question chose to repeat it in the context of the offer. However, the Code Committee rejected this option on the bases that:

- (a) the profit forecast would be on the public record, and it would be naïve to suggest that, provided that it was not referred to in the context of the offer, shareholders and other market participants would simply ignore it;
- (b) difficult issues would be likely to arise around the question of whether a profit forecast had been “repeated”. For example, a profit forecast made in an annual or interim results statement might be incorporated by reference into the offer document; and
- (c) if, say, an offeree company chose not to repeat (and obtain reports on) a profit forecast, this might attract adverse comment from the offeror, notwithstanding that the directors of the offeree company still considered the profit forecast to be achievable. In addition, the offeror might make arguments about the value of the offer which related to that profit forecast but the offeree company’s ability to respond would be restricted. In order not to be put into such a position, companies might therefore refrain from publishing profit forecasts outside an offer period. If this were to be the case, any removal from Rule 28 of the requirement to repeat an outstanding profit forecast would have, in fact, achieved little.

- 4.5 On balance, the Code Committee considers that Rule 28 should be amended so that, where a profit forecast has been published before an approach has been made by a potential offeror to the offeree company with regard to a possible offer, there will no longer be a requirement to obtain reports from reporting accountants and financial advisers. However, the Code Committee believes that there should be a requirement that the offer document or offeree board circular (as appropriate) should either:
- (a) repeat the profit forecast and include:
 - (i) confirmations by the directors that the profit forecast remains valid and that the basis of accounting is consistent with the company's accounting policies; and
 - (ii) the assumptions upon which the profit forecast was based and details of the basis on which it was compiled; or
 - (b) include a statement by the directors that the profit forecast is no longer valid and an explanation of why that is the case. The Code Committee considers that the fact that the profit forecast was published for a purpose that was unrelated to the offer would not be acceptable as an explanation for its invalidity; or
 - (c) include a new profit forecast for the relevant period (in which case the requirements which apply to profit forecasts published during the offer period, including the requirement to obtain reports from reporting accountants and financial advisers, would apply).
- 4.6 The Code Committee believes that such requirements, which would be similar to those in Chapter 13 of the Listing Rules with regard to a profit forecast published prior to the publication of a "class 1 circular", would represent a more

proportionate approach to outstanding profit forecasts than the current requirements. The Code Committee believes that the proposed requirements would continue to provide an appropriate level of assurance for offeree company shareholders in relation to outstanding profit forecasts, whilst reducing the deterrents from making forward-looking statements which the current reporting requirements in Rule 28 apparently impose on companies to which the Code applies.

- 4.7 The Code Committee therefore proposes to introduce a new Rule 28.1(c), as follows:

“(c) Except with the consent of the Panel, and subject to Rules 28.2 and 28.4, if a party to an offer (other than a cash offeror) has published a profit forecast before an approach was made by or on behalf of an offeror to the offeree company with regard to a possible offer, the offer document or offeree board circular (as appropriate) must:

(i) repeat the profit forecast and include confirmations by the directors that the profit forecast remains valid and that the basis of accounting used is consistent with the accounting policies of the party to the offer and the assumptions on which the profit forecast was based (see Rule 28.3); or

(ii) include a statement by the directors that that profit forecast is no longer valid and an explanation of why that is the case; or

(iii) include a new profit forecast for the relevant period, in which case the provisions of Rule 28.1(a) must be complied with.”.

- Q4 Do you agree with the proposed new requirements with regard to an outstanding profit forecast? Do you have any comments on the proposed new Rule 28.1(c)?

5. Ordinary course profit forecasts

- 5.1 As noted in PCP 2010/1, certain companies publish, in the ordinary course of their communications with their shareholders and the market, statements in relation to their likely future financial performance. Such statements, which are usually made in accordance with an established practice, will, in many cases, comprise profit forecasts for the purposes of Rule 28. Under the current requirements of Rule 28, if such an “ordinary course profit forecast” is published during the offer period by the offeree company or an offeror which is offering securities as consideration (a “**paper offeror**”), the relevant party to the offer is required to obtain reports on it from reporting accountants and its financial advisers. Similarly, if an ordinary course profit forecast has been made before the offer period, it will be required to be repeated and reported on in the offer document or offeree board circular (as appropriate).
- 5.2 In PCP 2010/1, it was suggested (broadly) that, in the context of a recommended offer, the Panel might grant a dispensation from the requirements of Rule 28 with respect to an ordinary course profit forecast where the forecast had been made more than one month prior to the commencement of the offer period and where it had not been used in any debate on the merits of the offer (or otherwise become a material issue). Separately, it was proposed that the Panel should have the ability to withdraw any dispensation granted with respect to an ordinary course profit forecast in the event of a change of circumstances, for example, if the forecast were subsequently to be used in the debate on the merits of the offer. The respondents to PCP 2010/1 were generally supportive of the idea of a dispensation being made available for ordinary course profit forecasts. However, a number of the respondents expressed concerns at the proposal that such a dispensation might be withdrawn in the event of a change of circumstances.
- 5.3 The Code Committee notes that a profit forecast which was published before an approach was made by a potential offeror to the offeree company with regard to a

- possible offer would fall under the proposed new Rule 28.1(c) and that the reporting requirements of the current Rule 28 would therefore no longer generally apply to an ordinary course profit forecast published before that time. Instead, the directors of the company concerned would be required either to confirm that the profit forecast remained valid or to explain why it was no longer valid (or, alternatively, they might choose to publish, and obtain reports on, a new profit forecast).
- 5.4 The Code Committee has given further consideration as to how an ordinary course profit forecast published following an approach ought to be treated under Rule 28. Whilst it might be argued that Rule 28 should treat an ordinary course profit forecast no differently from any other profit forecast published during that period (i.e. such that reports would be required to be obtained in accordance with the proposed new Rule 28.1(a) or (b)), it is arguable that the cost of obtaining reports on a forward-looking statement made in the ordinary course of a company's communication with its shareholders, and in accordance with an established practice, would be disproportionate to the benefits of such reports to offeree company shareholders, particularly in a recommended offer and in the absence of competing offerors.
- 5.5 On balance, the Code Committee considers that the Panel should have the express ability to dispense with the requirement under the proposed new Rules 28.1(a) and (b) for reports to be obtained where a party to an offer publishes an ordinary course profit forecast in the period during which the relevant Rule applies. However, the Code Committee considers that the Panel should consent to the disapplication of the reporting requirements only if each of the other parties consents to their disapplication. In addition, even if a dispensation is granted by the Panel, the Code Committee considers that the directors of the company concerned should be required to give details of the assumptions on which the profit forecast is based and to confirm that the basis of accounting used is consistent with the company's accounting policies.

- 5.6 The Code Committee therefore proposes to introduce a new Note 2 on Rule 28.1, as follows:

“2. Ordinary course profit forecasts

Where a party to the offer (other than a cash offeror) publishes, or has published, an ordinary course profit forecast, the Panel may consent to the disapplication of the requirements of Rule 28.1(a) or (b), provided that the other parties to the offer consent to the disapplication of those requirements. Where a dispensation is granted, a confirmation by the directors that the basis of accounting used is consistent with the company’s accounting policies and the assumptions on which the profit forecast is based must nevertheless be included in the document or announcement in which the ordinary course profit forecast is first published (in the case of a dispensation from Rule 28.1(a)) or, as appropriate, in the offer document or offeree board circular (in the case of a dispensation from Rule 28.1(b)). See also Rule 28.2.

An “ordinary course profit forecast” is a profit forecast published by a party to an offer in a forward-looking statement made by that party in the ordinary course of its communication with its shareholders and the market and in accordance with an established practice.”.

- Q5 Do you agree with the proposed ability for the Panel to grant a dispensation from the proposed new Rules 28.1(a) and (b) in relation to ordinary course profit forecasts? Do you have any comments on the proposed new Note 2 on Rule 28.1?**

6. Profit forecasts for future financial periods

(a) Proposed dispensation from the reporting requirements of Rule 28

- 6.1 The requirements of Rule 28 currently apply to a profit forecast by the offeree company or an offeror (other than a cash offeror) for any future period, however distant. However, it is commonly accepted that, given the uncertainties of long-term forecasting, it will often not be possible to obtain reports on a profit forecast for a financial period which extends beyond the short term.

- 6.2 If the proposed new Rule 28.1(c) were to be adopted, the offeree company or a paper offeror would no longer be required to obtain reports on a profit forecast for a future period that it had published prior to an approach by a potential offeror to the offeree company. The directors of the company concerned would instead be required either to confirm that the profit forecast remained valid or to explain why it was no longer valid.
- 6.3 However, under the proposed new Rules 28.1(a) and (b), any profit forecast for a future period published by a party to the offer following the approach would, as is currently the case, be required to be reported on. In addition, under the Note on the proposed new definition of “profit forecast”, a profits target would normally be treated as a profit forecast.
- 6.4 Whilst recognising the significance of profit forecasts to offeree company shareholders, the Code Committee believes that, in many cases, even if it were possible for a long-term profit forecast to be reported on, shareholders and other market participants would be likely to place considerably less reliance on a profit forecast published by a party to the offer in relation to a future financial period than on a profit forecast for the current financial year. Further, the Code Committee considers that it is unsatisfactory that, at present, owing to the fact that it may not be possible to obtain reports on a long-term profit forecast, the board of the offeree company may, in effect, be prevented from publishing a profit forecast for a future financial period as part of its defence against a hostile offer.
- 6.5 The Code Committee believes that a proportionate approach would be to provide the Panel with the express ability to grant a dispensation from the requirement to obtain reports under the proposed new Rules 28.1(a) and (b) where a party to the offer publishes, or has published, a profit forecast in relation to certain future financial periods. If such a dispensation were to be granted, the Code Committee believes that the directors of the company concerned should nevertheless be

required to state the assumptions on which the profit forecast was based and to confirm that the basis of accounting used is consistent with the company's accounting policies.

- 6.6 The Code Committee does not consider that it would be appropriate for the Panel to grant a dispensation from the reporting requirements of the proposed new Rules 28.1(a) and (b) with respect to a profit forecast for all future financial periods. For example, the Code Committee understands that, whereas a forecast made at the beginning of the current financial year with respect to the profits of the next following financial year would almost certainly not be capable of being reported on, a forecast made at the end of the current financial year with respect to the next following financial year normally would be.
- 6.7 The Code Committee recognises that the point in time in the current financial year at which it might become possible to obtain reports with respect to a profit forecast for the next following financial year will vary from case to case. Therefore, the Code Committee proposes to introduce presumptions that:
- (a) a profit forecast for any period ending 15 months or less from the date on which the profit forecast is first published would normally be capable of being reported on (such that a dispensation from the requirements of Rules 28.1(a) and (b) would not normally be available); and
 - (b) a profit forecast for any period ending more than 15 months from the date on which the profit forecast is first published would not normally be capable of being reported on (such that a dispensation from the requirements of Rules 28.1(a) and (b) would normally be available).
- 6.8 The Code Committee therefore proposes to introduce a new Note 3 on Rule 28.1, as follows:

“3. Profit forecasts for future financial periods

The Panel will normally consent to the disapplication of the requirements of Rule 28.1(a) or (b) where a profit forecast published by a party to the offer relates to a period ending more than 15 months from the date on which the profit forecast is, or was, first published. Where a dispensation is granted, a confirmation by the directors that the basis of accounting used is consistent with the company’s accounting policies and the assumptions on which the profit forecast is based must nevertheless be included in the document or announcement in which the profit forecast is first published (in the case of a dispensation from Rule 28.1(a)) or, as appropriate, in the offer document or offeree board circular (in the case of a dispensation from Rule 28.1(b)). See also Rule 28.2.”.

Q6 Do you agree with the proposal for the Panel to be able to grant a dispensation from the proposed new Rules 28.1(a) and (b) in relation to profit forecasts for certain future financial periods? Do you have any comments on the proposed new Note 3 on Rule 28.1?

(b) *Proposed requirement to publish a corresponding profit forecast for the current financial year*

6.9 As a separate matter, the Code Committee considers that a profit forecast for a financial year beyond the current financial year will necessarily be based upon profit forecasts for the current financial year and (if appropriate) for any intervening years. Given this, the Code Committee considers that, where a party to an offer wishes to publish a profit forecast with respect to a future financial year, the party concerned should provide offeree company shareholders with a full sequence of projected profits. The Code Committee would be concerned if the Code were to permit profit forecasts for future financial years to be published (but not reported on) and used as a device to enable shareholders, analysts and other market participants to interpolate a profit forecast for the current financial year, without the party concerned having published (and, where appropriate, having obtained reports on) that interpolated profit forecast.

- 6.10 The Code Committee therefore believes that if, during the period when the proposed new Rules 28.1(a) and (b) apply, a party to the offer publishes a profit forecast for a future financial year for the first time, or if the party is required under the proposed new Rule 28.1(c) to repeat and confirm an outstanding profit forecast for a future financial year, it should be required also to publish corresponding profit forecasts for the current financial year and for any intervening financial years. The Code Committee proposes to introduce a new Rule 28.2 to this effect.
- 6.11 The Code Committee notes that, where the new Rule 28.2 requires the offeree company or paper offeror to publish one or more new profit forecasts for previous corresponding periods, the offeree company or paper offeror will also be required to obtain reports on the new forecast(s) in accordance with the proposed new Rule 28.1(a). However, reports would not have to be obtained where the offeree company or paper offeror had, prior to the commencement of the offer period, published such corresponding profit forecasts since, instead, they could be confirmed by the company's directors under the proposed new Rule 28.1(c). In addition, where any new profit forecast related to a future financial period ending more than 15 months from the date on which the profit forecast was published, the offeree company or paper offeror would normally be able to obtain a dispensation from the requirement to obtain reports in accordance with the proposed new Note 3 on Rule 28.1.
- 6.12 In the light of the above, the Code Committee proposes to introduce a new Rule 28.2, as follows:

**“28.2 REQUIREMENT TO PUBLISH PROFIT FORECAST(S)
FOR INTERVENING FINANCIAL PERIOD(S)**

(a) Except with the consent of the Panel, if, during an offer period (or in an announcement which commences an offer period), a party to an offer (other than a cash offeror) publishes for the first time a profit forecast for a future financial year (or other future period), the

document or announcement in which the profit forecast for that future year (or period) is first published must also include a corresponding profit forecast for the current financial year (or the corresponding current period) and for any intervening financial year (or corresponding future period).

(b) Similarly, where a previously published profit forecast for a future financial year (or other future period) is repeated in an offer document or offeree board circular in accordance with Rule 28.1(b) or Rule 28.1(c)(i), the offer document or offeree board circular (as appropriate) must, except with the consent of the Panel, include a corresponding profit forecast for the current financial year (or the corresponding current period) and for any intervening financial year (or corresponding future period).

(c) If the requirements of Rules 28.2(a) or (b) result in the publication of a new profit forecast, Rule 28 will apply as usual to that new profit forecast.”.

Q7 Do you agree with the proposed requirement to publish corresponding profit forecasts for the current and intervening financial periods where a profit forecast for a future financial period is published? Do you have any comments on the proposed new Rule 28.2?

7. Management buy-outs and offers by controllers

7.1 The Code Committee is concerned that, where an offer is a management buy-out, or where an offeror (together with persons acting in concert with it) has control (as defined in the Code) of the offeree company, there is a greater risk that the directors of the offeree company may seek to influence the outcome of the offer by the use of a profit forecast. For example, prior to the commencement of the offer period, the board of the offeree company might publish a profit forecast indicating that profits for the current financial year are likely to be lower than market expectations (or that the company is likely to make a loss), in order to make a subsequent offer by the executive directors, or the controller of the company, appear more attractive to shareholders.

7.2 The Code Committee considers that Rule 28 should provide that:

- (a) where the offer is a management buy-out or similar transaction, or is being made by the existing controller or controlling group; and
- (b) the offeree company or offeror publishes a profit forecast during the offer period, or has published a profit forecast prior to the commencement of the offer period,

the party concerned should always be required to obtain reports on the profit forecast. In other words, the Code Committee believes that shareholders in the offeree company would not be afforded sufficient protection if, in such circumstances, the directors of the company were permitted to provide confirmations with respect to the profit forecast rather than being required to obtain reports on it.

- 7.3 The Code Committee therefore proposes to introduce a new Note 4 on Rule 28.1, as follows:

“4. Management buy-outs and offers by controllers

Except with the consent of the Panel, where the offer is a management buy-out or similar transaction or is being made by the existing controller or group of controllers, the relevant document or announcement must comply with the requirements of paragraphs (i) to (iii) of Rule 28.1(a), regardless of when the party in question first published the profit forecast.”.

- Q8 Do you agree that reports should always be required to be obtained on a profit forecast where the offer is a management buy-out or is made by the existing controller of the offeree company? Do you have any comments on the proposed new Note 4 on Rule 28.1?**

8. Profit ceilings

8.1 Paragraph 7.3 of PCP 2010/1 stated as follows:

“The Code Committee understands that it is the practice of the Executive to dispense with the requirement in Rule 28.6(a) for a report on a profit ceiling where there is no benefit to the company or the management announcing the profit ceiling. However, in circumstances where making a statement that puts a ceiling on the profits for a period could be seen to be in the interests of management or of controlling shareholders (for example in a management buy-out or an offer for a minority), the Executive will normally require a report. The Code Committee believes that this practice is correct and that [the Code] should accommodate these differing circumstances and formalise a framework where there is no obligation to report on the announcement of a profit ceiling where such a report would serve no useful purpose.”.

The Code Committee went on to propose that the practice described should be reflected in the Code by means of an amendment to Rule 28.6(a) and the introduction of a new Note on Rule 28.6.

8.2 The Code Committee continues to agree with the Executive’s practice with respect to profit ceilings and believes that it should be reflected in the new Rule 28.

8.3 In addition, the Code Committee considers that similar issues may arise in the context of a “whitewash” transaction subject to the requirements of Appendix 1 to the Code where the offeree company publishes, or has published, a profit forecast which gives a profit ceiling and where the person or group of persons which would otherwise be required to make a general offer under Rule 9 as a result of the issue of the new securities is the existing controller of the offeree company or includes one or more of the offeree company’s executive directors.

8.4 The Code Committee therefore proposes to introduce a new Note 5 on Rule 28.1, as follows:

“5. Profit ceilings

Except where the offer is a management buy-out or similar transaction, or is being made by the existing controller or group of controllers, the Panel may grant a dispensation from the requirements of Rule 28 if a profit forecast states a maximum figure for the likely level of profits for a particular period.

The Panel should be consulted where, in the context of a “whitewash” transaction, the “offeree company” publishes, or has published, a profit forecast which states a maximum figure for the likely level of profits for a particular period and the “offeror” is the existing controller of the “offeree company” or a group of persons which includes one or more of the executive directors of the “offeree company”.”.

Q9 Do you have any comments on the proposed new Note 5 on Rule 28.1 with regard to profit ceilings?

9. Where the offer is not material for the offeror

9.1 It is sometimes argued by an offeror in the context of a securities exchange offer that the Panel should grant a dispensation from the requirements of Rule 28 in relation to a profit forecast published by the offeror on the basis that the number of shares that the offeror would be required to issue as a result of the acquisition of the offeree company would not represent a material proportion of its existing share capital.

9.2 The arguments in favour of granting such a dispensation include the following:

- (a) that the risk of an offeror over-stating forecast profits in order to make its shares appear more attractive to offeree company shareholders is low where the number of shares that the offeror would be required to issue in connection with the offer is immaterial;

- (b) that the requirement for the profit forecast to be reported on under Rule 28 might result in the offeror either publishing a lower profit forecast, or not publishing the profit forecast at all; and
 - (c) that the cost to the offeror (which would, by definition, be a relatively large company) of obtaining reports on such a low risk profit forecast, both in terms of financial costs and management time and effort, would be disproportionate.
- 9.3 The arguments in favour of continuing to apply Rule 28 in the usual way include the following:
- (a) that the profit forecast will nevertheless be likely to be regarded as significant information by offeree company shareholders for the purposes of making their decision whether to accept the offer; and
 - (b) that there would nevertheless be a risk that any profit forecast by the offeror would have been published for a reason related to the offer.
- 9.4 By way of indirect analogy, the Code Committee notes that, under the current Rule 28.6(c)(iv), reports are not required to be obtained on profit figures in:
- “unaudited statements of interim results by offerors which comply with the requirements for half-yearly reports as set out in the UKLA Rules, whether or not the offer has been publicly recommended by the board of the offeree company but *provided the offer could not result in the issue of securities which would represent 10% or more of the enlarged voting share capital of the offeror.*”** *[italics added]*
- 9.5 On balance, the Code Committee does not consider that the fact that the offer would result in only an immaterial increase in the offeror’s existing share capital should give rise to an automatic exemption from the requirements of Rule 28. However, the Code Committee believes that there might be cases where it would

be appropriate for the Panel to grant a dispensation from the requirements of Rule 28 in such circumstances, and that it would therefore be appropriate for this to be expressly referred to in the new Rule 28. The Code Committee considers that such a dispensation should only be granted where, having taken all relevant factors into account including, for example:

- (a) the percentage increase in the offeror's voting share capital;
- (b) whether the profit forecast was an ordinary course profit forecast;
- (c) whether the offer was recommended;
- (d) the purpose for which the profit forecast was made; and
- (e) whether the profit forecast was of a specific or general nature,

the Panel considered that the application of Rule 28 would be disproportionate.

- 9.6 The Code Committee therefore proposes to introduce a new Note 6 on Rule 28.1, as follows:

“6. No material increase in the offeror's voting share capital

The Panel may grant a dispensation from the requirements of Rule 28 if the offer could not result in the issue of securities representing 10% or more of the enlarged equity share capital of the offeror and if the Panel considers that the application of the Rule would be disproportionate.”.

- Q10 Do you agree that the Code should expressly provide the Panel with the ability to grant a dispensation from the requirements of Rule 28 where the offer would not result in a material increase in the equity share capital of the offeror? Do you have any comments on the proposed new Note 6 on Rule 28.1?**

10. Compilation of profit forecasts and quantified financial benefits statements

- 10.1 In their responses to PCP 2010/1, certain respondents suggested that it would be helpful for the Code to provide a clearer indication of what is expected of a party preparing a profit forecast (or quantified financial benefits statement) and that it would be desirable for the Code's requirements to be made more consistent with the requirements for profit forecasts prepared for inclusion in prospectuses under the Prospectus Directive. In particular, it was suggested that the Code Committee might give consideration to aligning the Code's requirements more closely with guidance set out in the ESMA recommendations.
- 10.2 The Code Committee notes that Rule 28 does currently provide some guidance on the compilation of profit forecasts. However, the Code Committee agrees with the respondents that it would be helpful for such guidance to be updated and consolidated, and for guidance in the ESMA recommendations to be reflected in Rule 28.
- 10.3 The Code Committee therefore proposes to introduce a new Note 7 on Rule 28.1, as follows:

“7. *Compilation of profit forecasts and quantified financial benefits statements*

(a) *Any profit forecast or quantified financial benefits statement made by a party to an offer, and any assumptions on which it is based, are the responsibility of the relevant party to the offer and its directors.*

(b) *A profit forecast or a quantified financial benefits statement must be:*

(i) *understandable: it must not be so complex or include such extensive disclosure that it cannot be readily understood; and*

(ii) *reliable: it must be supported by a thorough analysis of the business of the party (or parties) to the offer and must represent factual and not hypothetical strategies, plans and risk analysis.*

(c) Any profit forecast published by a party to an offer (other than a cash offeror) must be compiled on a basis comparable with its historical financial information.

(d) A profit forecast of profit before tax should disclose any non-recurrent items and tax charges if they are expected to be abnormally high or low.”.

Q11 Do you have any comments on the proposed new Note 7 on Rule 28.1 in relation to the compilation of profit forecasts and quantified financial benefits statements?

11. Assumptions

11.1 The requirement for a profit forecast to be accompanied by assumptions is currently set out in Rule 28.2. As indicated above, the Code Committee believes that the primary requirement to state the assumptions on which a profit forecast or quantified financial benefits statement is based should be incorporated within the proposed new Rule 28.1. In addition, the Code Committee is proposing that more detailed provisions in relation to those assumptions should be set out in a new Rule 28.3.

11.2 The current Notes 1 and 2 on Rule 28.2 provide certain guidance with regard to the requirement to state the assumptions upon which a profit forecast is based, including in relation to their selection and drafting. Having reviewed the Notes on Rule 28.2, the Code Committee considers that these provisions could be recast so as to be more consistent with the corresponding provision in the PD Regulation, which provides as follows:

“There must be a clear distinction between assumptions about factors which members of the administrative, management or supervisory bodies can influence and assumptions about factors which are exclusively outside the influence of the administrative, management or supervisory bodies; the assumptions must be readily understandable by investors, be specific and

precise and not relate to the general accuracy of the estimates underlying the forecast.”.

- 11.3 In addition, although PCP 2010/1 did not include any proposals to amend Rule 28.2, one respondent made certain comments in relation to Note 1 on Rule 28.2, in particular, the second paragraph of Note 1(c) on Rule 28.2, which states as follows:

“Although the accountants have no responsibility for the assumptions, they will as a result of their review be in a position to advise the company on what assumptions should be listed in the circular and the way in which they should be described. The financial advisers and accountants obviously have substantial influence on the information about assumptions to be given in a circular; neither should allow an assumption to be published which appears to be unrealistic, or one to be omitted which appears to be important, without commenting appropriately in its report.”.

It was drawn to the Code Committee’s attention that that paragraph appeared to conflict with the independence requirements of the APB’s Ethical Standards for Reporting Accountants and it was suggested that the paragraph was therefore inappropriate and should be deleted. It was noted that, in any event, the paragraph appeared to be unnecessary, owing to the application of paragraph 54 of SIR 3000, which provides as follows:

“The reporting accountant should consider whether it has become aware of anything to cause it to believe that:

- (a) the profit forecast is presented in a way that is not understandable;
- (b) a material assumption is unrealistic;
- (c) an assumption or other information which appears to it to be material to a proper understanding of the profit forecast has not been disclosed; or
- (d) the profit forecast is not capable of subsequently being compared with historical financial information.

If the reporting accountant is aware of such matters it should discuss them with the parties responsible for the profit forecast and with those persons to whom its report is to be addressed and consider whether it is able to issue its opinion.”.

- 11.4 Having taken these various considerations into account, the Code Committee proposes to introduce a new Rule 28.3, as follows:

“28.3 ASSUMPTIONS

(a) Any assumptions included in the document or announcement in which a profit forecast or a quantified financial benefits statement is published must:

(i) be readily understandable;

(ii) be specific and precise; and

(iii) not relate to the general accuracy of the estimates underlying the profit forecast or the quantified financial benefits statement.

(b) The document or announcement in which the profit forecast or the quantified financial benefits statement is published should draw attention to any assumptions about factors which could have a material effect on the achievement of the profit forecast or the quantified financial benefits statement and, where possible, those factors should be quantified. There must be a clear distinction between assumptions about factors which the directors of the party to the offer can influence and assumptions about factors which are outside the influence of the directors.”

- Q12 Do you have any comments on the proposed new Rule 28.3 with regard to assumptions in relation to profit forecasts and quantified financial benefits statements?

12. Profit estimates

(a) Summary

- 12.1 Rule 28.6(c) currently provides that the following “unaudited profit figures” are not subject to the reporting requirements of Rule 28:

- “(i) unaudited statements of annual or interim results which have already been published;**
- (ii) unaudited statements of annual results which comply with the requirements for preliminary statements of annual results as set out in the UKLA Rules;**
- (iii) unaudited statements of interim results which comply with the requirements for half-yearly reports as set out in the UKLA Rules in cases where the offer has been publicly recommended by the board of the offeree company; or**
- (iv) unaudited statements of interim results by offerors which comply with the requirements for half-yearly reports as set out in the UKLA Rules, whether or not the offer has been publicly recommended by the board of the offeree company but provided the offer could not result in the issue of securities which would represent 10% or more of the enlarged voting share capital of the offeror.”.**

12.2 Section 4 of PCP 2010/1 proposed various amendments to Rule 28.6(c), including the extension of the exemption from the reporting requirements of Rule 28 to interim management statements in certain circumstances and to relevant statements made by companies admitted to trading on the Alternative Investment Market operated by the London Stock Exchange (“**AIM**”) or the PLUS primary markets (“**PLUS**”). The proposed amendments were generally welcomed, although respondents made a number of technical suggestions.

12.3 Having reconsidered the matter, the Code Committee believes that an exemption from the requirements of the proposed new Rule 28.1 should be available for:

- (a) a preliminary statement of annual results which complies with the relevant provisions of the Listing Rules (see paragraph 12.4 below);
- (b) a half-yearly financial report which complies with the relevant requirements of the Disclosure Rules and Transparency Rules, the AIM Rules for Companies or the PLUS Rules for Issuers; and

- (c) interim financial information which has been published in accordance with a regulatory requirement, complies with the relevant requirements of the Disclosure Rules and Transparency Rules, the AIM Rules for Companies or the PLUS Rules for Issuers, and which has been prepared in accordance with International Accounting Standard 34 on Interim Financial Reporting (“IAS 34”) (see paragraphs 12.6 to 12.8 below).

Provided that they comply with those requirements, the Code Committee does not believe that it is necessary to limit the availability of the exemption from the requirements of the proposed new Rule 28.1 to profit estimates published (i) during a recommended offer, and (ii) by a hostile offeror where the offer could not result in the issue of securities representing 10% or more of the enlarged voting share capital of the offeror (as is the case under the current Rule 28.6(c)).

(b) *Preliminary statements of annual results*

- 12.4 The Code Committee notes that, although companies admitted to trading on AIM or PLUS sometimes publish preliminary statements of annual results, neither the AIM Rules for Companies nor the PLUS Rules for Issuers include specific provisions in relation to such statements. The Code Committee understands that, in some cases, the financial statements underlying a preliminary statement of annual results by an AIM company or a PLUS company will already have been audited. Since such a statement will fall outside the proposed new definition of “profit forecast”, such preliminary statements would not be subject to the requirements of Rule 28. However, the Code Committee understands that, in other cases, the financial statements underlying a preliminary statement of annual results by an AIM company or a PLUS company will not have been audited.
- 12.5 In the absence of provisions in relation to preliminary statements in the AIM Rules and the PLUS Rules, the Code Committee believes that such a preliminary statement should be exempted from the requirements of the proposed new Rule

28.1 only if the Panel is satisfied that the preliminary statement would comply with the provisions of the UKLA Rules with regard to preliminary statements.

(c) *Interim financial information*

12.6 The Code Committee understands that market practice with regard to the presentation of interim financial information varies. As noted in PCP 2010/1, the Code Committee understands that a small number of companies produce full quarterly results with confirmation of an accountant's review in accordance with the International Standard on Review Engagements 2010 ("**ISRE 2410**") but that the majority of interim management statements are simply trading statements.

12.7 The Code Committee considers that an exemption from the requirements of the proposed new Rule 28.1 should be available for a profit estimate included in interim financial information which has been published in accordance with a regulatory requirement. Whilst the Code Committee does not consider that it is necessary to limit the availability of such an exemption to such interim financial information only where it has been reported on in accordance with ISRE 2410 (or an equivalent reporting standard), the Code Committee does consider that the exemption should only be available where the interim financial information has been prepared in accordance with the reporting framework set out in IAS 34 (or an equivalent accounting standard).

(d) *Companies not admitted to trading on a UK regulated market, AIM or PLUS*

12.8 The final paragraph of Rule 28.6(c) states as follows:

"The Panel should be consulted in advance if the company is not admitted to the Official List but wishes to take advantage of the exemptions under (ii), (iii) or (iv) above."

12.9 The Code Committee considers that, in appropriate circumstances, an exemption from the requirements of the proposed new Rule 28.1 should be available where a party to an offer which is not admitted to trading on a UK regulated market or on AIM or PLUS includes a profit estimate in a preliminary statement of annual results, a half-yearly financial report or interim financial information published in accordance with a regulatory requirement.

(e) *Proposed new Rule 28.4*

12.10 In the light of the above, the Code Committee proposes to introduce a new Rule 28.4, as follows:

“28.4 PROFIT ESTIMATES

(a) A profit estimate published by a party to an offer which is admitted to trading on a UK regulated market or on AIM or PLUS will be exempt from the requirements of Rule 28.1 if it is included in:

(i) a preliminary statement of annual results which complies with the relevant provisions of the UKLA Rules;

(ii) a half-yearly financial report which complies with the relevant provisions of the UKLA Rules, the AIM Rules for Companies or the PLUS Rules for Issuers; or

(iii) interim financial information published in accordance with a regulatory requirement and prepared in accordance with International Accounting Standard 34.

(b) Where a party to an offer which is not admitted to trading on a UK regulated market or on AIM or PLUS includes, or has included, a profit estimate in a preliminary statement of annual results, a half-yearly financial report or interim financial information published in accordance with a regulatory requirement, the Panel may, in appropriate circumstances, grant a dispensation from the requirements of Rule 28.1. The Panel should be consulted in such cases.

NOTE ON RULE 28.4

Preliminary statements of annual results

Where an unaudited preliminary statement of annual results is published by a party to an offer which is admitted to trading on AIM or on PLUS, the exemption from the requirements of Rule 28.1 will be subject to the Panel being satisfied that the statement would comply with the provisions of the UKLA Rules with regard to such statements.”.

12.11 In addition, the Code Committee is proposing to make certain minor amendments to the way in which historical financial information is described in Rules 24.3(a)(iv) and (v) and Rule 25.3, as set out in Appendix D.

Q13 Do you agree that the exemption from the requirements of Rule 28 for certain profit estimates should be extended as proposed? Do you have any comments on the proposed new Rule 28.4?

13. Quantified financial benefits statements

(a) Introduction

13.1 Section 6 of PCP 2010/1 proposed that:

- (a) the current Note 9 on Rule 19.1, with respect to “merger benefits statements”, should be moved to Rule 28; and
- (b) the scope of the statements covered by that provision should be extended so as to apply not only to “merger benefits statements” but also to other quantified statements of the potential financial effects of a course of action put forward in the course of an offer.

13.2 PCP 2010/1 proposed the introduction of a new definition of a “quantified effects statement”. In section 2 of this PCP, the Code Committee has proposed a revised definition of a “quantified financial benefits statement”. In summary, the

proposed new definition would cover not only statements quantifying the financial benefits expected to arise if an offer is successful but also statements by the offeree company quantifying the benefits expected to arise from other measures (or an alternative transaction) if the offer is unsuccessful.

(b) Common approach to reports and assumptions

13.3 Where the current Note 9 on Rule 19.1 applies to a merger benefits statement, the requirements imposed by that Note include the requirement to publish “reports by financial advisers and accountants that the statement has been made with due care and consideration”. One respondent to PCP 2010/1 suggested that it would be more appropriate for the reporting model for quantified financial benefits statements to follow that for profit forecasts, i.e. that the reporting accountants should give an opinion on the compilation of the information on the basis stated, whereas the financial advisers should report on the quality of the process that the preparer has undertaken.

13.4 As indicated by the new Rule 28.1(a) proposed in section 3 above, the Code Committee agrees that the requirements in relation to reports (and in relation to the stating of assumptions) should be the same for profit forecasts published during an offer period and for quantified financial benefits statements.

(c) Application to recommended offers

13.5 PCP 2010/1 proposed that the requirements of Rule 28 should not apply:

“(i) in respect of a quantified effects statement made by an offeror where the consideration is solely cash; or

(ii) normally, in the case of an offer that has been publicly recommended by the board of the offeree company, unless:

(A) in respect of a quantified effects statement by an offeror that is not offering solely cash, a competing offer or a named potential competing offeror has been announced; or

(B) the quantified effects statement otherwise becomes a material issue.”.

13.6 As indicated by the new Rule 28.1(a) proposed in section 3 above, the Code Committee continues to consider that the additional requirements imposed by that Rule should not apply to a quantified financial benefits statement made by a cash offeror. However, the Code Committee now considers that the requirements of the new Rule 28.1(a) should apply to all quantified financial benefits statements published by an offeror (other than a cash offeror) or an offeree company, and that the exemption from the requirements of Note 9 on Rule 19.1 that currently applies where the offer has been recommended by the board of the offeree company should no longer apply. With regard to this conclusion, the Code Committee considers that:

- (a) Rule 28.1(a) should apply in equal terms to quantified financial benefits statements and to profit forecasts published during the offer period;
- (b) there is no obvious basis for Rule 28.1(a) not applying to a quantified financial benefits statement published in the context of a recommended offer. The Code Committee notes that, in CP12/2, the FSA recently consulted on new requirements for synergies benefits statements made in relation to any class 1 transaction, irrespective of whether the acquisition target is supportive of the transaction; and
- (c) as noted by certain respondents to PCP 2010/1, a conditional dispensation for recommended offers, which might be withdrawn later, could often be worthless, because the relevant party to the offer might anyway instruct its advisers to ensure that they were in a position to produce reports, should the need arise.

(d) *More detailed requirements for quantified financial benefits statements*

13.7 PCP 2010/1 proposed that paragraph (c) of Note 9 on Rule 19.1 should be replaced by a new Rule 28.10(a)(iii), as follows:

“(a) If a party to an offer makes a quantified effects statement, it must publish at the same time:

...

(iii) an analysis and explanation of the constituent elements sufficient to enable the relative importance of these elements to be understood”.

With regard to this proposed new provision, paragraph 6.10 of PCP 2010/1 stated as follows:

“The Code Committee notes that it has become the usual practice for offerors making merger benefits statements to give, under the current paragraph (c) in Note [9] on Rule 19.1 ... , not only the annual quantum of synergies or other benefits expected, but also the year by which such benefits are expected to be fully realised and the costs expected to be incurred in achieving those synergies. Furthermore, some breakdown of the merger benefits is frequently provided as between, for example, “cost” and “revenue” benefits, major areas of cost savings and major, distinct operating divisions. The Code Committee considers that this is an appropriate interpretation of the current Note which would also apply, in respect of all other quantified effects statements, to the interpretation of the proposed Rule 28.10(a)(iii).”.

13.8 One respondent to PCP 2010/1 suggested that it would be helpful for more detailed guidance on the basis of preparation of quantified financial benefits statements to be included in the Code. The respondent noted the current lack of reporting standards for merger benefits statements, by contrast with profit forecasts (where the relevant reporting standard is SIR 3000).

13.9 Subsequently, in August 2010, the Executive met certain of the respondents to PCP 2010/1 in order to discuss various suggestions for ways in which the Code's provisions with regard to quantified financial benefits statements might be made more detailed. The outcome of these discussions is reflected in the proposed new Rule 28.5 set out below. In addition, the Code Committee has asked the Executive to discuss with the Financial Reporting Council whether it might be appropriate for a new reporting standard to be developed with respect to quantified financial benefits statements.

(e) Measures previously announced by the offeree company

13.10 The Code Committee recognises that, prior to the commencement of the offer period, and with no knowledge that an offer might be imminent, an offeree company might make a statement in relation to, for example, certain cost saving measures that it intends to put in place in the future. The Code Committee considers that such a statement should not normally be subject to the proposed new Rule 28.1(a). However, the Code Committee considers that the Panel should be consulted if a company proposes to publish such a statement after it has received an approach from a potential offeror with regard to a possible offer (but prior to the commencement of an offer period). In addition, if the offeree company were to publish a statement with regard to revised cost savings measures during the offer period, the Code Committee considers that the statement setting out the revised figures should be subject to Rule 28.1(a). This is reflected below in the proposed Note 1 on the new Rule 28.5.

(f) Synergies statements by the offeree company

13.11 On occasion, the board of the offeree company may wish to publish a statement in relation to its own expectations as to the financial benefits of a proposed takeover by a particular offeror. For example, whereas an offeror may announce that the expected financial benefits of a takeover would be £x million per annum, the

board of the offeree company may believe that the financial benefits would result in a materially different figure, and might consider that it was capable of satisfying the requirements currently set out in Note 9 on Rule 19.1 with regard to a statement of that belief. However, the Code Committee understands that it is the Executive's practice not to permit the offeree company to publish such a statement (although the offeree company would normally be permitted to publish a critique of any merger benefits statement which an offeror had published). The principal reasons for this practice are that:

- (a) whilst the offeree company may believe that it knows what action the offeror would take upon completion of the takeover, only the offeror would be in a position accurately to predict cost savings based upon its proposed strategy; and
- (b) whereas an offeror would be accountable to its shareholders for the delivery of the estimated merger benefits, the same would not apply in relation to the board of the offeree company.

13.12 The Code Committee acknowledges that it is arguable that, provided that the Code's requirements are met, the board of the offeree company should be permitted to publish its own estimate of the financial benefits which the offeror might be expected to achieve. On balance, however, the Code Committee agrees with the Executive's practice and proposes that it should be codified in the proposed Note 2 on the new Rule 28.5, as set out below.

(g) ***Proposed new Rule 28.5***

13.13 In the light of the above, and of various other comments made in the responses to PCP 2010/1, the Code Committee proposes to introduce a new Rule 28.5, as follows:

“28.5 QUANTIFIED FINANCIAL BENEFITS STATEMENTS

In addition to the requirements of Rule 28.1(a), a quantified financial benefits statement must:

(a) include the bases of the belief (including sources of information) supporting the statement;

(b) include an analysis, explanation and quantification of the constituent elements sufficient to enable the context and relative importance of those elements to be understood;

(c) include a base figure where any comparison is made with historical financial performance or with existing cost bases and structures;

(d) include details of all the material financial effects of the proposed transaction or other measures, and not only the financial benefits or other selected effects;

(e) include only the financial benefits which are expected to arise directly from the proposed transaction or other measures, and exclude any financial benefits which could be achieved independently;

(f) indicate when the financial benefits are expected to be realised;

(g) indicate whether the expected financial benefits will be recurring, clearly identifying any non-recurring benefit(s); and

(h) identify the non-recurring costs of realising the expected financial benefits, including an explanation if there is expected to be a material difference between the cash costs and the charge to the profit and loss account.

NOTES ON RULE 28.5

1. Measures previously announced

The Panel should be consulted if a company proposes to publish a statement with regard to future cost savings measures after it has received an approach from a potential offeror with regard to a possible offer but prior to the commencement of an offer period so that it can consider whether the statement should be treated as being subject to the requirements of Rule 28.1(a).

If the offeree company publishes a statement with regard to revised cost savings measures during the offer period, that statement will be subject to the requirements of Rule 28.1(a).

2. Merger benefits statements by the offeree company

The Panel will not normally permit an offeree company to publish a statement quantifying the financial benefits expected to result from an offer unless the statement is published with the consent of the relevant offeror. However, the offeree company will be permitted to publish its views on any quantified financial benefits statement published by an offeror.”.

Q14 Do you have any comments on the proposed new Rule 28.5 in relation to quantified financial benefits statements?

14. Profit forecast for part of a business

14.1 Section 5 of PCP 2010/1 proposed that the Code should be amended so that Rule 28 would apply to a profit forecast in respect of an individual part of a business, as if it were a profit forecast for the whole business. The Code Committee continues to believe that Rule 28 should apply to a profit forecast for part of a business and that this should be expressly stated in the Code.

14.2 In relation to the question of materiality, paragraph 5.4 of PCP 2010/1 stated as follows:

“The Code Committee has considered whether it should propose some guidelines as to the materiality of a part of a business in respect of which a profit forecast should require a report. For example, the “class tests” applied in the [Listing Rules] to determine the nature of disclosure required in respect of transactions could be a reference point. The Code Committee has concluded that it is difficult to select a single proportion which would be appropriate for the many different permutations of profit forecasts for parts of a business, or to be prescriptive as to the bases (for example, forecast or historical operating profits, or estimates of value) on which the relative size of a part should be judged. The Code Committee is also conscious that, in certain circumstances, if a relative size threshold were to be set, the decision as to whether or not a report was required might enable the

market to infer or to speculate on a profit number in respect of the whole business, which would be undesirable.”.

14.3 Notwithstanding that a number of the respondents to PCP 2010/1 considered that the Code ought to provide guidance on the question of the materiality of a part of a business in respect of which a profit forecast should require a report, the Code Committee continues to believe that a relative size threshold should not be included in Rule 28. The Code Committee considers that the Panel’s starting point would be likely to be that, if a company had chosen to publish a profit forecast in relation to a particular part of its business, that forecast would be likely to be material, such that the requirements of Rule 28 should apply. However, this will not invariably be the case and the Code Committee therefore considers that the Panel should have the express ability to consent to Rule 28 not being applied to a profit forecast for a part of a business in appropriate circumstances.

14.4 Accordingly, the Code Committee proposes to introduce a new Rule 28.6, as follows:

“28.6 PROFIT FORECAST FOR PART OF A BUSINESS

Except with the consent of the Panel, Rule 28 applies equally to a profit forecast which relates to a part of the business of a party to an offer.”.

Q15 Do you have any comments on the proposed new Rule 28.6 with regard to a profit forecast for part of a business?

15. Profit forecasts published by persons other than the party to the offer to whose profits the forecast relates

(a) Introduction

15.1 As was explained in section 7(c) of PCP 2010/1, if the offeree company or an offeror (other than a cash offeror) refers in any document or announcement to any

profit forecast with respect to its own future profits which has been published by one or more third parties, including an average profit forecast, that profit forecast will be treated by the Executive as having been published by the party concerned and, accordingly, the requirements of Rule 28 will apply to it.

- 15.2 On the other hand, if the offeree company or an offeror refers in any document or announcement to profit forecasts which have been published by third parties with respect to the future profits of a party to the offer other than itself, including an average of two or more third party profit forecasts, the Code Committee understands that such references are not treated by the Executive as being subject to the requirements of Rule 28. Accordingly, subject to the requirements of Rule 19.1, a hostile offeror may, in its arguments supporting the value of its offer, make reference to, for example, an average profit forecast with respect to the offeree company's future profits, without that reference triggering a requirement for reports from its accountants and financial advisers. However, the offeree company's ability to respond to such arguments will be constrained since, as explained above, any reference it might make to the average profit forecast would be subject to the requirements of Rule 28. In this regard, one respondent to PCP 2010/1 commented that:

“The different treatment may well be well intentioned and to some extent logical (the offeror by definition is not privy to the offeree's business plans) but it reinforces the uneven playing surface.”.

- (b) *References to profit forecasts published by third parties with respect to a company's own future profits*
- (i) *Proposed codification of existing practice*

- 15.3 The Code Committee continues to agree with the Executive's practice of treating references by a party to the offer (other than a cash offeror) to profit forecasts by third parties with respect to its own profits as being subject to Rule 28. The Code

Committee notes that the application of Rule 28 to such profit forecasts is not as a result of Rule 28 itself but as a result of the Executive's application of Note 5 on Rule 19.1, which provides as follows:

“5. *Quotations*

A quotation (eg from a newspaper or a broker's circular) must not be used out of context and details of the origin must be included.

Since quotations will necessarily carry the implication that the comments quoted are endorsed by the board, such comments must not be quoted unless the board is prepared, where appropriate, to corroborate or substantiate them and the directors' responsibility statement is included.”.

- 15.4 The Code Committee believes that the Executive's practice should be codified in the proposed new Rule 28 and is therefore proposing to introduce a new Rule 28.7(a), as follows:

“28.7 THIRD PARTY PROFIT FORECASTS

(a) Subject to Rule 28.7(c), if, during an offer period (or in an announcement which commences an offer period), an offeror (other than a cash offeror) or the offeree company refers to any profit forecast with respect to its own future profits published by one or more third parties, including an average of such third party profit forecasts, the profit forecast will be treated as having been published by the party to the offer concerned and Rule 28.1(a) will apply accordingly.”.

- 15.5 In addition, the Code Committee proposes to introduce a cross-reference to the proposed new Rule 28.7(a) into Note 5 on Rule 19.1, and to make some minor drafting amendments to Note 5 on Rule 19.1, as set out in Appendix D.

(ii) *Websites*

- 15.6 In PCP 2010/1, the Code Committee proposed that if a party to an offer had, before the commencement of the offer period, published on its website a third

party profit forecast, including average figures, the party should be required to add to it a statement to the effect that the forecast had not been prepared for the purposes of the offer and that it had not been examined or reported on in accordance with Rule 28.

- 15.7 Upon further reflection, the Code Committee considers that it would be more consistent with the proposed new Rule 28.7(a) if the Code were to require that, upon the commencement of the offer period, the offeree company and any offeror (other than a cash offeror) should remove from its website any analysts' profit forecasts with respect to its own profits, including average figures.
- 15.8 The Code Committee therefore proposes to introduce a new Note 1 on Rule 28.7, as follows:

"1. Websites

Upon the commencement of an offer period, each of the parties to the offer (other than a cash offeror) must remove from its website any analysts' profit forecasts with respect to its own profits, including any average figures."

Q16 Do you have any comments on the proposed new Rule 28.7(a), the proposed amendments to Note 5 on Rule 19.1, or the proposed Note 1 on Rule 28.7, with regard to references by a party to an offer to third party or average forecasts with respect to its own profits?

(b) References to profit forecasts published by third parties with respect to the future profits of another party to the offer

(i) Requirement to use a "consensus" profit forecast

- 15.9 The Code Committee considers that it is unsatisfactory that, as explained in paragraph 15.2 above, a hostile offeror is able to refer to third party profit forecasts with respect to the future profits of the offeree company in its arguments

- as to the value of its offer but that the offeree company is unable to make arguments in reply without triggering the requirements of Rule 28. The Code Committee considers that the offeree company would be placed in an invidious position if a hostile offeror were to refer selectively to analysts' forecasts which cast the value of the consideration offered in a favourable light but ignored those analysts' forecasts which made the value of the offer appear less favourable.
- 15.10 The Code Committee considers that a hostile offeror should continue to be permitted to refer to third party forecasts of the future profits of the offeree company but that it should be required to do so by reference to a "consensus" profit forecast. The Code Committee considers that, although it may be less likely to wish to do so, an offeree company should be permitted to refer to third party profit forecasts with respect to the future profits of a hostile offeror on the same basis. The Code Committee further considers that, where a consensus profit forecast is so referred to, the other party should have a "right of reply", without the requirements of the proposed new Rule 28.7(a) applying.
- 15.11 The Code Committee considered whether, in circumstances where a hostile offeror wished to refer to a forecast for the future profits of the offeree company, the Code should impose a requirement on the offeror and the offeree company to agree between themselves how the consensus profit forecast should be compiled, failing which, the consensus profit forecast would be determined by the Panel. However, the Code Committee concluded that there would be little incentive for the parties to the offer to reach an agreement on the compilation of a consensus profit forecast in such circumstances and that, in the absence of agreement between the parties, the Panel would not be well-qualified to make such a determination, given the subjective considerations which might be involved.
- 15.12 The Code Committee considers that, for the purposes of the proposed new Rule 28.7(b), there should be an objective means by which a consensus profit forecast should be determined. On balance, the Code Committee considers that an

appropriate means of determining a consensus profit forecast would normally be to calculate the arithmetical mean of the consensus figures published by independent providers of third party data services, such as Bloomberg and Thomson Reuters.

15.13 The Code Committee notes that, whilst the new Rule 28.7(b) proposed below would require an offeror or offeree company which wished to refer to the future profits of the other party to do so by reference to a “consensus profit forecast”, any consensus profit forecast so referred to would nevertheless need to comply with the standards required by Rule 19.1. As previously noted, Rule 19.1 requires, among other things, that statements made during the course of an offer must be made in accordance with the highest standards of care and accuracy, and that the information given must be adequately and fairly presented. Therefore, if an offeror or the offeree company (as the case may be) intended to refer to the future profits of the other party by reference to a “consensus profit forecast”, it would need to be able to demonstrate, among other things, that it had reasonable grounds for believing that the consensus profit forecast complied with the standards set out in Rule 19.1. By way of illustration, if one of the analysts whose forecast was included in a third party data provider’s consensus figure was from a connected adviser to the party to which the forecast related, and the forecast had become out of date (as a result of the analyst being unable to update the forecast because of the restrictions imposed by Note 4 on Rule 20.1), the “consensus profit forecast” might not meet the standards of Rule 19.1. In the case of any doubt as to whether a “consensus profit forecast” complied with the requirements of Rule 19.1, the Panel would need to be consulted.

15.14 In the light of the above, the Code Committee proposes to introduce a new Rule 28.7(b), and a new Note 2 on Rule 28.7, as follows:

“(b) If, during an offer period (or in an announcement which commences an offer period), an offeror or the offeree company refers to the future profits of any other party to the offer, it must normally

do so by reference to a consensus profit forecast calculated in accordance with Note 2.

...

2. Consensus profit forecasts

For the purposes of Rules 28.7(b) and (c), a consensus profit forecast should normally be calculated as the arithmetical mean of any consensus figures for the relevant profit forecasts which have been published by independent financial data providers.”.

(ii) “Right of reply”

15.15 The Code Committee considers that where, in accordance with the proposed new Rule 28.7(b), a hostile offeror has referred to a consensus profit forecast with respect to the future profits of the offeree company, the offeree company should be permitted to refer to that consensus profit forecast in a subsequent document or announcement without that reference to the consensus profit forecast then triggering the reporting and other requirements of the proposed new Rule 28.1(a). For example, if the offeror noted that the value of its offer represented a 20x multiple of the consensus forecast for the current year’s earnings per share, the offeree company would be able to reply that a 20x multiple of the consensus EPS of x pence undervalued the company, without being required to report on the figure of x pence. On the other hand, if the offeree company referred to a different consensus forecast, for example of EBITDA, or of EPS for a different year, which the offeror had not referred to, or if it wished to state that its own forecast for the current year’s EPS was y pence, the requirements of Rule 28.1(a) would then apply.

15.16 The Code Committee therefore proposes to introduce a new Rule 28.7(c), as follows:

“(c) Where an offeror or the offeree company has referred to a consensus profit forecast with respect to the future profits of another

party to the offer, Rule 28.7(a) will not apply to any subsequent reference to that consensus profit forecast by the party to whose profits it relates.”.

(iii) *Application to hostile offers only*

15.17 The Code Committee considers that the use of a consensus profit forecast with respect to the future profits of another party to an offer will be appropriate only in the context of a hostile offer. Where an offer has been, or will be, recommended by the board of the offeree company, the offeror will normally have been given access to the offeree company’s financial information and there will therefore be no need for it to refer to a consensus profit forecast. Indeed, the publication by a recommended offeror of a consensus profit forecast with respect to the profits of the offeree company might, with the cooperation of the offeree company, amount to a circumvention of the requirements of the proposed new Rule 28.7(a).

15.18 The Code Committee therefore proposes to introduce a new Note 3 on Rule 28.7, as follows:

“3. Recommended offers

Where an offer has been, or will be, recommended by the board of the offeree company, or where the document or announcement is published with the agreement or approval of the other party to the offer, a reference by the offeror or the offeree company to a profit forecast with respect to the other party’s profits will be treated for the purposes of Rule 28.7(a) as having been published by the party to whose profits it relates.”.

(iv) *Sources and basis of compilation*

15.19 The Code Committee considers that, where any document published by a party to an offer refers to an average or consensus profit forecast, the sources and basis of compilation should be stated. The Code Committee believes that:

- (a) in the case of an average profit forecast, as referred to in the proposed new Rule 28.7(a), this should include details of the analysts whose forecasts have been included in, and excluded from, the calculation of the average profit forecast; and
- (b) in the case of a consensus profit forecast, as referred to in the proposed new Rule 28.7(b), this should include the details of the financial data providers from whose figures the consensus profit forecast has been calculated.

15.20 The Code Committee therefore proposes to introduce a new Note 4 on Rule 28.7, as follows:

“4. Sources and basis of compilation

Where any document or announcement published by a party to the offer refers to an average profit forecast, as referred to in Rule 28.7(a), or a consensus profit forecast, as referred to in Rule 28.7(b), the sources and basis of compilation must be stated, including:

(a) in the case of an average profit forecast:

(i) the analysts whose forecasts have been included in the calculation of the average profit forecast, including the individual figures and the dates on which they were published; and

(ii) the analysts whose forecasts have been excluded from the calculation of the consensus figure, including the reason(s) for their exclusion; and

(b) in the case of a consensus profit forecast, the independent financial data providers upon whose figures the consensus profit forecast has been calculated.”.

Q17 Do you have any comments on the proposed new Rules 28.7(b) and (c), and the proposed new Notes 2 to 4 on Rule 28.7, with regard to a party to an offer referring to consensus profit forecasts with respect to the profits of another party to the offer?

B: MATERIAL CHANGES IN INFORMATION**16. Proposed new Rule 27****(a) Introduction**

16.1 As indicated in section 1 above, the Code Committee has considered the following three principal issues in relation to Rule 27:

- (a) in what circumstances should a party to an offer be required to disclose details of material changes to information which it has published previously;
- (b) in the event that a party to an offer is required to disclose details of material changes to information it has published previously, how should those details be disclosed – e.g. by way of an announcement and/or by way of a document; and
- (c) in the event that a further document is published by a party to an offer, either voluntarily or because this is required by the Code, to what extent should the party to the offer be required to update information which it has published previously?

(b) *Circumstances in which a party to an offer should be required to disclose details of material changes to information*

16.2 Rule 23.1 (which derives from General Principle 2) provides as follows:

“Shareholders must be given sufficient information and advice to enable them to reach a properly informed decision as to the merits or demerits of an offer. Such information must be available to

shareholders early enough to enable them to make a decision in good time. No relevant information should be withheld from them. ...”.

- 16.3 Rule 27.1 requires the disclosure of material changes to previously published information, but only in the event that the relevant party to the offer publishes a subsequent document (in which event the material change(s) must be disclosed in that document). In the absence of its publishing a subsequent document, there is currently no specific requirement in the Code for a party to an offer to disclose details of any material changes to information which it has published previously.
- 16.4 To date, the absence of a specific obligation to disclose material changes in previously published information has not given rise to widespread concerns. The Code Committee believes that this is because:
- (a) in most cases, the shares in the offeree company are admitted to the Official List or to trading on a “prescribed market”, in which case the offeree company will be subject to the continuing obligations requirements imposed by the UKLA or the relevant operator of the prescribed market. Likewise, in most cases where the offeror is a trading entity, and particularly where it is offering securities as consideration, the offeror will be subject to regulatory requirements which impose similar ongoing disclosure obligations; and
 - (b) in those cases where the Panel has considered it necessary to require a party to an offer to announce a material development, it has done so on the basis of (i) General Principle 2 and Rule 23, and (ii) General Principle 4 (which provides that false markets must not be created in the securities of the offeree company or of the offeror).
- 16.5 Notwithstanding this, the Code Committee considers that there should be a specific provision in the Code under which a party to an offer would be required

to disclose material changes to information which it has published previously. This is on the basis that:

- (a) it is illogical for the Code to require a party to an offer to disclose material changes to previously published information in the event that a subsequent document is published, but not otherwise. The Code Committee believes that, if there is a material change in information which has been published previously, this should be drawn to shareholders' attention promptly, and that there should not be scope for debate about whether this is required under the Code;
- (b) the Code aims to set out all the rules which the Panel believes are necessary to ensure that parties to an offer adhere to appropriate business standards during an offer and the Panel should seek to avoid relying on other authorities enforcing their rules in order for it to be satisfied that an offer is being appropriately regulated. In addition, since the disclosure obligation will vary between different listing authorities or markets, the only way to ensure that a consistent approach is adopted in all transactions to which the Code applies is to ensure that an appropriate rule is included in the Code; and
- (c) whereas the disclosure obligations imposed by listing authorities and markets are primarily for the benefit of shareholders and other market participants, the requirements of the Code are also for the benefit of other constituents including:
 - (i) the offeror, which may use the information to assist it in determining whether to seek to invoke a condition to its offer; and
 - (ii) other persons who are affected by takeovers, such as the offeree company's employees, whose representatives might wish to

circulate an opinion on the effects of the offer on employment, or to amend an existing opinion, in the light of new information.

- 16.6 The Code Committee notes the comments which it made in RS 2011/1 with regard to Rule 27 (see paragraph 1.20 above). On reflection, however, the Code Committee considers that providing an offeror with information to assist it in making its case that it should be permitted to invoke a condition to its offer would not, of itself, be an appropriate rationale for amending the Code.
- 16.7 The Code Committee believes that the proposed new Rule 27 should require that an offeror and the offeree company must disclose promptly any material changes in information published in the offer document and the offeree board circular respectively. The Code Committee believes that the new Rule 27 should be effective in relation to the offeror once the offer document has been published and in relation to the offeree company once the board has published its circular. This is on the basis that:
- (a) it is upon the publication of these documents that the offeror and the offeree company must disclose the full extent of the information required to be disclosed by the Code, as set out in Rules 24 and 25 respectively; and
 - (b) it is only upon publication of the offer document that shareholders have the ability to decide on the merits of the offer.
- 16.8 The Code Committee understands that the Executive's practice is to apply the current Rule 27 during the offer period, but not thereafter, on the basis that it is appropriate for the protections afforded by Rule 27 to cease to apply once the so-called "battle for control" is over. The Code Committee agrees with this practice and believes that it should be expressly stated in the proposed new Rule 27.

16.9 The Code Committee wishes to make clear that the purpose of the proposed new Rule 27.1(a) is simply to accelerate the time at which the disclosure of a material change in information must be made, i.e. instead of this potentially being deferred until the party to the offer publishes a subsequent document, the disclosure should be made promptly by way of an announcement.

(c) ***Manner in which details of material changes in information should be disclosed***

16.10 The Code Committee has considered whether the proposed new Rule 27 should require details of any material changes in information to be disclosed by means of the publication of a document or by means of an announcement only.

16.11 On the basis that:

- (a) it is proposed that the obligation to disclose material changes should start to apply from the time when the offeror or the board of the offeree company publishes its principal document; and
- (b) by definition, there will have been a material change in the information included in that document in order for the proposed new rule to be in point,

it might be argued that the material change should be disclosed by way of the publication of a document, so as to be certain that the information will be received by all persons to whom the original document was sent or made available. This would be consistent with the approach set out in Notes 2 and 3 on Rule 20.1, which contemplate that, in the event of material new information being disclosed in a media interview or at a shareholder meeting, a circular must be sent to shareholders and persons with information rights.

16.12 On the other hand, where a clarification is required following either a misleading statement in a document or a leak of information, the Code Committee understands that the Executive's practice is normally to require an announcement to be made, rather than to require a document to be published. On occasion, however, the Executive has required the publication of a document, having taken all relevant factors into account, including:

- (a) the significance of the matter which requires clarification;
- (b) the stage in the offer timetable;
- (c) the profile of the offer period and the offeree company;
- (d) the size of the shareholder register; and
- (e) whether the matter relates to an approval required in general meeting under Rule 16 or Rule 21.1.

16.13 On balance, the Code Committee considers that the new Rule 27 should provide that an announcement will always be required and that the Panel will have the ability also to require the publication of a document. The Code Committee anticipates that, in deciding whether to require the publication of a document, the Panel would take into account all relevant factors, including those set out in paragraph 16.12 above. In addition, the Code Committee considers that the new Rule 27 should provide that, if, following the publication of the offer document or offeree board circular, a party to the offer were to publish any subsequent document in connection with the offer, that document should include details of any material changes in information or a statement that there had been none.

16.14 The Code Committee therefore proposes to introduce new Rules 27.1(a), 27.1(b) and 27.2(a)(i), as set out at the end of this section 16.

Q18 Do you have any comments on the proposed new Rules 27.1 and 27.2(a)(i) with regard to material changes in information?

(d) Requirement to update information previously published

16.15 The Code Committee believes that, in line with the current Rule 27, where a party to an offer publishes a subsequent document in connection with the offer, that document should be required to “update” certain of the matters which are required to be disclosed under, respectively, Rules 24 and 25. In addition, the Code Committee believes that the list of matters which should be required to be updated should be expanded in certain respects.

16.16 The Code Committee therefore proposes to introduce new Rules 27.2(a)(ii), 27.2(b) and 27.2(c), as set out at the end of this section 16.

Q19 Do you have any comments on the proposed new Rules 27.2(a)(ii), 27.2(b) and 27.2(c) in relation to the requirement to update certain matters in any subsequent document?

(e) Requirement to confirm ongoing validity and application of certain matters

16.17 The current Rule 27.2 provides that, when a profit forecast has been made, documents subsequently published by the party to the offer making the forecast must comply with the requirements of Rule 28.5. Rule 28.5 provides as follows:

“28.5 SUBSEQUENT DOCUMENTS — CONTINUING VALIDITY OF FORECAST

When a company includes a forecast in a document, any document subsequently published by that company in connection with that offer must, except with the consent of the Panel, contain a statement by the directors that the forecast remains valid for the purpose of the offer and that the financial advisers and accountants who reported on the

forecast have indicated that they have no objection to their reports continuing to apply.”.

16.18 The Code Committee proposes to introduce a new Rule 27.2(d), which would replace the current Rules 27.2 and 28.5, as set out at the end of this section 16.

(f) Proposed amendments

16.19 The Code Committee proposes to delete the current Rule 27 and to introduce a new Rule 27, as follows:

“27.1 MATERIAL CHANGES

(a) Following the publication of the initial offer document or offeree board circular (as appropriate) and until the end of the offer period, the offeror or the offeree company (as appropriate) must promptly announce any material changes in information disclosed in any document or announcement previously published by it in connection with the offer.

(b) Where an announcement is required to be made under Rule 27.1(a), the Panel may, in addition, require a document setting out the relevant information to be:

(i) sent to shareholders in the offeree company and persons with information rights; and

(ii) made readily available to the offeree company’s employee representatives (or, where there are no employee representatives, to the employees themselves) and to the trustees of the offeree company’s pension scheme(s).

27.2 SUBSEQUENT DOCUMENTS

(a) If, following the publication of the initial offer document or offeree board circular (as appropriate) and before the end of the offer period, an offeror or the offeree company publishes any subsequent document in connection with the offer, that document must include:

(i) any material changes in information disclosed in any previous document published by it in connection with the offer

(or a statement that there have been no such material changes); and

(ii) details of any changes to the matters listed in Rule 27.2(b) (in the case of an offeror) or in Rule 27.2(c) (in the case of the offeree company) which have occurred since the publication of any previous document published by it in connection with the offer (or a statement that there have been no such changes).

(b) In the case of an offeror, the matters referred to in Rule 27.2(a)(ii) are as follows:

(i) its intentions with regard to the matters referred to in Rule 24.2;

(ii) any known significant change in its or the offeree company's financial or trading position (to the extent required under Rule 24.3(a)(v));

(iii) material contracts (Rule 24.3(a)(vii));

(iv) ratings and outlooks (Rule 24.3(c));

(v) the terms of the offer (Rule 24.3(d)(v));

(vi) any agreements or arrangements which relate to the invocation of the conditions to its offer (Rule 24.3(d)(ix));

(vii) irrevocable commitments and letters of intent (Rule 24.3(d)(x));

(viii) any offer-related arrangements etc. permitted under, or excluded from, Rule 21.2 (Rule 24.3(d)(xv));

(ix) profit forecasts (Rule 24.3(d)(xii));

(x) financing arrangements (Rule 24.3(f));

(xi) interests and dealings in relevant securities (Rule 24.4);

(xii) the effect of the offer on the emoluments of the offeror's directors (Rule 24.5);

(xiii) any special arrangements, including management incentivisation arrangements (Rule 24.6 and Rule 16.2);

(xiv) the ultimate owner of any securities acquired (Rule 24.9);

(xv) any arrangements of the kind referred to in Note 11 on the definition of acting in concert (Rule 24.13); and

(xvi) fees and expenses (to the extent required under Rule 24.16).

(c) In the case of the offeree company, the matters referred to in Rule 27.2(a)(ii) are as follows:

(i) its opinion on the offer and the other matters referred to in Rule 25.2(a);

(ii) the substance of the independent financial adviser's advice (Rule 25.2(b));

(iii) any known significant changes in its financial or trading position (Rule 25.3);

(iv) interests and dealings in relevant securities (Rule 25.4);

(v) the service contracts of the offeree company's directors (Rule 25.5);

(vi) any arrangements of the kind referred to in Note 11 on the definition of acting in concert (Rule 25.6);

(vii) material contracts (Rule 25.7(a));

(viii) irrevocable commitments and letters of intent (Rule 25.7(b));

(ix) profit forecasts (Rule 25.7(d)); and

(x) fees and expenses (to the extent required under Rule 25.8).

(d) If any document or announcement published by the offeror or the offeree company included a profit forecast, a quantified financial benefits statement or an asset valuation, any document subsequently published by that party in connection with the offer must, unless superseded by information included in the new document, include a statement by the directors of that party confirming:

(i) that the profit forecast, quantified financial benefits statement or asset valuation (as appropriate) remains valid;

(ii) where reports were obtained on a profit forecast or quantified financial benefits statement, that the reporting accountants and financial advisers have confirmed that their reports continue to apply; and

(iii) where an opinion on value was obtained on an asset valuation, that the independent valuer has confirmed that its opinion continues to apply.”.

16.20 In addition, the Code Committee proposes to:

- (a) make corresponding amendments Notes 2 and 3 on Rule 20.1, as set out in Appendix D; and
- (b) delete Note 1 on Rule 23.1, on the basis that it will be superseded by the provisions of the proposed new Rule 27.

Q20 Do you have any further comments on the proposed new Rule 27 and the related Code amendments?

C. OTHER AMENDMENTS IN RELATION TO DOCUMENTS PUBLISHED BY AN OFFEROR AND THE OFFEREE COMPANY

17. Proposed amendments to the current Rule 28.4

(a) Consent letters

17.1 The second sentence of Rule 28.4 requires that, when reports by reporting accountants and financial advisers on a profit forecast are included in a document or announcement:

“The reports must be accompanied by a statement that those making them have given and not withdrawn their consent to publication.”.

17.2 The Code Committee considers that this requirement should be moved to Rule 23.3, which currently requires that any document which includes an opinion of a financial adviser must include a statement that the financial adviser has consented to the publication of the document with the inclusion of its opinion in the form and context in which it is included. In addition, the Code Committee proposes to make a number of minor drafting amendments to Rule 23.3.

17.3 The Code Committee is therefore proposing to amend Rule 23.3, as follows:

“23.3 FINANCIAL ADVISERS’ CONSENT TO INCLUSION OF ADVICE, OPINIONS AND REPORTS

If any document or announcement published in connection with an offer includes:

(a) a recommendation or an opinion the substance of the advice given to the board of the offeree company or to an offeror by ~~of a the independent~~ financial adviser for or against acceptance of the offer, appointed under Rule 3.1 or 3.2;

(b) reports on a profit forecast or a quantified financial benefits statement given by reporting accountants and financial advisers in accordance with Rule 28; or

(c) an opinion on value given by an independent valuer in accordance with Rule 29,

the document or announcement must, unless published by the financial adviser in question, include a statement that the financial advisers, the reporting accountants and/or the independent valuer (as appropriate) has given and not withdrawn its consent to the inclusion of its advice, report or opinion (as the case may be) in the relevant document publication of the document with the inclusion of its recommendation or opinion in the form and context in which it is included.”.

17.4 In addition, the Code Committee proposes to make corresponding amendments to Rules 26.2(c), (e) and (f), as set out in Appendix D.

(b) Where a profit forecast is first published in an announcement

17.5 The third sentence of Rule 28.4 provides as follows:

“If a company’s forecast is published first in an announcement, it must be repeated in full, together with the reports, in the next document published in connection with the offer by that company.”.

17.6 The Code Committee considers that this requirement should be moved to Rules 24 and 25 (in the case of a profit forecast which is first published in an announcement which precedes an offer document or offeree board circular) and Rule 27 (in the case of a profit forecast which is first published in an announcement subsequent to the publication of an offer document or offeree board circular).

17.7 The Code Committee is therefore proposing to introduce new Rules 24.3(d)(xviii), 25.7(d), 27.2(b)(ix) and 27.2(c)(ix), as set out in Appendix D.

Q21 Do you have any comments on the proposed amendments relating to the current Rule 28.4?

18. Documents on display

(a) *New documents*

18.1 Rule 26.1 requires certain documents to be put on display on a website as soon as possible following the announcement by an offeror of a firm intention to make an offer (or, if later, the date of the relevant document). Rule 26.2 requires certain other documents to be put on display on a website from the time the offer document or offeree board circular (as appropriate) is published. Note 5 on Rule 26 provides that:

“If a document on display is amended, varied, updated or replaced during the period in which it is required to be on display under Rule 26, then the amended, varied or updated document, or the replacement document, should also be put on display and a statement that this has been done should be included on the website.”

18.2 Therefore, if, for example, an offeror amends any document relating to the financing of its offer after the date of the announcement of its firm intention to make the offer, a copy of the amended document must be put on display on the website, and the website updated to show that this has been done. However, there is no requirement for an announcement to be made of the fact that the amended financing document has been entered into. Similarly, there is no requirement for an announcement to be made if an entirely new document is entered into and required to be put on display on a website under Rule 26.1 or Rule 26.2.

18.3 In addition, Rule 26.2(d) requires a party to an offer to put on display on a website any material contract entered into by it (or any of its subsidiaries) in connection with the offer where the contract is described in the offer document or the offeree board circular under, respectively, Rules 24 or 25. However, there is no express

requirement to put on display a material contract entered into in connection with the offer after the publication of the offer document or offeree board circular (as appropriate).

- 18.4 In order to address the issues identified in the preceding paragraphs, the Code Committee proposes to amend Rule 26.2 and Note 5 on Rule 26, as follows:

“26.2 DOCUMENTS TO BE ON DISPLAY FOLLOWING THE MAKING OF AN OFFER

Except with the consent of the Panel, copies of the following documents must be published on a website from the time the offer document or offeree board circular, as appropriate, is published (or, if later, the date of the relevant document) until the end of the offer (including any related competition reference period):

...

(d) any material contract entered into by an offeror or the offeree company, or any of their respective subsidiaries, in connection with the offer that is:

(i) described in the offer document or offeree board circular (as appropriate) in compliance with Rule 24.3(a), Rule 24.3(b) or Rule 25.7(a); or

(ii) entered into after the publication of the offer document or the offeree board circular (as appropriate);

...

NOTES ON RULE 26

...

5. *Amendment ~~etc.~~, ~~variation, updating or replacement~~ of documents on display and entering into new documents required to be put on display*

If a document ~~on display~~ is amended, varied, updated or replaced during the period in which it is required to be ~~on display~~ published on a website under Rule 26, ~~then~~ the amended, varied or updated document, or the replacement document, ~~should~~ must also be ~~put on display~~ published on a

website and a statement that this has been done should be included on the website—an announcement made explaining that this has been done. Similarly, where a new document is entered into which is required to be published on a website under Rule 26, an announcement must be made explaining that the document has been entered into and that it has been so published.”.

(b) Agreements relating to the invocation of conditions

18.5 At present, Rule 26.2(i) requires an agreement or arrangement which relates to the circumstances in which an offeror may or may not invoke, or seek to invoke, a condition to its offer to be published on a website from the time of the publication of the offer document. The Code Committee believes that it would be more appropriate for such agreements or arrangements to be published on a website from the time of the announcement by the offeror of its firm intention to make an offer. The Code Committee therefore proposes to delete Rule 26.2(i) and to introduce a new Rule 26.1(e), as set out in Appendix D.

Q22 Do you have any comments on the proposed amendments to Rule 26 in relation to documents on display?

D. ASSESSMENT OF THE IMPACT OF THE PROPOSALS

19. Proportionality, benefits and cost implications

(a) Profit forecasts and quantified financial benefits statements

19.1 The Code Committee believes that the reporting requirements currently imposed by the Code in relation to profit forecasts and quantified financial benefits statements (currently referred to as merger benefits statements) represent a proportionate means of ensuring that such forecasts and statements have been prepared to an appropriate standard, insofar as they apply to:

- (a) profit forecasts and quantified financial benefits statements published during an offer period; and
- (b) profit forecasts published by an offeree company or by potential offeror following an approach with regard to a possible offer.

The requirements of the Code in relation to such forecasts and statements will remain essentially unchanged and there will therefore be no additional cost implications where this is the case.

19.2 The Code Committee believes that its proposals for applying less stringent requirements than at present to profit forecasts which have been published before an approach has been made with regard to a possible offer represent a more proportionate approach than is currently the case and, in many circumstances, will relieve a party to an offer from the time and cost burden involved in obtaining third party reports. As indicated in section 4 above, the Code Committee considered whether such profit forecasts should be excluded entirely from the scope of Rule 28 but rejected this option, on the basis that an outstanding profit forecast is likely to be a statement on which shareholders and other market

participants will place particular reliance in the context of an offer. Whilst the current reporting requirements might be regarded as disproportionate, the Code Committee concluded that the Code should nevertheless continue to include specific provisions with regard to outstanding profit forecasts. However, the removal of the requirement to obtain reports from professional advisers will represent a cost saving opportunity for offeree companies and paper offerors, although the Code Committee recognises that such cost saving may be reduced if, as is possible, companies choose to take professional advice in order for their directors to be able to provide the confirmations which will be required under the revised Rule 28.

- 19.3 The proposed requirement to publish a corresponding profit forecast for the current financial year when, during an offer period, a party to the offer first publishes a profit forecast for a future financial year, and the requirement to have the profit forecast for the current financial year reported on, will potentially result in additional costs for offeree companies and paper offerors. However, the Code Committee believes that a requirement to publish and obtain reports on a corresponding profit forecast for the current year is logical and justified and notes that the costs of obtaining reports will be mitigated if the company has previously published a profit forecast for the current financial year (in which case the directors will be required to confirm the validity of the profit forecast but will not be required to obtain reports on it).
- 19.4 In addition, as a result of the proposed amendments, new reporting requirements will be imposed in respect of quantified financial benefits statements (which will include statements made by offeree companies) that are published in the context of a recommended securities exchange offer. The Code Committee believes that the revised Rule 28 should apply equally to all quantified financial benefits statements published during an offer period and that there is no obvious basis for not applying the rule in the context of a recommended offer. The Code Committee notes that this approach is in line with that proposed by the FSA in

CP12/2. Further, if this change is made, the existing risk that a conditional dispensation granted by the Panel in the context of a recommended offer might later be withdrawn will be removed.

- 19.5 In proposing that the Panel should have the ability to grant a dispensation from the Code's requirements in relation to ordinary course profit forecasts, profit forecasts for future financial periods, and profit forecasts by paper offerors where the shares to be issued will represent less than 10% of their enlarged equity share capital, the Code Committee has sought to balance the costs of obtaining reports on profit forecasts from reporting accountants and financial advisers against the benefit of such reports to shareholders and other constituents. However, the Code Committee considers that the costs of requiring reports in the context of a management buy-out or similar transaction, in circumstances where the proposed relaxation of the reporting requirements of the Code would not normally apply, is justified, given the risks for shareholders which are associated with such transactions.
- 19.6 Although incapable of quantification, the Code Committee believes that the adoption of a more logical framework for the regulation of profit forecasts and the greater consistency with other relevant legislation, standards and guidance will be of benefit to the regulated community as a whole.

(b) *Material changes in information*

- 19.7 The Code Committee does not believe that the introduction of a requirement to announce material changes to previously published information, even though the party concerned is not publishing a new document (or, in appropriate circumstances, to publish a document setting out the relevant information) will impose a significant burden on offeree companies and offerors. This is on the basis that General Principle 2 and Rule 23 already impose, in summary, an obligation on parties to offers to provide shareholders with sufficient information

to enable them to reach a properly informed decision in respect of an offer. The Code Committee therefore believes that the requirement to inform shareholders of material changes is a specific example of what those parties should, in any event, already be doing under the current rules. In addition, in view of the fact that:

- (a) in the majority of cases, offerors and offeree companies are subject to on-going disclosure obligations under the rules of other regulatory authorities and markets; and
- (b) any additional disclosure obligation could normally be satisfied by means of an announcement rather than the publication of an additional document,

the Code Committee believes that any incremental cost of complying with the Code's amended disclosure regime would not be significant.

(c) *Other amendments in relation to documents published by an offeror and the offeree company*

19.8 The amendments proposed in Part C of this PCP are of a minor and consequential nature and the Code Committee does not believe that any material costs or benefits will flow from the proposed amendments.

APPENDIX A

Summary of the application of the principal provisions of the proposed new Rule 28

	NON “ORDINARY COURSE” PROFIT FORECAST (“PF”) FOR CURRENT YEAR ¹	“ORDINARY COURSE” PF FOR CURRENT YEAR ¹ : OTHER PARTIES DO NOT CONSENT TO DISPENSATION	“ORDINARY COURSE” PF FOR CURRENT YEAR ¹ : OTHER PARTIES CONSENT TO DISPENSATION	PF FOR YEAR(S) ENDING MORE THAN 15 MONTHS FROM DATE PF FIRST PUBLISHED ²
PF first published before approach	Directors’ confirmation <i>(Rule 28.1(c))</i>		Directors’ confirmation <i>(Rule 28.1(c))</i>	Directors’ confirmation <i>(Rule 28.1(c))</i>
PF first published during offer period/after approach³	Reports <i>(Rule 28.1(a)/(b))</i>		Directors’ confirmation <i>(Note 2 on Rule 28.1)</i>	Directors’ confirmation <i>(Note 3 on Rule 28.1)</i>
MBO or offer made by a controller (whenever PF first published)	Reports <i>(Note 4 on Rule 28.1)</i>		Reports <i>(Note 4 on Rule 28.1)</i>	Directors’ confirmation <i>(Note 3 on Rule 28.1)</i>

1. Under Note 3 on Rule 28.1, the Panel will normally consent to the disapplication of Rule 28.1(a) or (b) where a profit forecast relates to a period ending more than 15 months from the date when the profit forecast is, or was, first published.
2. Under Rule 28.2, if an offeree company or paper offeror publishes a profit forecast for a future financial year for the first time during an offer period (or in an announcement which commences an offer period), or is required to repeat a previously published profit forecast for a future financial year in an offer document or offeree board circular, it must also publish a corresponding profit forecast for the current financial year and for any intervening financial year(s). Such a profit forecast for the current financial year that has not previously been published will be required to be reported on, unless it is an ordinary course profit forecast and the other parties consent to a dispensation from the reporting requirements.
3. Under Note 1 on Rule 28.1, the Panel may also require reports where a profit forecast was published by the offeror prior to the commencement of the offer period but following the first active consideration of a possible offer.

APPENDIX B

Current Note 9 on Rule 19.1, Rule 27 and Rule 28¹

Rule 19.1

19.1 STANDARDS OF CARE

...

NOTES ON RULE 19.1

...

9. *Merger benefits statements*

In order to satisfy the existing standards of information set out in the Code, certain additional requirements may need to be complied with if a party to the offer makes quantified statements about the expected financial benefits of a proposed takeover or merger (for example, a statement by an offeror that it would expect the offeree company to contribute an additional £x million of profit post acquisition). These requirements will only need to be complied with in securities exchange offers and will not normally apply in the case of a recommended securities exchange offer unless a competing offer is made and the merger benefits statement is subsequently repeated by the party which made it or the statement otherwise becomes a material issue. These additional requirements include publication of:

- (a) the bases of the belief (including sources of information) supporting the statement;*
- (b) reports by financial advisers and accountants that the statement has been made with due care and consideration;*
- (c) an analysis and explanation of the constituent elements sufficient to enable the relative importance of these elements to be understood; and*
- (d) a base figure for any comparison drawn.*

These requirements may also be applicable to statements to the effect that an acquisition will enhance an offeror's earnings per share where such enhancement depends in whole or in part on material merger benefits.

A party to an offer wishing to make a merger benefits statement should consult the Panel in advance. See also Rule 28.6(g).

¹ The provisions in this Appendix B will be deleted if the amendments proposed in this PCP are adopted.

Rule 27**RULE 27. DOCUMENTS SUBSEQUENTLY PUBLISHED****27.1 MATERIAL CHANGES**

Documents subsequently sent to shareholders of the offeree company and persons with information rights by a party to the offer must contain details of any material changes in information previously published by or on behalf of the relevant party during the offer period; if there have been no such changes, this must be stated. In particular, the following matters must be updated:

- (a) changes or additions to, or the replacement of, material contracts, irrevocable commitments or letters of intent or financing arrangements (Rules 24.3(a), (b), (d)(x) and (f) and 25.7(a) and (b));
- (b) any known significant changes in the financial or trading position (Rules 24.3(a)(v) and 25.3);
- (c) interests and dealings (Rules 24.4 and 25.4);
- (d) directors' emoluments (Rule 24.5);
- (e) special arrangements (Rule 24.6);
- (f) ultimate owner of securities acquired under the offer (Rule 24.9);
- (g) arrangements in relation to dealings (Rules 24.13 and 25.6); and
- (h) changes to directors' service contracts (Rule 25.5).

27.2 CONTINUING VALIDITY OF PROFIT FORECASTS

When a profit forecast has been made, documents subsequently published by the party to the offer making the forecast must comply with the requirements of Rule 28.5.

Rule 28**SECTION K. PROFIT FORECASTS****RULE 28**

28.1 STANDARDS OF CARE

There are obvious hazards attached to the forecasting of profits; this should in no way detract from the necessity of maintaining the highest standards of accuracy and fair presentation in all communications published in connection with an offer. A profit forecast must be compiled with due care and consideration by the directors, whose sole responsibility it is; the financial advisers must satisfy themselves that the forecast has been prepared in this manner by the directors.

NOTE ON RULE 28.1

Existing forecasts

At the outset, an adviser should invariably check whether or not his client has a forecast on the record so that the procedures required by Rule 28.3(d) can be set in train with a minimum of delay.

28.2 THE ASSUMPTIONS

(a) When a profit forecast appears in any document published in connection with an offer, the assumptions, including the commercial assumptions, upon which the directors have based their profit forecast, must be stated in the document.

(b) When a profit forecast is given in a press announcement commencing or made during an offer period, any assumptions on which the forecast is based should be included in the announcement.

NOTES ON RULE 28.2

1. Requirement to state the assumptions

(a) It is important that by listing the assumptions on which the forecast is based useful information should be provided to help relevant persons to form a view as to the reasonableness and reliability of the forecast. This should draw attention to, and where possible quantify, those uncertain factors which could materially disturb the ultimate achievement of the forecast.

(b) There are inevitable limitations on the accuracy of some forecasts and these should be indicated. A description of the general nature of the business or businesses with an indication of any major hazards in forecasting in these particular businesses should normally be included.

(c) *The forecast and the assumptions on which it is based are the sole responsibility of the directors. However, a duty is placed on the financial advisers to discuss the assumptions with their client and to satisfy themselves that the forecast has been made with due care and consideration. Auditors or consultant accountants must satisfy themselves that the forecast, so far as the accounting policies and calculations are concerned, has been properly compiled on the basis of the assumptions made.*

Although the accountants have no responsibility for the assumptions, they will as a result of their review be in a position to advise the company on what assumptions should be listed in the circular and the way in which they should be described. The financial advisers and accountants obviously have substantial influence on the information about assumptions to be given in a circular; neither should allow an assumption to be published which appears to be unrealistic, or one to be omitted which appears to be important, without commenting appropriately in its report.

2. *General rules*

(a) *The following general rules apply to the selection and drafting of assumptions.*

(i) *The implications of the assumptions should be capable of being understood with a view to helping relevant persons to form a judgement as to the reasonableness of the forecast and the main uncertainties attaching to it.*

(ii) *The assumptions should be specific rather than general, definite rather than vague.*

(iii) *Assumptions about factors which the directors can influence may be included, provided that they are clearly identified as such. However, assumptions relating to the general accuracy of estimates should be avoided. The following would not be acceptable:*

“Sales and profits for the year will not differ materially from those budgeted for.”

“There will be no increases in costs other than those anticipated and provided for.”

Every forecast involves estimates of income and of costs and must obviously be dependent on these estimates. Assumptions of the type illustrated above would not help a person in considering the forecast.

(iv) *The assumptions should not relate to the accuracy of the accounting systems. If the systems of accounting and forecasting are such that full reliance cannot be placed on them, this should be the subject of some qualification, in the forecast itself. It is not satisfactory for this type of deficiency to be covered by the assumptions. The following would not be acceptable:*

“The book record of stock and work-in-progress will be confirmed at the end of the financial year.”

(v) *The assumptions should relate only to matters which may have a material bearing on the forecast.*

(b) *Even the more specific type of assumption may still leave doubt as to its implications, for instance:*

“No abnormal liabilities will arise under guarantees.”

“Provisions for outstanding legal claims will prove adequate.”

Such phrases might be dismissed on the grounds that the first relates to the unforeseen and the second to the adequacy of the estimating system. In both these examples information would be necessary about the extent or basis of the provision already made and/or about the circumstances in which unprovided for liabilities might arise.

(c) *There may be occasions, particularly when the estimate relates to a period already ended, when no assumptions are required.*

28.3 REPORTS REQUIRED IN CONNECTION WITH PROFIT FORECASTS

(a) A forecast made by an offeror offering solely cash need not be reported on. With the consent of the Panel, this exemption may be extended to an offeror offering a non-convertible debt instrument.

(b) In all other cases, the accounting policies and calculations for the forecasts must be examined and reported on by the auditors or consultant accountants. Any financial adviser mentioned in the document must also report on the forecasts.

(c) When income from land and buildings is a material element in a forecast, that part of the forecast should normally be examined and reported on by an independent valuer: this requirement does not apply where the income is virtually certain, eg known rents receivable under existing leases.

(d) Except with the consent of the Panel, any profit forecast which has been made before the commencement of the offer period must be examined, repeated and reported on in the document sent to shareholders and persons with information rights.

(e) Exceptionally, the Panel may accept that, because of the uncertainties involved, it is not possible for a forecast previously made to be reported on in accordance with the Code nor for a revised forecast to be made. In these circumstances, the Panel would insist on a full explanation being given as to why the requirements of the Code were not capable of being met.

28.4 PUBLICATION OF REPORTS AND CONSENT LETTERS

Whenever a profit forecast is made during an offer period, the reports must be included in the document containing the forecast or, when the forecast is made in an announcement (including one commencing the offer period), in that announcement. The reports must be accompanied by a statement that those making them have given and not withdrawn their consent to publication. If a company's forecast is published first in an announcement, it must be repeated in full, together with the reports, in the next document published in connection with the offer by that company.

28.5 SUBSEQUENT DOCUMENTS — CONTINUING VALIDITY OF FORECAST

When a company includes a forecast in a document, any document subsequently published by that company in connection with that offer must, except with the consent of the Panel, contain a statement by the directors that the forecast remains valid for the purpose of the offer and that the financial advisers and accountants who reported on the forecast have indicated that they have no objection to their reports continuing to apply.

28.6 STATEMENTS WHICH WILL BE TREATED AS PROFIT FORECASTS

(a) When no figure is mentioned

Even when no particular figure is mentioned or even if the word “profit” is not used, certain forms of words may constitute a profit forecast, particularly when considered in context. Examples are “profits will be somewhat higher than last year” and “performance in the second half-year is expected to be similar to our performance and results in the first half-year” (when interim figures have already been published). Whenever a form of words puts a floor under, or a ceiling on, the likely profits of a particular period or contains the data necessary to calculate an approximate figure for future profits, it will be

treated by the Panel as a profit forecast which must be reported on. In cases of doubt, professional advisers should consult the Panel in advance.

(b) Estimates of profit for a completed period

An estimate of profit for a period which has already expired should be treated as a profit forecast.

(c) Interim and preliminary figures

Except with the consent of the Panel, any unaudited profit figures published during an offer period must be reported on. This provision does not, however, apply to:

- (i) unaudited statements of annual or interim results which have already been published;**
- (ii) unaudited statements of annual results which comply with the requirements for preliminary statements of annual results as set out in the UKLA Rules;**
- (iii) unaudited statements of interim results which comply with the requirements for half-yearly reports as set out in the UKLA Rules in cases where the offer has been publicly recommended by the board of the offeree company; or**
- (iv) unaudited statements of interim results by offerors which comply with the requirements for half-yearly reports as set out in the UKLA Rules, whether or not the offer has been publicly recommended by the board of the offeree company but provided the offer could not result in the issue of securities which would represent 10% or more of the enlarged voting share capital of the offeror.**

The Panel should be consulted in advance if the company is not admitted to the Official List but wishes to take advantage of the exemptions under (ii), (iii) or (iv) above.

(d) Forecasts for a limited period

A profit forecast for a limited period (eg the following quarter) is subject to this Rule.

(e) Dividend forecasts

A dividend forecast is not normally considered to be a profit forecast unless, for example, it is accompanied by an estimate as to dividend cover.

(f) Profit warranties

The Panel must be consulted in advance if a profit warranty is to be published in connection with an offer as it may be regarded as a profit forecast.

(g) Earnings enhancement and merger benefits statements

Parties to an offer wishing to make earnings enhancement statements which are not intended to be profit forecasts must include an explicit and prominent disclaimer to the effect that such statements should not be interpreted to mean that earnings per share will necessarily be greater than those for the relevant preceding financial period.

Parties should also be aware that the inclusion of earnings enhancement statements, if combined with merger benefits statements and/or other published financial information, may result in the market being provided with information from which the prospective profits for the offeror or the enlarged offeror group or at least a floor or ceiling for such profits can be inferred. Such statements would then be subject to this Rule. If parties are in any doubt as to the implications of the inclusion of such statements, they should consult the Panel in advance.

See also Note 9 on Rule 19.1.

28.7 TAXATION, EXTRAORDINARY ITEMS AND MINORITY INTERESTS

When a forecast of profit before taxation appears in a document published in connection with an offer, there must be included forecasts of taxation (where the figure is expected to be significantly abnormal), extraordinary items and minority interests (where either of these amounts is expected to be material).

28.8 WHEN A FORECAST RELATES TO A PERIOD WHICH HAS COMMENCED

Whenever a profit forecast is made in relation to a period in which trading has already commenced, any previously published profit figures in respect of any expired part of that trading period, together with comparable figures for the same part of the preceding year, must be stated.

APPENDIX C

Respondents to PCP 2010/1 (excluding those who submitted comments on a confidential basis)

1. Association for Financial Markets in Europe
2. Association of British Insurers
3. Deloitte LLP
4. Deutsche Bank AG London
5. Ernst & Young Global Limited
6. GC100 Group
7. Grant Thornton UK LLP
8. Institute of Chartered Accountants in England and Wales
9. PricewaterhouseCoopers LLP
10. Takeovers Joint Working Party of the City of London Law Society Company Law Sub-Committee and the Law Society of England and Wales' Standing Committee on Company Law

APPENDIX D

Proposed amendments to the Code²

DEFINITIONS

Cash offeror

A cash offeror is aAn offeror (or potential offeror) which has announced, or in respect of which the offeree company has announced, that its offer is, or is likely to be, solely in cash. A non-convertible debt instrument will normally be treated as cash.

Offer period

...

Subject to Note 3, aAn offer period will end when an announcement is made that an offer has become or has been declared unconditional as to acceptances, that a scheme of arrangement has become effective, that all announced offers have been withdrawn or have lapsed or following certain other announcements having been made (such as all publicly identified potential offerors having made a statement to which Rule 2.8 applies).

...

3. First closing date

Where an offer is unconditional from the outset, or becomes or is declared unconditional as to acceptances prior to the first closing date, the offer period will nevertheless continue until the first closing date.

Profit estimate

A profit estimate is a profit forecast for a period which has expired and for which audited results have not yet been published.

Profit forecast

A profit forecast is a form of words which expressly states, or by implication indicates, a figure, or a minimum or maximum figure, for the likely level of profits or losses for a particular period, or contains data from which a calculation of such a figure for profits or losses may be made, even if no particular figure is mentioned and the word “profit” is not used.

² In addition to the amendments set out in this Appendix D, it is proposed that the current Note 9 on Rule 19.1, Rule 27 and Rule 28 (which provisions are set out in Appendix B) will be deleted.

NOTE ON PROFIT FORECAST

A statement in relation to a target for profits (or losses) will normally be treated as a profit forecast.

Quantified financial benefits statement

A quantified financial benefits statement is either:

(a) a statement by an offeror or the offeree company quantifying any financial benefits expected to arise from the proposed transaction if the offer or possible offer is successful; or

(b) a statement by the offeree company quantifying any financial benefits expected to arise from cost saving measures and/or an alternative transaction proposed to be implemented if the offer or possible offer is withdrawn or lapses.

Rule 2.9**2.9 ANNOUNCEMENT OF AN OFFER OR POSSIBLE OFFER TO BE PUBLISHED VIA A RIS**

...

NOTES ON RULE 2.9

...

2. *Other Rules*

[various minor amendments required: not shown]

Rule 19.1**19.1 STANDARDS OF CARE**

...

NOTES ON RULE 19.1

5. *Quotations*

...

Since quotations will necessarily carry the implication that the comments quoted are endorsed by the relevant party to the offer~~board~~, such comments must not be quoted unless the ~~board~~party is prepared, where appropriate, to corroborate or substantiate them and the directors' responsibility statement is included. See also Rule 28.7(a).

...

[current Note 9 on Rule 19.1 to be deleted]

Rule 20.1

20.1 EQUALITY OF INFORMATION TO SHAREHOLDERS AND PERSONS WITH INFORMATION RIGHTS

...

NOTES ON RULE 20.1

...

2. Media interviews

Parties to an offer must take particular care not to disclose new material in interviews or discussions with the media. If, notwithstanding this Note, any new information is published as a result of such an interview or discussion, ~~a circular must be sent to shareholders and persons with information rights and, where appropriate, paid newspaper space taken as required by Note 3 below~~ an announcement giving all relevant details must be made as soon as possible thereafter (see also Note 1 on Rule 19.1). Where appropriate, the Panel may, in addition, require a document to be sent to shareholders and persons with information rights and made readily available to the offeree company's employee representatives (or, where there are no employee representatives, to the employees themselves) and to the trustees of the offeree company's pension scheme(s).

3. Meetings

...

If, notwithstanding the above, any material new information or significant new opinion does emerge at the meeting, an announcement giving all relevant details must be made as soon as possible thereafter. Where appropriate, the Panel may, in addition, require a document to ~~a circular giving details must be sent to~~

shareholders and persons with information rights and made readily available to the offeree company's employee representatives (or, where there are no employee representatives, to the employees themselves) and to the trustees of the offeree company's pension scheme(s) as soon as possible thereafter: in the final stages of an offer it may be necessary to make use of paid newspaper space as well as a circular. The circular or advertisement must include the directors' responsibility statement. If such new information or opinion is not capable of being substantiated as required by the Code (eg a profit forecast), this must be made clear and it must be formally withdrawn in the circular or advertisement.

...

Rule 23

23.1 SUFFICIENT INFORMATION

...

NOTES ON RULE 23.1

1. — *Material changes*

Any document published in connection with an offer must include information about any material change in any information previously published by or on behalf of the relevant party during the offer period; if there have been no such changes, this should be stated.

2. — *Offers conditional on shareholder action*

...

23.3 FINANCIAL ADVISERS' CONSENT TO INCLUSION OF ADVICE, OPINIONS AND REPORTS

If any document or announcement published in connection with an offer includes:

(a) a recommendation or an opinion the substance of the advice given to the board of the offeree company or to an offeror by of a the independent financial adviser for or against acceptance of the offer, appointed under Rule 3.1 or 3.2;

(b) reports on a profit forecast or a quantified financial benefits statement given by reporting accountants and financial advisers in accordance with Rule 28; or

(c) an opinion on value given by an independent valuer in accordance with Rule 29,

the document or announcement must, unless published by the financial adviser in question, include a statement that the financial advisers, the reporting accountants and/or the independent valuer (as appropriate) has given and not withdrawn its consent to the inclusion of its advice, report or opinion (as the case may be) in the relevant document publication of the document with the inclusion of its recommendation or opinion in the form and context in which it is included.

Rule 24

24.3 FINANCIAL AND OTHER INFORMATION ON THE OFFEROR, THE OFFEREE COMPANY AND THE OFFER

Except with the consent of the Panel:

(a) where the offeror is a company incorporated under the Companies Act 2006 (or its predecessors) and its shares are admitted to trading on a UK regulated market or on AIM or PLUS, the offer document must contain:

...

(iv) details of the website address where any ~~interim statement and/or preliminary announcement made~~ statement of annual results, half-yearly financial report or interim financial information published since the date of its last published audited accounts have been published and a statement that any such statement or ~~announcement report or information~~ has been incorporated into the offer document by reference to that website in accordance with Rule 24.15;

(v) in the case of a securities exchange offer, a description of any known significant change in its financial or trading position which has occurred since the end of the last financial period for which ~~either audited accounts, a preliminary statement of annual results, a half-yearly financial report~~ financial information or interim financial information has been published, or provide an appropriate negative statement;

...

(d) the offer document (including, where relevant, any revised offer document) must include:

...

(xviii) in the case of a securities exchange offer, any profit forecast or quantified financial benefits statement published during the offer period or following the approach to the offeree company with regard to a possible offer, and any assumptions, reports or confirmations required by Rule 28;

...

Rule 25

25.3 FINANCIAL AND OTHER INFORMATION

The offeree board circular must contain a description of any known significant change in the financial or trading position of the offeree company which has occurred since the end of the last financial period for which ~~either audited accounts, a preliminary statement of annual results, a half-yearly financial report~~ financial information or interim financial information has been published, or provide an appropriate negative statement.

...

~~25.7 MATERIAL CONTRACTS, IRREVOCABLE COMMITMENTS AND LETTERS OF INTENT, AND DOCUMENTS ON DISPLAY~~ OTHER INFORMATION

The offeree board circular must contain:

...

(b) ... ; ~~and~~

(c) ... ; and

(d) any profit forecast or quantified financial benefits statement published during the offer period, or following the approach by or on behalf of the offeror with regard to a possible offer, and any assumptions, reports or confirmations required by Rule 28.

Rule 26**26.1 DOCUMENTS TO BE ON DISPLAY FOLLOWING THE ANNOUNCEMENT OF AN OFFER**

Except with the consent of the Panel, copies of the following documents must be published on a website as soon as possible and in any event by no later than 12 noon on the business day following the announcement of a firm intention to make an offer (or, if later, the date of the relevant document) until the end of the offer (including any related competition reference period):

...

(c) ... ; ~~and~~

(d) ... ; and

(e) any agreements or arrangements, or, if not reduced to writing, a memorandum of all the terms of such agreements or arrangements, which relate to the circumstances in which the offeror may or may not invoke or seek to invoke a pre-condition or a condition to its offer (Rule 2.7(c)(iv)).

26.2 DOCUMENTS TO BE ON DISPLAY FOLLOWING THE MAKING OF AN OFFER

Except with the consent of the Panel, copies of the following documents must be published on a website from the time the offer document or offeree board circular, as appropriate, is published (or, if later, the date of the relevant document) until the end of the offer (including any related competition reference period):

...

(c) any written consents of ~~the~~ an independent financial advisers to the inclusion of its advice in the relevant document in the form and context in which it is included (Rule 23.3(a));

(d) any material contract entered into by an offeror or the offeree company, or any of their respective subsidiaries, in connection with the offer that is:

(i) described in the offer document or offeree board circular (as appropriate) in compliance with Rule 24.3(a), Rule 24.3(b) or Rule 25.7(a); or

(ii) entered into after the publication of the offer document or the offeree board circular (as appropriate);

(e) where a profit forecast or quantified financial benefits statement has been published made:

(i) the reports of the ~~auditors or consultant reporting~~ accountants and of the financial advisers (Rules 28.1(a) and (b)); and

~~(ii) the letters giving the written consents of the auditors or consultant reporting accountants and of the financial advisers to the publication of the relevant document with the inclusion of their reports in the relevant document in the form and context in which it is they are included (Rule 23.3(b)) and/or, if appropriate, to the continued use of the report in a subsequent document the confirmations that their reports continue to apply (Rules 28.4 and 28.5)~~Rule 27.2(d);

(f) where an asset valuation has been published made:

(i) the valuation certificate and associated report or schedule containing details of the aggregate valuation (Rule 29.5(c)); and

~~(ii) a the written consent of letter stating that the independent valuer to the inclusion of its opinion of value has given and not withdrawn his consent to the publication of his name in the relevant document in the form and context in which it is included (Rule 29.5(b)) (Rule 23.3(c)) and, if appropriate, the confirmation that its report continues to apply (Rule 27.2(d));~~

...

~~(i) any agreements or arrangements, or, if not reduced to writing, a memorandum of all the terms of such agreements or arrangements, which relate to the circumstances in which the offeror may or may not invoke or seek to invoke a condition to its offer (Rule 24.3(d)(ix)).~~

NOTES ON RULE 26

...

5. *Amendment etc., variation, updating or replacement of documents on display and entering into new documents required to be put on display*

If a document ~~on display~~ is amended, varied, updated or replaced during the period in which it is required to be ~~on display~~ published on a website under

Rule 26, ~~then~~ the amended, varied or updated document, or the replacement document, ~~should~~ must also be ~~put on display~~ published on a website and a statement that this has been done should be included on the website ~~an announcement made explaining that this has been done. Similarly, where a new document is entered into which is required to be published on a website under Rule 26, an announcement must be made explaining that the document has been entered into and that it has been so published.~~

Rule 27

RULE 27. MATERIAL CHANGES AND SUBSEQUENT DOCUMENTS

27.1 MATERIAL CHANGES

(a) Following the publication of the initial offer document or offeree board circular (as appropriate) and until the end of the offer period, the offeror or the offeree company (as appropriate) must promptly announce any material changes in information disclosed in any document or announcement previously published by it in connection with the offer.

(b) Where an announcement is required to be made under Rule 27.1(a), the Panel may, in addition, require a document setting out the relevant information to be:

(i) sent to shareholders in the offeree company and persons with information rights; and

(ii) made readily available to the offeree company's employee representatives (or, where there are no employee representatives, to the employees themselves) and to the trustees of the offeree company's pension scheme(s).

27.2 SUBSEQUENT DOCUMENTS

(a) If, following the publication of the initial offer document or offeree board circular (as appropriate) and before the end of the offer period, an offeror or the offeree company publishes any subsequent document in connection with the offer, that document must include:

(i) any material changes in information disclosed in any previous document published by it in connection with the offer (or a statement that there have been no such material changes); and

(ii) details of any changes to the matters listed in Rule 27.2(b) (in the case of an offeror) or in Rule 27.2(c) (in the case of the offeree

company) which have occurred since the publication of any previous document published by it in connection with the offer (or a statement that there have been no such changes).

(b) In the case of an offeror, the matters referred to in Rule 27.2(a)(ii) are as follows:

(i) its intentions with regard to the matters referred to in Rule 24.2;

(ii) any known significant change in its or the offeree company's financial or trading position (to the extent required under Rule 24.3(a)(v));

(iii) material contracts (Rule 24.3(a)(vii));

(iv) ratings and outlooks (Rule 24.3(c));

(v) the terms of the offer (Rule 24.3(d)(v));

(vi) any agreements or arrangements which relate to the invocation of the conditions to its offer (Rule 24.3(d)(ix));

(vii) irrevocable commitments and letters of intent (Rule 24.3(d)(x));

(viii) any offer-related arrangements etc. permitted under, or excluded from, Rule 21.2 (Rule 24.3(d)(xv));

(ix) profit forecasts (Rule 24.3(d)(xii));

(x) financing arrangements (Rule 24.3(f));

(xi) interests and dealings in relevant securities (Rule 24.4);

(xii) the effect of the offer on the emoluments of the offeror's directors (Rule 24.5);

(xiii) any special arrangements, including management incentivisation arrangements (Rule 24.6 and Rule 16.2);

(xiv) the ultimate owner of any securities acquired (Rule 24.9);

(xv) any arrangements of the kind referred to in Note 11 on the definition of acting in concert (Rule 24.13); and

(xvi) fees and expenses (to the extent required under Rule 24.16).

(c) In the case of the offeree company, the matters referred to in Rule 27.2(a)(ii) are as follows:

(i) its opinion on the offer and the other matters referred to in Rule 25.2(a);

(ii) the substance of the independent financial adviser's advice (Rule 25.2(b));

(iii) any known significant changes in its financial or trading position (Rule 25.3);

(iv) interests and dealings in relevant securities (Rule 25.4);

(v) the service contracts of the offeree company's directors (Rule 25.5);

(vi) any arrangements of the kind referred to in Note 11 on the definition of acting in concert (Rule 25.6);

(vii) material contracts (Rule 25.7(a));

(viii) irrevocable commitments and letters of intent (Rule 25.7(b));

(ix) profit forecasts (Rule 25.7(d)); and

(x) fees and expenses (to the extent required under Rule 25.8).

(d) If any document or announcement published by the offeror or the offeree company included a profit forecast, a quantified financial benefits statement or an asset valuation, any document subsequently published by that party in connection with the offer must, unless superseded by information included in the new document, include a statement by the directors of that party confirming:

(i) that the profit forecast, quantified financial benefits statement or asset valuation (as appropriate) remains valid;

(ii) where reports were obtained on a profit forecast or quantified financial benefits statement, that the reporting accountants and financial advisers have confirmed that their reports continue to apply; and

(iii) where an opinion on value was obtained on an asset valuation, that the independent valuer has confirmed that its opinion continues to apply.

Rule 28

SECTION K. PROFIT FORECASTS AND QUANTIFIED FINANCIAL BENEFITS STATEMENTS

RULE 28

28.1 REQUIREMENTS FOR PROFIT FORECASTS AND QUANTIFIED FINANCIAL BENEFITS STATEMENTS

(a) Except with the consent of the Panel, and subject to Rule 28.4, if, during an offer period (or in an announcement which commences an offer period), a party to an offer (other than a cash offeror) publishes a profit forecast or a quantified financial benefits statement, the document or announcement in which the profit forecast or the quantified financial benefits statement is first published must include:

(i) the assumptions on which the profit forecast or the quantified financial benefits statement is based (see Rule 28.3);

(ii) a report from reporting accountants stating that, in their opinion, the profit forecast or the quantified financial benefits statement has been properly compiled on the basis stated and that the basis of accounting used is consistent with the accounting policies of the party to the offer; and

(iii) a report from its financial advisers stating that, in their opinion, the profit forecast or the quantified financial benefits statement has been prepared with due care and consideration.

(b) Except with the consent of the Panel, and subject to Rule 28.4, if a party to an offer (other than a cash offeror) has published a profit forecast prior to the commencement of an offer period but following an approach by or on behalf of an offeror to the offeree company with regard to a possible offer, the offer document or offeree board circular (as appropriate) must repeat the profit forecast and must include the assumptions and reports described in paragraphs (i) to (iii) of Rule 28.1(a).

(c) Except with the consent of the Panel, and subject to Rules 28.2 and 28.4, if a party to an offer (other than a cash offeror) has published a profit forecast before an approach was made by or on behalf of an offeror to the

offeree company with regard to a possible offer, the offer document or offeree board circular (as appropriate) must:

(i) repeat the profit forecast and include a confirmations by the directors that the profit forecast remains valid and that the basis of accounting used is consistent with the accounting policies of the party to the offer and the assumptions on which the profit forecast was based (see Rule 28.3); or

(ii) include a statement by the directors that that profit forecast is no longer valid and an explanation of why that is the case; or

(iii) include a new profit forecast for the relevant period, in which case the provisions of Rule 28.1(a) must be complied with.

NOTES ON RULE 28.1

1. Profit forecasts published following the first active consideration of a possible offer

If an offeror published a profit forecast prior to the commencement of the offer period but following the first active consideration of a possible offer, the Panel may apply Rule 28.1(b) to that profit forecast.

2. Ordinary course profit forecasts

Where a party to the offer (other than a cash offeror) publishes, or has published, an ordinary course profit forecast, the Panel may consent to the disapplication of the requirements of Rule 28.1(a) or (b), provided that the other parties to the offer consent to the disapplication of those requirements. Where a dispensation is granted, a confirmation by the directors that the basis of accounting used is consistent with the company's accounting policies and the assumptions on which the profit forecast is based must nevertheless be included in the document or announcement in which the ordinary course profit forecast is first published (in the case of a dispensation from Rule 28.1(a)) or, as appropriate, in the offer document or offeree board circular (in the case of a dispensation from Rule 28.1(b)). See also Rule 28.2.

An "ordinary course profit forecast" is a profit forecast published by a party to an offer in a forward-looking statement made by that party in the ordinary course of its communication with its shareholders and the market and in accordance with an established practice.

3. Profit forecasts for future financial periods

The Panel will normally consent to the disapplication of the requirements of Rule 28.1(a) or (b) where a profit forecast published by a party to the offer relates to a period ending more than 15 months from the date on which the profit forecast is, or was, first published. Where a dispensation is granted, a confirmation by the directors that the basis of accounting used is consistent with the company's accounting policies and the assumptions on which the profit forecast is based must nevertheless be included in the document or announcement in which the profit forecast is first published (in the case of a dispensation from Rule 28.1(a)) or, as appropriate, in the offer document or offeree board circular (in the case of a dispensation from Rule 28.1(b)). See also Rule 28.2.

4. Management buy-outs and offers by controllers

Except with the consent of the Panel, where the offer is a management buy-out or similar transaction or is being made by the existing controller or group of controllers, the relevant document or announcement must comply with the requirements of paragraphs (i) to (iii) of Rule 28.1(a), regardless of when the party in question first published the profit forecast.

5. Profit ceilings

Except where the offer is a management buy-out or similar transaction, or is being made by the existing controller or group of controllers, the Panel may grant a dispensation from the requirements of Rule 28 if a profit forecast states a maximum figure for the likely level of profits for a particular period.

The Panel should be consulted where, in the context of a "whitewash" transaction, the "offeree company" publishes, or has published, a profit forecast which states a maximum figure for the likely level of profits for a particular period and the "offeror" is the existing controller of the "offeree company" or a group of persons which includes one or more of the executive directors of the "offeree company".

6. No material increase in the offeror's voting share capital

The Panel may grant a dispensation from the requirements of Rule 28 if the offer could not result in the issue of securities representing 10% or more of the enlarged equity share capital of the offeror and if the Panel considers that the application of the Rule would be disproportionate.

7. Compilation of profit forecasts and quantified financial benefits statements

(a) Any profit forecast or quantified financial benefits statement made by a party to an offer, and any assumptions on which it is based, are the responsibility of the relevant party to the offer and its directors.

(b) A profit forecast or a quantified financial benefits statement must be:

(i) understandable: it must not be so complex or include such extensive disclosure that it cannot be readily understood; and

(ii) reliable: it must be supported by a thorough analysis of the business of the party (or parties) to the offer and must represent factual and not hypothetical strategies, plans and risk analysis.

(c) Any profit forecast published by a party to an offer (other than a cash offeror) must be compiled on a basis comparable with its historical financial information.

(d) A profit forecast of profit before tax should disclose any non-recurrent items and tax charges if they are expected to be abnormally high or low.

28.2 REQUIREMENT TO PUBLISH PROFIT FORECAST(S) FOR INTERVENING FINANCIAL PERIOD(S)

(a) Except with the consent of the Panel, if, during an offer period (or in an announcement which commences an offer period), a party to an offer (other than a cash offeror) publishes for the first time a profit forecast for a future financial year (or other future period), the document or announcement in which the profit forecast for that future year (or period) is first published must also include a corresponding profit forecast for the current financial year (or the corresponding current period) and for any intervening financial year (or corresponding future period).

(b) Similarly, where a previously published profit forecast for a future financial year (or other future period) is repeated in an offer document or offeree board circular in accordance with Rule 28.1(b) or Rule 28.1(c)(i), the offer document or offeree board circular (as appropriate) must, except with the consent of the Panel, include a corresponding profit forecast for the current financial year (or the corresponding current period) and for any intervening financial year (or corresponding future period).

(c) If the requirements of Rules 28.2(a) or (b) result in the publication of a new profit forecast, Rule 28 will apply as usual to that new profit forecast.

28.3 ASSUMPTIONS

(a) Any assumptions included in the document or announcement in which a profit forecast or a quantified financial benefits statement is published must:

- (i) be readily understandable;**
- (ii) be specific and precise; and**
- (iii) not relate to the general accuracy of the estimates underlying the profit forecast or the quantified financial benefits statement.**

(b) The document or announcement in which the profit forecast or the quantified financial benefits statement is published should draw attention to any assumptions about factors which could have a material effect on the achievement of the profit forecast or the quantified financial benefits statement and, where possible, those factors should be quantified. There must be a clear distinction between assumptions about factors which the directors of the party to the offer can influence and assumptions about factors which are outside the influence of the directors.

28.4 PROFIT ESTIMATES

(a) A profit estimate published by a party to an offer which is admitted to trading on a UK regulated market or on AIM or PLUS will be exempt from the requirements of Rule 28.1 if it is included in:

- (i) a preliminary statement of annual results which complies with the relevant provisions of the UKLA Rules;**
- (ii) a half-yearly financial report which complies with the relevant provisions of the UKLA Rules, the AIM Rules for Companies or the PLUS Rules for Issuers; or**
- (iii) interim financial information published in accordance with a regulatory requirement and prepared in accordance with International Accounting Standard 34.**

(b) Where a party to an offer which is not admitted to trading on a UK regulated market or on AIM or PLUS includes, or has included, a profit estimate in a preliminary statement of annual results, a half-yearly financial report or interim financial information published in accordance with a regulatory requirement, the Panel may, in appropriate circumstances, grant a dispensation from the requirements of Rule 28.1. The Panel should be consulted in such cases.

NOTE ON RULE 28.4

Preliminary statements of annual results

Where an unaudited preliminary statement of annual results is published by a party to an offer which is admitted to trading on AIM or on PLUS, the exemption from the requirements of Rule 28.1 will be subject to the Panel being satisfied that the statement would comply with the provisions of the UKLA Rules with regard to such statements.

28.5 QUANTIFIED FINANCIAL BENEFITS STATEMENTS

In addition to the requirements of Rule 28.1(a), a quantified financial benefits statement must:

(a) include the bases of the belief (including sources of information) supporting the statement;

(b) include an analysis, explanation and quantification of the constituent elements sufficient to enable the context and relative importance of those elements to be understood;

(c) include a base figure where any comparison is made with historical financial performance or with existing cost bases and structures;

(d) include details of all the material financial effects of the proposed transaction or other measures, and not only the financial benefits or other selected effects;

(e) include only the financial benefits which are expected to arise directly from the proposed transaction or other measures, and exclude any financial benefits which could be achieved independently;

(f) indicate when the financial benefits are expected to be realised;

(g) indicate whether the expected financial benefits will be recurring, clearly identifying any non-recurring benefit(s); and

(h) identify the non-recurring costs of realising the expected financial benefits, including an explanation if there is expected to be a material difference between the cash costs and the charge to the profit and loss account.

NOTES ON RULE 28.5

1. Measures previously announced

The Panel should be consulted if a company proposes to publish a statement with regard to future cost savings measures after it has received an approach from a potential offeror with regard to a possible offer but prior to the commencement of an offer period so that it can consider whether the statement should be treated as being subject to the requirements of Rule 28.1(a).

If the offeree company publishes a statement with regard to revised cost savings measures during the offer period, that statement will be subject to the requirements of Rule 28.1(a).

2. Merger benefits statements by the offeree company

The Panel will not normally permit an offeree company to publish a statement quantifying the financial benefits expected to result from an offer unless the statement is published with the consent of the relevant offeror. However, the offeree company will be permitted to publish its views on any quantified financial benefits statement published by an offeror.

28.6 PROFIT FORECAST FOR PART OF A BUSINESS

Except with the consent of the Panel, Rule 28 applies equally to a profit forecast which relates to a part of the business of a party to an offer.

28.7 THIRD PARTY PROFIT FORECASTS

(a) Subject to Rule 28.7(c), if, during an offer period (or in an announcement which commences an offer period), an offeror (other than a cash offeror) or the offeree company refers to any profit forecast with respect to its own future profits published by one or more third parties, including an average of such third party profit forecasts, the profit forecast will be treated as having been published by the party to the offer concerned and Rule 28.1(a) will apply accordingly.

(b) If, during an offer period (or in an announcement which commences an offer period), an offeror or the offeree company refers to the future profits of any other party to the offer, it must normally do so by reference to a consensus profit forecast calculated in accordance with Note 2.

(c) Where an offeror or the offeree company has referred to a consensus profit forecast with respect to the future profits of another party to the offer, Rule 28.7(a) will not apply to any subsequent reference to that consensus profit forecast by the party to whose profits it relates.

NOTE ON RULE 28.7

1. Websites

Upon the commencement of an offer period, each of the parties to the offer (other than a cash offeror) must remove from its website any analysts' profit forecasts with respect to its own profits, including any average figures.

2. Consensus profit forecasts

For the purposes of Rules 28.7(b) and (c), a consensus profit forecast should normally be calculated as the arithmetical mean of any consensus figures for the relevant profit forecasts which have been published by independent financial data providers.

3. Recommended offers

Where an offer has been, or will be, recommended by the board of the offeree company, or where the document or announcement is published with the agreement or approval of the other party to the offer, a reference by the offeror or the offeree company to a profit forecast with respect to the other party's profits will be treated for the purposes of Rule 28.7(a) as having been published by the party to whose profits it relates.

4. Sources and basis of compilation

Where any document or announcement published by a party to the offer refers to an average profit forecast, as referred to in Rule 28.7(a), or a consensus profit forecast, as referred to in Rule 28.7(b), the sources and basis of compilation must be stated, including:

(a) in the case of an average profit forecast:

(i) the analysts whose forecasts have been included in the calculation of the average profit forecast, including the individual figures and the dates on which they were published; and

(ii) the analysts whose forecasts have been excluded from the calculation of the consensus figure, including the reason(s) for their exclusion; and

(b) in the case of a consensus profit forecast, the independent financial data providers upon whose figures the consensus profit forecast has been calculated.

Rule 32.1**32.1 PUBLICATION OF REVISED OFFER DOCUMENT**

...

*NOTES ON RULE 32.1**1. Announcements which may increase the value of an offer*

Where an offer involves an exchange of equity or potential equity, the announcement by an offeror of any material new information (including trading results, profit or dividend forecasts, asset valuations, ~~merger-quantified financial~~ benefits statements and proposals for dividend payments or for any material acquisition or disposal) may have the effect of increasing the value of the offer. An offeror will not, therefore, normally be permitted to make such announcements after it is precluded from revising its offer. If an announcement of a kind referred to in this Note might fall to be made during the offer period, the Panel must be consulted at the earliest opportunity and an offeror will not be permitted to make a no increase statement as defined in Rule 32.2 prior to the publication of the announcement.

Appendix 1**4 WHITEWASH CIRCULAR**

The circular must contain the following information and statements and comply appropriately with the Rules of the Code as set out below:

...

(o) Rules 28 and 29 (profit forecasts, quantified financial benefits statements and asset valuations relating to the offeree company or relating to assets being acquired by the offeree company).

APPENDIX E**List of questions**

- Q1** Do you have any comments on the proposed new definitions of “profit forecast”, “profit estimate” and “quantified financial benefits statement” and the proposed amendments of the definitions of “cash offeror” and “offer period”?
- Q2** Do you agree that the requirements for assumptions to be stated and for third party reports to be obtained should be retained for profit forecasts and quantified financial benefits statements which are first published during an offer period? Do you have any comments on the proposed new Rule 28.1(a)?
- Q3** Do you agree that the requirements for assumptions to be stated and for third party reports to be obtained should be retained for profit forecasts which have been published following the making of an approach or, in appropriate circumstances, the first active consideration of a possible offer? Do you have any comments on the proposed new Rule 28.1(b) and Note 1 on Rule 28.1?
- Q4** Do you agree with the proposed new requirements with regard to an outstanding profit forecast? Do you have any comments on the proposed new Rule 28.1(c)?
- Q5** Do you agree with the proposed ability for the Panel to grant a dispensation from the proposed new Rules 28.1(a) and (b) in relation to ordinary course profit forecasts? Do you have any comments on the proposed new Note 2 on Rule 28.1?
- Q6** Do you agree with the proposal for the Panel to be able to grant a dispensation from the proposed new Rules 28.1(a) and (b) in relation to profit forecasts for certain future financial periods? Do you have any comments on the proposed new Note 3 on Rule 28.1?
- Q7** Do you agree with the proposed requirement to publish corresponding profit forecasts for the current and intervening financial periods where a profit forecast for a future financial period is published? Do you have any comments on the proposed new Rule 28.2?
- Q8** Do you agree that reports should always be required to be obtained on a profit forecast where the offer is a management buy-out or is made by the existing controller of the offeree company? Do you have any comments on the proposed new Note 4 on Rule 28.1?
- Q9** Do you have any comments on the proposed new Note 5 on Rule 28.1 with regard to profit ceilings?

- Q10 Do you agree that the Code should expressly provide the Panel with the ability to grant a dispensation from the requirements of Rule 28 where the offer would not result in a material increase in the equity share capital of the offeror? Do you have any comments on the proposed new Note 6 on Rule 28.1?**
- Q11 Do you have any comments on the proposed new Note 7 on Rule 28.1 in relation to the compilation of profit forecasts and quantified financial benefits statements?**
- Q12 Do you have any comments on the proposed new Rule 28.3 with regard to assumptions in relation to profit forecasts and quantified financial benefits statements?**
- Q13 Do you agree that the exemption from the requirements of Rule 28 for certain profit estimates should be extended as proposed? Do you have any comments on the proposed new Rule 28.4?**
- Q14 Do you have any comments on the proposed new Rule 28.5 in relation to quantified financial benefits statements?**
- Q15 Do you have any comments on the proposed new Rule 28.6 with regard to a profit forecast for part of a business?**
- Q16 Do you have any comments on the proposed new Rule 28.7(a), the proposed amendments to Note 5 on Rule 19.1, or the proposed Note 1 on Rule 28.7, with regard to references by a party to an offer to third party or average forecasts with respect to its own profits?**
- Q17 Do you have any comments on the proposed new Rules 28.7(b) and (c), and the proposed new Notes 2 to 4 on Rule 28.7, with regard to a party to an offer referring to consensus profit forecasts with respect to the profits of another party to the offer?**
- Q18 Do you have any comments on the proposed new Rules 27.1 and 27.2(a)(i) with regard to material changes in information?**
- Q19 Do you have any comments on the proposed new Rules 27.2(a)(ii), 27.2(b) and 27.2(c) in relation to the requirement to update certain matters in any subsequent document?**
- Q20 Do you have any further comments on the proposed new Rule 27 and the related Code amendments?**

Q21 Do you have any comments on the proposed amendments relating to the current Rule 28.4?

Q22 Do you have any comments on the proposed amendments to Rule 26 in relation to documents on display?