



The Secretary to the Code Committee  
The Takeover Panel  
10 Paternoster Square  
London  
EC4M 7DY

28 September 2012

Dear Sirs

**BVCA response The Takeover Panel consultation PCP2012/1: Profit forecasts, quantified financial benefits statements, material changes in information and other amendments to the Takeover Code**

The British Private Equity and Venture Capital Association ('BVCA') is the industry body for the UK private equity and venture capital industry. With a membership of over 500 firms, the BVCA represents the vast majority of all UK based private equity firms and their advisers.

This submission has been prepared by the BVCA's Legal & Technical committee, which represents the interests of BVCA members in legal, accounting and technical matters relevant to the private equity and venture capital industry.

This response sets out, on behalf of the BVCA, the answers to those questions which are considered to be most pertinent to BVCA members.

**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?**

We do not agree with the Code Committee's proposal that reports on a profit forecast should always be required where the offer is an MBO or is made by the existing controller of the offeree.

We think there are good grounds to distinguish between a management-led MBO where incumbent management are driving the bid (and have arranged funding for the buyout) and a leveraged private equity bid especially where no Rule 16 management equity proposal has been discussed with management before announcement or posting. It is often the case that a private equity bidder will want to retain some or all of the existing management team. The term "MBO" as used in the Code does not distinguish between these two different situations.

The Code Committee is concerned that "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" (paragraph 7.1 of the PCP). However, in the case of a private equity bid, we would argue that this risk is no more significant than in any other bid where any number of the offeree company directors will be retained post-takeover.

We also do not think that it is appropriate to suggest that offeree board directors who are involved in an MBO are more likely to manipulate dishonestly the market through releasing profit forecasts to make an offer "appear more attractive to shareholders" than an offeree board director who is involved in a takeover from a corporate bidder.

For these reasons, we disagree with the approach of the proposed new Note 4. We suggest that Note 4 should instead require parties to consult with the Panel in the case of an MBO or similar transaction (similar to the approach taken in proposed Note 5 on Rule 28.1 in the context of a



whitewash). This would permit the Panel to consider the full circumstances and context of the bid and the profit forecast and come to an appropriate ruling on the facts.

The role of independent NEDs will continue to be important in the context of an MBO and protects against the risk identified in paragraph 7.1 of the PCP.

We suggest that the new Note 4 to Rule 28.1 should make clear that the dispensation available under new Note 3 will continue to be available to MBOs and similar transactions.

**Other comments**

We remain available to discuss this response and our views on the consultation more generally at any time.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'S. Witney'.

Simon Witney  
Chairman, Legal & Technical Committee