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THE TAKEOVER PANEL

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

DIVIDENDS

The Code Committee of the Takeover Panel (the “**Panel**”) invites comments on this Public Consultation Paper. Comments should reach the Code Committee by Friday, 12 June 2015.

Comments may be sent by e-mail to:

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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.

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1. Introduction and summary of proposals

(a) Introduction

1.1 In this Public Consultation Paper (“**PCP**”), the Code Committee of the Panel (the “**Code Committee**”) proposes amendments to the Takeover Code (the “**Code**”) in relation to the treatment of dividends paid by an offeree company to its shareholders.

1.2 The proposed amendments are intended primarily to clarify the application of existing provisions of the Code and to ensure greater alignment of the Code with the existing practice of the Panel Executive (the “**Executive**”). The Code Committee believes that clarifying, codifying and updating the application of the Code to the treatment of dividends paid by an offeree company will be beneficial to parties to offers, shareholders and other stakeholders, market participants and practitioners.

(b) Summary of proposals

(i) Reserving the right to reduce the offer consideration if a dividend is paid

1.3 In Section 2 of the PCP, the Code Committee proposes to introduce new Notes on Rule 2.5 (with regard to possible offer announcements), Rule 2.7 (with regard to firm offer announcements) and Rule 24.3 (with regard to offer documents) which would provide that:

- (a) an offeror may reserve the right to reduce the offer consideration by the amount of all or part of a dividend subsequently paid by the offeree company; and

(b) if an offeror does not reserve that right in each of (i) any statement in relation to the terms of a possible offer (if made), (ii) its firm offer announcement, and (iii) the offer document, it will not normally be permitted to reduce the offer consideration by all or part of a dividend which is subsequently paid by the offeree company.

(ii) *Effect of a dividend where the offeror has made a “no increase statement”*

1.4 In Section 3 of the PCP, the Code Committee proposes to introduce new Notes on Rule 2.5 and Rule 32.2 which would make clear that an offeror which has made a “no increase statement” must reduce the value of its offer by the amount of any dividend subsequently paid by the offeree company, unless a specific reservation was included in the “no increase statement” which provided that offeree company shareholders would be entitled to receive the dividend.

(iii) *Impact of dividends on a minimum offer price established by share purchases*

1.5 In Section 4 of the PCP, the Code Committee proposes to replace Note 5 on Rule 6, Note 4 on Rule 9.5 and Note 9 on Rule 11.1 with new Notes in order to clarify how dividends are treated in calculating the minimum offer value which may be established by the acquisition of interests in offeree company shares by an offeror or any person acting in concert with it.

(c) *Interpretation*

1.6 Unless the context otherwise requires, words and expressions defined in the Code have the same meanings when used in this PCP. In addition, the following expressions used in this PCP have the following meanings:

(a) “**cum dividend**”: shares which trade “cum dividend” carry the right to receive a particular dividend which has been announced. Shares trade on

this basis from the date on which the dividend is announced until the “ex dividend” date relating to the dividend; and

- (b) “**ex dividend**”: shares which trade “ex dividend” do not carry the right to receive the relevant dividend. Shares trade on this basis from the “ex dividend” date relating to the dividend until the date on which it is paid.

(d) *Invitation to comment*

1.7 The Code Committee invites comments on the amendments to the Code proposed in this PCP. Comments should reach the Code Committee by Friday, 12 June 2015 and should be sent in the manner set out at the beginning of this PCP.

1.8 The full text of the proposed amendments is set out in Appendix A. Where amendments are proposed, underlining indicates proposed new text and striking-through indicates text that is proposed to be deleted. For ease of reference, a list of the questions that are put for consultation is set out in Appendix B.

(e) *Executive Practice Statement*

1.9 The Executive has informed the Code Committee that it intends to publish a Practice Statement in order to set out in one place the Executive’s practice in relation to the application of certain provisions of the Code to the payment of dividends by an offeree company. In addition to its practice in relation to the provisions of the Code which are the subject of this PCP, the Practice Statement would also address the Executive’s application of Rule 21.2 (Inducement fees and other offer-related arrangements) in relation to the payment of dividends by an offeree company.

1.10 The Code Committee understands that the Executive intends to publish the Practice Statement at the same time as any amendments to the Code proposed in

this PCP come into effect. However, the Executive considers that it would be helpful to provide details of the contents of the draft Practice Statement at the same time as this PCP is published. Accordingly, a copy of the draft Practice Statement, which is drafted as if the amendments proposed in this PCP had come into effect, is set out in Appendix C.

2. Reserving the right to reduce the offer consideration if a dividend is paid

2.1 The payment of a dividend by an offeree company may affect the financial terms on which an offeror wishes to make or proceed with an offer. In particular, an offeror will usually wish to protect itself against value leakage from the offeree company caused by the payment of a dividend by reserving the right to reduce the offer consideration if a dividend is paid to offeree company shareholders. However, an offeror may be prepared to allow offeree company shareholders to receive a specific dividend in addition to receiving the offer consideration.

2.2 Rule 2.5(a) provides that the Panel must be consulted in advance if, prior to the announcement of a firm intention to make an offer, any person proposes to make a statement in relation to the terms on which an offer might be made for the offeree company. If a potential offeror makes such a statement (or agrees to the offeree company making such a statement) and it is not withdrawn immediately if incorrect, the potential offeror will be bound by the statement if an offer for the offeree company is subsequently made except:

- (a) where, at the time the statement was made, it specifically reserved the right not to be so bound in certain circumstances and those circumstances subsequently arise; or
- (b) in wholly exceptional circumstances.

In particular, Rule 2.5(a)(i) provides that, where the statement concerned relates to the price of a possible offer, any offer made by the potential offeror for the offeree company will be required to be made on the same or better terms.

2.3 The purpose of Rule 2.5(a)(i) is to ensure that market participants are able to rely on statements made by a potential offeror in relation to the value of its possible offer and to make their investment decisions on the basis that any offer, if made,

- will not be less than the amount stated (save where a specific reservation applies or in wholly exceptional circumstances).
- 2.4 The first paragraph of Note 1 on Rule 2.5 provides that the first announcement in which a statement subject to Rule 2.5(a) is made must contain prominent reference to any reservation to set it aside and that any subsequent mention by the potential offeror of the statement must be accompanied by a reference to the reservation.
- 2.5 The Code Committee considers that the Code should expressly permit an offeror, in a statement to which Rule 2.5(a)(i) applies, to reserve the right to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company (for example, the potential offeror may wish to reserve the right to reduce the offer consideration by the amount by which a subsequent dividend exceeds a dividend previously announced or forecast).
- 2.6 If such a reservation is included in a statement to which Rule 2.5(a) applies, the Code Committee considers that the Code should permit the potential offeror to include the same reservation in any subsequent firm offer announcement or offer document. This would be an exception to the final paragraph of Note 1 on Rule 2.5, which provides that, once it has announced a firm intention to make an offer, an offeror will not be permitted to exercise any right it had previously reserved to set aside a statement in relation to the level of consideration that it might offer.
- 2.7 Conversely, the Code Committee considers that, where a reservation in relation to the payment of a dividend is not included in any statement to which Rule 2.5(a) applies, the potential offeror should not normally be permitted to:

- (a) reserve the right, in any subsequent firm offer announcement or offer document, to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company; or
 - (b) reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company.
- 2.8 However, the Code Committee considers that, where a potential offeror announces an increased possible or firm offer, the Code should permit it, at that time, to introduce a reservation of the right to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company, provided that the offeror does not propose to reduce the offer consideration below the value of the previous offer which was not subject to the reservation.
- 2.9 The Code Committee considers that the ability of an offeror to reserve such a right, and the consequences of not doing so, should be set out in a new Note 4 on Rule 2.5 and that similar provisions should also be included in a new Note 4 on Rule 2.7 (in relation to an offeror reserving the right to reduce the offer consideration in a firm offer announcement) and in a new Note 5 on Rule 24.3 (in relation to an offeror reserving the right to reduce the offer consideration in an offer document).
- 2.10 In addition, the Code Committee considers that the proposed new Note 4 on Rule 2.7 and the proposed new Note 5 on Rule 24.3 should provide that, if an offeror includes a term of its offer which provides that it shall be entitled to receive any dividend paid by the offeree company after a specified date, it must expressly reserve the right to reduce the offer consideration by the amount of the dividend. This is to ensure that, if an offeror wishes to reduce the offer consideration by the amount of any dividend which is paid to offeree company shareholders, it will do so pursuant to the exercise of a clear reservation of the

right to reduce the offer consideration, rather than pursuant to a term which does not expressly refer to the effect of the payment of any dividend on the offer consideration.

2.11 In view of the above, the Code Committee proposes:

(a) to introduce a new Note 4 on Rule 2.5, as follows:

“4. Reserving the right to reduce the offer if the offeree company pays a dividend

A potential offeror may, in a statement to which Rule 2.5(a)(i) applies, reserve the right to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company. If such a reservation is included in a statement to which Rule 2.5(a)(i) applies, the potential offeror may include the same reservation in any subsequent firm offer announcement or offer document.

Where a reservation in relation to the payment of a dividend is not included in any statement to which Rule 2.5(a)(i) applies, the potential offeror will not normally be permitted to:

(a) reserve the right, in any subsequent firm offer announcement or offer document, to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company; or

(b) reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company.

However, where a potential offeror announces an increased possible or firm offer, it may, at that time, introduce a reservation of the right to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company, provided that it does not propose to reduce the offer consideration below the value of the previous possible offer which was not subject to the reservation.”;

(b) to amend the final paragraph of Note 1 on Rule 2.5, as follows:

“Except for a reservation relating to the payment of a dividend by the offeree company (see Note 4), once it has announced a firm intention to make an offer, an offeror will not be permitted to exercise any right it had

previously reserved either to set aside a statement in relation to the level of consideration that it might offer or to vary the form and/or mix of the consideration.”;

- (c) to introduce a new Note 4 on Rule 2.7, as follows:

“4. Reserving the right to reduce the offer if the offeree company pays a dividend

An offeror may reserve the right in its firm offer announcement to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company, provided that any statement to which Rule 2.5(a)(i) applied included the same reservation.

Where a reservation in relation to the payment of a dividend is not included in a firm offer announcement, the offeror will not normally be permitted to:

(a) reserve the right in a subsequent offer document to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company; or

(b) reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company.

However, where an offeror announces an increased offer, it may, at that time, introduce a reservation of the right to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company, provided that it does not reduce the offer consideration below the value of the previous offer which was not subject to the reservation.

If an offeror includes a term of its offer which provides that it shall be entitled to receive any dividend paid by the offeree company after a specified date, it must expressly reserve the right to reduce the offer consideration by the amount of the dividend in accordance with this Note.”; and

- (d) to introduce a new Note 5 on Rule 24.3, as follows:

“5. Reserving the right to reduce the offer if the offeree company pays a dividend

An offeror may reserve the right to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company, provided that any statement to which Rule 2.5(a)(i) applied and the firm offer announcement included the same reservation.

Where a reservation in relation to the payment of a dividend is not included in an offer document, the offeror will not normally be permitted to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company.

However, where an offeror announces an increased offer, it may, at that time, introduce a reservation of the right to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company, provided that it does not reduce the offer consideration below the value of the previous offer which was not subject to the reservation.

If an offeror includes a term of its offer which provides that it shall be entitled to receive any dividend paid by the offeree company after a specified date, it must expressly reserve the right to reduce the offer consideration by the amount of the dividend in accordance with this Note.”.

2.12 In addition, a cross-reference to the new Note 5 on Rule 24.3 would be introduced at the end of Rule 24.3(d)(iv), as set out in Appendix A.

Q1 Should Note 4 on Rule 2.5, Note 4 on Rule 2.7 and Note 5 on Rule 24.3 be introduced, and Note 1 on Rule 2.5 amended, as proposed?

3. **Effect of a dividend where the offeror has made a “no increase statement”**

3.1 Rule 2.5(a)(ii) provides that, where a statement subject to Rule 2.5(a) includes reference to the fact that the terms of the possible offer “will not be increased” or are “final” or uses a similar expression, the potential offeror will not be allowed subsequently to make an offer on better terms. This is subject to the exception provided in Rule 2.5(a) that a potential offeror will not be bound by such a statement:

(a) where, at the time the statement was made, it specifically reserved the right not to be so bound in certain circumstances and those circumstances subsequently arise; or

(b) in wholly exceptional circumstances.

3.2 Similarly, Rule 32.2 provides that, if an offeror which has announced a firm offer makes such a “no increase statement”, the offeror will not be allowed subsequently to amend the terms of its offer in any way, even if the amendment would not result in an increase in the value of the offer, except:

(a) where, at the time the no increase statement was made, it specifically reserved the right to do so in certain circumstances and those circumstances subsequently arise; or

(b) in wholly exceptional circumstances.

3.3 The Code Committee considers that, where such a statement is made, market participants should be entitled to rely on the statement and to make their investment decisions on the basis that the offer is final and that additional value above the stated final offer price will not be provided to offeree company shareholders under the offer or otherwise.

3.4 The Code Committee understands that it is the Executive's practice, where a potential offeror has made a statement to which Rule 2.5(a)(ii) applies, or an offeror has made a no increase statement under Rule 32.2, and the offeree company subsequently pays a dividend, then to require the potential offeror or offeror to reduce the offer consideration by an amount equal to that dividend so that the overall value receivable by the offeree company shareholders remains the same, unless a specific reservation was included in the relevant statement which provided that shareholders would be entitled to receive the specific dividend that was paid in addition to the offer consideration. The Code Committee considers that this should be made clear in the Code.

3.5 The Code Committee therefore proposes:

(a) to introduce a new Note 5 on Rule 2.5, as follows:

“5. Requirement to reduce the offer if the potential offeror has made a statement to which Rule 2.5(a)(ii) applies and the offeree company pays a dividend

Where a potential offeror has made a statement to which Rule 2.5(a)(ii) applies and the offeree company subsequently pays a dividend, the potential offeror will normally then be required to reduce the offer consideration by an amount equal to the dividend so that the overall value receivable by the offeree company shareholders remains the same, unless a specific reservation was included in the relevant statement which provided that shareholders would be entitled to receive, in addition to the offer consideration, the specific dividend that was paid.”; and

(b) to introduce a new Note 6 on Rule 32.2, as follows:

“6. Requirement to reduce the offer if the offeror has made a “no increase statement” and the offeree company pays a dividend

Where an offeror has made a “no increase statement” and the offeree company subsequently pays a dividend, the offeror will normally then be required to reduce the offer consideration by an amount equal to the

dividend so that the overall value receivable by the offeree company shareholders remains the same, unless a specific reservation was included in the relevant statement which provided that shareholders would be entitled to receive, in addition to the offer consideration, the specific dividend that was paid.”.

Q2 Should Note 5 on Rule 2.5 and Note 6 on Rule 32.2 be introduced as proposed?

4. Impact of dividends on a minimum offer price established by share purchases

(a) Introduction

4.1 Rules 6, 9.5 and 11.1 set out provisions relating to the minimum amount, and form, of offer consideration where the offeror (or any person acting in concert with it) has acquired interests in offeree company shares during certain specified periods. Broadly, the consideration offered must be at no less than the highest price paid by the offeror (or any person acting in concert with it) for an interest in the shares of the offeree company during the relevant period or during the offer period.

(b) Where offeree company shareholders are entitled to receive a dividend in addition to the offer consideration

4.2 Note 5 on Rule 6 provides that, when accepting shareholders are entitled under the offer to retain a dividend declared or forecast by the offeree company but not yet paid, purchases in the market or otherwise by an offeror (or any person acting in concert with it) may be made at prices up to the net cum dividend equivalent of the offer value without necessitating any revision of the offer.

4.3 Note 4 on Rule 9.5 and Note 9 on Rule 11.1 provide that, when accepting shareholders are entitled under the offer to retain a dividend declared or forecast by the offeree company but not yet paid, the offeror, in establishing the level of the cash offer, may deduct from the highest price paid the net dividend to which offeree company shareholders are entitled.

4.4 These provisions ensure that a shareholder who receives the dividend and accepts the offer receives the same overall value as a shareholder who sells its shares to the offeror in the circumstances described, in accordance with the requirement in

- General Principle 1 for shareholders in an offeree company to be afforded equivalent treatment.
- 4.5 For example, in relation to Note 5 on Rule 6, if the offeror is offering consideration of 100 pence in cash and, under the terms of the offer, offeree company shareholders are entitled to receive an announced dividend of 2 pence per share in addition to the offer consideration, the offeror will be permitted to purchase shares which are trading cum dividend for up to 102 pence without being required to increase its offer. However, after the shares commence trading ex dividend, the offeror will only be permitted to purchase shares for up to 100 pence if it is to avoid being required to increase its offer.
- 4.6 The Code Committee considers that Note 5 on Rule 6 should be clearer as to the period during which shares are regarded as trading cum dividend for the purpose of the Note. The Code Committee considers that shares should be regarded as trading cum dividend from the time at which the dividend is “announced” by the offeree company until the “ex dividend date”. This formulation would replace the existing wording, which refers to a dividend which has been “declared or forecast by the offeree company but not yet paid”. The Code Committee proposes to amend the Note accordingly.
- 4.7 The Code Committee considers that the term “net cum dividend equivalent”, which is used in Note 5 on Rule 6 to refer to the maximum amount that an offeror may pay for offeree company shares without having to increase the value of the offer, should be clarified. The Code Committee considers that the term is intended to mean that an offeror may acquire shares at up to an amount equal to the aggregate of the offer value and the amount of the dividend. The Code Committee considers that this should be made clearer in the Note.
- 4.8 In addition, the Code Committee considers that the term “net”, as referred to in the Note 5 on Rule 6, Note 4 on Rule 9.5 and Note 9 on 11.1, is inappropriate, as

it suggests that the tax treatment of the dividend in the hands of offeree company shareholders could be taken into account. The Code Committee confirms that it is not the intention that the amount of any tax credit, tax payable or other deduction should be taken into account in calculating the maximum price that an offeror may pay for shares without having to increase its offer. Accordingly, the Code Committee proposes to delete the term “net” from those Notes.

- 4.9 The Code Committee notes that Note 5 on Rule 6 relates to share purchases which the offeror might make during the course of an offer, whereas Note 4 on Rule 9.5 and Note 9 on Rule 11.1 relate to share purchases already made. Each of the Notes is, in practice, applied in both situations (in relation to the respective periods referred to in Rules 6, 9.5 and 11.1) and the Code Committee considers that this should be reflected in each of the Notes. Accordingly, the Code Committee considers that each of Note 5 on Rule 6, Note 4 on Rule 9.5 and Note 9 on 11.1 should provide that, when accepting shareholders are entitled under the offer to receive and retain, in addition to the offer consideration, a dividend which has been announced by the offeree company but the ex dividend date has not yet occurred:
- (a) the offeror, in establishing the minimum level of the offer, may deduct from the highest price paid by it (or any person acting in concert with it) during the relevant period to which the relevant Rule applies the amount of the dividend to which offeree company shareholders are entitled; and
 - (b) once an offer value has been announced, purchases in the market or otherwise during the cum dividend period by the offeror (or any person acting in concert with it) may be made at prices up to the aggregate of the offer value and the amount of the dividend without necessitating any revision of the offer.

In addition, the Code Committee considers that each of the Notes should provide that purchases in the market or otherwise after the ex dividend date by an offeror (or any person acting in concert with it) may only be made at prices up to the amount of the offer value without necessitating any revision of the offer.

(c) Where offeree company shareholders are not entitled to receive a dividend in addition to the offer consideration

4.10 Note 5 on Rule 6, Note 4 on Rule 9.5 and Note 9 on Rule 11.1 currently only address the situation where, under the terms of the offer, offeree company shareholders are entitled to retain a relevant dividend in addition to the full amount of the offer consideration.

4.11 The Code Committee acknowledges that there may also be situations where offeree company shareholders are not entitled, under the terms of the offer, to receive the dividend in addition to the full amount of the offer consideration. In addition, the Notes do not explain the potential impact on the minimum offer price of purchasing shares after the ex dividend date.

4.12 Accordingly, the Code Committee considers that each of Note 5 on Rule 6, Note 4 on Rule 9.5 and Note 9 on 11.1 should also provide that, when accepting shareholders are not entitled under the offer to receive and retain, in addition to the offer consideration, a dividend which has been announced by the offeree company:

- (a) the offeror, in establishing the minimum level of the offer, may not deduct from the highest price paid by it (or any person acting in concert with it) during the relevant period to which the relevant Rule applies the amount of the dividend; and

- (b) once an offer value has been announced, purchases in the market or otherwise during the cum dividend period by the offeror (or any person acting in concert with it) may be made at prices up to the offer value without necessitating any revision of the offer.

In addition, the Code Committee considers that each of the Notes should provide that purchases in the market or otherwise after the ex dividend date by an offeror (or any person acting in concert with it) may only be made at prices up to the offer value less the amount of the dividend without necessitating any revision of the offer.

- 4.13 For example, if the offeror is offering consideration of 100 pence in cash per share and, under the terms of the offer, offeree company shareholders are not entitled to receive a dividend of 2 pence per share in addition to the offer consideration, the offeror may purchase shares which are trading cum dividend for up to 100 pence without being required to increase its offer.
- 4.14 If, notwithstanding the terms of the offer, offeree company shareholders become entitled to receive the dividend by virtue of being on the register of members on the dividend record date, the offeror may decide to reduce the offer consideration by the amount of the dividend, provided that it had reserved the right to do so. If the offer consideration is so reduced, the offeror will be permitted to acquire shares after the ex dividend date for up to only 98 pence if it is to avoid being required to increase its offer. This is because, following the ex dividend date, shareholders will have become entitled to the 2 pence dividend which, when added to the 98 pence purchase price, would result in a selling shareholder receiving an aggregate of 100 pence per share. Alternatively, provided the offeror has not made a “no increase statement”, the offeror may decide to revise its offer so as to allow offeree company shareholders to keep the 2 pence dividend in addition to the 100 pence offer consideration, in which event the offeror will be

permitted to acquire shares after the ex dividend date for up to 100 pence without being required to increase its offer.

(d) *Conforming the Notes on Rules 6, 9.5 and 11.1*

4.15 As indicated above, the Code Committee considers that each of Note 5 on Rule 6, Note 4 on Rule 9.5 and Note 9 on Rule 11.1 should be in the same terms. Rather than repeating the entire Note in each of Rules 6, 9.5 and 11.1, the Code Committee proposes to set out the new Note in full in Note 5 on Rule 6 and to replace the current Note 4 on Rule 9.5 and the current Note 9 on Rule 11.1 with a cross-reference to the new Note 5 on Rule 6.

(e) *Proposed amendments*

4.16 In view of the above, the Code Committee proposes:

(a) to delete the current Note 5 on Rule 6 and replace it with the following:

“5. *Treatment of dividends*

(a) *Dividends which accepting shareholders are entitled to receive and retain*

When accepting shareholders are entitled under the offer to receive and retain, in addition to the offer consideration, a dividend which has been announced by the offeree company but the “ex dividend” date has not yet occurred:

(i) the offeror, in establishing the minimum level of the offer, may deduct from the highest price paid by it (or any person acting in concert with it) during the relevant period to which the Rule applies the amount of the dividend to which offeree company shareholders are entitled; and

(ii) once an offer value has been announced, purchases in the market or otherwise during the “cum dividend” period by the offeror (or any person acting in concert with it) may be made at prices up to the aggregate of the offer value and the amount of the dividend without necessitating any revision of the offer.

However, purchases in the market or otherwise after the “ex dividend” date by an offeror (or any person acting in concert with it) may only be made at prices up to the amount of the offer value without necessitating any revision of the offer.

(b) Dividends which accepting shareholders are not entitled to receive and retain

When accepting shareholders are not entitled under the offer to receive and retain, in addition to the offer consideration, a dividend which has been announced by the offeree company:

(i) the offeror, in establishing the minimum level of the offer, may not deduct from the highest price paid by it (or any person acting in concert with it) during the relevant period to which the Rule applies the amount of the dividend; and

(ii) once an offer value has been announced, purchases in the market or otherwise during the “cum dividend” period by the offeror (or any person acting in concert with it) may be made at prices up to the offer value without necessitating any revision of the offer.

However, purchases in the market or otherwise after the “ex dividend” date by an offeror (or any person acting in concert with it) may only be made at prices up to the offer value less the amount of the dividend without necessitating any revision of the offer.”;

- (b) to delete the current Note 4 on Rule 9.5 and replace it with the following:

“4. Treatment of dividends

See Note 5 on Rule 6.”; and

- (c) to delete the current Note 9 on Rule 11.1 and replace it with the following:

“9. Treatment of dividends

See Note 5 on Rule 6.”.

Q3 Should Note 5 on Rule 6, Note 4 on Rule 9.5 and Note 9 on Rule 11.1 be amended as proposed?

5. Assessment of the impact of the proposals

- 5.1 The Code Committee believes that clarifying, codifying and updating the application of the Code to the treatment of dividends paid by an offeree company to its shareholders, as proposed, will be beneficial to: parties to offers; shareholders and other stakeholders; market participants; and practitioners.
- 5.2 The Code Committee does not believe that the proposed amendments will result in any significant costs being imposed, given that the amendments are intended to clarify the application of existing provisions of the Code and to ensure greater alignment of the Code with the existing practice of the Executive in relation to dividends paid by an offeree company, rather than introduce any new substantive requirements.

APPENDIX A

Proposed amendments to the Code

Rule 2.5

2.5 TERMS AND PRE-CONDITIONS IN POSSIBLE OFFER ANNOUNCEMENTS

...

NOTES ON RULE 2.5

1. *Reservation of the right to set a statement aside*

The first announcement in which a statement subject to Rule 2.5(a) is made must contain prominent reference to any reservation to set it aside (precise details of which must be included). Any subsequent mention by the potential offeror of the statement must be accompanied by a reference to the reservation.

...

Except for a reservation relating to the payment of a dividend by the offeree company (see Note 4), once it has announced a firm intention to make an offer, an offeror will not be permitted to exercise any right it had previously reserved either to set aside a statement in relation to the level of consideration that it might offer or to vary the form and/or mix of the consideration.

...

4. *Reserving the right to reduce the offer if the offeree company pays a dividend*

A potential offeror may, in a statement to which Rule 2.5(a)(i) applies, reserve the right to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company. If such a reservation is included in a statement to which Rule 2.5(a)(i) applies, the potential offeror may include the same reservation in any subsequent firm offer announcement or offer document.

Where a reservation in relation to the payment of a dividend is not included in any statement to which Rule 2.5(a)(i) applies, the potential offeror will not normally be permitted to:

(a) reserve the right, in any subsequent firm offer announcement or offer document, to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company; or

(b) reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company.

However, where a potential offeror announces an increased possible or firm offer, it may, at that time, introduce a reservation of the right to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company, provided that it does not propose to reduce the offer consideration below the value of the previous possible offer which was not subject to the reservation.

5. Requirement to reduce the offer if the potential offeror has made a statement to which Rule 2.5(a)(ii) applies and the offeree company pays a dividend

Where a potential offeror has made a statement to which Rule 2.5(a)(ii) applies and the offeree company subsequently pays a dividend, the potential offeror will normally then be required to reduce the offer consideration by an amount equal to the dividend so that the overall value receivable by the offeree company shareholders remains the same, unless a specific reservation was included in the relevant statement which provided that shareholders would be entitled to receive, in addition to the offer consideration, the specific dividend that was paid.

Rule 2.7

2.7 THE ANNOUNCEMENT OF A FIRM INTENTION TO MAKE AN OFFER

...

NOTES ON RULE 2.7

...

4. Reserving the right to reduce the offer if the offeree company pays a dividend

An offeror may reserve the right in its firm offer announcement to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company, provided that any statement to which Rule 2.5(a)(i) applied included the same reservation.

Where a reservation in relation to the payment of a dividend is not included in a firm offer announcement, the offeror will not normally be permitted to:

(a) reserve the right in a subsequent offer document to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company; or

(b) reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company.

However, where an offeror announces an increased offer, it may, at that time, introduce a reservation of the right to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company, provided that it does not reduce the offer consideration below the value of the previous offer which was not subject to the reservation.

If an offeror includes a term of its offer which provides that it shall be entitled to receive any dividend paid by the offeree company after a specified date, it must expressly reserve the right to reduce the offer consideration by the amount of the dividend in accordance with this Note.

Rule 6

RULE 6. ACQUISITIONS RESULTING IN AN OBLIGATION TO OFFER A MINIMUM LEVEL OF CONSIDERATION

...

NOTES ON RULE 6

...

5. ~~Cum dividend~~

~~When accepting shareholders are entitled under the offer to retain a dividend declared or forecast by the offeree company but not yet paid, purchases in the market or otherwise by an offeror or any person acting in concert with it may be made at prices up to the net cum dividend equivalent of the offer value without necessitating any revision of the offer. Where the offeror or any person acting in concert with it proposes to acquire an interest in shares in reliance on this Note other than by purchasing shares, the Panel should be consulted.~~

5. Treatment of dividends

(a) Dividends which accepting shareholders are entitled to receive and retain

When accepting shareholders are entitled under the offer to receive and retain, in addition to the offer consideration, a dividend which has been announced by the offeree company but the “ex dividend” date has not yet occurred:

(i) the offeror, in establishing the minimum level of the offer, may deduct from the highest price paid by it (or any person acting in concert with it) during

the relevant period to which the Rule applies the amount of the dividend to which offeree company shareholders are entitled; and

(ii) once an offer value has been announced, purchases in the market or otherwise during the “cum dividend” period by the offeror (or any person acting in concert with it) may be made at prices up to the aggregate of the offer value and the amount of the dividend without necessitating any revision of the offer.

However, purchases in the market or otherwise after the “ex dividend” date by an offeror (or any person acting in concert with it) may only be made at prices up to the amount of the offer value without necessitating any revision of the offer.

(b) Dividends which accepting shareholders are not entitled to receive and retain

When accepting shareholders are not entitled under the offer to receive and retain, in addition to the offer consideration, a dividend which has been announced by the offeree company:

(i) the offeror, in establishing the minimum level of the offer, may not deduct from the highest price paid by it (or any person acting in concert with it) during the relevant period to which the Rule applies the amount of the dividend; and

(ii) once an offer value has been announced, purchases in the market or otherwise during the “cum dividend” period by the offeror (or any person acting in concert with it) may be made at prices up to the offer value without necessitating any revision of the offer.

However, purchases in the market or otherwise after the “ex dividend” date by an offeror (or any person acting in concert with it) may only be made at prices up to the offer value less the amount of the dividend without necessitating any revision of the offer.

Rule 9.5

9.5 CONSIDERATION TO BE OFFERED

...

NOTES ON RULE 9.5

...

4. ~~Cum dividend~~

~~When accepting shareholders are entitled under the offer to retain a dividend declared or forecast by the offeree company but not yet paid, the offeror, in~~

~~establishing the level of the cash offer, may deduct from the highest price paid the net dividend to which offeree company shareholders are entitled. Where the offeror or any person acting in concert with it has acquired any interest in shares to which this Note may be relevant other than by purchasing shares, the Panel should be consulted.~~

4. Treatment of dividends

See Note 5 on Rule 6.

Rule 11.1

11.1 WHEN A CASH OFFER IS REQUIRED

...

NOTES ON RULE 11.1

...

9. Cum dividend

~~When accepting shareholders are entitled under the offer to retain a dividend declared or forecast by the offeree company but not yet paid, the offeror, in establishing the level of the cash offer, may deduct from the highest price paid the net dividend to which offeree company shareholders are entitled. Where the offeror or any person acting in concert with it has acquired any interest in shares to which this Note may be relevant other than by purchasing shares, the Panel should be consulted.~~

9. Treatment of dividends

See Note 5 on Rule 6.

Rule 24.3

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

Except with the consent of the Panel:

...

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

...

(iv) details of each class of security for which the offer is made, including whether those securities will be transferred “cum” or “ex” any dividend and the maximum and minimum percentages of those securities which the offeror undertakes to acquire (see Note 5);

...

NOTES ON RULE 24.3

...

5. Reserving the right to reduce the offer if the offeree company pays a dividend

An offeror may reserve the right to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company, provided that any statement to which Rule 2.5(a)(i) applied and the firm offer announcement included the same reservation.

Where a reservation in relation to the payment of a dividend is not included in an offer document, the offeror will not normally be permitted to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company.

However, where an offeror announces an increased offer, it may, at that time, introduce a reservation of the right to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company, provided that it does not reduce the offer consideration below the value of the previous offer which was not subject to the reservation.

If an offeror includes a term of its offer which provides that it shall be entitled to receive any dividend paid by the offeree company after a specified date, it must expressly reserve the right to reduce the offer consideration by the amount of the dividend in accordance with this Note.

Rule 32.2

32.2 NO INCREASE STATEMENTS

...

NOTES ON RULE 32.2

...

6. Requirement to reduce the offer if the offeror has made a “no increase statement” and the offeree company pays a dividend

Where an offeror has made a “no increase statement” and the offeree company subsequently pays a dividend, the offeror will normally then be required to reduce the offer consideration by an amount equal to the dividend so that the overall value receivable by the offeree company shareholders remains the same, unless a specific reservation was included in the relevant statement which provided that shareholders would be entitled to receive, in addition to the offer consideration, the specific dividend that was paid.

APPENDIX B**List of questions**

- Q1** Should Note 4 on Rule 2.5, Note 4 on Rule 2.7 and Note 5 on Rule 24.3 be introduced, and Note 1 on Rule 2.5 amended, as proposed?
- Q2** Should Note 5 on Rule 2.5 and Note 6 on Rule 32.2 be introduced as proposed?
- Q3** Should Note 5 on Rule 6, Note 4 on Rule 9.5 and Note 9 on Rule 11.1 be amended as proposed?

APPENDIX C

Draft Practice Statement

PRACTICE STATEMENT NO [•]

DIVIDENDS

1. Introduction

1.1 This Practice Statement explains the Panel Executive's practice with regard to:

- (a) permitting an offeror to reserve the right to reduce the offer consideration if the offeree company pays a dividend;
- (b) requiring the offer consideration to be reduced where a dividend is paid by the offeree company after the offeror has made a "no increase statement";
- (c) calculating the maximum price at which an offeror may purchase offeree company shares without having to increase its offer under Rules 6, 9.5 or 11.1 where the shares are trading "cum dividend" or "ex dividend"; and
- (d) the application of Rule 21.2 in prohibiting an offeree company (or any person acting in concert with it) from entering into an agreement with an offeror (or any person acting in concert with it) in relation to the payment of dividends by the offeree company.

1.2 References in this Practice Statement to the following expressions have the following meanings:

- (a) "cum dividend": shares which trade "cum dividend" carry the right to receive a particular dividend which has been announced. Shares trade on this basis from the date on which the dividend is announced until the "ex dividend" date relating to the dividend; and

- (b) “ex dividend”: shares which trade “ex dividend” do not carry the right to receive the relevant dividend. Shares trade on this basis from the “ex dividend” date relating to the dividend until the date on which it is paid.

2. Reserving the right to reduce the offer consideration if a dividend is paid

(a) *Introduction*

- 2.1 The payment of a dividend by an offeree company may affect the financial terms on which an offeror wishes to make or proceed with an offer. In particular, an offeror will usually wish to protect itself against value leakage from the offeree company caused by the payment of a dividend by reserving the right to reduce the offer consideration if a dividend is paid to offeree company shareholders. However, an offeror may be prepared to allow offeree company shareholders to receive a specific dividend in addition to receiving the offer consideration.

(b) *Possible offer announcements*

- 2.2 Rule 2.5(a) provides that the Panel must be consulted in advance if, prior to the announcement of a firm intention to make an offer, any person proposes to make a statement in relation to the terms on which an offer might be made for the offeree company. If a potential offeror makes such a statement (or agrees to the offeree company making such a statement) and it is not withdrawn immediately if incorrect, the potential offeror will be bound by the statement if an offer for the offeree company is subsequently made, except:

- (a) where it specifically reserved the right not to be so bound in certain circumstances at the time the statement was made and those circumstances subsequently arise; or
- (b) in wholly exceptional circumstances.

- 2.3 The purpose of Rule 2.5(a) is to ensure that market participants are able to rely on statements made by a potential offeror in relation to the value of its possible offer

- and to make their investment decisions on the basis that any offer, if made, will not be less than the amount stated (save where a specific reservation applies or in wholly exceptional circumstances).
- 2.4 Note 4 on Rule 2.5 provides that a potential offeror may, in a statement to which Rule 2.5(a)(i) applies, reserve the right to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company.
- 2.5 A potential offeror which is making a statement to which Rule 2.5(a)(i) applies after the offeree company has announced a dividend and while the shares are still trading “cum dividend” will normally state whether the offeree company shareholders will be entitled to receive the dividend in addition to the offer consideration. In addition, a potential offeror may wish to reserve the right to reduce the offer consideration by the amount of all or part of any dividend which may subsequently be announced and paid by the offeree company during the offer period.
- 2.6 In accordance with the first paragraph of Note 1 on Rule 2.5, the first announcement in which a statement subject to Rule 2.5(a)(i) is made must contain prominent reference to any reservation to reduce the offer consideration if a dividend is paid by the offeree company (together with any other reservation to set the statement aside). In addition, any subsequent mention of the terms of the possible offer must be accompanied by a reference to the reservation. Any reservation should be expressed in clear terms so that offeree company shareholders are able to understand the effect that the payment of a dividend by the offeree company will have on the terms of the possible offer if the offeror subsequently exercises the right to reduce the offer consideration.
- 2.7 As provided in Note 4 on Rule 2.5, where the potential offeror makes a statement to which Rule 2.5(a)(i) applies (or the offeree company makes such a statement with the offeror’s agreement) but does not reserve the right for the potential

offeror to reduce the offer consideration if the offeree company subsequently pays a dividend, the potential offeror will not normally be permitted to:

- (a) reserve the right, in any subsequent firm offer announcement or offer document, to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company; or
 - (b) reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company.
- 2.8 Accordingly, it is extremely important that a potential offeror which is considering making a statement (or consenting to the offeree company making a statement) to which Rule 2.5(a)(i) applies ensures that an appropriate reservation is included in that statement if it wishes to be able to reduce the offer consideration if a dividend is subsequently paid by the offeree company.
- 2.9 However, as provided in the final paragraph of Note 4 on Rule 2.5, where a potential offeror announces an increased possible or firm offer, it may, at that time, introduce a reservation of the right to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company, provided that it does not propose to reduce the offer consideration below the value of the previous offer which was not subject to the reservation.
- 2.10 If, on the date on which the potential offeror makes a statement to which Rule 2.5(a) applies, the offeree company shares are already trading “ex dividend”, the potential offeror will normally be expected to ensure that the offer terms take into account the shareholders’ entitlements to the dividend, rather than include a reservation to reduce the offer consideration by the amount of the dividend.
- (c) ***Firm offer announcements and offer documents***
- 2.11 Note 4 on Rule 2.7 provides that an offeror may reserve the right in its firm offer announcement to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company, provided that any

- statement to which Rule 2.5(a)(i) applied included the same reservation. A similar provision is set out in Note 5 on Rule 24.3 in relation to offer documents.
- 2.12 Any reservation should be expressed in clear terms so that offeree company shareholders are able to understand the effect that the payment of a dividend by the offeree company will have on the terms of the offer if the offeror subsequently exercises the right to reduce the offer consideration.
- 2.13 As provided in Note 4 on Rule 2.7 and Note 5 on Rule 24.3, where a reservation in relation to the payment of a dividend is not included in a firm offer announcement or offer document, the offeror will not normally be permitted to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company.
- 2.14 However, where an offeror announces an increased offer, the offeror may, at that time, introduce a reservation of the right to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid by the offeree company, provided that it does not reduce the offer consideration below the value of the previous offer which was not subject to the reservation.
- 2.15 As provided in Note 4 on Rule 2.7 and Note 5 on Rule 24.3, if an offeror includes a term of its offer which provides that it shall be entitled to receive any dividend paid by the offeree company after a specified date, it must expressly reserve the right to reduce the offer consideration by the amount of the dividend. This is to ensure that, if an offeror wishes to reduce the offer consideration by the amount of any dividend which is paid to offeree company shareholders, it will do so pursuant to the exercise of a clear reservation of the right to reduce the offer consideration, rather than pursuant to a term which does not expressly refer to the effect of the payment of any dividend on the offer consideration.
- (d) *Offer condition not normally regarded as a reservation of the right to reduce the offer consideration*

- 2.16 Where an offeror includes a condition to its offer that the offeree company will not pay a dividend or other distribution (but does not reserve the right to reduce the offer consideration), the Executive will not normally consider that the condition would, of itself, provide an adequate basis for reducing the offer consideration if a dividend or other distribution is subsequently paid.
- 2.17 In addition, given the high standard of materiality required to invoke a condition under Rule 13.5(a), a condition to an offer which provides that the offeree company will not pay a dividend or other distribution is unlikely to be capable of being invoked unless the dividend or distribution is especially large and unexpected.
- 2.18 The payment of a dividend may be subject to the restrictions set out in Rule 21.1 in relation to frustrating action. However, given that a dividend may be capable of being approved for the purposes of Rule 21.1 by offeree company shareholders in general meeting, Rule 21.1 may not be considered by an offeror to provide adequate protection against value leakage arising from the payment of dividends. Accordingly, an offeror which requires such protection should ensure that it reserves the right to reduce the offer consideration if a dividend is paid in the manner set out above.

(e) Exercising a right to reduce the offer consideration if a dividend is paid

- 2.19 Where, in a possible offer announcement, firm offer announcement or offer document, the offeror reserves the right to reduce the offer consideration if the offeree company pays a dividend and the offeree company subsequently announces an intention to pay or recommend a dividend, the Executive will normally require the offeror to make an announcement as soon as possible after the offeree company's announcement of the dividend. The offeror's announcement should state whether the right to reduce the offer consideration will be exercised if the dividend is paid and, if it will, state the revised consideration which will then be payable under the offer or possible offer.

2.20 In addition, if, following the announcement of a firm offer, the offeror announces its intention to exercise the right to reduce the offer consideration if an announced dividend is paid, the Executive may require the offeror to send a document to offeree company shareholders.

2.21 If, following the announcement of a dividend by the offeree company, the offeror announces its intention to reduce the offer consideration but the dividend is not ultimately paid, the offeror will not be permitted to reduce the offer consideration.

(f) Non-cash consideration

2.22 Where a securities exchange offeror reserves the right to reduce the offer consideration if the offeree company pays a dividend and the offeror subsequently exercises that right, the amount by which the consideration securities shall be reduced will normally be calculated by reference to the value of those securities as at the close of trading on the day before the offeror's announcement that the offer consideration is to be reduced.

(g) Set-off

2.23 The exercise by an offeror of any right it has reserved to reduce the offer consideration if a dividend is paid will not be regarded by the Executive as a set-off which is prohibited under Rule 24.12.

3. Effect of a dividend where the offeror has made a “no increase statement”

3.1 If a potential offeror states that the terms of a possible offer “will not be increased” or are “final” or uses a similar expression, Rule 2.5(a)(ii) provides that the potential offeror will not be allowed subsequently to make an offer on better terms, except:

- (a) where it specifically reserved the right not to be so bound in certain circumstances at the time the statement was made and those circumstances subsequently arise; or

- (b) in wholly exceptional circumstances.
- 3.2 Similarly, if an offeror which has announced a firm offer makes such a “no increase statement”, Rule 32.2 provides that the offeror will not be allowed subsequently to amend the terms of its offer in any way, even if the amendment would not result in an increase in the value of the offer, except:
 - (a) where the offeror specifically reserved the right to do so in certain circumstances at the time the statement was made and those circumstances subsequently arise; or
 - (b) in wholly exceptional circumstances.
- 3.3 The Executive considers that market participants should be entitled to rely on such statements and to make their investment decisions on the basis that the offer is final and that additional value above the stated final offer price will not be provided to offeree company shareholders under the offer or otherwise. Consistent with this principle, Note 5 on Rule 2.5 and Note 6 on Rule 32.2 provide that, where a potential offeror has made a statement to which Rule 2.5(a)(ii) applies or an offeror has made a “no increase statement” and the offeree company subsequently pays a dividend, the potential offeror or offeror will normally then be required to reduce the offer consideration by an amount equal to the dividend so that the overall value receivable by the offeree company shareholders remains the same, unless a specific reservation was included in the relevant statement which provided that shareholders would be entitled to receive, in addition to the offer consideration, the specific dividend that was paid. The Executive considers that such a reduction in the offer consideration would normally be required to be made even where the offeror had not previously reserved the right to reduce the consideration if the offeree company were to pay a dividend.

4. Impact of dividends on a minimum offer price established by share purchases

(a) *Purchasing shares “cum dividend” or “ex dividend”*

4.1 Rules 6, 9.5 and 11.1 set out the circumstances in which acquisitions of interests in shares in an offeree company by an offeror (or any person acting in concert with it) will determine the minimum amount and form of consideration which must be offered under the terms of an offer.

4.2 Note 5 on Rule 6 sets out how dividends are to be treated in calculating the minimum offer consideration. Note 5 seeks to ensure that all offeree company shareholders receive the same value for their shares, regardless of whether they sell their shares to the offeror “cum dividend” or, alternatively, receive the dividend, accept the offer and transfer their shares to the offeror “ex dividend”.

4.3 Note 5(a) on Rule 6 provides that, when accepting shareholders are entitled under the offer to receive and retain, in addition to the offer consideration, a dividend which has been announced by the offeree company but the “ex dividend” date has not yet occurred:

- (a) the offeror, in establishing the minimum level of the offer, may deduct from the highest price paid by it (or any person acting in concert with it) during the relevant period to which the Rule applies the amount of the dividend to which offeree company shareholders are entitled; and
- (b) once an offer value has been announced, purchases in the market or otherwise during the “cum dividend” period by the offeror (or any person acting in concert with it) may be made at prices up to the aggregate of the offer value and the amount of the dividend without necessitating any revision of the offer.

However, purchases in the market or otherwise after the “ex dividend” date by an offeror (or any person acting in concert with it) may only be made at prices up to the amount of the offer value without necessitating any revision of the offer.

4.4 Note 5(b) on Rule 6 provides that, when accepting shareholders are not entitled under the offer to receive and retain, in addition to the offer consideration, a dividend which has been announced by the offeree company:

- (a) the offeror, in establishing the minimum level of the offer, may not deduct from the highest price paid by it (or any person acting in concert with it) during the relevant period to which the Rule applies the amount of the dividend; and
- (b) once an offer value has been announced, purchases in the market or otherwise during the “cum dividend” period by an offeror (or any person acting in concert with it) may be made at prices up to the offer value without necessitating any revision of the offer.

However, purchases in the market or otherwise after the “ex dividend” date by an offeror (or any person acting in concert with it) may only be made at prices up to the offer value less the amount of the dividend without necessitating any revision of the offer.

4.5 Note 5 on Rule 6 also applies to Rule 9.5 (by virtue of Note 4 on Rule 9.5) and Rule 11.1 (by virtue of Note 9 on Rule 11.1).

4.6 Accordingly, if, for example, the offeror is offering consideration of 100 pence in cash and, under the terms of the offer, offeree company shareholders are entitled to receive an announced dividend of 2 pence per share in addition to the offer consideration, the offeror will be permitted to purchase shares which are trading “cum dividend” for up to 102 pence without being required to increase its offer under any of Rules 6, 9.5 or 11.1. However, after the shares commence trading “ex dividend”, the offeror will only be permitted to purchase shares for up to 100 pence if it is to avoid being required to increase its offer.

4.7 Similarly, if the offeror is offering consideration of 100 pence per share in cash and, under the terms of the offer, offeree company shareholders are not entitled to receive a dividend of 2 pence per share in addition to the offer consideration, the offeror may purchase shares which are trading cum dividend for up to 100 pence without being required to increase its offer.

4.8 If offeree company shareholders are not entitled under the terms of the offer to receive a dividend in addition to the offer consideration but nevertheless become entitled to receive the dividend by virtue of being on the register of members on the dividend record date, the offeror may decide to reduce the offer consideration by the amount of the dividend, provided that it had reserved the right to do so. If the offer consideration is so reduced, the offeror will be permitted to acquire shares after the ex dividend date for up to only 98 pence if it is to avoid being required to increase its offer. This is because, following the ex dividend date, shareholders will have become entitled to the 2 pence dividend which, when added to the 98 pence purchase price, would result in a selling shareholder receiving an aggregate of 100 pence per share. Alternatively, provided the offeror has not made a “no increase statement”, the offeror may decide to revise its offer so as to allow offeree company shareholders to keep the 2 pence dividend in addition to the 100 pence offer consideration, in which event the offeror will be permitted to acquire shares after the ex dividend date for up to 100 pence without being required to increase its offer.

(b) Consequences of purchasing shares when a dividend has been announced but is not ultimately paid

4.9 If a dividend is announced but not ultimately paid, there is a risk that offeree company shareholders will not be treated equally if an offeror purchases shares on a “cum dividend” basis.

4.10 Therefore, if, in the example given in paragraph 4.6 above, the offeror purchases shares “cum dividend” for 102 pence and the dividend which was announced is not subsequently paid to offeree company shareholders (e.g. if shareholders

resolve not to approve the dividend), the Executive's practice is then to require the offeror to increase its offer from 100 pence to 102 pence in order to ensure that offeree company shareholders who accept the offer (and do not ultimately receive the dividend) receive the same value for their shares as those offeree company shareholders who had previously sold their shares to the offeror at 102 pence.

5. Prohibition of offer-related arrangements in respect of dividends

- 5.1 Rule 21.2(a) provides that, except with the consent of the Panel, neither the offeree company nor any person acting in concert with it may enter into any offer-related arrangement with either the offeror or any person acting in concert with it during an offer period or when an offer is reasonably in contemplation.
- 5.2 The prohibition in Rule 21.2(a) is broad and subject only to the limited exceptions set out in Rule 21.2(b), none of which permit arrangements concerning the payment of dividends. Accordingly, the Executive applies Rule 21.2(a) so as to prohibit an offeree company (or any person acting in concert with it) from entering into an arrangement with the offeror (or any person acting in concert with it) which relates to the payment of dividends by the offeree company. Such prohibited arrangements include, for example, any undertaking given by the offeree company to the offeror not to pay dividends, or not to pay dividends of more than a specified amount, before the offer becomes wholly unconditional.
- 5.3 If an offeror wishes to protect itself against value leakage from the offeree company caused by the payment of a dividend, it should do so by reserving the right to reduce the offer consideration if a dividend is paid to offeree company shareholders in the manner described above rather than by seeking to restrict the board of the offeree company from paying dividends.

Practice Statements are issued by the Panel Executive to provide informal guidance to companies involved in takeovers and practitioners as to how the Executive normally interprets and applies relevant provisions of the Takeover Code in certain circumstances. Practice Statements do not form part of the Code. Accordingly, they are not binding on

the Executive or the Panel and are not a substitute for consulting the Executive to establish how the Code applies in a particular case. All Practice Statements issued by the Executive are available on the Panel's website at www.thetakeoverpanel.org.uk.

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