

RS 2015/1 23 October 2015

THE TAKEOVER PANEL

DIVIDENDS

RESPONSE STATEMENT BY THE CODE COMMITTEE OF THE PANEL FOLLOWING THE CONSULTATION ON PCP 2015/1

CONTENTS

	Page
1. Introduction	1
2. Right to reduce the offer consideration in respect of a dividend	4
3. Effect of a dividend where the offeror has made a “no increase statement”	13
4. Impact of dividends on a minimum offer price established by share purchases	18
APPENDIX A Respondents to PCP 2015/1 (excluding those who submitted comments on a confidential basis)	22
APPENDIX B Amendments to the Code	23

1. Introduction

(a) Background

1.1 On 11 May 2015, the Code Committee of the Takeover Panel (the “**Code Committee**”) published a public consultation paper (“**PCP 2015/1**” or the “**PCP**”) in which it proposed amendments to the Takeover Code (the “**Code**”) in relation to the treatment of dividends paid by an offeree company to its shareholders. The proposed amendments were 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**”).

1.2 In summary, the Code Committee proposed:

- (a) to introduce a new Note 4 on Rule 2.5 (with regard to possible offer announcements), a new Note 4 on Rule 2.7 (with regard to firm offer announcements) and a new Note 5 on Rule 24.3 (with regard to offer documents), which would provide that:
 - (i) an offeror could, if it so wished, 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
 - (ii) if an offeror did not reserve that right in a statement made in relation to the terms of a possible offer, a firm offer announcement and the offer document, it would not normally be permitted to reduce the offer consideration by all or part of a dividend which was subsequently paid by the offeree company;
- (b) to introduce a new Note 5 on Rule 2.5 and a new Note 6 on Rule 32.2, which would make clear that an offeror which 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 the offeror had specifically stated that offeree company shareholders would be entitled to receive the dividend concerned; and

- (c) to replace Note 5 on Rule 6, Note 4 on Rule 9.5 and Note 9 on Rule 11.1 with new Notes on those Rules which would clarify how dividends announced by the offeree company would be treated in calculating the minimum offer value which would be established by the acquisition of interests in offeree company shares by an offeror or any person acting in concert with it.

(b) *Responses to the consultation*

1.3 The consultation period in relation to PCP 2015/1 ended on 12 June 2015. The Code Committee received comments on the consultation questions from the five respondents listed in Appendix A. Each of the responses has been published on the Panel's website at www.thetakeoverpanel.org.uk. The Code Committee thanks the respondents for their comments.

1.4 Respondents were generally supportive of the proposals. However, concern was expressed that a potential offeror that made a possible offer announcement which included the terms on which an offer might be made for the offeree company, but which (possibly as the result of an inadvertent mistake) did not reserve the right to reduce the offer consideration by the amount of all or part of a dividend subsequently paid by the offeree company, would not be permitted to introduce such a reservation in a subsequent firm offer announcement or offer document, and that this could result in potentially significant consequences for the offeror.

(c) *The Code Committee's conclusions*

1.5 Having considered the responses to the consultation, the Code Committee has adopted the substance of the amendments to the Code which were proposed in PCP 2015/1. However, the Code Committee has decided that the new Note 4

on Rule 2.5, the new Note 4 on Rule 2.7 and the new Note 5 on Rule 24.3 should not be adopted in the forms proposed in the PCP. The Code Committee has instead concluded that, in summary, the Code should require an offeror, in a statement made under Rule 2.5(a)(i), a firm offer announcement and an offer document, to state that the offeror will have the right to reduce the offer consideration by the amount of any dividend (or other distribution) which is paid or becomes payable by the offeree company to offeree company shareholders, unless, and to the extent that, the offeror expressly states that offeree company shareholders will be entitled to receive all or part of a specified dividend in addition to the offer consideration.

(d) Code amendments

- 1.6 The amendments to the Code which the Code Committee has adopted in this Response Statement are set out in Appendix B. In Appendix B, underlining indicates new text and striking-through indicates deleted text, as compared with the current provisions of the Code.

(e) Implementation

- 1.7 The amendments to the Code introduced as a result of this Response Statement will take effect, and revised pages of the Code will be published, on Monday, 23 November 2015.

(f) Executive Practice Statement

- 1.8 A draft of an Executive Practice Statement in relation to the application of certain provisions of the Code to the payment of dividends by an offeree company was set out in Appendix C to PCP 2015/1. The Code Committee understands from the Executive that, in view of the final form of the amendments to the Code adopted in this Response Statement, it considers that it is not currently necessary to publish a Practice Statement in this area.

2. Right to reduce the offer consideration in respect of a dividend

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?

(a) *Introduction*

2.1 In summary, Rule 2.5(a) provides that, where a potential offeror makes a statement in relation to the terms on which an offer might be made for the offeree company, the potential offeror will be bound by that statement if an offer is subsequently made, except:

- (a) where it specifically reserves 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 a statement to which Rule 2.5(a) applies relates to the price of a possible offer (a “**Rule 2.5(a)(i) Statement**”), any offer made by the potential offeror for the offeree company will be required to be made on the same or better terms.

2.2 In Section 2 of the PCP, the Code Committee proposed the introduction of a new Note 4 on Rule 2.5 which would provide that:

- (a) if a potential offeror made a Rule 2.5(a)(i) Statement, it could, if it so wished, reserve the right to reduce the offer consideration by the amount of all or part of a dividend subsequently paid by the offeree company (a “**Dividends Reservation**”). The proposed Note also provided that, if the potential offeror did include a Dividends Reservation in its Rule 2.5(a)(i) Statement, it could include the same reservation in any subsequent firm offer announcement or offer document;

(b) if a potential offeror did not include a Dividends Reservation in its Rule 2.5(a)(i) Statement, the potential offeror would not normally be permitted to:

- (i) include a Dividends Reservation in any subsequent firm offer announcement or offer document; or
- (ii) reduce the offer consideration if a dividend were subsequently paid by the offeree company.

However, the proposed new Note 4 on Rule 2.5 provided that, where the potential offeror announced an increased possible or firm offer, it could, at that time, introduce a Dividends Reservation, provided that the offer consideration was not reduced below the value specified in the Rule 2.5(a)(i) Statement.

2.3 The Code Committee also proposed the introduction of similar provisions to those described in paragraph 2.2(a) above in relation to Dividends Reservations which were included in:

- (a) a firm offer announcement (the proposed new Note 4 on Rule 2.7); and
- (b) an offer document (the proposed new Note 5 on Rule 24.3).

2.4 In addition, under the proposed new Note 4 on Rule 2.7 and the proposed new Note 5 on Rule 24.3, if an offeror included a term of its offer which provided that it (rather than offeree company shareholders) would be entitled to receive any dividend paid by the offeree company after a specified date, the offeror would be required to include an appropriate Dividends Reservation.

(b) *Summary of respondents' views and the Code Committee's response*

(i) *Introduction*

2.5 Subject to the points highlighted below, respondents were generally supportive of, or did not express an opinion on, the proposals put forward in Section 2 of the PCP.

(ii) *Consequences of not including a Dividends Reservation*

2.6 One respondent expressed concern at the proposal that a potential offeror which made a Rule 2.5(a)(i) Statement without including a Dividends Reservation would not be able to include a Dividends Reservation in a subsequent firm offer announcement or offer document. The respondent suggested that, if the Code Committee's objective was to provide clarity to the market as to whether an offeror could reduce the offer consideration if the offeree company subsequently paid a dividend, and in view of the potentially significant consequences for a potential offeror of not including a Dividends Reservation in a Rule 2.5(a)(i) Statement (as set out in paragraph 2.2(b) above), the Code could instead provide either that:

- (a) unless it specified to the contrary, a potential offeror would always have the right to reduce the offer consideration by the amount of any dividend subsequently paid by the offeree company, regardless of whether it reserved the right to do so ("**Option 1**"); or
- (b) a potential offeror should be required to state, in each of a Rule 2.5(a)(i) Statement, firm offer announcement and offer document, whether it reserved the right to reduce the offer consideration by the amount of any dividend subsequently paid by the offeree company ("**Option 2**").

2.7 The Code Committee acknowledges the concern raised by the respondent. In relation to Option 1, the Code Committee does not consider that it would be

appropriate for a potential offeror which did not include a Dividends Reservation (or similar) in a Rule 2.5(a)(i) Statement to have an automatic right to reduce the offer consideration by the amount of any dividend subsequently paid by the offeree company. The Code Committee considers that the principal objective of the proposed amendments is to provide clarity to offeree company shareholders and other market participants as to whether the offeror will be able to reduce the offer consideration if a dividend is subsequently paid by the offeree company and believes that this would be best achieved by requiring the offeror to make this clear on the face of each of a Rule 2.5(a)(i) Statement, firm offer announcement and offer document, as contemplated by Option 2.

- 2.8 The Code Committee has therefore concluded that the new Note 4 on Rule 2.5, the new Note 4 on Rule 2.7 and the new Note 5 on Rule 24.3 should not be adopted in the forms proposed in the PCP.
- 2.9 Instead, the Code Committee has concluded that the Code should require an offeror, in each of a Rule 2.5(a)(i) Statement, firm offer announcement and offer document, to state that the offeror will have the right to reduce the offer consideration by the amount of any dividend which is paid by the offeree company, unless, and to the extent that, the offeror expressly states that offeree company shareholders will be entitled to receive and retain all or part of a specified dividend in addition to the offer consideration. The Code Committee notes that a such a “specified dividend” may include not only a final or interim dividend which has already been announced or declared by the offeree company but also a dividend which may be announced or declared by the offeree company during the course of an offer.
- 2.10 The new Note 4(a) on Rule 2.5, the new Rule 2.7(c)(xii) and the new Rule 24.17 which have been adopted by the Code Committee are set out below.

(iii) *Dividends paid by the offeree company after completion*

2.11 Two respondents suggested that the proposed new provisions, in addition to referring to the reduction of the offer consideration by the amount of a dividend which is subsequently paid by the offeree company, should also refer to a dividend which, as at the completion of the offer, has not yet been paid but which remains payable to the offeree company shareholders.

2.12 The Code Committee agrees that the new provisions of the Code are intended to cover both dividends which are paid by the offeree company to offeree company shareholders before the offer completes and those which are paid to offeree company shareholders (as opposed to being paid to the offeror) after completion. The provisions adopted below therefore refer to any dividend “which is paid or becomes payable by the offeree company to offeree company shareholders”.

2.13 If an offeror reduces the offer consideration in respect of a dividend which has not yet been paid, offeree company shareholders must be allowed to receive and retain that dividend. This is reflected in the new Rule 24.17(b), as set out below.

(iv) *Dividends which are not approved or which are cancelled*

2.14 Two respondents noted that it was possible that a dividend declared by the offeree company might not be approved by the offeree company’s shareholders or might be cancelled by the offeree company. The respondents considered that, in such circumstances, the offeror should have the option, but not an obligation, to increase the offer consideration.

2.15 The Code Committee agrees with the respondents. This point is illustrated by the example of an offeror offering consideration of 100 pence in cash per share, with offeree company shareholders also being entitled to receive and retain a dividend of 2 pence previously announced by the offeree company (i.e. such that offeree company shareholders would receive a total value of 102

pence). In this example, if the dividend was not approved by offeree company shareholders, or was cancelled by the offeree company, and if the offeror had not purchased shares so as to trigger a requirement to increase its offer in order to comply with Rules 6, 9.5 or 11.1 (see further Section 4 below), the Code Committee considers that the offeror would have the option, but not an obligation, to increase its offer to up to 102 pence. The Code Committee considers that the offeror would be able to increase its offer to up to 102 pence even if it had previously made a “no increase” statement or even if “Day 46” had already passed.

2.16 However, if the offeror had purchased shares for 102 pence “cum dividend”, then, upon the dividend not being approved, or being cancelled, the offeror would be required to increase its offer to 102 pence in order to ensure that accepting shareholders received the same value as those who had sold shares to the offeror at 102 pence.

(v) *Other distributions*

2.17 One respondent noted that the proposed amendments to the Code referred to dividends but did not refer to other distributions made by an offeree company.

2.18 The Code Committee considers that the new provisions of the Code should apply not only to dividends but also to other distributions made by an offeree company and has introduced references to distributions other than dividends into the new provisions. The Code Committee considers that the Panel will need to be consulted in circumstances where the offer consideration is to be reduced by the value of a non-cash distribution.

(vi) *Exercising a right to reduce the offer consideration*

2.19 One respondent noted that the draft Executive Practice Statement set out at Appendix C to the PCP stated that, where an offeree company announced an intention to pay or recommend a dividend to its shareholders, the Executive would normally require the offeror to make an announcement as soon as

possible thereafter, which announcement would be required to state whether the right to reduce the offer consideration will be exercised if the dividend is paid and, if it will, the revised consideration which will then be payable. The Code Committee agrees, but does not consider that it is necessary for this to be expressly stated in the Code itself.

- 2.20 One respondent noted that the draft Executive Practice Statement which was set out at Appendix C to the PCP had stated that, in the case of a securities exchange offeror exercising its right to reduce the offer consideration by the amount of a dividend paid by the offeree company, the amount by which the offeror may reduce the consideration securities would 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 was to be reduced. The respondent queried whether this approach might produce an anomalous result if the offeror's share price had declined significantly since the original exchange ratio was set. The Code Committee agrees with the approach set out in the draft Executive Practice Statement and does not consider that it would normally produce an anomalous result in the circumstance described.

(c) Amendments to the Code

- 2.21 As indicated above, the Code Committee has concluded that it should not adopt the new Note 4 on Rule 2.5, the new Note 4 on Rule 2.7 and the new Note 5 on Rule 24.3 in the forms proposed in the PCP. Instead, the Code Committee has adopted a new Note 4(a) on Rule 2.5, a new Rule 2.7(c)(xii) and a new Rule 24.17, as set out below.
- 2.22 In addition, the Code Committee has deleted the requirement in Rule 24.3(d)(iv) for the offer document to state whether the securities for which the offer is made will be transferred "cum" or "ex" any dividend.
- 2.23 The relevant amendments to the Code will therefore be as follows:

“2.5 TERMS AND PRE-CONDITIONS IN POSSIBLE OFFER ANNOUNCEMENTS

...

NOTES ON RULE 2.5

...

4. Dividends

(a) When an offeror makes a statement to which Rule 2.5(a)(i) applies, the offeror must state that it will have the right to reduce the offer consideration by the amount of any dividend (or other distribution) which is paid or becomes payable by the offeree company to offeree company shareholders, unless, and to the extent that, the statement provides that offeree company shareholders will be entitled to receive and retain all or part of a specified dividend (or other distribution) in addition to the offer consideration.

...

2.7 THE ANNOUNCEMENT OF A FIRM INTENTION TO MAKE AN OFFER

...

(c) When a firm intention to make an offer is announced, the announcement must state include:

...

(x) ... ; ~~and~~

(xi) ... ; and

(xii) a statement that the offeror will have the right to reduce the offer consideration by the amount of any dividend (or other distribution) which is paid or becomes payable by the offeree company to offeree company shareholders, unless, and to the extent that, the announcement provides that offeree company shareholders will be entitled to receive and retain all or part of a specified dividend (or other distribution) in addition to the offer consideration;

...

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;

...

24.17 DIVIDENDS

(a) It must be a term of the offer that the offeror has the right to reduce the offer consideration by the amount of any dividend (or other distribution) which is paid or becomes payable by the offeree company to offeree company shareholders, unless, and to the extent that, offeree company shareholders are entitled to receive and retain all or part of a specified dividend (or other distribution) in addition to the offer consideration.

(b) It must also be a term of the offer that, if the offeror exercises the right to reduce the offer consideration by all or part of the amount of a dividend (or other distribution) that has not been paid, offeree company shareholders will be entitled to receive and retain that dividend (or other distribution).”.

2.24 In addition, the Code Committee has:

- (a) made minor amendments to Note 1 on Rule 2.5; and
- (b) introduced a new Note 4 on Rule 2.7, which replicates the provisions of Note 1(c) on Rule 2.5 (as amended),

as set out in Appendix B.

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

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

(a) *Introduction*

3.1 Rule 32.2(b) provides that, if an offeror which has announced a firm offer makes a “**no increase statement**” (as defined in Rule 32.2(a)), 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 no increase statement was made, and those circumstances subsequently arise; or

(b) in wholly exceptional circumstances.

3.2 Similarly, the effect of Rule 2.5(a)(ii) is that, where a statement to which Rule 2.5(a) applies includes reference to the fact that the terms of a 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, except where the potential offeror 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 in wholly exceptional circumstances.

3.3 In Section 3(a) of the PCP, the Code Committee proposed the introduction of a new Note 6 on Rule 32.2 which would provide that, 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 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 subsequently paid. The Code Committee also proposed the introduction of a new Note 5 on Rule 2.5 in similar terms.

(b) *Summary of respondents' views and the Code Committee's response*

(i) Introduction

3.4 Respondents were generally supportive of, or did not express an opinion in relation to, the proposed new Note 5 on Rule 2.5 and the proposed new Note 6 on Rule 32.2.

(ii) Consequences of not including a Dividends Reservation

3.5 The respondent referred to in paragraph 2.6 above was concerned that, under the proposed new provisions, a potential inconsistency might arise if an offeror did not include a Dividends Reservation in a Rule 2.5(a)(i) Statement but then made a no increase statement. In summary, the respondent was concerned that, if the offeree company were subsequently to pay a dividend to its shareholders, the offeror would then be obliged to reduce the offer consideration (under the proposed new Note 5 on Rule 2.5 or the proposed new Note 6 on Rule 32.2), while such a reduction would not normally be permitted (under the proposed new Note 4 on Rule 2.5).

3.6 The Code Committee acknowledges that this could have been a concern under the amendments to the Code as proposed in the PCP. However, the Code Committee considers that such an inconsistency should not arise under the new provisions adopted in Section 2 above as an offeror will always be required to make a clear statement in relation to dividends subsequently paid by the offeree company. This is because the Code will require an offeror, in a Rule 2.5(a)(i) Statement, firm offer announcement and offer document, to include a statement that the offeror will have the right to reduce the offer

consideration by the amount of any dividend which is paid or becomes payable by the offeree company to offeree company shareholders, unless, and to the extent that, the offeror expressly states that offeree company shareholders will be entitled to receive all or part of a specified dividend in addition to the offer consideration.

(iii) *Timing of the reduction of the offer consideration following the announcement of a dividend by the offeree company*

3.7 One respondent asked for confirmation that, if the offer consideration was reduced in accordance with the proposed new Note 5 on Rule 2.5 or the proposed new Note 6 on Rule 32.2, this would not be viewed as a revision to the terms of the offer, such that the reduction could take place at any time during the course of the offer.

3.8 The Code Committee does not consider that a reduction of the offer consideration by an offeror which has made a no increase statement following a dividend being paid by the offeree company would be a revision of the offer. In particular, the Code Committee does not consider that a revised offer document would need to be published in accordance with Rule 32.1(a) or that the reduction of the offer consideration would necessarily need to be made on or before “Day 46” of the offer timetable (as is the case where an offer is revised, given that Rule 32.1(c) provides that a revised offer must be kept open for at least 14 days and that Rule 31.6 provides that an offer must become or be declared unconditional as to acceptances by no later than “Day 60” of the offer timetable). However, the Code Committee also notes that, under Rule 31.9, the board of the offeree company will usually be restricted from declaring any new dividends after “Day 39” of the offer timetable, such that this issue should not arise in practice.

3.9 One respondent asked how, and by whom, offeree company shareholders would be notified if the offer consideration was to be reduced following the declaration of a dividend by the offeree company after the offeror had made a no increase statement.

3.10 The Code Committee would expect that, if an offeror had made a no increase statement and the offeree company then announced a new dividend, any reduction of the offer consideration would need to be announced as soon as practicable by the offeror via a RIS. In addition, the Code Committee understands that the Executive might require the offeror to send a copy of the relevant announcement directly to offeree company shareholders.

(c) *Amendments to the Code*

3.11 In the light of the above, the Code Committee has adopted modified versions of the proposed new Note 5 on Rule 2.5 (which has been adopted as a new Note 4(b) on Rule 2.5) and the proposed new Note 6 on Rule 32.2, as follows:

“2.5 TERMS AND PRE-CONDITIONS IN POSSIBLE OFFER ANNOUNCEMENTS

...

NOTES ON RULE 2.5

...

4. Dividends

...

(b) Where an offeror has made a statement to which Rule 2.5(a)(ii) applies and a dividend (or other distribution) is subsequently paid or becomes payable by the offeree company to offeree company shareholders, the offeror will normally be required to reduce the offer consideration by an amount equal to the dividend (or other distribution) so that the overall value receivable by the offeree company shareholders remains the same, unless, and to the extent that, the offeror has stated that offeree company shareholders will be entitled to receive all or part of a specified dividend (or other distribution) in addition to the offer consideration.

...

32.2 NO INCREASE STATEMENTS

...

NOTES ON RULE 32.2

...

6. Dividends

Where an offeror has made a no increase statement and a dividend (or other distribution) is subsequently paid or becomes payable by the offeree company to offeree company shareholders, the offeror will normally be required to reduce the offer consideration by an amount equal to the dividend (or other distribution) so that the overall value receivable by offeree company shareholders remains the same, unless, and to the extent that the offeror has stated that offeree company shareholders will be entitled to receive and retain all or part of a specified dividend (or other distribution) in addition to the offer consideration.”.

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

<p>Q3. Should Note 5 on Rule 6, Note 4 on Rule 9.5 and Note 9 on Rule 11.1 be amended as proposed?</p>

(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 periods specified in those Rules. Broadly, the consideration offered must be 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.

4.2 In Section 4 of the PCP, the Code Committee proposed the introduction of new Notes 5(a) and 5(b) on Rule 6 in relation to the treatment of dividends, which would replace the current Note 5 on Rule 6.

4.3 The proposed new Note 5(a) on Rule 6 would 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 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.

In addition, the proposed new Note 5(a) would 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.

4.4 The proposed new Note 5(b) on Rule 6 would 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 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 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 proposed new Note 5(b) would 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.

4.5 The Code Committee proposed that these provisions should apply not only to Rule 6 (in relation to acquisitions which result in an obligation to offer a minimum level of consideration) but also to Rule 9.5 (in relation to the consideration to be offered in a mandatory offer) and to Rule 11.1 (in relation to acquisitions which result in a requirement to make a cash offer). The Code Committee proposed to do this by deleting the current Note 4 on Rule 9.5 and

Note 9 on Rule 11.1 and replacing them with cross-references to the proposed new Note 5 on Rule 6.

(b) *Summary of respondents' views and the Code Committee's response*

4.6 Respondents were generally supportive of, or did not express an opinion in relation to, the proposed new Note 5 on Rule 6, Note 4 on Rule 9.5 and Note 9 on Rule 11.1.

(c) *Amendments to the Code*

4.7 The Code Committee has therefore:

(a) deleted the current Note 5 on Rule 6 and replaced it with the following:

“5. *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 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 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) deleted the current Note 4 on Rule 9.5 and replaced it with the following:

“4. Dividends

Note 5 on Rule 6 also applies to acquisitions made during the period to which Rule 9.5 applies.”; and

- (c) deleted the current Note 9 on Rule 11.1 and replaced it with the following:

“9. Dividends

Note 5 on Rule 6 also applies to acquisitions made during the period to which Rule 11.1 applies.”.

APPENDIX A

Respondents to PCP 2015/1

(excluding those who submitted comments on a confidential basis)

1. Association for Financial Markets in Europe
2. BDO LLP
3. Institute of Chartered Accountants in England and Wales
4. Quoted Companies Alliance
5. Takeovers Joint Working Party of the City of London Law Society Company Law Sub-Committee and the Law Society of England and Wales' Standing Committee on Company Law

APPENDIX B

Amendments to the Code

Rule 2.5

2.5 TERMS AND PRE-CONDITIONS IN POSSIBLE OFFER ANNOUNCEMENTS

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NOTES ON RULE 2.5

1. Reservation of the right to set a statement aside or to vary the form and/or mix of consideration

(a) 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.

(b) Where a potential offeror has reserved the right to vary the form and/or mix of the consideration referred to in a statement ~~subject to~~ which Rule 2.5(a)(i) applies (but remains bound to a specified minimum level of consideration) and exercises that right, the value of any offer that is made subsequently must be the same as or better than the value of the consideration referred to in that statement, calculated as at the time of the announcement of the firm intention to make an offer. If, during the period ending when the market closes on the first business day after the announcement of the firm intention to make an offer, the value is not maintained, the Panel will be concerned to ensure that the offeror acted with all reasonable care in determining the consideration. If there is a restricted market in the securities offered, or if the amount of securities to be issued of a class already admitted to trading is large in relation to the amount already issued, the Panel may require justification of prices used to determine the value of the offer.

(c) 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~~ reduce the level of consideration that it might offer or to vary the form and/or mix of the consideration. However, the offeror's ability to reduce the offer consideration by the amount of a specified dividend (or other distribution) will not be affected.

...

4. Dividends

(a) When an offeror makes a statement to which Rule 2.5(a)(i) applies, the offeror must state that it will have the right to reduce the offer consideration

by the amount of any dividend (or other distribution) which is paid or becomes payable by the offeree company to offeree company shareholders, unless, and to the extent that, the statement provides that offeree company shareholders will be entitled to receive and retain all or part of a specified dividend (or other distribution) in addition to the offer consideration.

(b) Where an offeror has made a statement to which Rule 2.5(a)(ii) applies and a dividend (or other distribution) is subsequently paid or becomes payable by the offeree company to offeree company shareholders, the offeror will normally be required to reduce the offer consideration by an amount equal to the dividend (or other distribution) so that the overall value receivable by the offeree company shareholders remains the same, unless, and to the extent that, the offeror has stated that offeree company shareholders will be entitled to receive all or part of a specified dividend (or other distribution) in addition to the offer consideration.

Rule 2.7

2.7 THE ANNOUNCEMENT OF A FIRM INTENTION TO MAKE AN OFFER

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(c) When a firm intention to make an offer is announced, the announcement must state include:

...

(x) ... ; **and**

(xi) ... ; **and**

(xii) a statement that the offeror will have the right to reduce the offer consideration by the amount of any dividend (or other distribution) which is paid or becomes payable by the offeree company to offeree company shareholders, unless, and to the extent that, the announcement provides that offeree company shareholders will be entitled to receive and retain all or part of a specified dividend (or other distribution) in addition to the offer consideration;

...

NOTES ON RULE 2.7

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4. Reservations to a previous statement in relation to the terms of a possible offer

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 reduce the level of consideration that it might offer or to vary the form and/or mix of the consideration. However, the offeror's ability to reduce the offer consideration by a specified dividend (or other distribution) which is subsequently paid by the offeree company to offeree company shareholders will not be affected.

Rule 6

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

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NOTES ON RULE 6

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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. 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 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 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

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NOTES ON RULE 9.5

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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. Dividends

Note 5 on Rule 6 also applies to acquisitions made during the period to which Rule 9.5 applies.

Rule 11.1

11.1 WHEN A CASH OFFER IS REQUIRED

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NOTES ON RULE 11.1

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~~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. Dividends

Note 5 on Rule 6 also applies to acquisitions made during the period to which Rule 11.1 applies.

Rule 24

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

Except with the consent of the Panel:

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

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(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;~~

...

24.17 DIVIDENDS

(a) It must be a term of the offer that the offeror has the right to reduce the offer consideration by the amount of any dividend (or other distribution) which is paid or becomes payable by the offeree company to offeree company shareholders, unless, and to the extent that, offeree company shareholders are entitled to receive and retain all or part of a specified dividend (or other distribution) in addition to the offer consideration.

(b) It must also be a term of the offer that, if the offeror exercises the right to reduce the offer consideration by all or part of the amount of a dividend (or other distribution) that has not been paid, offeree company shareholders will be entitled to receive and retain that dividend (or other distribution).

Rule 32.2

32.2 NO INCREASE STATEMENTS

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NOTES ON RULE 32.2

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6. Dividends

Where an offeror has made a no increase statement and a dividend (or other distribution) is subsequently paid or becomes payable by the offeree company to offeree company shareholders, the offeror will normally be required to reduce the offer consideration by an amount equal to the dividend (or other distribution) so that the overall value receivable by offeree company shareholders remains the same, unless, and to the extent that the offeror has stated that offeree company shareholders will be entitled to receive and retain all or part of a specified dividend (or other distribution) in addition to the offer consideration.