

PCP 12 Issued on 7 January 2003

**THE PANEL ON TAKEOVERS AND MERGERS**

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

**QUESTIONS AS TO THE POSSIBLE AMENDMENT  
OF RULE 31.9 AND RELATED RULES**

**REVISION PROPOSALS RELATING TO RULES  
31.5, 31.9, 32.1 and 32.2 OF THE TAKEOVER CODE**

Before it introduces or amends any Rules of the Takeover Code or the Rules Governing the Substantial Acquisitions of Shares, the Code Committee of the Takeover Panel is required under its consultation procedures to publish the proposed Rules and amendments for public consultation and to consider responses arising from the public consultation process.

The Code Committee is therefore inviting comments on this Consultation Paper. Comments should reach the Code Committee by **17 February 2003**.

Comments may be sent by email to:

[consultation@disclosure.org.uk](mailto:consultation@disclosure.org.uk)

Alternatively, please send comments in writing to:

The Secretary to the Code Committee  
The Panel on Takeovers and Mergers  
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The Stock Exchange Building  
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It is the Code Committee's policy to make all responses to formal consultation available for public inspection unless the respondent requests otherwise.

## 1. INTRODUCTION

1.1 One of the principal objectives of The City Code on Takeovers and Mergers (the “Code”), as set out in the Introduction to the Code, is to provide an orderly framework within which takeover bids are conducted. Consistent with this objective, Rule 31.9 prohibits an offeree company from publishing certain significant information in the context of an offer after the 39th day from the posting of the offer document.

1.2 The wording of Rule 31.9 is set out below:

### **“31.9 OFFEREE COMPANY ANNOUNCEMENTS AFTER DAY 39**

**The board of the offeree company should not, except with the consent of the Panel (which should be consulted in good time), announce trading results, profit or dividend forecasts, asset valuations or proposals for dividend payments after the 39th day following the posting of the initial offer document. Where the announcement of trading results and dividends would normally take place after the 39th day, every effort should be made to bring forward the date of the announcement, but, where this is not practicable, the Panel will normally give its consent to a later announcement. If an announcement of the kind referred to in this paragraph is made after the 39th day, the Panel will normally be prepared to grant an extension of the period of 60 days referred to in Rule 31.6.**

**(See also Note 3 on Rule 31.6.)”**

1.3 On several occasions over the years, the Panel has been required to consider issues which raised the question of whether the list of announcements set out in the Rule should be interpreted exhaustively or whether, instead, the Rule should apply to a wider range of matters that might have a significant impact on an offer.

- 1.4 This Consultation Paper seeks views on the approach (which includes amendments to the Code, as set out in Appendix B) that the Panel should adopt in relation to Rule 31.9, and certain other issues arising from its possible amendment.

## **2. PURPOSE OF RULE 31.9**

- 2.1 As noted in paragraph 1.1 above, one of the principal objectives of the Code is to provide an orderly framework within which takeover bids are conducted. The Code therefore prescribes, in Rule 31.6, a 60 day timetable within which an offer must become or be declared unconditional as to acceptances, or otherwise lapse.
- 2.2 The rationale behind this 60 day rule derives from the siege principle. While an offeror should have sufficient time in which to prosecute its offer (and to seek to persuade shareholders of its merits), the offeree company should not be exposed to an excessive period of siege.
- 2.3 In addition, Rule 32.1 requires that a revised offer must be kept open for at least 14 days after the posting of the revised offer document. This gives effect to General Principle 4 of the Code, which provides that shareholders must be given sufficient time to reach a properly informed decision about an offer. The result of this is that, given the offer may not become unconditional as to acceptances after Day 60, the latest date on which an offer can be revised and the revised offer document posted is Day 46 of the offer timetable.
- 2.4 So that the offeror has the opportunity properly to consider whether or not to revise its offer by Day 46, and if so on what terms, Rule 31.9 requires the offeree company to announce by Day 39 certain material information that may have an impact on the outcome of the offer.
- 2.5 The siege principle is generally irrelevant, however, where the offeree company is receptive to an extension to the offer timetable. The Panel will, therefore, normally be willing to extend Day 60 or Day 46 if the offeree

company board consents. This would suggest that, if the offeree company is prepared to accept an extension to the offer period (i.e. to Day 46 or Day 60) as the likely consequence of its announcing significant new information late in the timetable, it should be permitted to do so.

- 2.6 It would be unsatisfactory, though, if the offeree company was permitted to extend the offer timetable ad infinitum by gradually trickling out information. An extended offer timetable could be detrimental to the offeror (for example if it is incurring commitment fees on any necessary financing) and to offeree company shareholders. Moreover, shareholders and others in the market may deal after Day 39 in the false belief that they have been provided with all relevant information by the offeree company.
- 2.7 These considerations therefore lead to the conclusion that, regardless of the implications of the siege principle, the Panel is justified in seeking to ensure that offeree companies are not able to release significant information at will late in the offer period, having regard to the importance of achieving an orderly resolution to takeover bids.

### **3. CONSIDERATIONS REGARDING EXTENDING THE RULE**

#### **3.1 Arguments for and against**

- 3.1.1 The principal arguments in favour of the list of announcements currently set out in Rule 31.9 being interpreted as exhaustive are that:
- only an exhaustive list provides certainty for the parties to an offer, their advisers and the market as a whole as to what matters may not (and, therefore, what matters may still) be announced after Day 39 and, as offeree company shareholders and the wider market can be expected to deal on the assumption that no further information of the kind referred to in the Rule will normally be forthcoming after Day 39, this

is not an area that should be left open to interpretation and flexibility of application; and

- the Rule should be aimed only at preventing an offeree company manipulating the timing of the release of information for tactical considerations, for example in the knowledge that the offeror will be unable to respond to the information within the normal offer timetable. As such the Rule should be limited to apply only to announcements that are within the clear and sole control of the offeree company. It could be argued that developments in the ordinary course of the offeree company's business outside its control should (provided the announcement has not been delayed so as to gain a tactical advantage) be considered a risk that the offeror accepts when it makes its offer.

3.1.2 The argument in favour of a wider application is that there may be other types of announcement which could be made by the offeree company of equivalent relevance and materiality to the rationale behind Rule 31.9 (i.e. information that may be perceived to enhance the value of the offeree company and that may, therefore, afford a new and substantial reason for rejection of the offer), but which do not fall within the list of announcements currently specified in the Rule. An example might be an announcement that the offeree company has agreed to dispose of a major asset as part of a refocusing of its business, since the consideration being paid for the asset might imply a higher value for the whole of the offeree company's business than is available under the offer.

3.1.3 If such an announcement were made by the offeree company after Day 39, the offeror might be unable adequately to consider the new information before deciding whether or not to revise its offer by Day 46 and, if the announcement were made after Day 46, the offeror would be prevented from revising its offer (if it so wished) in response. Similarly, offeree company shareholders might not have sufficient time to digest the information and decide upon an appropriate, properly informed course of action before the end of the normal offer timetable. If the offer lapsed as a result, the offeror would then normally

be prevented by Rule 35.1 from making a further offer for a period of 12 months thereafter.

- 3.1.4 The release of such significant new information by the offeree company (but of a type not specified in Rule 31.9) towards the end of the offer timetable might in these circumstances have the effect of depriving offeree company shareholders of a possible revised offer from the offeror or, at least, of the opportunity to consider the information (and any counter-arguments made by the offeror in response) in sufficient time before the end of the offer.

### **3.2 Recommendation of the Code Committee**

- 3.2.1 The Code Committee can see the merit in the argument that Rule 31.9 should be limited in its application to announcements where the timing is dictated by tactical considerations, since the Rule was originally designed to prevent the takeover timetable being used to gain a tactical advantage and not to restrict the offeree company from announcing, in the normal way, developments in its usual sphere of activity.
- 3.2.2 However, the Code Committee is concerned that, by limiting the application of the Rule, there may be other announcements made by an offeree company late in the offer timetable (but not necessarily deliberately so) that disclose new information and thereby (potentially) affect shareholders' perceptions of value and acceptance decisions, but that offeree company shareholders do not have sufficient time to digest in order to make a properly informed decision and which deprive the offeror of sufficient opportunity properly to prosecute its offer. In other words, it is the nature of the information (new, material and potentially value-enhancing) that is critical to the rationale underlying Rule 31.9 and no exhaustive list can encapsulate that concept.
- 3.2.3 For these reasons, the Code Committee believes that Rule 31.9 should apply to a wider range of matters than the list of specific announcements currently set out in the Rule (but subject to the issues referred to in Section 4 below), and believes that this approach is justified in seeking to achieve an orderly

resolution to offers without depriving offeree company shareholders of the possible benefit of a response from the offeror to the new information released. In particular, the Code Committee considers that major asset acquisitions and disposals should be caught by the operation of the Rule.

**Q1 Do you agree with the conclusions set out in paragraph 3.2.3 above?**

### **3.3 Proposed Rule change**

3.3.1 To reflect this wider application of Rule 31.9, the Code Committee proposes that the Code is amended by replacing the existing list of specific announcements set out in Rule 31.9 and instead applying the Rule to any announcement by the offeree company of “material new information” after Day 39. The Code Committee considers that the Rule should continue to include, for illustration, a list of specific types of announcement that will be subject to the Rule, and that such list should also include reference to material acquisitions and disposals to clarify the Rule’s application to such matters.

3.3.2 The following amendment to the first sentence of the Rule is therefore proposed:

**“The board of the offeree company should not, except with the consent of the Panel (which should be consulted in good time), announce any material new information (including trading results, profit or dividend forecasts, asset valuations ~~or~~ and proposals for dividend payments ~~or for any material acquisition or disposal~~ after the 39th day following the posting of the initial offer document.”**

**Q2 Do you agree that the first sentence of Rule 31.9 should be amended as proposed in paragraph 3.3.2?**



#### 4. WHEN A LATE ANNOUNCEMENT MAY BE MADE

- 4.1 In the Code Committee's view, one of the principal concerns with an offeree company announcing material new information after Day 39 is that offeree company shareholders and the wider market are likely to believe that all relevant information within the knowledge of the offeree company has been disclosed before that date. Shareholders and others may therefore have dealt, or accepted the offeror's offer, on the assumption that no further material information was being held back by the offeree company.
- 4.2 The Code Committee therefore considers that in order to avoid the risk of a false market, if a matter is known to the offeree company that might lead to an announcement of a type within Rule 31.9 being made after Day 39, every effort must be made by the offeree company to make an announcement in relation to that matter by Day 39.
- 4.3 In order to make this approach clear in the Rule, the Code Committee therefore proposes that the second sentence of Rule 31.9 is amended as follows:

**“Where ~~the announcement of trading results and dividends would normally take place~~ a matter which might give rise to such an announcement being made after the 39th day is known to the offeree company, every effort should be made to bring forward the date of the announcement, but, where this is not practicable or where the matter arises after that date, the Panel will normally give its consent to a later announcement.”**

- 4.4 This part of the Rule also recognises, however, that it may not always be possible to avoid the need for an announcement after Day 39 (either because it is not possible to bring forward the announcement or because the matter giving rise to the announcement only comes to light after Day 39) and therefore gives the Panel discretion to consent to an announcement being made by the offeree company when it would otherwise be prohibited by the

Rule. In determining whether to allow a particular offeree company announcement to be made late, the Panel will have regard to a number of factors, including:

- (a) whether the announcement is required by law or under another regulatory regime.

Under Chapter 9 of the UK Listing Authority's Listing Rules, for example, a company admitted to official listing in the UK must announce a number of matters without delay, including any major new development in its sphere of activity or change in its financial condition that would, in either case, be likely to lead to a substantial movement in its share price.

The Panel will not seek to restrict the announcement of a matter where it is satisfied that the announcement is required as a matter of law, or under the Listing Rules or the rules of another equivalent regulatory body to which the offeree company is subject. The Panel will, however, normally consult with the UKLA or any other relevant regulator in order to satisfy itself that the announcement is in fact required.

- (b) whether the matter giving rise to the announcement is beyond the control of the offeree company.

The Code timetable should not be used to gain a tactical advantage, and so the Panel will not be minded to consent to an announcement being made after Day 39 where it has been deliberately delayed by the offeree company for tactical reasons with the intent of frustrating the bid.

On the other hand, where the matter giving rise to the announcement is beyond the reasonable control of the offeree company or arises after Day 39, say the receipt and acceptance of an unsolicited offer for a

major asset or the discovery of a new oil reserve by an oil exploration company, the Panel will normally be sympathetic to a request for its announcement after Day 39.

In such circumstances, the information that the offeree company proposes to announce may be of such significance to it, or to its prospects, that it would be unfair to deny offeree company shareholders the opportunity of considering it when making their decision whether to accept the offer or not. Another example might be the case of a retailing company whose performance is very dependent on sales over the Christmas period. If an offeror launches its offer at such a time that Day 39 occurs on 2 January, the offeree company may argue that its trading results for the Christmas period are of such importance to the company's performance and value that it would be detrimental to offeree company shareholders if the information was withheld from them.

**Q3 Do you agree with the proposed amendments to the second sentence of Rule 31.9 set out in paragraph 4.3 above?**

## **5. CONSEQUENCES OF A LATE ANNOUNCEMENT**

5.1 If an announcement to which Rule 31.9 applies is made after Day 39, the possible consequences for the offer timetable are:

- none, the offer should continue on its normal timetable notwithstanding the release of the new information by the offeree company;
- an extension to Day 46 for the offeror to revise its offer;
- an extension to Day 60 for the offer to become unconditional as to acceptances; or

- an extension to both Day 46 and Day 60.

5.2 Rule 31.9 itself only provides that the Panel will normally be prepared to grant an extension to the period of 60 days referred to in Rule 31.6 for the offer to become unconditional as to acceptances (although by implication it may also allow the offer to continue on its normal timetable by not imposing any different requirement).

5.3 It is likely, however, that simply extending the time period for acceptances of an offer will be of limited assistance to the offeror if it is not also given the opportunity to increase its offer. An extended acceptance period alone may do little more than allow additional time for the offeree company to persuade its shareholders to reject the offer on the basis of the new information and for the shareholders themselves to withdraw any previous acceptances.

5.4 In the Code Committee's view, the consequence of a late announcement that will most often be appropriate will be to permit the offeror, if it so wishes, to revise its offer in the light of the new information. This will normally require a resetting of Day 46 to seven days after the release of the new information, coupled with a consequent extension to Day 60 as well.

5.5 The Code Committee, therefore, proposes that the last sentence of Rule 31.9 is amended as follows:

**“If an announcement of the kind referred to in this ~~paragraph~~ Rule is made after the 39th day, the Panel will normally be prepared to grant an extension ~~of the period of 60 days referred to in Rule 31.6~~ to “Day 46” (see Rule 32.1) and/or “Day 60” (see Rule 31.6) as appropriate.”**

**Q4 Do you agree with the proposed amendments to the last sentence of Rule 31.9 set out in paragraph 5.5 above?**

## **6. CONSEQUENTIAL AMENDMENTS**

### **6.1 No increase/no extension statements**

- 6.1.1 During the course of an offer, an offeror may make a statement that it will not extend the period for acceptance of its offer (a “no extension statement”) or that it will not increase its offer (a “no increase statement”).
- 6.1.2 Rules 31.5 and 32.2 provide, broadly, that an offeror should be bound by any no extension or no increase statement, other than in “wholly exceptional circumstances” or to the extent that the offeror has specifically reserved the right in the relevant statement not to be bound in certain circumstances. A competitive situation arising and the offeree company board recommending the offer are expressly catered for in Rules 31.5 and 32.2 as possible carve-outs from such statements.
- 6.1.3 Competitive situations and board recommendations are not the only matters that can be specifically reserved for in no extension/increase statements, but in the past it has not been common for offerors to reserve the right not to be bound by such statements in the event of the offeree company making an announcement caught by Rule 31.9 after Day 39.
- 6.1.4 In order to preserve an orderly market, no extension/increase statements must be capable of being relied upon by offeree company shareholders and the market as an accurate statement of the offeror’s intentions as regards the conduct of the offer. Accordingly, the Code Committee believes that an offeror making an unqualified no extension or no increase statement does so at its own risk and should not be permitted to renege on such statement as a result of the offeree company making an announcement caught by Rule 31.9 after Day 39 of the offer timetable. The Code Committee believes that the Panel should, therefore, not normally reset Day 46 or Day 60 as contemplated in Section 5 above in these circumstances.

- 6.1.5 An offeror would be able, however, specifically to reserve the right when it made a no extension or no increase statement not to be bound by it in the event of the release (with the consent of the Panel, as required by Rule 31.9) by the offeree company of material new information after Day 39.
- 6.1.6 In such a case, in order to minimise the period of uncertainty between the time of the offeree company announcement and the offeror clarifying its intentions, the Code Committee believes that the offeror should inform offeree company shareholders whether or not it will extend or increase its offer as soon as possible after the relevant announcement by the offeree company.
- 6.1.7 The Code Committee therefore proposes to add a new Note on both Rule 31.5 and Rule 32.2 (and to make certain consequential amendments to the existing Notes on those Rules) in order to reflect this position. The proposed amendments to Rules 31.5 and 32.2 are set out in Sections 2 and 3 respectively of Appendix B.

**Q5 Do you agree with the proposed amendments to Rules 31.5 and 32.2 referred to in paragraph 6.1.7 above?**

**6.2 Rule 32.1, Note 1**

- 6.2.1 As referred to in Section 2 above, in order to ensure that offeree company shareholders are given a period of certainty within which to assess the merits of an offer and to make their investment decision, Rule 32.1 prevents an offeror from revising its offer in the 14 days before Day 60.
- 6.2.2 Note 1 on Rule 32.1 goes on to provide as follows:

*“1. Announcements which may increase the value of an offer  
Where an offer involves an exchange of equity or potential equity, the announcement by an offeror of trading results, profit or dividend forecasts, asset valuations, merger benefit statements or proposals for dividend payments may have the effect of increasing the value of the offer. An offeror*

*will not, therefore, normally be permitted to make such announcements after it is precluded from revising its offer. If an announcement of trading results and/or dividends would normally be made in accordance with the offeror's usual timetable during the offer period, the Panel must be consulted at the earliest opportunity and an offeror will not be permitted to make a no increase statement as defined in Rule 32.2 prior to the release of either of the above announcements."*

- 6.2.3 This Note 1 recognises that, in the case of a securities exchange offer, there may be matters announced by an offeror that, while not amounting to a revision of the terms of the offer, nevertheless have the effect of increasing the value of the offeror's securities being offered.
- 6.2.4 The rationale underpinning Note 1 is the same as the rationale for Rule 31.9, but from an offeror's, rather than the offeree company's, perspective. In other words, new and important information released by an offeror during the course of a securities exchange offer may affect offeree company shareholders', and the market's, perceptions of the value of the offer and acceptance decisions, and as such should not be freely permitted at a time when the offeror is prevented from revising its offer (either because it is after Day 46 or because the offeror has made a no increase statement).
- 6.2.5 Given this, and given that the wording of the Note currently reflects the wording of Rule 31.9 (subject to the addition of a reference to "merger benefit statements" which, in practice, can only be made by offerors), the Code Committee considers that the changes to Rule 31.9 set out in Section 3 of this Consultation Paper should flow through to Note 1 on Rule 32.1.
- 6.2.6 The Code Committee therefore proposes to amend Note 1 as follows:

*"1. Announcements which may increase the value of an offer  
Where an offer involves an exchange of equity or potential equity, the announcement by an offeror of any material new information (including trading results, profit or dividend forecasts, asset valuations, merger benefit*

*statements ~~or and~~ proposals for dividend payments or for any material acquisition or disposal) may have the effect of increasing the value of the offer. An offeror will not, therefore, normally be permitted to make such announcements after it is precluded from revising its offer. If an announcement of ~~trading results and/or dividends would normally a kind referred to in this Note might fall to~~ be made ~~in accordance with the offeror's usual timetable~~ during the offer period, the Panel must be consulted at the earliest opportunity and an offeror will not be permitted to make a no increase statement as defined in Rule 32.2 prior to the release of ~~either of the above announcements~~the announcement."*

- 6.2.7 The Code Committee recognises, as explained in Section 4 above, that it may not always be possible for an offeror to avoid the need for an announcement to be made (for example, due to its obligations under the UKLA's Listing Rules). Where the offeror is aware beforehand of a matter which might give rise to such an announcement obligation, the Code Committee believes that the offeror should make every effort to bring forward the date of the announcement so that any conflict between the need to make the announcement and the Code does not arise (and the offeror must not make a no increase statement in these circumstances before the announcement is made). Where this is not possible or where the matter arises after the offeror is restricted from revising its offer, the Panel should be consulted by the offeror in advance of any proposed announcement and will normally want to consult with the UKLA or any other relevant regulator in order to satisfy itself that the announcement is in fact required.

**Q6 Do you agree with the proposed amendments to Rule 32.1, Note 1 set out in paragraph 6.2.6 above?**

## **7. COST/BENEFIT IMPLICATIONS**

The Code Committee believes that the proposals set out in this Consultation Paper will be of benefit to the parties to a takeover and their respective shareholders and should not involve any significant increase in costs.



## APPENDIX A

### Full text of Rules considered in this Consultation Paper

#### 31.9 OFFEREE COMPANY ANNOUNCEMENTS AFTER DAY 39

The board of the offeree company should not, except with the consent of the Panel (which should be consulted in good time), announce trading results, profit or dividend forecasts, asset valuations or proposals for dividend payments after the 39th day following the posting of the initial offer document. Where the announcement of trading results and dividends would normally take place after the 39th day, every effort should be made to bring forward the date of the announcement, but, where this is not practicable, the Panel will normally give its consent to a later announcement. If an announcement of the kind referred to in this paragraph is made after the 39th day, the Panel will normally be prepared to grant an extension of the period of 60 days referred to in Rule 31.6.

(See also Note 3 on Rule 31.6.)

#### 31.5 NO EXTENSION STATEMENTS

If statements in relation to the duration of an offer such as “the offer will not be extended beyond a specified date unless it is unconditional as to acceptances” (“no extension statements”) are included in documents sent to offeree company shareholders, or are made by or on behalf of an offeror, its directors, officials or advisers, and not withdrawn immediately if incorrect, only in wholly exceptional circumstances will the offeror be allowed subsequently to extend its offer beyond the stated date except where the right to do so has been specifically reserved. The provisions of Rule 31.4 will apply in any event.

#### NOTES ON RULE 31.5

(See also Rule 31.6)

##### 1. Firm statements

*In general, an offeror will be bound by any firm statement as to the duration of its offer. Any statement of intention will be regarded for this purpose as a firm statement; the expression “present intention” should not be used as it may be misleading to shareholders.*

##### 2. Competitive situations

*Subject to Note 4 below, if a competitive situation arises after a no extension statement has been made, the offeror can choose not to be bound by it and to be free to extend its offer provided that:-*

(a) notice to this effect is given as soon as possible (and in any event within 4 business days after the day of the firm announcement of the competing offer) and shareholders are informed in writing at the earliest opportunity; and

(b) any offeree shareholders who accepted the offer after the date of the no extension statement are given a right of withdrawal for a period of 8 days following the date on which the notice is posted.

(For the purpose of this Note a competitive situation will normally arise following a public announcement of the existence of a new offeror or potential offeror whether named or not. Other circumstances, however, may also constitute a competitive situation.)

### 3. Recommendations

Subject to Note 4 below, the offeror can choose not to be bound by a no extension statement which would otherwise prevent the posting of an increased or improved offer recommended for acceptance by the board of the offeree company.

### 4. Reservation of right to set statements aside

A no extension statement may be set aside in the circumstances set out in Notes 2 and 3 above only if the offeror has specifically reserved the right to do so in such circumstances at the time the statement was made; this applies whether or not the offer was recommended at the outset. The first document sent to shareholders in which mention is made of the no extension statement must contain prominent reference to this reservation (precise details of which must also be included in the document). Any subsequent mention by the offeror of the no extension statement must be accompanied by a reference to the reservation or, at the least, to the relevant sections in the document containing the details. If the right to set aside the no extension statement has not been specifically reserved as set out above, only in wholly exceptional circumstances will the offeror be allowed to extend its offer (except as required by Rule 31.4), even if a recommendation from the board of the offeree company is forthcoming.

## **RULE 32. REVISION**

### **32.1 OFFER OPEN FOR 14 DAYS AFTER REVISION**

If revised, an offer must be kept open for at least 14 days following the date on which the revised offer document is posted. Therefore, no revised offer document may be posted in the 14 days ending on the last day the offer is able to become unconditional as to acceptances.

#### *NOTES ON RULE 32.1*

##### 1. *Announcements which may increase the value of an offer*

*Where an offer involves an exchange of equity or potential equity, the announcement by an offeror of trading results, profit or dividend forecasts, asset valuations, merger*

*benefits statements or proposals for dividend payments may have the effect of increasing the value of the offer. An offeror will not, therefore, normally be permitted to make such announcements after it is precluded from revising its offer. If an announcement of trading results and/or dividends would normally be made in accordance with the offeror's usual timetable during the offer period, the Panel must be consulted at the earliest opportunity and an offeror will not be permitted to make a no increase statement as defined in Rule 32.2 prior to the release of either of the above announcements.*

2. *When revision is required*

*An offeror will normally be required to revise its offer if it, or any person acting in concert with it, purchases shares at above the offer price (see Rule 6) or it becomes obliged to make an offer in accordance with Rule 11 or to make a cash offer, or to increase an existing cash offer, under Rule 9.*

3. *When revision is not permissible*

*Since an offer must remain open for acceptance for 14 days following the date on which the revised offer document is posted, an offeror will generally not be able to revise its offer, and must not place itself in a position where it would be required to revise its offer, in the 14 days ending on the last day its offer is able to become unconditional as to acceptances. Nor must an offeror place itself in a position where it would be required to revise its offer if it has made a no increase statement as defined in Rule 32.2.*

4. *Triggering Rule 9*

*When an offeror, which is making a voluntary offer either in cash or with a cash alternative, makes an acquisition which causes it to have to extend a mandatory offer under Rule 9 at no higher price than the existing cash offer, the change in the nature of the offer will not be viewed as a revision (and will thus not be precluded by an earlier no increase statement), even if the offeror is obliged to waive any outstanding condition, but such an acquisition can only be made if the offer can remain open for acceptance for a further 14 days following the date on which the amended offer document is posted.*

## **32.2 NO INCREASE STATEMENTS**

If statements in relation to the value or type of consideration such as “the offer will not be further increased” or “our offer remains at xp per share and it will not be raised” (“no increase statements”) are included in documents sent to offeree company shareholders, or are made by or on behalf of an offeror, its directors, officials or advisers, and not withdrawn immediately if incorrect, only in wholly exceptional circumstances will the offeror be allowed subsequently to amend the terms of its offer in any way even if the amendment would not result in an increase of the value of the offer (eg the introduction of a lower paper alternative) except where the right to do so has been specifically reserved.

## NOTES ON RULE 32.2

### 1. Firm statements

*In general, an offeror will be bound by any firm statement as to the finality of its offer. In this respect, the Panel will treat any indication of finality as absolute, unless the offeror clearly states the circumstances in which the statement will not apply, and will not distinguish between the precise words chosen, ie the offer is “final” or will not be “increased”, “amended”, “revised”, “improved”, “changed”, and similar expressions will all be treated in the same way. Any statement of intention will be regarded for this purpose as a firm statement; the expression “present intention” should not be used as it may be misleading to shareholders.*

### 2. Competitive situations

*Subject to Note 4 below, if a competitive situation arises after a no increase statement has been made, the offeror can choose not to be bound by it and to be free to revise its offer provided that:-*

*(a) notice to this effect is given as soon as possible (and in any event within 4 business days after the day of the firm announcement of the competing offer) and shareholders are informed in writing at the earliest opportunity; and*

*(b) any shareholders who accepted the offer after the date of the no increase statement are given a right of withdrawal for a period of 8 days following the date on which the notice is posted.*

*(For the purpose of this Note a competitive situation will normally arise following a public announcement of the existence of a new offeror or potential offeror whether named or not. Other circumstances, however, may also constitute a competitive situation.)*

### 3. Recommendations

*Subject to Note 4 below, the offeror can choose not to be bound by a no increase statement which would otherwise prevent the posting of an increased or improved offer recommended for acceptance by the board of the offeree company.*

### 4. Reservation of right to set statements aside

*A no increase statement may be set aside in the circumstances set out in Notes 2 and 3 above only if the offeror has specifically reserved the right to do so in such circumstances at the time the statement was made; this applies whether or not the offer was recommended at the outset. The first document sent to shareholders in which mention is made of the no increase statement must contain prominent reference to this reservation (precise details of which must also be included in the document). Any subsequent mention by the offeror of the no increase statement must be accompanied by a reference to the reservation or, at the least, to the relevant sections in the document containing the details. If the right to set aside the no increase statement has not been specifically reserved as set out above, only in wholly*

*exceptional circumstances will the offeror be allowed to increase its offer after a no increase statement, even if a recommendation from the board of the offeree company is forthcoming or if the offer is unconditional in all respects.*

## APPENDIX B

### Possible Code amendments to reflect the proposals in this Consultation Paper

#### 1. Revised Rule 31.9

Amend Rule 31.9 as follows:

#### **“31.9 OFFEREE COMPANY ANNOUNCEMENTS AFTER DAY 39**

The board of the offeree company should not, except with the consent of the Panel (which should be consulted in good time), announce any material new information (including trading results, profit or dividend forecasts, asset valuations ~~or~~ and proposals for dividend payments ~~or for any material acquisition or disposal~~) after the 39th day following the posting of the initial offer document. Where ~~the announcement of trading results and dividends would normally take place a matter which might give rise to such an announcement being made~~ after the 39th day is known to the offeree company, every effort should be made to bring forward the date of the announcement, but, where this is not practicable or where the matter arises after that date, the Panel will normally give its consent to a later announcement. If an announcement of the kind referred to in this ~~paragraph~~ Rule is made after the 39th day, the Panel will normally be prepared to grant an extension ~~of the period of 60 days referred to in Rule 31.6~~ to “Day 46” (see Rule 32.1) and/or “Day 60” (see Rule 31.6) as appropriate.

(See also Note 3 on Rule 31.6.)”

#### 2. Rule 31.5

Renumber the existing Note 4 as Note 2 and renumber the existing Notes 2 and 3 accordingly.

Amend the first sentence of the new Note 2 as follows:

*“A no extension statement may be set aside ~~in the circumstances set out in Notes 2 and 3 above~~ only if the offeror ~~has~~ specifically reserved the right ~~to do so in such circumstances~~ at the time the statement was made to set it aside in the circumstances which subsequently arise; this applies whether or not the offer was recommended at the outset.”*

Add a new Note 5 as follows:

*“5. Rule 31.9 announcements*  
*Subject to Note 2 above, if the offeree company makes an announcement of the kind referred to in Rule 31.9 after the 39th day and after a no extension statement has been made, the offeror can choose not to be bound by that statement and to be free to extend its offer if permitted by the Panel under Rule 31.9, provided that notice to this effect is given as soon as possible (and in any event within 4 business days after the date of the offeree company announcement) and shareholders are informed in writing at the earliest opportunity.”*

Amend the opening words of the new Notes 3 and 4 to read:

*“Subject to ~~Note 4 below~~Note 2 above, ... ”.*

### **3. Rule 32.2**

Renumber the existing Note 4 as Note 2 and renumber the existing Notes 2 and 3 accordingly.

Amend the first sentence of the new Note 2 as follows:

*“A no increase statement may be set aside ~~in the circumstances set out in Notes 2 and 3 above~~ only if the offeror ~~has~~ specifically reserved the right ~~to do so in such circumstances~~ at the time the statement was made to set it aside in*

*the circumstances which subsequently arise; this applies whether or not the offer was recommended at the outset.*

Add a new Note 5 as follows:

*“5. Rule 31.9 announcements  
Subject to Note 2 above, if the offeree company makes an announcement of the kind referred to in Rule 31.9 after the 39th day and after a no increase statement has been made, the offeror can choose not to be bound by that statement and to be free to revise its offer if permitted by the Panel under Rule 31.9, provided that notice to this effect is given as soon as possible (and in any event within 4 business days after the date of the offeree company announcement) and shareholders are informed in writing at the earliest opportunity.”*

Amend the opening words of the new Notes 3 and 4 to read:

*“Subject to ~~Note 4 below~~ Note 2 above, ...”*

#### **4. Rule 32.1, Note 1**

Amend Note 1 as follows:

*“1. Announcements which may increase the value of an offer  
Where an offer involves an exchange of equity or potential equity, the announcement by an offeror of any material new information (including trading results, profit or dividend forecasts, asset valuations, merger benefit statements ~~or~~ and proposals for dividend payments or for any material acquisition or disposal) may have the effect of increasing the value of the offer. An offeror will not, therefore, normally be permitted to make such announcements after it is precluded from revising its offer. If an announcement of ~~trading results and/or dividends would normally a kind referred to in this Note might fall to~~ be made ~~in accordance with the offeror’s usual timetable~~ during the offer period, the Panel must be consulted at the*



*earliest opportunity and an offeror will not be permitted to make a no increase statement as defined in Rule 32.2 prior to the release of ~~either of the above announcements~~ the announcement.”*

**APPENDIX C****Questions for Consultation**

- Q1 Do you agree with the conclusions set out in paragraph 3.2.3 above?**
- Q2 Do you agree that the first sentence of Rule 31.9 should be amended as proposed in paragraph 3.3.2?**
- Q3 Do you agree with the proposed amendments to the second sentence of Rule 31.9 set out in paragraph 4.3 above?**
- Q4 Do you agree with the proposed amendments to the last sentence of Rule 31.9 set out in paragraph 5.5 above?**
- Q5 Do you agree with the proposed amendments to Rules 31.5 and 32.2 referred to in paragraph 6.1.7 above?**
- Q6 Do you agree with the proposed amendments to Rule 32.1, Note 1 set out in paragraph 6.2.6 above?**