2 October 2012

Our ref: ICAEW Rep 139/12

The Secretary to the Code Committee
The Takeover Panel
10 Paternoster Square
London
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supportgroup@thetakeoverpanel.org.uk

Dear sirs

PCP 2012/1 PROFIT FORECASTS, QUANTIFIED FINANCIAL BENEFITS STATEMENTS, MATERIAL CHANGES IN INFORMATION AND OTHER AMENDMENTS TO THE TAKEOVER CODE

ICAEW is pleased to respond to your request for comments on PCP 2012/1 Profit Forecasts, Quantified Financial Benefits Statements, Material Changes In Information And Other Amendments To The Takeover Code.

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours faithfully

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ICAEW REPRESENTATION

PCP 2012/1 PROFIT FORECASTS, QUANTIFIED FINANCIAL BENEFITS STATEMENTS, MATERIAL CHANGES IN INFORMATION AND OTHER AMENDMENTS TO THE TAKEOVER CODE

Memorandum of comment submitted in October 2012 by ICAEW, in response to PCP 2012/1 Profit Forecasts, Quantified Financial Benefits Statements, Material Changes In Information And Other Amendments To The Takeover Code, a consultation by the Code Committee of the Takeover Panel published in July 2012

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation paper *PCP 2012/1 Profit Forecasts, Quantified Financial Benefits Statements, Material Changes In Information And Other Amendments To The Takeover Code* published by the Code Committee of the Takeover Panel on 5 July 2012, a copy of which is available from this link.

WHO WE ARE

2. ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 138,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

3. ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

4. The Corporate Finance Faculty is the voice of corporate finance within ICAEW. The faculty is responsible for submissions to regulators on behalf of ICAEW. It provides a range of services to its members including a monthly magazine Corporate Financier.

MAJOR POINTS

Support for the initiative

5. We are broadly supportive of the proposed changes to profit forecasts and quantified financial benefits statements but have some concerns, as indicated in our detailed responses below.

6. We believe that Appendix A to the PCP could be usefully incorporated into the Code, perhaps with a cross reference from Rule 28.

RESPONSES TO SPECIFIC QUESTIONS

Part A: Profit forecasts and quantified financial benefits statements

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"?

7. We have no comments on the proposed amendments of the definitions of "cash offeror" and "offer period". We note however that the definition of profit forecast is not identical to the definition in the Prospectus Directive and wonder why the Code Committee decided against adopting that definition.

8. We draw the Code Committee's attention to the inconsistency between the proposed new definition of "profit forecast" and ICAEW's position which differentiates targets from prospective financial information such as profit forecasts. Insofar as a target is an aspiration rather than an intention, the term may also not meet the definition of "profit forecast" in the Prospectus Regulation. In our view the proposed new definition in PCP paragraph 2.7 is unhelpful and should be omitted.

9. Regarding the proposed new definition of "quantified financial benefits statements" we would like to know what the Code Committee means by 'alternative transaction'.

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)?

10. We note that the proposed requirement for assumptions to be stated for quantified financial benefits statements is a departure from current practice but the reason for this is not obvious. We suggest restricting the requirement to state assumptions to profit forecasts and retaining the existing requirement to state the "bases of belief" for quantified financial benefits statements.

11. Rule 28.3 would seem more appropriate for profit forecasts and Rule 28.5 for quantified financial benefits statements and we question whether Rule 28.3 needs to refer to quantified financial benefits statements at all.

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?

12. We agree but suggest that it would be helpful to include an indication of when a party to an offer should consult the Panel.

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)?

13. Different approaches by different directors could potentially lead to a wide range in market practice of what companies actually do to confirm validity of outstanding forecasts. It would be useful to understand what the directors need to consider before deciding that an outstanding profit forecast remains valid and whether they might be expected to take advice. What would happen if a previously made forecast that is required to be repeated does not meet the requirements of Note 7 to Rule 28.1 and Rule 28.3? Our experience is that this may often be the case. Do such standards apply to a repeated forecast?

14. We think that proposed new Rule 28.1(c) is not expressed as clearly and helpfully as the analysis in PCP paragraph 4.5. For example part of paragraph 4.5(a)(ii) 'and the details of the basis on which it was compiled' has not been included in proposed new Rule 28.1(c)(i). We also suggest the word 'include' is inserted before 'the assumptions' in proposed new Rule 28.1(c)(i).

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?

15. We agree in principle with the proposed ability for the Panel to grant a dispensation from the proposed new Rules 28.1(a) and (b). We note however that companies may still get private work done in case the dispensation was reversed and reports were required so may not achieve the intended cost saving.

16. We believe it is unlikely that other parties to a hostile offer will consent to the disapplication of the reporting requirements in new Rules 28.1(a) and (b) and suggest that the new rule should require a reasonable basis (as adjudged by the Panel) where consent is not given.

17. We also think that the new Note 2 could usefully elaborate on what is meant by 'in accordance with an established practice'.

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?

18. We agree.

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?

19. Not all our members agree with the proposed requirement to publish corresponding profit forecasts in all the situations above. They consider that it will create a particular burden on companies who have made such forecasts before the offer period and who, under this proposal, will have to create forecasts that they would not otherwise have made (and have them reported on). They consider that the case made in the PCP for introducing the requirement, which is based on the assumption that shareholders and analysts would be able to interpolate a current year forecast, does not reflect the difficulty involved in doing so with any degree of confidence, and that, even if the intention to use the approach as a device to circumvent the Code were present in a party publishing such a forecast during an offer period, it would be unreasonable to attribute such an intention to a party who had published such a statement at some earlier date. It would be helpful to understand the basis on which the Panel would give an exemption to the requirement.

20. Even though some of our members agree with the proposal to require publication of intervening forecasts in cases where previously published future forecasts are repeated, all nevertheless believe that a directors' confirmation relating to forecasts for current and intervening financial periods would suffice and that having to obtain a report is unnecessarily onerous.

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?

21. We agree.

22. We note that proposed new Note 4 refers to 'the requirements of paragraphs (i) to (iii) of Rule 28.1(a)' whereas PCP paragraph 1.19(f) refers to 'the reporting requirements of Rule 28'. Is the Committee content that as drafted, proposed new Note 4 is sufficiently clear?

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

23. It would be useful if the Code Committee provided commentary on why ceilings are not normally required to be reported on other than in the context of MBOs. For instance, a loss-making company could move into profit with a ceiling and this could be material.

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?

24. We agree.

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?

25. We believe the Code Committee could usefully refer to the language relating to 'reliability' and the discussion of 'understandability' in ICAEW's guidance Prospective Financial Information (2003). This is more expansive than that in the ESMA update of the CESR recommendations for the consistent implementation of the European Commission's Regulation on Prospectuses.

26. We also believe that it would be appropriate to deal separately with profit forecasts and quantified benefits statements, as there are different considerations to take into account at a detailed level. ICAEW's guidance provides, in chapter 10, some material in relation to merger benefits statements which would usefully form the basis for suitable guidance in relation to quantified 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?

27. Our only comment on proposed new Rule 28.3 relates to the requirement in (b) to quantify (where possible) factors for which assumptions have been made - certain assumptions can be quantified whereas others are qualitative. It is difficult to be precise about quantified financial benefits statements and difficult to separately quantify the impact of individual assumptions, which are often an interaction to get to a number.

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?

28. We believe that the exemption in new Rule 28.4(b) should also extend to ordinary course profit estimates made voluntarily. This could be achieved by inserting 'or established practice' after 'a regulatory requirement'.

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

29. We believe that items (d) and (e) in the proposed new Rule 28.5 could be clearer as follows:

30. We assume that the concept of completeness underlies (d). However, as currently drafted, the reference to 'all the material financial effects' could encompass a range of matters unrelated to a conventional quantified benefits statement and not relevant to the completeness of that statement. For example, a revenue synergy benefit could be a financial effect of the transaction. It is not customary, however, to deal with such matters, nor would the information have a bearing on the completeness of a cost synergy statement. Furthermore, the financial effects of a takeover for an offeror would include other matters such as the funding of the consideration, and other costs which are unrelated to the quantified benefits statement. We believe that (d) should be recast so as to relate it more specifically to ensuring that the costs of achieving synergies are included, and that, where relevant, dissynergies that will have the effect of reducing the benefits claimed are disclosed.

31. It is unclear what 'other measures' are intended to reflect in (3) and how the reference to excluding benefits achievable 'independently' applies in the case of statements by offeree companies about cost savings expected to arise if the offer is withdrawn or lapses (ie, if they remain independent).

32. Our members are split over the discussion in paragraph 13.6, where a consequence of the redrafting of Rule 28.1(a) is to remove the exemption contained in Note 9 on Rule 19.1 relating to disclosure and reporting on synergy statements where the offer has been recommended by the board of the offeree. Although all members are sympathetic to the view that disclosures in such cases should meet best practice standards, some members question whether the additional costs involved in having statements reported on publicly in the circumstances of a recommended offer ought to be imposed when there has been no indication that the current arrangements are failing to meet regulatory needs. They do not believe that the existence of a difference in approach between profit forecasts and quantified benefits statement is of itself a reason for making a potentially costly and onerous change.

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

33. We have no comments but assume that the rule will not apply separately where a forecast has also been made in relation to the whole group.

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?

34. We have no comments.

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?

35. The operation of the rule in circumstances where forecasts that are on parts of a business have been published may need consideration. Are they to be ignored for the purpose of calculating the arithmetic mean or, if they can be incorporated, what basis should be used for their incorporation?

Part B: Material changes in information

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?

36. We are concerned that the proposed extensions in new Rules 27.1 and 27.2 create an overlap with UK and other market regulators who have specific rules and safe harbours regarding prompt disclosure of price-sensitive information. The new Rules do not acknowledge these or address situations where the party can benefit from a safe harbour under a relevant rule.

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?

37. We have no comments.

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

38. We have no further comments.

Part C: Other amendments in relation to documents published by an offeror and the offeree company

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

39. We have no comments.

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

40. We have no comments.

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