



2 October 2012

Our ref: ICAEW Rep 140/12

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

supportgroup@thetakeoverpanel.org.uk

Dear sirs

PCP 2012/2 PENSION SCHEME TRUSTEES

ICAEW is pleased to respond to your request for comments on PCP 2012/2 Pension Scheme Trustees.

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 2012/2 PENSION SCHEME TRUSTEES

Memorandum of comment submitted in October 2012 by ICAEW, in response to PCP 2012/2 Pension Scheme Trustees, 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 2012/2 Pension Scheme Trustees* 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 agree that the provisions of the Code which apply to employee representatives should be extended so as to apply also to the trustees of the offeree company's pension scheme(s). In the experience of our members, where pensions are key to a deal the parties typically discuss this with the trustees. The proposal will thus formalise practice exhibited by bidders of engaging closely with pension scheme trustees and, as suggested in PCP paragraph 2.5, create a framework for the effects of an offer on the offeree's pension scheme(s) to become a debating point during the course of the offer.
6. However we expect that the proposals, if adopted, will not result in particularly instructive disclosures by those bidders who wish to retain flexibility as to the funding of the target's pension scheme(s). Fairly bland statements are also expected from the trustees in the absence of any definitive conclusion being reached by the bidder with regards to their approach to the pension scheme(s).
7. We urge the Code Committee to give more consideration to, and provide clarification on, the application of the rules on concert parties as addressed in PCP paragraphs 3.19 and 3.20. The statement in paragraph 3.20 that 'pension scheme trustees are normally independent of the sponsoring company' ignores the frequent occurrence of a board director being also a trustee of the company's pension scheme. The application of Rule 21.2(a) to such directors would limit engagement between a bidder and the trustees of the target's pension scheme and this would not be desirable. It should be clearer what the Panel would expect to happen. Should a director resign or be recused from the position of trustee?
8. We also believe that additional guidance from the Code Committee should be provided to clarify change of control in whitewash situations eg where the bank(s) obtain control through a debt for equity swap. Moreover should the views of employee representatives and trustees be included in the content requirements of whitewash documents in Appendix 1 to the Code?

RESPONSES TO SPECIFIC QUESTIONS

Q1: Do you have any comments on the proposed amendments to Rules 24.2(a) and (b) relating to the requirement for an offeror to disclose, among other matters, its intentions with regard to the offeree company's pension scheme(s)?

9. We have no comments on the proposed amendments.

Q2: Do you have any comments on the proposed amendments to Rule 25.2(a) relating to the requirement for the offeree board to include in the offeree board circular its views on, among other matters, the effects of implementation of the offer on the offeree company's pension scheme(s)?

10. We have no comments on the proposed amendments.

Q3: Do you have any comments on the proposed amendments to Rules 2.12(a), 2.12(b), 24.1, 25.1, 32.1, 32.6(a) and 27.1(b), and to Note 6 on Rule 20.1, in each case relating to the information to be disclosed to the trustees of an offeree company's pensions scheme(s)?

11. Regarding the intention to commit parties to statements made on action to the offeree's pension scheme(s) for a period of 12 months from the date on which the offer period ends, the Code Committee might consider whether to reference a different period determined eg by a scheduled valuation date or a deadline for funding plans.

12. The Code Committee might also consider including guidance on whether the parties to an offer should be upfront about the state of any discussions with pension scheme trustees. Such guidance may be along the lines of Rule 16.2 where the Code sets out specific disclosure requirements as to the status of discussions between the bidder and the offeree company's management team.

Q4: Do you have any comments on the proposed amendments to Rule 25.9 (and Note 1 on that Rule) and to Rule 32.6 regarding the rights of the trustees of an offeree company's pension scheme(s) to make known their views on the effects of the offer on the scheme(s)?

13. We are not convinced by the reasoning in paragraph 3.11 that underlies the decision to propose in Note on Rule 25.9 a different treatment of the costs of advice obtained by employee representatives and pension scheme trustees.

14. Trustees may find themselves under pressure from the board not to jeopardise a deal and forming an opinion will be onerous. We feel it is important that trustees are able to obtain the advice they need in order to form an opinion without facing uncertainty over the recoverability of associated costs from the sponsoring company. We suggest removing the carve-out of pension scheme trustees' costs from Note on Rule 25.9 and related text in proposed Rule 2.12(d).

Q5: Do you have any comments on the proposed amendments to Rule 2.12(d) and to Rule 32.1 regarding the requirement for the trustees of the offeree company's pension scheme(s) to be informed of their rights under the Code to make known the effects of the offer on the scheme(s)? Do you have any comments on the proposed amendment to Rule 19.2 relating to directors' responsibility statements?

15. We have no comments on the proposed amendments to Rule 2.12(d) and to Rule 32.1.

16. We refer to our point in para 7 about a board director being also a trustee of the company's pension scheme(s). We assume that the proposed amendment to Rule 19.2 relating to directors' responsibilities statements also includes directors who are also trustees and that such directors will cease to act as a trustee due to their conflict of interest.

Q6. Do you have any comments on the proposed new Rule 24.3(d)(xvi) and new Rule 26.2(i) relating to the requirement for the offer document to include a summary of any agreement between the offeror and the offeree company's employee representatives or the trustees of the offeree company's pension scheme(s) in relation to any of the matters described in Rule 24.2 and to the requirement for any such agreement(s) to be put on display?

17. We agree with the proposed new Rules.

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