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THE PANEL ON TAKEOVERS AND MERGERS

CONSULTATION PAPER ISSUED BY THE CODE COMMITTEE OF THE PANEL

MARKET-RELATED ISSUES

REVISION PROPOSALS RELATING TO VARIOUS RULES OF THE TAKEOVER CODE AND THE SARs

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 normally 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 1 October 2004.

Comments may be sent by email to:

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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It is the Code Committee's policy to make all responses to formal consultation available for public inspection unless the respondent requests otherwise.

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INTRODUCTION

It has always been the Panel's aim to achieve a sensible and practical balance between the objective of providing an orderly framework within which takeovers are conducted and a desire not to fetter the securities markets unnecessarily. Therefore, as a general rule, the Code does not restrict the ability of the parties to an offer, their associates or significant shareholders to deal in relevant securities either before or during an offer period.

The Code does, however, require the prompt and accurate disclosure of dealings by such persons that do take place. Disclosure underpins market transparency which, in turn, constitutes a fundamental protection for shareholders and others who deal in the UK securities markets. It also enables shareholders to assess and take into account the market impact of dealings in relevant securities by persons who have, or may have, an interest in the outcome of an offer.

The Code Committee has been considering a number of issues relating to the Code's treatment of, and impact upon, the dealing activities of persons during an offer. The Panel has in recent years developed a number of policies in this area which have not to date been reflected in the Code. The Code Committee has reviewed these policies and other related issues, and is now proposing amendments to the Code and the SARs on the series of issues outlined in this paper.

In the case of the large majority of the issues considered, the Code Committee believes that, although the Panel's practices are already known to market practitioners who frequently deal in relevant securities, the Code and the SARs should be amended so that they are clear in their application and this Consultation Paper seeks approval of their codification. The other issues considered reflect developments of existing policy and the Code Committee is seeking views on these matters and the proposed associated Code amendments.

The issues addressed in this Consultation Paper fall broadly into five categories, and are dealt with accordingly in separate sections below, as follows:

- the Code's treatment of dealings by principal traders and fund managers, and in particular the relaxations of the usual presumptions of concertedness that apply when a principal trading or fund management operation is part of the same group as a party, or an adviser to a party, to a Code transaction (see Section A below);

- the application of the disclosure requirements of Rule 8 of the Code to certain dealings (see Section B below);

- the application of the Code definitions of "acting in concert" and "associate" in certain situations (see Section C below);

- issues relating to the obtaining by an offeror or offeree company of irrevocable commitments and letters of intent (see Section D below); and

- certain miscellaneous matters arising out of specific dealing activities (see Section E below).

The proposed amendments to the Code and the SARs are set out in full in Appendix A.

SECTION A
PRINCIPAL TRADERS AND FUND MANAGERS

1. The exempt system

(a) Introduction

1.1 The Code imposes certain prohibitions, restrictions and obligations in respect of particular dealings by the principal parties involved in bids, and by persons acting in concert with them. Persons acting in concert are effectively treated as a single person for the purposes of the mandatory offer rule and certain other Code rules.

1.2 It has been the Panel's long-standing view that financial and other professional advisers to corporate clients should be regarded as acting in concert with those clients. Under presumption (5) of the definition of "acting in concert", a financial or other professional adviser (including a stockbroker) is presumed to be acting in concert with its client in respect of the shareholdings of the adviser and persons controlling, controlled by or under the same control as the adviser. Accordingly, where the adviser is part of a larger organisation, the presumption of concertedness extends to all entities within that group, including market-makers, principal traders and fund managers, which are under common control (as defined in the Code) with the adviser. As a result, such entities will be presumed to be acting in concert with, for example, an offeror to which a corporate finance or corporate broking department within their group is an adviser.

1.3 The Big Bang reforms in 1986 led to the formation of numerous multi-service financial organisations. At that time, the Panel undertook a major review of the presumption of acting in concert referred to above. It recognised that in the absence of some relief, market-makers and fund managers within groups which had corporate finance or corporate broking departments would be presumed to be in concert with the corporate clients of those departments, and

that, accordingly, the freedom of such entities to deal without significant consequences would be severely constrained.

1.4 The freedom of such market-makers and fund managers to deal would have been constrained as a result of the operation of various Code rules. For example, Rules 6 and 11 impose certain obligations on an offeror if it, or any person acting in concert with it, purchases offeree company shares. The offeror may incur an obligation to make an offer at a minimum level or in a particular specie, or to revise its existing offer, depending on the quantum and timing of the relevant purchase, the purchase price and the form of consideration. Offerors and their concert parties are also restricted, under Rule 4.2, in their ability to sell offeree company shares. On the offeree side, financial advisers and stockbrokers to the target company are prohibited under Rule 4.4 from purchasing offeree company shares and from dealing in derivatives referenced to, or options in respect of, such shares.

1.5 As a result of these and certain other Code rules, if the Panel's presumption of concertedness in respect of advisers had been maintained in its previous form following Big Bang, market-makers, principal traders and fund managers within the same group as an adviser to an offeror would effectively have been forced to cease trading in offeree company shares for the duration of the offer period. They would have been forced to do so because otherwise any purchases of offeree company shares by such persons would have obliged the offeror, if it made an offer, to make it in cash at the highest price paid, or to revise any existing offer to that level, and any sales of such shares would have triggered a prohibition under Rule 4.2 on the offeror revising its offer and could potentially have constituted breaches of that Rule. It would not therefore have been possible in practice for a market-maker in this position to comply with the Code and at the same time to fulfil its obligations under Stock Exchange rules to quote bid and offer prices in relevant securities. Following the addition of Rule 4.4 to the Code in 1998, groups advising offeree companies would have been in a similar position. A regime under which groups involved in bids in an advisory capacity would have to withdraw from

trading in offeree company shares during the offer period would potentially damage market liquidity, to the general detriment of shareholders.

1.6 Against this background, the Panel looked for a way in which the concerns about market liquidity might be met but without opening the door to possible abuse by advisers involved in bids. Its conclusion was that there should be a new regime for market-makers and fund managers and this was announced in October 1986. Under this new regime, which continues in force today in an amended form, market-makers and fund managers which can demonstrate to the Panel's satisfaction their independence from corporate advisory and corporate broking operations in their group are granted exempt status, subject in certain cases to compliance with particular requirements imposed as a condition of granting such status (as stated in Note 1 on the definition of exempt fund manager and exempt market-maker). The effect of granting exempt status to such entities is to remove them from the presumption of concertedness which would otherwise apply and to enable the relevant group's normal trading and fund management activities to continue without Code consequences for the group's corporate finance clients, and without the Code being breached, when they are involved in offers.

1.7 This was a pragmatic solution and was not one without risk. Although the Panel is able in the process of reviewing applications for exempt status to check, for example, that the group has appropriate restrictions on the passage of information and that there is an adequate separation between the operations of the applicant market-maker or fund manager on the one hand and those of the corporate finance and corporate broking departments on the other, common membership of the group, and the community of interest which that creates, will always leave a residual risk of concerted actions. The Panel considered this risk to be more acute in respect of market-making and the use of the group's own capital than in respect of discretionary fund management operations, which owed duties to their investment clients and were accordingly less likely to take action to assist the group's corporate finance clients.

1.8 In order to address this risk, the Panel imposed certain restrictions on the ability of exempt market-makers connected with an offeror to deal as principal with that offeror in offeree company securities or to assent such securities to that offeror's offer and prohibited exempt market-makers connected with an offeror or the offeree company from dealing with the purpose of assisting that party and from voting relevant securities in the context of an offer. These restrictions and prohibitions, which are set out in Rules 38.1 to 38.4, were considered by the Panel to represent an essential condition for relaxing the strict application of presumption (5) of the definition of "acting in concert" in respect of market-makers. They were designed to permit normal market-making activities to continue but to prevent exempt market-makers from taking actions which could most obviously have the effect of assisting the group's corporate finance clients. In addition, the Panel required dealings by exempt market-makers in relevant securities to be disclosed under Rule 38.5 so that shareholders could take into account, and could discount as appropriate, the market impact of such dealings. The specific restrictions and prohibitions in Rules 38.1 to 38.4 do not apply to exempt fund managers although the Panel would not expect such a fund manager to take any action with the intention of assisting the group's corporate finance clients because this would undermine the basis on which exempt status was granted to it.

1.9 In 1986 the Panel took the view that the exempt status granted to exempt market-makers, and the consequent relaxation of presumption (5) of the definition of acting in concert, should be limited strictly to the market-making activities of such entities. Accordingly, Note 3 on the definition of "exempt fund manager and exempt market-maker" was introduced as follows:

"*Dealings by a connected exempt market-maker in a market-making capacity will not normally be considered as coming within the acting in concert presumptions, although dealings in any other capacity will be. (See Rule 38.)*"

During the 1990s, the type and nature of the principal trading activities which the Panel was prepared to regard as eligible for exempt status was extended

considerably in two main respects. The scope of exempt status was extended, first, to principal dealings by relevant groups in securities dealt in on the Stock Exchange Electronic Trading Service ("SETS") order book and, secondly, to a variety of other principal trading operations, such as derivative desks.

1.10 SETS was introduced on 20 October 1997. This provides a platform for the automated execution of trades on an electronic order book in the securities of a number of larger companies. As a result of the introduction of SETS, the concept of officially designated market-makers in the securities of such companies ceased to exist and any Stock Exchange member firm has since then been able to trade in such securities through the order book (regardless of whether the member firm was previously a recognised market-maker).

1.11 Prior to the introduction of SETS, the Panel reviewed the way in which the exempt system had operated since 1986 and considered whether, and to what extent, exempt status should be recognised in respect of order book trading in SETS securities. The Panel was naturally cautious about extending the scope of exempt status to a form of principal trading in which traders are not, as market-makers are, obliged to quote bid and offer prices. It considered whether the argument for permissive regulation, in order to avoid the need for connected groups to withdraw from principal trading, with consequent potential damage to market liquidity, had the same force in relation to an order book trading system as it did in relation to market-makers. Following a securities industry consultation exercise, and detailed discussions with relevant interest groups, the Panel concluded that the major securities groups were likely to continue to provide significant liquidity in SETS securities and therefore, on balance, that connected groups should be permitted to enjoy exempt status in respect of order book trading subject to compliance with the restrictions and prohibitions in Rules 38.1 to 38.4 and to disclosure of their dealings in relevant securities under Rule 38.5.

1.12 At the time of the introduction of SETS in 1997, the Panel therefore issued Panel Statement 1997/11 which explained that in interpreting the Code and the SARs a Stock Exchange member firm dealing as principal in SETS order book

securities would be regarded as a "principal trader" and that, generally, all references in the Code and the SARs to exempt market-makers or market-makers should be read to refer also to exempt principal traders or principal traders, as appropriate.

1.13 At this time the Panel considered adopting a new method for determining which market participants should be eligible for exempt principal trader status. Of the various alternatives considered, none appeared to represent, either in terms of market protection or administrative practicality, an improvement on the method applied to determine an entity's suitability for the grant of exempt market-maker status. Accordingly, it was decided that those entities which already benefited from exempt market-maker status would continue to benefit from exempt status albeit as principal traders. One significant change was, however, necessary. Prior to the introduction of SETS, a market-maker's exempt status was specific to the particular securities in which the market-maker was registered as a market-maker. However, a principal trader has no recognised status in respect of particular securities and, as a practical matter, the Panel consequently regards a principal trader's exempt status as applying in relation to all SETS securities and not merely in relation to the securities in which the principal trader was registered as a market-maker prior to the introduction of SETS.

1.14 Panel Statement 1997/11 also explained that the exemption from disclosure under Rule 8.3(d) (which provides that Rule 8.3 does not apply to recognised market-makers acting in their capacity as such) would be available to principal traders who were recognised market-makers in any security prior to the introduction of SETS, but, except with the consent of the Panel, would not be available to principal traders who became recognised market-makers thereafter. The Panel did not want to create an automatic entitlement to the Rule 8.3(d) exemption and, therefore, it decided to require new market participants to demonstrate that the level of market liquidity they provide is sufficient to justify the benefits of the exemption. The Panel is not aware that the absence of an automatic right to the exemption has been a problem for new market participants.

1.15 During the 1990s, there were other significant developments in the operation of the securities markets and in the dealing activities of securities groups and trading in many new and complex investment products commenced and increased substantially. There was, for example, a huge increase in the use of derivatives, to which the Code's disclosure requirements were extended in 1996, and investment banks actively participated in this. This led to frequent requests being made for the Panel to regard a variety of principal trading operations, such as derivative desks, as falling under the umbrella of the relevant group's existing exempt status. The Panel dealt with such requests on a case by case basis and, by way of dispensation, agreed in many instances that the trading operation should have the benefits of exempt status.

1.16 The Panel was comfortable with this extension of the scope of exempt status to various principal trading operations for the following main reasons:

(a) in many cases, the principal trading operations concerned were carried on by entities which had been granted exempt principal trader status, and which had therefore satisfied the Panel as to their independence from corporate finance operations in their group. In other cases, the Panel was satisfied as to the independence of the respective operations;

(b) the Panel was satisfied that the principal trading operations concerned were engaged, principally at least, in providing services to investment clients; and

(c) since the actions and dealings of the principal trading operations concerned would be subject to the restrictions and prohibitions in Rules 38.1 to 38.4 and to the disclosure obligations in Rule 38.5, which extend to dealings in options and derivatives, the risks of extending the benefits of exempt status to them were diminished to an acceptable level.

1.17 The Code Committee has noted the Panel's suggestion in Panel Statement 2004/12 that it might wish to review certain issues raised by the evolution of market-making activities in relation to relevant provisions of the Code. It has

done so and has considered the way in which the exempt regime has evolved since 1986, the development since that time in the operation of the securities markets and in the dealing activities of securities groups and the manner in which relevant Code provisions apply in the current environment.

1.18 The Code Committee recognises that there has been a significant rise in the amount of capital made available by securities groups for trading operations, that market-makers and principal traders frequently take large positions in securities for proprietary reasons or in order to hedge their financial exposure under derivative contracts, particularly in the context of takeovers, and that the distinction between client-serving and proprietary dealings has become blurred. This represents a major change from the position prior to Big Bang, when market-makers carried out a middle-man function between buyers and sellers, and has increased the potential scope for groups connected with offerors or offeree companies to carry out dealings which may assist their corporate finance clients.

1.19 Nevertheless, the Panel's gradual expansion of the principal trading activities which may benefit from exempt status, to the point where almost all principal trading carried out in the UK is now covered, has been effected without any identifiable deterioration in trading conduct. In overall terms, therefore, it appears that shareholders have benefited from this permissive approach in the sense that markets have been allowed to develop without any material restriction by Panel regulations, but also without shareholder interests being compromised. The Code Committee believes that the following features of the Panel's approach to markets have been important in achieving this outcome:

(a) the daily monitoring of dealings in relevant securities, and their investigation as appropriate, by the Panel's market surveillance unit;

(b) the careful review of applications for exempt status in respect of principal trading operations, which enables the Panel to understand the nature of such operations and to be satisfied as to their independence;

(c) the Code's dealing disclosure requirements and in particular those in Rule 38.5; and

(d) the restrictions and prohibitions in Rules 38.1 to 38.4.

The Code Committee proposes a number of amendments to the Code's dealing disclosure requirements in this Consultation Paper which it believes will improve market transparency to the benefit of shareholders. It considers that there may be a case for further changes to these requirements in relation to market-makers, principal traders and investor activities in derivatives and it intends to examine this case in due course. It believes, however, that, with this level of protection in place, all principal trading activities carried out in the UK should be eligible for exempt status.

1.20 The Code Committee has also considered whether there is a case for relaxing the approach to connected advisory groups in other more radical ways, such as amending the manner in which the Code's acting in concert presumptions should be applied. The Code Committee recognises, of course, that there have been significant changes since 1986 in the way in which markets and securities groups in the UK are regulated by other regulators. It also understands that there have been shifts in the respective revenue contributions of trading operations and corporate finance operations in securities groups. It can be argued that such changes have reduced the risk of abusive conduct and therefore the need for the Panel to make the presumptions that it does. The Code Committee believes, however, that the existing regime strikes a reasonable balance. It permits market activity by connected groups to continue without onerous restriction, and has accommodated change and innovation in market structures and practices over the years, but at the same time it provides important protections for shareholders. The Code Committee believes that the exempt system and the Code's other market-related provisions have served investors and the securities industry well and it does not consider that the rules should be relaxed further.

(b) Codification of principal trader status

1.21 In the light of the above, the Code Committee is proposing to codify the definitions of principal trader and exempt principal trader and to amend the Code and the SARs, where necessary, to reflect Panel Statement 1997/11. The Code Committee, therefore, proposes to:

(a) include a new definition of a "principal trader" as follows:

"**Principal trader**

A principal trader is a person who:

(1) is registered as a market-maker with the Stock Exchange, or is accepted by the Panel as a market-maker; or

(2) is a Stock Exchange member firm dealing as principal in order book securities.";

(b) replace the existing definition of "exempt market-maker" in the Code with a new definition of "exempt principal trader" as follows:

"**Exempt ~~market-maker~~ principal trader**

~~An exempt market-maker is a person who is registered as a market-maker with the Stock Exchange in relation to the relevant securities, or is accepted by the Panel as a market-maker in those securities, and, in either case, is recognised by the Panel as an exempt market-maker for the purposes of the Code.~~ An exempt principal trader is a principal trader who is recognised by the Panel as an exempt principal trader for the purposes of the Code.";

(c) replace all existing references in the Code and the SARs to "exempt market-makers" and "market-makers" with "exempt principal traders" and "principal traders", as appropriate. A list of all the Rules that it is proposed to amend on this basis is set out at the end of Appendix A;

(d) replace the existing references to "recognised market-makers" in Rule 8.3(d) and Note 9 on Rule 8 with "principal traders"; and

(e) add a new first paragraph to Note 9 on Rule 8 as follows:

"*Except with the consent of the Panel, the exception in relation to principal traders for Rule 8.3(d) is only available to principal traders who were recognised market-makers in any security prior to the introduction of the Stock Exchange Electronic Trading Service*."

Note: In the remainder of this Consultation Paper, including any relevant sections quoting existing provisions of the Code and the SARs, it has been assumed that the above changes have already been effected and, except where otherwise required, this Consultation Paper therefore refers only to principal traders, rather than to both market-makers and principal traders. If the above changes are not implemented, appropriate changes to refer to market-makers will be made in any other amendments proposed in this Consultation Paper which currently refer to principal traders.

Q.1 Do you agree with the Panel's approach to the exempt system, principal traders and the availability of the Rule 8.3(d) exemption and with the proposed amendments to the Code and the SARs to refer to "principal traders" and "exempt principal traders" referred to above?

(c) Note 3 on the definitions of "exempt fund manager" and "exempt principal trader"

1.22 As stated in paragraph 1.6, the effect of being granted exempt status is to remove the entity from presumption (5) of the definition of "acting in concert". As also stated above, since the 1990s the Panel has extended the scope of exempt status to various forms of principal trading in a manner that was not envisaged in 1986 when Note 3 on the definitions of "exempt fund manager" and "exempt principal trader" was included in the Code. The Code Committee is, therefore, proposing to delete the existing Note 3 as it no longer accurately reflects the Panel's policy and to replace it with a new Note 3 that

will set out the consequence of being granted exempt status. The proposed new Note 3 is worded as follows:

"*3. ~~Dealings by a connected exempt market-maker in a market-making capacity will not normally be considered as coming within the acting in concert presumptions, although dealings in any other capacity will be. (See Rule 38.)~~ The effect of a principal trader or fund manager having exempt status is that presumption (5) of the definition of acting in concert will not apply. However, the principal trader or fund manager will still be regarded as connected with the offeror or offeree company, as appropriate. Connected principal traders, but not connected exempt fund managers, must comply with Rule 38.*"

Q.2 Do you agree with the proposed amendment to Note 3 on the definitions of "exempt fund manager" and "exempt principal trader" referred to above?

(d) Exempt status falling away

1.23 Exempt status was devised primarily for multi-service financial organisations with trading and/or fund management operations which are also regularly involved in Code transactions in a corporate finance advisory capacity. The relaxation of the usual rules on concertedness afforded by exempt status allows such organisations to continue both their normal dealing activities and their corporate finance advisory activities without material interference as a result of the operation of the Code.

1.24 Exempt status is not relevant, however, where the group of which the trading or fund management operation is a part is itself an offeror or the offeree company in a Code transaction, or is a concert party of an offeror or the offeree company for a reason other than presumed concertedness as a result of its advisory role (for example, because it is in the same group as an investor in an offeror consortium). In other words, exempt status only applies where the sole reason for the trading or fund management operation to be treated as being in concert is that it is within the same group as a financial or other professional adviser to a party to the transaction concerned.

1.25 This point is already largely addressed in Note 2 on the definitions of "exempt fund manager" and "exempt principal trader". However, in order to clarify the position, the Code Committee is proposing that that Note be amended as follows:

"*2. When a ~~market-maker~~ principal trader or fund manager is connected with the offeror or offeree company, exempt status is not relevant ~~only where~~ unless the sole reason for the connection is that the ~~market-maker~~ principal trader or fund manager is controlled by, controls or is under the same control as a financial or other professional adviser (including stockbrokers) to:*

(1) the offeror; ~~or~~
(2) the offeree company; or
(3) a concert party of either the offeror (for example as a result of being an investor in a consortium) or the directors of the offeree company.

References in the Code to exempt ~~market-makers~~ principal traders or exempt fund managers should be construed accordingly. (See also Rule 7.2 ~~regarding discretionary fund managers~~.)"

The rationale for the inclusion of paragraph (3) in Note 2 on the definitions of "exempt fund manager" and "exempt principal trader" is explained in paragraph 15.2 below.

Q.3 Do you agree with the proposed amendments to Note 2 on the definitions of "exempt fund manager" and "exempt principal trader"?

(e) Special exempt fund manager status

1.26 Exempt fund manager status is of particular benefit to groups with fund management operations that frequently deal in UK equities and which are also regularly involved in Code transactions in a corporate finance advisory capacity. However, some large financial groups which have active UK corporate finance operations also have fund managers based overseas which are unlikely, in practice, to deal frequently in UK equities. In such cases, the Panel recognises that the Code's presumptions of concertedness can present large international groups with a significant administrative burden, but that the exercise of applying for exempt fund manager status may not be worthwhile

given the infrequency with which the overseas fund manager usually trades in UK securities.

1.27 To address this, the Panel will, in appropriate cases, be prepared to grant a fund manager in this position "special exempt fund manager" status, rather than exempt status. Such status will only be granted where appropriate undertakings are provided to the Panel and where the fund manager concerned has less than £50 million under discretionary management in UK equities and such UK equities represent less than 10% of the total equity funds under discretionary management.

1.28 Once granted special exempt status, the Panel will regard the relevant fund manager as having exempt fund manager status for the purposes of the Code and the SARs (except that the fund manager will not have to disclose dealings in relevant securities under Rule 8.1(b)), notwithstanding that it has not gone through the full process of applying to be an exempt fund manager. Special exempt status will, however, not normally apply for the duration of a transaction where any corporate finance unit of the group based in the same country as the fund manager concerned is advising in relation to the transaction or if the client for whom the group is acting as corporate finance adviser in relation to the transaction (whether in the UK or elsewhere) is itself based in the same country as the fund manager.

1.29 In order to clarify the ability of an overseas fund manager to apply for special exempt fund manager status in appropriate cases, the Code Committee is proposing to add a new Note 4 on the definitions of "exempt fund manager" and "exempt principal trader" as follows:

"*4. In appropriate cases, a fund manager based overseas may be granted special exempt status subject to its satisfying certain conditions. References in the Code to exempt fund managers (with the exception of those in Rule 8.1(b)) include such special exempt fund managers, subject always to the conditions on which such special exempt status is granted in any particular case.*"

Q.4 Do you agree with the inclusion of the proposed new Note 4 on the definitions of "exempt fund manager" and "exempt principal trader" concerning special exempt fund managers?

(f) "Ad hoc" exempt principal trader status

1.30 In a similar way, the Panel will on occasion be prepared to grant a particular trading entity within a larger financial institution exempt principal trader status on an ad hoc, rather than permanent, basis for the duration of a particular offer period in respect of which the group's corporate finance operation is acting as an adviser. A trading entity may wish to be granted ad hoc principal trader status because, for example, it is an overseas trading entity dealing primarily in overseas securities and relevant securities of the offeror or offeree company are quoted overseas.

1.31 Ad hoc exempt principal trader status will only be granted in cases where the Panel is satisfied that it is appropriate to do so and, for example, normally only when the transaction concerned is recommended and no competitive situation has arisen. If there is a substantive change in the facts or circumstances after the ad hoc exempt principal trader status is granted in any particular case, for example if the offer ceases to be recommended or becomes competitive, the status will be reviewed by the Panel and might be revoked.

1.32 In order to clarify the ability of a trading entity to apply for ad hoc exempt principal trader status in appropriate cases, the Code Committee is proposing to add a new Note 5 on the definitions of "exempt fund manager" and "exempt principal trader" as follows:

"*5. In appropriate cases, a trading entity may be granted exempt status on an ad hoc basis subject to the satisfaction of certain conditions. References in the Code to exempt principal traders include persons granted such ad hoc exempt status, for so long as the grant of such exempt status remains valid and subject always to the conditions on which such ad hoc exempt status is granted in any particular case.*"

Q.5 Do you agree with the inclusion of the proposed new Note 5 on the definitions of "exempt fund manager" and "exempt principal trader" concerning "ad hoc" exempt principal trader status?

2. Rule 7.2 and dealings by connected persons during an offer period

(a) Revision of Rule 7.2

2.1 As referred to above, under presumption (5) of the definition of "acting in concert", a fund manager or principal trader which is in the same group as an offeror or the offeree company, or which is in the same group as a financial or other professional adviser to an offeror or the offeree company, is presumed to be acting in concert with the offeror or the directors of the offeree company, as the case may be.

2.2 In addition, under Note 5 on the definition of "acting in concert", an investor in an offer consortium is normally presumed to be acting in concert with the offeror, and where the investor is part of a larger organisation that presumption will normally also extend to other parts of the organisation, including any fund manager or principal trader in the same group.

2.3 Fund managers and principal traders that are presumed to be acting in concert with an offeror or the directors of the offeree company in this way are regarded by the Panel as "connected". The definition of "connected fund managers and principal traders" currently provides as follows:

"A fund manager or principal trader will be connected with an offeror or the offeree company, as the case may be, if the fund manager or principal trader is controlled by, controls or is under the same control as:-

(1) an offeror;

(2) the offeree company;

(3) any bank or financial or other professional advisers (including stockbrokers) to an offeror or the offeree company; or

(4) an investor in a consortium (e.g. through a vehicle company formed for the purpose of making an offer)."

2.4 The effect of a fund manager or principal trader being connected with an offeror or the offeree company is that it is treated under the Code as acting in concert with that offeror or with the directors of the offeree company (as the case may be), save that if (i) the sole reason for the fund manager or principal trader being connected is on account of paragraph (3) of the above definition, and (ii) the fund manager or principal trader has been granted exempt status, the presumption of concertedness between the connected fund manager or principal trader and the offeror or offeree company directors will not apply. However, even when a connected entity benefits from exempt status, certain obligations still arise under the Code. For example, a connected exempt principal trader is subject to Rule 38 and a connected exempt fund manager must disclose all dealings in relevant securities privately to the Panel under Rule 8.1(b)(ii).

2.5 As a result of being presumed in concert, any shareholdings and dealings in relevant securities by a connected fund manager or principal trader, whether on behalf of discretionary clients or as principal, could have important consequences for the offeror or offeree company with which the person is connected, unless the fund manager or principal trader benefits from exempt status. For example, an offeror could have to make its offer in cash if a non-exempt fund manager connected with it acquires offeree company shares for cash during the offer period.

2.6 As explained in paragraph 1.6 above, the presumption of concertedness does not apply when the relevant fund manager or principal trader benefits from exempt status. However, not all relevant fund managers or principal traders have exempt status. Also, exempt status is not relevant where the entity is in the same group as an offeror or the offeree company itself, or is in the same group as an investor in an offer consortium. Without any relaxation of these presumptions of concertedness, therefore, dealings by such non-exempt entities could have significant consequences.

2.7 Recognising this issue, Rule 7.2 of the Code provides, broadly, that connected non-exempt fund managers who manage accounts on a discretionary basis will not normally be presumed to be acting in concert before the identity of the offeror or the offeree company, as the case may be, is publicly known. This is on the basis that, before the nature of the connection is made public, the fund manager should not be aware of the fact that the party with which it is connected might be involved in a takeover. If in fact the fund manager had been aware of the possible transaction before the relevant public announcement, the relaxation of the presumption of concertedness provided by Rule 7.2 would not apply. Once the connection between the fund manager and the offeror or offeree company is publicly known, the presumption of concertedness will apply as normal.

2.8 This therefore means, for example, that a potential offeror contemplating a bid does not normally need to be concerned about the consequences of dealings by a discretionary fund manager which might be connected with it (for example, because the fund manager is in the same group either as the offeror or an adviser to the offeror) until after its identity as an offeror or potential offeror is publicly announced. Equally, a fund manager can continue its normal dealing activities without restraint until it becomes aware of the fact that it is connected with an offeror or offeree company.

2.9 Although the wording of Rule 7.2 only refers to discretionary fund managers, it has been the practice of the Panel for many years also to extend the principle of Rule 7.2 to non-exempt principal traders, provided that they are not aware of their possible connection with the offeror or offeree company before any relevant public announcement. Given this, the Code Committee is now proposing that Rule 7.2 should refer specifically to principal traders.

2.10 The Code Committee is also proposing that the Rule and its related Notes should be redrafted at the same time to make their application clearer, and to reflect the following points:

- Rule 4.4 prohibits certain dealings in offeree company securities during the offer period, in a non-exempt capacity whether as principal or on behalf of discretionary clients, by any financial adviser to the offeree company or any other entity in the same group as such financial adviser. There is no reference in Rule 7.2, however, to Rule 4.4 and the fact that, once a discretionary fund manager or principal trader is presumed to be in concert with the offeree company directors as a result of the operation of Rule 7.2, Rule 4.4 will restrict its dealing activities. The Code Committee therefore proposes to include a reference to Rule 4.4 in Rule 7.2.

- Once a non-exempt principal trader is presumed to be in concert with an offeror or the offeree company pursuant to the operation of Rule 7.2(a), it will need to cease or restrict its dealing activities in offeree company securities for the duration of the offer period - or, in other words, to "stand down". Otherwise, if it is connected with the offeror, any sale of offeree company securities would be a breach of Rule 4.2; and if it is connected with the offeree company, any acquisition of offeree company shares, or dealing in derivatives referenced to, or in options in respect of, such shares would be a breach of Rule 4.4. In these circumstances, the principal trader may find that at the time it is presumed to be in concert it has an open long or short position in offeree company securities that it might not be able to unwind. Similarly, during a securities exchange offer, a connected non-exempt principal trader might want to stand down from trading in offeror securities in order to avoid having to disclose any dealings under Rule 8.1(a). The Panel will generally permit a connected non-exempt principal trader to buy or sell offeree company securities so as to flatten its book position within a short period of being presumed to be in concert (usually 24 to 48 hours). The Panel does not apply the usual Code consequences to any dealings undertaken with its consent in this way and also no disclosure of such dealings, or of dealings to flatten a position in offeror securities, is required under Rule 8.1(a). The Code

Committee is proposing that this practice be reflected in the Notes on Rule 7.2.

- As with connected non-exempt principal traders, once it is presumed to be in concert with an offeror pursuant to the operation of Rule 7.2(a) a connected non-exempt discretionary fund manager will normally be unable to sell any offeree company securities for the duration of the offer period without being in breach of Rule 4.2. However, the Panel takes the view that, in view of the fiduciary duties which discretionary fund managers owe to their underlying investment clients, the likelihood of sales of shares being undertaken with a view to assisting the offeror is remote and also that an absolute ban on sales of offeree company securities may be unduly damaging to the interests of the fund manager's clients. The Panel will, therefore, normally be prepared to grant its consent under Rule 4.2 to sales of offeree company securities by connected non-exempt discretionary fund managers without the need for 24 hours prior notice or the other consequences that usually apply where consent is given for such sales under Rule 4.2. The Code Committee is also proposing that this practice be reflected in the Notes on Rule 7.2.

- Even though a connected non-exempt fund manager or principal trader will only be presumed to be in concert with an offeror or the offeree company once the identity of the party with which it is connected is made public, dealings in relevant securities by the entity will still need to be disclosed in accordance with Rule 24.3 or Rule 25.3 (but may be aggregated in appropriate cases in accordance with Note 4 on Rule 24.3), whether those dealings took place before or after the connection became public. The Code Committee proposes that this point be made clear in Rule 7.2.

- Where the aggregate holdings of a connected principal trader or fund manager and the other members of its group carry 30% or more of the

voting rights of a company, Rule 9 will apply notwithstanding the usual application of Rule 7.2 and irrespective of whether the connected principal trader or fund manager has exempt status. This is because control of the relevant positions, whether held as principal or on behalf of discretionary clients and whether held through an exempt entity or otherwise, will effectively be in the hands of the overall group. However, in order not to restrict the principal trading functions within a multi-service financial organisation unnecessarily, where a group's aggregate holding approaches or exceeds 30%, the Panel will normally be prepared to allow a principal trading entity within the group to continue its trading activities without triggering a mandatory offer under Rule 9.1, provided that the company concerned is not in an offer period and the holding of the principal trader does not exceed 3% of the company's voting rights. The Code Committee believes that this policy should be made clear in Rule 7.2 and also in the Notes on Rule 9.1.

2.11 The Code Committee therefore proposes that Rule 7.2 and its Notes should be re-written. The new wording is set out below.

(*The references in Rule 7.2 and its Notes to Rule 4.6 assume that the proposed changes referred to in paragraph 27 will be adopted.*)

"**7.2 DEALINGS BY CONNECTED DISCRETIONARY FUND MANAGERS AND PRINCIPAL TRADERS**

(a) Discretionary fund managers and principal traders who, in either case, are connected with an offeror or potential offeror, will not normally be presumed to be acting in concert with that person until its identity as an offeror or potential offeror is publicly announced or, if prior to that, the connected party had actual knowledge of the possibility of an offer being made. Rules 5, 6, 9, 11 and 36 will then be relevant to purchases of offeree company securities and Rule 4.2 to sales of offeree company securities by such persons. Rule 4.6 will also be relevant.

Similarly, discretionary fund managers and principal traders who, in either case, are connected with the offeree company, will not normally be presumed to be acting in concert with the directors of the offeree company until the commencement of the offer period. Rules 5 and 9 may then be relevant to purchases of offeree company securities and Rule 4.4 will be relevant to purchases of offeree company shares and dealings in

derivatives referenced to, or options in respect of, such shares. Rule 4.6 will also be relevant.

(See also the Definition of connected fund managers and principal traders.)

(b) An exempt fund manager or exempt principal trader which is connected for the sole reason that it is controlled by, controls or is under the same control# as a financial or other professional adviser (including stockbrokers) to the offeror or offeree company or to a concert party of either the offeror or the directors of the offeree company will not be presumed to be in concert even after the commencement of the offer period or the identity of the offeror being publicly announced (as the case may be). (See Note 2 on the Definitions of exempt fund manager and exempt principal trader.)

 # See Note 1 at end of Definitions Section.

NOTES ON RULE 7.2

1. Prior dealings

(a) As a result of Rule 7.2(a) and notwithstanding the usual application of the presumptions of acting in concert, dealings and stock borrowing and lending transactions by discretionary fund managers and principal traders connected with the offeree company will not normally be relevant for the purposes of Rules 4.6, 5 or 9 before the commencement of the offer period.

(b) Similarly, notwithstanding the usual application of the presumptions of acting in concert, dealings and stock borrowing and lending transactions by discretionary fund managers and principal traders connected with an offeror or potential offeror will not normally be relevant for the purposes of Rules 4.2, 4.6, 5, 6, 9, 11 and 36 before the identity of the offeror or potential offeror has been publicly announced.

(c) Rule 9 will, however, be relevant if the aggregate holdings of shares of all persons under the same control# (including any exempt fund manager or exempt principal trader) carry 30% or more of the voting rights of a company. Notwithstanding this, if such a group includes a principal trader and the group's aggregate holding of shares in a company approaches or exceeds 30% of the voting rights, the Panel may consent to the principal trader continuing to acquire further shares in the company without consequence under Rule 9.1 provided that the company is not in an offer period and the holding of the principal trader does not at any relevant time exceed 3% of the voting rights of the company.

 # See Note 1 at end of Definitions Section.

2. Qualifications

(a) If a connected discretionary fund manager or principal trader is in fact acting in concert with an offeror or with the directors of the offeree company, the usual concert party consequences will apply irrespective of whether the offeree company is in an offer period or the identity of the offeror or potential offeror has been publicly announced.

(b) Similarly, if a connected discretionary fund manager or principal trader is aware of the possibility of an offer for the offeree company or by an offeror or potential offeror, it will be considered to be acting in concert with the party with which it is connected as a result of the usual application of the presumptions of acting in concert irrespective of whether the offeree company is in an offer period or the identity of the offeror or potential offeror has been publicly announced.

(c) If an offeror or potential offeror, or any company in its group, has funds managed on a discretionary basis by an exempt fund manager, Rule 7.2 may be relevant. If, for example, any securities of the offeree company are managed by such exempt fund manager for the offeror or potential offeror, the exception in Rule 7.2(b) in relation to exempt fund managers may not apply in respect of those securities. The Panel should be consulted in such cases.

3. Standing down

After the identity of an offeror or potential offeror is publicly announced, a principal trader connected with the offeror or potential offeror may stand down from its dealing activities. Similarly, a principal trader connected with the offeree company may stand down from its dealing activities after the commencement of the offer period. In such circumstances, with the prior consent of the Panel, the principal trader may reduce its holding of offeree company securities or offeror securities, or may acquire such securities with a view to reducing any short position, without such dealings being relevant for the purposes of Rules 4.2, 4.4, 5, 6, 9, 11 and 36 or falling to be disclosed under Rule 8.1(a), notwithstanding the usual application of the presumptions of acting in concert and Rule 7.2(a). Any such dealings must take place within a time period agreed in advance by the Panel.

4. Sales by discretionary fund managers connected with an offeror

After the commencement of the offer period, with the prior consent of the Panel, a discretionary fund manager connected with an offeror will normally be permitted to sell offeree company securities without such sales being relevant for the purposes of Rule 4.2, notwithstanding the usual application of the presumptions of acting in concert and Rule 7.2(a). Any such sale should be disclosed under Rule 8.1(a).

5. Rule 9

The Panel should be consulted if, once the identity of the offeror or potential offeror is publicly known, it becomes apparent that relevant securities in the offeree company (including options in respect of and derivatives referenced to

such relevant securities) held by the offeror or potential offeror and persons acting in concert with it, including any connected discretionary fund managers and principal traders to which Rule 7.2(a) applies, carry or relate to in aggregate 30% or more of the voting rights of the offeree company.

6. Disclosure of dealings

Holdings of relevant securities and dealings (whether before or after the presumptions in Rule 7.2(a) apply) by connected discretionary fund managers and principal traders (unless exempt) must be disclosed in any offer document in accordance with Rule 24.3 and in any offeree board circular in accordance with Rule 25.3, as the case may be."

It is proposed that a new Note 17 on Rule 9.1 (in equivalent terms to new Note 1(c) on Rule 7.2 above) will be included in the Code (see Appendix A) and that the current Note 1(d) on Rule 7.2 will be incorporated in Note 5 on the definition of "acting in concert" – see paragraph 16.4 below.

Q.6 Do you agree with the replacement of Rule 7.2 and its Notes as set out in paragraph 2?

(b) Consequential amendments

2.12 Rule 7.2 therefore affords a relaxation of the usual presumptions of concertedness in respect of connected non-exempt discretionary fund managers and principal traders, such that dealings by such persons will normally only be relevant for the purposes of those Rules mentioned in Rule 7.2 once the identity of the party with which they are connected is publicly known.

2.13 Each of the Rules of the Code currently referred to in Rule 7.2 also has a Note drawing attention to the approach in relation to connected fund managers set out in Rule 7.2 and referring to that Rule. For example, Note 6 on Rule 4.2 currently provides as follows:

"*6. Discretionary clients*

Sales of securities of the offeree company for discretionary clients by fund managers connected with the offeror, unless they are exempt fund managers, may be relevant (see Rule 7.2)."

2.14 In the light of the proposals above to amend Rule 7.2, the Code Committee is proposing to amend each of these relevant Notes. For example, Note 6 on Rule 4.2 is to be amended as set out below:

"*6. Discretionary ~~clients~~ fund managers and principal traders*

*Sales of securities of the offeree company ~~for discretionary clients~~ by non-exempt discretionary fund managers and principal traders which are connected with the offeror~~, unless they are exempt fund managers, may be relevant (see~~ will be treated in accordance with Rule 7.2~~).~~"

2.15 Equivalent changes would be made to each of Note 8 on Rule 5.1, Note 8 on Rule 6, Note 14 on Rule 9.1, Note 7 on Rule 11.1 and Note 1 on Rule 36.3. These changes are set out in full in Appendix A.

2.16 The Code Committee has also been considering what disclosure of holdings of, and dealings in, relevant securities by connected entities should be required in any offer document or offeree board circular. In this regard, the Code Committee considers that:

- connected non-exempt discretionary fund managers and principal traders should be subject to the same requirements in terms of disclosure in any offer documentation;

- although the Code does not currently require a discretionary fund manager connected with the offeree company which does not have any relevant holdings to disclose that fact, there is no clear rationale for this exception to the usual requirement to disclose nil holdings and the position should therefore be brought into line with that which applies to discretionary fund managers connected with the offeror; and

- in the case of an entity connected with an offeror, all dealings in the 12 month period prior to the offer period, together with those during the offer period, should be disclosed. This is notwithstanding that, as a result of Rule 7.2, an entity connected with an offeror will normally be presumed to be acting in concert with that offeror only once the identity of the offeror is first publicly announced. The Code Committee believes that this approach is similar to the usual approach of the Code to require disclosure of dealings by concert parties of an offeror in the 12 months before the offer period, irrespective of when the relationship of concertedness arose. It also facilitates scrutiny of the entity's dealing activities in case there is any suggestion that the entity should have been considered to be acting in concert with the offeror at an earlier date than would normally be established by Rule 7.2.

2.17 The requirements for the holding and dealing disclosures that must be included in offer documents and offeree board circulars are set out in Rules 24.3 and 25.3, respectively, and the Code Committee is proposing to reflect the position above:

(a) by amending Note 6 on Rule 24.3 as follows:

"*6. Discretionary ~~clients~~ fund managers and principal traders*

Shareholdings of ~~the~~ non-exempt discretionary ~~clients of~~ fund managers and principal traders which are connected with the offeror~~, unless they are exempt fund managers,~~ and their dealings since the date 12 months prior to ~~commencement of~~ the offer period ~~may be relevant and the Panel should be consulted.~~ will need to be disclosed under Rules 24.3(a)(iii) and 24.3(c) respectively.";

(*If, as is proposed in paragraph 24.2 below, Note 5 on Rule 24.3 is deleted, Note 6 on Rule 24.3 will be renumbered as Note 5.*)

(b) by amending Rule 25.3(a)(v) as follows:

"**(v) ~~except with the consent of the Panel,~~ the shareholdings in the offeree company and (in the case of a securities exchange offer only) in the offeror ~~which are managed on a~~ of non-exempt discretionary ~~basis by~~ fund managers ~~(other than exempt fund managers)~~ (the beneficial owner need not be named) and non-exempt principal traders which are connected with the offeree company ~~(the beneficial owner need not be named);~~**"; and

(*If the amendment proposed in paragraph 30.7 below is adopted, the above amendment will not be made.*)

(c) by amending Rule 25.3(b) as follows:

"**(b) If in any of the above categories~~, with the exception of (a)(v),~~ there are no shareholdings, then this fact should be stated. This will not apply to category (a)(iv) if there are no such arrangements;**".

Q.7 Do you agree with the proposed amendments relating to connected non-exempt fund managers and principal traders set out above?

3. Dealings through anonymous trading systems

3.1 As referred to in paragraph 2.1 above, under the definition of "acting in concert", a principal trader in the same group as an adviser to an offeror will usually be presumed to be acting in concert with that offeror. However, if the principal trader has exempt status, the presumption of concertedness will be broken so that the group can continue both its normal dealing activities and its advisory role without fear of the usual consequences under the Code that can apply in respect of dealings by concert parties of the offeror.

3.2 Rule 38 imposes certain restrictions on connected exempt principal traders, however, with a view to preventing the principal trader abusing its exempt status and it specifically prohibits the carrying out of dealings so as to assist the offeror. In particular, Rule 38.2 prohibits an exempt principal trader connected with the offeror from selling offeree company securities to the offeror during the offer period. Rule 38.2 provides as follows:

"**An offeror and any person acting in concert with it must not deal as principal with an exempt principal trader connected with the offeror in relevant securities (as defined in Rule 8) of the offeree company during the offer period. It will generally be for the advisers to the offeror to ensure compliance with this Rule ……**".

3.3 If offerors and concert parties thereof were permitted to purchase relevant securities of the offeree company through an anonymous order book system, such as SETS, there would be a potential risk that the prohibition in Rule 38.2 might be circumvented. This would be the case if the offeror or its advisers were to arrange with an exempt principal trader connected with the offeror for the latter to place sell orders on the order book and thereby to enable the offeror to purchase offeree securities from the connected exempt principal trader. Whilst the making of such arrangements would represent a breach of the general prohibition in Rule 38.1 on connected exempt principal traders carrying out dealings with the purpose of assisting the offeror, and of the spirit of Rule 38.2, it could be difficult for the Panel to establish the full facts. In addition, there is merit in addressing this potential risk in order to preserve confidence in the integrity of actions by connected persons. This argues in favour of a prudent approach.

3.4 Accordingly, at the time of the introduction of SETS in 1997, the Panel explained in its 1997/11 statement that, to ensure compliance with Rule 38.2, offerors and persons acting in concert with them must not purchase offeree company securities through SETS or any other anonymous order book system and should not purchase such securities through any other means unless it can be established that the seller is not an exempt principal trader connected with the offeror.

3.5 The Code Committee now proposes that this restriction should be reflected in the Code:

(a) by renumbering the existing Rule 4.2 as Rule 4.2(a);

(b) by adding a new Rule 4.2(b) as follows:

"**(b) During an offer period, the offeror and persons acting in concert with it must not purchase any securities in the offeree company:**

(i) through any anonymous order book system; or

(ii) through any other means unless it can be established that the seller is not an exempt principal trader connected with the offeror. In the case of dealings through an inter-dealer broker or other similar intermediary, "seller" includes the person who has transferred the securities to the intermediary as well as the intermediary itself. (See also Rule 38.2.)"

The proposed wording of Rule 4.2(b)(ii) reflects the fact that non-exempt principal traders connected with an offeror are, by virtue of their lack of exempt status, persons acting in concert with the offeror. Rule 38.2 does not, therefore, apply to them;

(c) by inserting the words "**(See also Rule 4.2(b).)**" at the end of Rule 38.2; and

(d) by deleting the existing Note 7 on Rule 4.2.

Q.8 Do you agree with the proposed new Rule 4.2(b), and consequential amendments, preventing an offeror and persons acting in concert with it acquiring offeree company securities from an anonymous seller?

4. Prohibition on the purchase of assented securities by exempt principal traders connected with the offeror

4.1 As referred to above in paragraph 3, Rule 38.1 prohibits an exempt principal trader connected with an offeror from carrying out any dealings with the purpose of assisting the offeror. Consistent with this, it is the Panel's practice to prohibit exempt principal traders connected with an offeror from purchasing offeree company securities which have been assented to the offer. This is because it is possible that this activity could be undertaken in order to assist the offeror.

4.2 For example, the exempt entity might purchase assented stock to ensure that the acceptance to the offer in respect of such assented stock would not be withdrawn if withdrawal rights were running or were about to run. Such purchases of assented offeree securities would not necessarily be undertaken with the intention of assisting the offeror, but the Panel's concern has been to avoid the risk of potential abuse. The Code Committee believes that it would be appropriate to codify this practice and is, accordingly, proposing to amend Rule 38.3 (which currently only prohibits exempt principal traders connected with the offeror from assenting offeree securities to an offer) to read:

"**38.3 ASSENTING SECURITIES AND DEALINGS IN ASSENTED SECURITIES**

~~Securities owned by an exempt market maker~~ An exempt principal trader connected with the offeror must not assent offeree company securities ~~be assented~~ to the offer or purchase such securities in assented form until the offer is unconditional as to acceptances."

Q.9 Do you agree with the proposed amendment to Rule 38.3 to prevent an exempt principal trader connected with an offeror from purchasing assented securities?

5. Minor clarificatory amendments to Rule 38.5

5.1 Whilst most of the Code's dealing disclosure requirements are set out in Rule 8, connected exempt principal traders are required to disclose their dealings on an aggregated basis under Rule 38.5.

5.2 The disclosure obligations in Rule 8 apply only during an offer period, which is a defined term in the Code, and the Rule states this clearly. Rule 38.5, on the other hand, does not state its period of application. The Panel's practice has, however, been to require Rule 38.5 dealing disclosures only during an offer period. As a result, Rule 38.5 ceases to apply once an offer has become or is declared unconditional as to acceptances notwithstanding that the offer will remain open for acceptance for at least 14 days after this date. The dealing disclosure obligations in Rule 38.5 cease at this moment because, once

an offer is unconditional as to acceptances, statutory control of the offeree company will have passed to the offeror.

5.3 The Code Committee proposes that the Panel's practice should be made clear in the Code by amending the first line of Rule 38.5 as follows:

"**Dealings in relevant securities (as defined by Rule 8), during the offer period, …**"

5.4 The penultimate paragraph of Note 2 on Rule 8 states that disclosure of dealings in relevant securities of an offeror is only required where the offer is a securities exchange offer or if it has not been announced that any offer is likely to be solely in cash. The wording of Note 2 on Rule 38.5 addresses this point but is less specific. The Code Committee is proposing to amend both Notes as follows (see also paragraph 12.2 below):

"*2. Exception*

~~*If the offer is not a securities exchange offer, there is no requirement to disclose dealings in securities of the offeror.*~~ *Where it has been announced that an offer or possible offer is, or is likely to be, solely in cash, there is no requirement to disclose dealings in relevant securities of the offeror.*"

Q.10 Do you agree with the proposed minor changes to Rule 38.5 and the Notes thereon set out in paragraph 5?

SECTION B

DISCLOSURE REQUIREMENTS AND AMENDMENTS TO RULE 8

6. Requirement to disclose dealings and resultant total holdings in any relevant securities

(a) Rule 8.3(a) and Note 7 on Rule 8

6.1 As mentioned above, the Code does not impose extensive restrictions on the ability of the parties to an offer, their associates or significant shareholders in the offeree company (or, in the case of a securities exchange offer, in the offeror) to deal in relevant securities during an offer period. It does, however, require prompt and accurate disclosure when certain dealings take place, as required (principally) by Rule 8. In the case of shareholders, Rule 8.3 requires dealings to be disclosed by any person who owns or controls 1% or more of any class of relevant securities. Rule 8.3(a) provides as follows:

"**During an offer period, if a person, whether or not an associate, owns or controls (directly or indirectly) 1% or more of any class of relevant securities of an offeror or of the offeree company or as a result of any transaction will so own or control 1% or more, dealings in such securities of that company by such person (or any person through whom ownership or control is derived) must be publicly disclosed in accordance with Notes 3, 4 and 5.**"

6.2 The definition of relevant securities also includes options in respect of, and derivatives referenced to, classes of relevant securities. However, Note 7 on Rule 8 makes clear that, where a person is dealing in options or derivatives, disclosure is only required if that person also owns 1% or more of the underlying physical stock. Note 7 on Rule 8 provides that:

"*Under Rule 8.3, a disclosure of dealings in options or derivatives is only required if the person dealing in such options or derivatives owns or controls 1% or more of the class of securities which is the subject of the option or to whose price the derivative is referenced.*"

6.3 As currently drafted, Rule 8.3 requires a shareholder who holds 1% or more of a class of relevant securities to disclose only if it deals further in relevant securities of the same class, but not if it deals in other classes of relevant securities issued by the same company. Therefore, where, for example, an offeree company has in issue both ordinary shares and convertible preference shares, a person holding 3% of the ordinary shares would be required to disclose if it dealt in the ordinary shares, but would not be required to disclose dealings in the preference shares unless and until its holding of preference shares also reached the 1% limit.

6.4 Similarly, under Note 7, a person dealing in an option in respect of, or a derivative referenced to, a particular class of underlying relevant securities issued by a company need only disclose that dealing if he holds 1% or more of the underlying securities of that same class, but not if he has substantial interests in other classes of relevant securities issued by that company. For example, a person holding 3% of the ordinary shares of an offeree company would have to disclose the entry into a contract for differences referenced to the ordinary shares, but would not have to disclose if he entered into a contract for differences referenced to convertible preference shares issued by the offeree company (regardless of how large the derivative position was).

6.5 The Code Committee believes that this approach should be changed. The principle behind Rule 8.3 is that the dealing activities of persons holding 1% or more of a class of relevant securities might be significant to the outcome of an offer and, as such, should be disclosed publicly so that they can be considered by shareholders and the market. The current approach does not, however, require disclosure of a complete picture of such persons' dealings in relevant securities. The Code Committee is therefore proposing that the Code be amended so that a shareholder holding 1% or more of a physical class of relevant securities should be required to disclose all further dealings in both:

- any class of relevant securities issued by the company concerned; and

- options in respect of, and derivatives referenced to, any class of relevant securities issued by that company.

The Code Committee does not, however, consider that it is necessary for a person holding 1% or more of a class of relevant securities of one of the parties to the offer, say the offeree company, to disclose all dealings in relevant securities of the other party, i.e. the offeror (although disclosure of such dealings would need to be made on a securities exchange offer if the person also held 1% or more of a class of relevant securities of the offeror).

6.6 The Code Committee is, therefore, proposing that Rule 8.3(a) should be amended as follows:

"**(a) During an offer period, if a person, whether or not an associate, owns or controls (directly or indirectly) 1% or more of any class of relevant securities of an offeror or of the offeree company or as a result of any transaction will so own or control 1% or more, dealings in ~~such~~ any relevant securities of that company by such person (or any other person through whom ownership or control is derived) must be publicly disclosed in accordance with Notes 3, 4 and 5.**",

and that Note 7 on Rule 8 be amended as follows:

"*7. Dealings in options and derivatives*

Under Rule 8.3, a disclosure of dealings in options in respect of, or derivatives referenced to, any relevant securities of an offeror or the offeree company is only required if the person dealing in such options or derivatives owns or controls 1% or more of ~~the~~ any class of relevant securities ~~which is the subject of the option or to whose price the derivative is referenced~~ of that company."

Q.11 Do you agree with the proposed amendments to Rule 8.3(a) and Note 7 on Rule 8 set out above?

(b) Note 5(a) on Rule 8

6.7 Note 5 on Rule 8 specifies the information that any person required to make a dealing disclosure must include in its Rule 8 disclosure. The general

philosophy underlying Note 5(a) is that full details of the relevant dealing, and of the person's resultant interests in relevant securities, should be included so that the nature of the dealing can be properly understood by shareholders and others who deal in relevant securities.

6.8 The Code Committee is aware, however, of a number of occasions on which disclosures under Rules 8.1 or 8.3 have not been made in accordance with the requirements of Note 5(a) as it is interpreted by the Panel. The Code Committee is therefore proposing a number of amendments to Note 5(a), as set out below and later in this Section B, in order to clarify the application of the Note in certain important respects.

(i) Resultant positions

6.9 Paragraphs (a)(vi) and (vii) of Note 5 stipulate that any dealing disclosure must include "*the resultant total amount of relevant securities owned or controlled by*" the person making the disclosure and also "*if relevant, details of any arrangements required by Note 6 below*". In the Panel's view, the purpose of these provisions is to ensure that there are disclosed not only details of the particular transaction entered into by the person making the disclosure, but also that person's total resultant interest in, and exposure to movements in the price of, the relevant securities of the company concerned.

6.10 The Panel has encountered instances where a person dealing in, say, the ordinary shares of the offeree company has disclosed its resultant ownership of ordinary shares without also detailing its interests in other relevant securities issued by the offeree company or options in respect of, or derivatives referenced to, such securities. The Code Committee believes that any Rule 8 disclosure should include the following information:

- the total amount of each class of relevant securities, issued by the company concerned, owned or controlled by the person making the disclosure;

- details of all open positions in options in respect of, or derivatives referenced to, relevant securities issued by the company concerned held by that person at the time of the disclosure, whether those positions were entered into before or after the start of the offer period; and

- details of all existing arrangements covered by Note 6 on Rule 8 that have been entered into by that person, again whether before or after the start of the offer period.

Consistent with the position set out in paragraph 6.5 above, however, the Code Committee does not consider that a Rule 8 disclosure relating to a dealing in the securities of one of the parties to an offer, say the offeree company, needs also to include details of the person's holdings in the relevant securities of other parties (i.e. the offeror(s)).

6.11 In order to reflect these points, the Code Committee proposes that the existing paragraphs (vi) and (vii) of Note 5(a) on Rule 8 should be replaced by the following (the numbering of which reflects the proposed deletion of paragraph (v) as referred to in paragraph 34 below):

"*(v) the resultant total amount, and the percentage which it represents, of each class of relevant securities of an offeror or the offeree company (as the case may be) owned or controlled by the associate or other person disclosing;*

(vi) details of all outstanding options in respect of, and derivatives referenced to, relevant securities of an offeror or the offeree company (as the case may be) entered into by the associate or other person disclosing (see also below); and

(vii) details of any arrangements of the kind referred to in Note 6 below entered into by the associate or other person disclosing, including the total amount and the percentage which it represents of each class of relevant securities to which the arrangements relate."

Q.12 Do you agree with the proposed amendments to require Rule 8 disclosures to include details of the person's resultant position in all relevant securities of the company concerned?

(ii) Linked transactions

6.12 If a person who is obliged to disclose in accordance with Note 5(a) enters into two or more separate dealings in relevant securities at (or around) the same time, possibly as part of one overall transaction or arrangement, the Rule 8 disclosure should, in the Panel's view, disclose details, in accordance with Note 5(a), of each such dealing so that shareholders and the market in general can properly understand the nature of the dealings concerned.

6.13 For example, where an investor enters into a long contract for differences referenced to the shares of a company, the counterparty with whom the contract for differences is entered into will often (although it is not obliged to) seek to hedge its exposure to movements in the price of the company's shares by acquiring the shares to which the contract for differences is referenced and holding them for the duration of the period that the contract for differences is outstanding.

6.14 In these circumstances, if the shares concerned are relevant securities and the counterparty is subject to the disclosure requirements of Rules 8.1(a), 8.1(b)(i) or 8.3 (for example, because it is an associate of an offeror or the offeree company or because it holds more that 1% of the company's shares), there will have been two separate dealings by the counterparty for the purposes of Rule 8 – the entry into the contract for differences referenced to the company's shares and also the acquisition of the company's shares for the purposes of hedging. Accordingly, details of both of these dealings must be included in the Rule 8 disclosure made. It will not be sufficient only to disclose details of the acquisition of the shares to which the contract for difference is referenced without also disclosing the entry into the contract for differences.

6.15 The Code Committee proposes that an additional paragraph be inserted in Note 5(a) on Rule 8 as follows:

"*For the avoidance of doubt, when a person transacts two or more separate but related dealings executed at or around the same time (for example, the entering into of a derivative referenced to relevant securities and the acquisition of such securities for the purposes of hedging), the disclosure must include the required information in relation to each such dealing so executed.*"

Q.13 Do you agree with the proposed amendment to clarify the disclosure requirements in relation to "linked transactions"?

(iii) Side agreements

6.16 The definition of a derivative in the Code is as follows:

> "Derivative includes any financial product whose value in whole or in part is determined directly or indirectly by reference to the price of an underlying security but which does not include the possibility of delivery of such underlying securities."

6.17 This is on the basis that most derivative products are structured so as to provide only an economic exposure to movements in the price of the securities to which the derivative is referenced and will not also entitle the party entering into the derivative to acquire or dispose of those securities. A product that by its terms provides for the possibility of physical delivery of relevant securities will normally be considered by the Panel to be an option in respect of those securities for the purposes of Rule 8 and should be disclosed as such accordingly. For example, a futures contract which includes the possibility of delivery of the underlying securities will be treated by the Panel as an option, whereas a future which does not include such a possibility will fall within the Code definition of a derivative. A product which provides for the possibility of physical delivery of underlying securities will also confer "rights over shares" on the purchaser for the purposes of the Code and the SARs, whereas a product which does not provide for physical delivery will not confer "rights over shares".

6.18 The Panel has encountered instances where a person has entered into a single stock contract for differences providing economic exposure to offeror or offeree company securities and, either at the same time or later, has also entered into a side agreement entitling him to exercise the voting rights attached to the securities held by the counterparty as a hedge and/or to acquire those securities at a future date. In such cases the Panel has required the disclosure required by Rule 8 to include details of the side agreement so that the nature of the person's interest in the securities concerned can be properly understood. Entering into a side agreement which entitles a person to exercise the voting rights attached to such securities will also confer "rights over shares" on that person for the purposes of the Code and the SARs.

6.19 Similarly, when a person enters into an option to acquire the shares of an offeror or offeree company, it would be usual for the voting rights attaching to the shares which are the subject of the option to be retained by the owner of the shares until such time as the option is exercised. If, however, the option agreement itself or any other side agreement, arrangement or understanding provides for the voting rights to be exercised by, or at the direction of, the party which has the benefit of the option, the Panel has required full details of such arrangement to be included in the relevant Rule 8 disclosure. For the avoidance of doubt, when any side agreement, arrangement or understanding of this kind is entered into at a later date than the derivative or option to which it relates, it will be regarded as a variation of the derivative or option concerned which will in turn be regarded as a dealing for the purposes of Rule 8 and disclosable accordingly.

6.20 The Code Committee is therefore proposing that Note 5(a) on Rule 8 be amended by the addition of the following paragraph:

"*In addition, if there exists any agreement, arrangement or understanding, formal or informal, between the person dealing and any other person relating to the voting rights of any relevant securities under option or relating to the voting rights or future acquisition or disposal of any relevant securities to which a derivative is referenced (as the case may be), full details of such agreement, arrangement or understanding, identifying the relevant securities in question, must be included in the disclosure. If there are no such*

agreements, arrangements or understandings, this fact should be stated. Where such an agreement, arrangement or understanding is entered into at a later date than the derivative or option to which it relates, it will be regarded as a dealing in relevant securities."

Q.14 Do you agree with the proposed amendment to clarify the disclosure requirements in relation to side agreements?

(iv) Description of derivatives and options

6.21 The definition of a derivative in the Code captures a wide range of different financial products. Disclosure obligations under Rule 8 may arise in respect of all such products unless they are regarded as not having a connection with an offer or potential offer (see paragraph 28 below). In order to ensure that any disclosure which includes details of positions or dealings in derivatives referenced to relevant securities of an offeror or the offeree company can be properly understood, the Panel's practice is to require such Rule 8 disclosures to include a description of the derivative product concerned. A similar issue arises in respect of options.

6.22 The Code Committee is therefore proposing that the final two sentences of what is currently the penultimate paragraph of Note 5(a) on Rule 8 should be amended as follows:

"*For options this should include a description of the options concerned, the number of securities under option, the exercise period (or in the case of exercise, the exercise date), the exercise price and any option money paid or received. For derivatives this should include, at least, a description of the derivatives concerned, the number of reference securities to which they relate (when relevant), the maturity date (or, if applicable, the closing out date) and the reference price.*"

Q.15 Do you agree with the proposed amendment to require a description of any relevant option or derivative to be disclosed under Rule 8?

7. Disclosure of short positions

7.1 As mentioned in paragraph 6.7 above, the purpose of Note 5 on Rule 8 is to ensure that, when a dealing disclosure is made, there are disclosed not only details of the particular transaction entered into by the person making the disclosure, but also that person's resultant total interest in, and exposure to movements in the price of, the relevant securities of the company concerned. In this regard, the Panel considers that where a person disclosing has a position following a dealing which is "short" (i.e. the person has sold securities it does not own), full details of that fact should also be included in any Rule 8 disclosure. For the avoidance of doubt, a person whose only exposure to movements in the price of relevant securities is a short position of 1% or more will not be subject to the disclosure requirements of Rule 8.3, unless that short position resulted from a dealing which took place when it had a long position of 1% or more of a class of relevant securities.

7.2 The Code Committee is therefore proposing to add an additional sentence to new paragraph (v) (as proposed to be amended in paragraph 6.11) of Note 5(a) on Rule 8 as follows:

"*Where a person required to make a disclosure has a short position in any relevant security of the company concerned, the number of relevant securities of which that person is short (and the percentage of the class of relevant securities which it represents) should be disclosed;*".

7.3 The Code Committee also considers that Rules 24.3 and 25.3 should make clear that where any person whose shareholdings are required to be disclosed in an offer document or offeree board circular has a residual short position, the details of that short position should be disclosed. The Code Committee therefore proposes to reflect this policy:

(a) by amending Rule 24.3(b) as follows:

"**(b) If in any of the above categories there are no shareholdings, this fact should be stated; if, however, the person concerned has a short position, full details should be given. This will not apply to categories**

(a)(iv) or (v) if there are no such irrevocable commitments or arrangements."; and

(b) by amending Rule 25.3(b) as follows:

"**(b) If in any of the above categories there are no shareholdings, then this fact should be stated; if, however, the person concerned has a short position, full details should be given. This will not apply to category (a)(iv) if there are no such arrangements.**".

(*The above assumes that the proposed amendment to Rule 25.3(b) referred to in paragraph 2.17(c) will be adopted.*)

Q.16 Do you agree with the proposed disclosure of short positions as set out in paragraph 7 above?

8. Disclosure of subscriptions for new shares

8.1 At present, Rule 8 of the Code only specifically requires a person subject to the disclosure requirements of that Rule to disclose an acquisition of new shares or other new securities of an offeror or the offeree company in limited circumstances, for example when the acquisition results from the exercise of an option or on the conversion of convertible securities.

8.2 The Code Committee believes, however, that the disclosure of any subscription, or agreement to subscribe, for new securities by a person subject to Rule 8 will be relevant to a proper understanding of that person's dealing activities and, accordingly, that such actions should be disclosed in the same way as an acquisition of existing shares. The Code Committee therefore proposes that the Code be amended by including the following new sentence in Note 2 on Rule 8:

"*The taking, granting or exercising of an option (including a traded option contract) in respect of any of the foregoing or the exercise or conversion of any security under (d) above whether in respect of new or existing securities and the acquisition of, entering into, closing out, exercise (by either party) of any rights under, or variation of, a derivative will be regarded as a dealing in relevant securities (see also Notes 5 and 7 below). Subscribing or agreeing to subscribe for new relevant securities will also be regarded as a dealing.*"

8.3 To ensure that it is clear that subscriptions for new shares (and, indeed, other dealings in relevant securities that would fall to be disclosed under Rule 8) by relevant parties should also be disclosed in an offer document or offeree board circular, the Code Committee proposes to add a new Note on Rule 24.3 (which will apply equally to Rule 25.3 by virtue of the Note on that Rule) as follows:

"*6. Dealings*

For the purpose of this Rule, dealings includes any action which is regarded as a dealing for the purposes of Note 2 on Rule 8.".

(*The above assumes that the existing Note 5 on Rule 24.3 is deleted, as proposed in paragraph 24.2 below, and that existing Note 6 therefore becomes Note 5.*)

8.4 The Code Committee also considers that, where an offeror or any person acting in concert with it has a right to subscribe for any securities of the offeree company at the time of announcement of a firm intention to make an offer in accordance with Rule 2.5, details should be included in the offer announcement in the same way as details of holdings of existing shares must be disclosed. The Code Committee therefore proposes that Rule 2.5(b)(iii) be amended as follows:

"**(iii) details of any existing holding in the offeree company:**

…

(d) **in respect of which the offeror holds an option to purchase or right to subscribe;**

(e) **in respect of which any person acting in concert with the offeror holds an option to purchase or right to subscribe;**".

Q.17 Do you agree with the amendments relating to the disclosure of subscriptions and rights to subscribe for new securities as set out above?

9. Transfers of relevant securities into or out of funds under management

9.1 It is sometimes the case that the number of relevant securities in funds managed by a manager will vary as a result of a decision taken by the investment client rather than the fund manager, for example when the investment client transfers some or all of its funds away from one fund manager in order for them to be managed by a different fund management operation.

9.2 The Code Committee has considered whether a change in the number of relevant securities managed by a fund manager who is subject to a disclosure obligation should be disclosed pursuant to Rule 8 where the change has arisen as a result of transfers into or out of funds under management as described above. The Code Committee has concluded that there is no need for shareholders to be informed of changes in funds under management resulting from an investment client's decision to change the manager of its funds because the discretionary fund manager itself will have taken no action. However, the Code Committee believes that where a fund manager has already made a public Rule 8 disclosure, it would be helpful to include an explanation in any subsequent Rule 8 disclosure of any variation from what the resultant total holding might legitimately be expected to be. Accordingly, the Code Committee has concluded that such an explanation should be made in the next Rule 8 disclosure, but that full details do not have to be given. The Code Committee is not proposing to specify the exact wording that should be used by fund managers, but the Panel has indicated that a statement similar to the following would normally be acceptable:

"The variation between the resultant holding stated above and that included in our last relevant public Rule 8 disclosure which is not accounted for by the sales or purchases detailed above arises out of a transfer into or out of our funds under management."

It is therefore proposed to amend Note 5(a) on Rule 8 by the inclusion of the following new paragraph:

"*If, following a public disclosure made under Rule 8, relevant securities are transferred into or out of a person's management, a reference to the transfer must be included in the next public disclosure made by that person under Rule 8.*"

Q.18 Do you agree with the proposed amendment to Note 5(a) on Rule 8 relating to transfers into or out of funds under management?

10. Dealings on a specially cum or ex dividend basis

10.1 Where securities rank for a dividend that has been announced but not paid and the security is not yet quoted ex dividend in the market, it is sometimes the case that dealings take place on a "specially" ex dividend basis. It is also possible, once the security is quoted ex dividend in the market, to deal "specially" cum dividend.

10.2 Where an offeror or any person with whom it is acting in concert purchases offeree company securities on a specially cum or ex dividend basis, it may be unclear to the market whether an obligation to make an increased offer has arisen unless the dividend basis on which the dealing was made is disclosed in the relevant Rule 8 announcement. In the absence of such details, persons who read the disclosure will naturally assume that the dealings disclosed were transacted on the prevailing basis, in terms of dividend entitlements, on which the market was trading at the time. For example, a specially ex dividend purchase by an offeror or any person acting in concert with it at below the cum dividend offer value might appear not to have triggered an obligation to make an increased offer when in fact it had. Conversely, a specially cum dividend purchase by an offeror or any person acting in concert with it at above the ex dividend offer value might appear to have triggered an obligation to make an increased offer when in fact it had not.

10.3 The Panel has encountered instances where disclosures of dealings in offeree securities by offerors or concert parties thereof in such circumstances have led to uncertainty as to whether an obligation to revise the offer has been

triggered. It has dealt with such cases by requiring amended disclosures to be made clarifying the dividend basis on which the dealings were transacted. Whilst dealings specially cum or ex a dividend may also take place in offeror securities, the same concerns do not arise since such dealings cannot result in any obligation to revise the offer.

10.4 The Code Committee is, therefore, proposing to include a new paragraph in Note 5(a) on Rule 8 as set out below to require offerors and their concert parties to disclose when they deal in offeree company securities on a cum or ex dividend basis out of line with the prevailing basis on which the market quotation is made. Where the dealing is in line with the existing market quotation, no disclosure of this fact is required. The proposed wording of the new paragraph of Note 5(a) on Rule 8 is as follows:

"*Where an offeror or any person acting in concert with it purchases offeree company securities on a specially cum or specially ex dividend basis, details of that fact should also be disclosed.*"

Q.19 Do you agree with the proposed amendment to Note 5(a) on Rule 8 relating to purchases of offeree company securities on a specially cum or ex dividend basis?

11. Calculation of percentage to be disclosed

The Code Committee believes it would be helpful to persons required to make disclosures to include the wording set out below as a new paragraph in Note 5(a) on Rule 8. If this proposal is adopted, the Code Committee also proposes to delete what is currently the final paragraph of Note 2 on Rule 8 as this will no longer be necessary.

"*Percentages should be calculated by reference to the numbers of relevant securities given in a company's latest announcement required by Rule 2.10. In the case of a disclosure relating to a right to subscribe, or subscription, for new securities, the Panel should be consulted regarding the appropriate number of relevant securities to be used in calculating the relevant percentage.*"

Q.20 Do you agree with the inclusion of a paragraph in Note 5(a) on Rule 8 relating to the method of calculating percentages to be disclosed and with the consequential deletion of the corresponding paragraph in Note 2 on Rule 8?

12. Minor amendments to Rule 8

12.1 The Code Committee proposes to delete NB 1, 2 and 3 set out at the beginning of Rule 8. The information contained in NB 1 is repeated in Note 2 on Rule 8. NB 2 states that the obligation to disclose pursuant to Rule 8 applies only in respect of relevant dealings taking place during an offer period: this is set out in each of Rules 8.1, 8.2 and 8.3. As regards NB 3, the Code Committee considers that it is not necessary to draw attention specifically to the Definitions section of the Code.

12.2 As referred to in paragraph 5.4 above, the Code Committee considers that the penultimate paragraph of Note 2 on Rule 8 could be worded more clearly and is therefore proposing to amend it as follows:

"~~*Disclosure of dealings in relevant securities of an offeror is only required (a) following the announcement of a securities exchange offer, or (b) following the earlier commencement of an offer period, if it has not been announced that any offer is likely to be solely in cash*~~. *Where it has been announced that an offer or possible offer is, or is likely to be, solely in cash, there is no requirement to disclose dealings in relevant securities of the offeror.*"

Q.21 Do you agree with the deletion of NB 1, 2 and 3 set out at the beginning of Rule 8 and the amendment to Note 2 on Rule 8?

13. Obligation to publicise the disclosure requirements of Rule 8

13.1 Although Rule 8 imposes an obligation on the parties to an offer, their associates and 1% shareholders to disclose all dealings in relevant securities during an offer period, many dealings will actually be effected through a stockbroker or other intermediary on behalf of the person dealing. The Code does not impose separate disclosure obligations on such intermediaries who

execute dealings on behalf of clients, but it does currently require them to take steps to ensure that their clients are aware of their obligations under Rule 8 and are willing to comply with them. The relevant part of Note 10 on Rule 8 provides as follows:

"*Stockbrokers, banks and others who deal in relevant securities on behalf of clients have a general duty to ensure, so far as they are able, that those clients are aware of the disclosure obligations attaching to associates and other persons under Rule 8 and that those clients are willing to comply with them. Market-makers and dealers who deal directly with investors should, in appropriate cases, likewise draw attention to the relevant Rules. However, this does not apply when the total value of dealings (excluding stamp duty and commission) in any relevant security undertaken for a client during any 7 day period is less than £50,000.*

This dispensation does not alter the obligation of principals, associates and other persons themselves to initiate disclosure of their own dealings, whatever total value is involved.

…"

13.2 The intention behind this provision is to help to make sure that disclosures are made in the correct form and manner and within the specified time period. Proper fulfilment by the intermediary of its obligations under this Note should normally be satisfied by the relevant trader or salesperson notifying the client at the time any dealing is undertaken of the requirements of Rule 8. Over the years intermediaries have found it difficult to comply with these obligations in full. The Panel has recognised that they may be onerous in a fast-moving trading environment and also that, to the extent that the clients of intermediaries are aware of the Code's dealing disclosure requirements, or may reasonably be assumed to be so aware, to require strict compliance with the obligations in Note 10 may be regarded as unnecessarily burdensome.

13.3 The Code Committee proposes that the paragraphs of Note 10 on Rule 8 set out above should be deleted from the Code (although this would not affect the remaining provisions of Note 10, which require intermediaries to co-operate with the Panel in its dealing enquiries – see further below in this paragraph).

Q.22 Do you agree with the proposed deletion of the paragraphs of Note 10 on Rule 8 that require an intermediary to inform its clients of the disclosure obligations of Rule 8?

13.4 The Code Committee remains concerned, however, that certain persons proposing to deal in relevant securities of a party to an offer during an offer period might be unfamiliar with their dealing disclosure obligations under the Code and might therefore fail to make necessary disclosures as required by Rule 8. To address this concern, the Code Committee believes that it would be appropriate to require a summary of the principal provisions of Rule 8 to be included in relevant announcements made by the parties and documents sent to shareholders during the course of the offer period.

13.5 The Code Committee is therefore proposing that the Code be amended so as to require such a summary to be included in any announcement made in accordance with Rule 2.4 or Rule 2.5, in any circular sent to offeree company shareholders in accordance with Rule 2.6 and also prominently in any offer document. In the case of Rule 2.4 and 2.5 announcements, this would replace the existing obligations in those Rules in cases where the offer is announced to a stock exchange outside the United Kingdom on which any relevant securities are listed or traded to include a summary of the provisions of Rule 8.3. In order to assist parties and their advisers, the Code Committee also proposes that a template for this Rule 8 summary, which can be amended or supplemented as appropriate, should be included on the Panel's website (but will not form part of the Code itself).

13.6 The Code Committee is proposing to reflect these proposals:

(a) by replacing the final sentence of Rule 2.4 as follows:

"~~**In most cases where such an announcement is made to a stock exchange outside the United Kingdom on which any relevant securities are listed or traded, a summary of the provisions of Rule 8.3 should be given.**~~ **Except with the consent of the Panel, such an announcement should also include**

a summary of the provisions of Rule 8 (see the Panel's website at www.thetakeoverpanel.org.uk).";

(b) by replacing Rule 2.5(b)(viii) with the following:

"**(viii) ~~in cases where the offer is announced to a stock exchange outside the United Kingdom on which any relevant securities are listed or traded,~~ a summary of the provisions of Rule ~~8.3~~ (see the Panel's website at www.thetakeoverpanel.org.uk).**";

(c) by adding a new sentence at the end of Rule 2.6 as follows:

"**Any circular published under this Rule should also include a summary of the provisions of Rule 8 (see the Panel's website at www.thetakeoverpanel.org.uk).**"; and

(d) by adding a new paragraph to Rule 24.2(d) as set out below. Assuming that the amendment referred to in paragraph 24.3 below is adopted, this will be included as paragraph 24.2(d)(xi):

"**(xi) a summary of the provisions of Rule 8 (see the Panel's website at www.thetakeoverpanel.org.uk);**".

13.7 The wording that the Code Committee proposes will be included on the Panel's website as a template for the summary of the provisions of Rule 8 is set out in Appendix C to this Consultation Paper.

Q.23 Do you agree with the proposed amendments to require a summary of the provisions of Rule 8 to be included in relevant announcements and documents?

13.8 The final paragraph of the existing Note 10 on Rule 8 requires intermediaries to co-operate with the Panel in any dealing enquiries it makes and to supply relevant dealing information to the Panel as part of that co-operation. The Code Committee is also proposing a minor amendment to this paragraph to put beyond doubt that the information to be supplied to the Panel, if it so requests, should include client contact details as well as the identity of the

intermediary's clients. The Panel expects intermediaries to be in a position freely to provide it with any relevant information requested under this Note and, accordingly, if this amendment is adopted those persons affected should take the necessary steps to ensure that they are able to comply with the revised Note. The proposed amendment is as follows:

"*Intermediaries are expected to co-operate with the Panel in its dealings enquiries. Therefore, those who deal in relevant securities should appreciate that stockbrokers and other intermediaries will supply the Panel with relevant information as to those dealings, including identities of clients and full client contact information, as part of that co-operation.*"

Q.24 Do you agree with the proposed amendment to the final paragraph of Note 10 on Rule 8 specifically to require intermediaries to disclose client contact information?

SECTION C
ACTING IN CONCERT AND ASSOCIATE STATUS

14. Application of presumption (5) of the definition of "acting in concert", paragraph (2) of the definition of "associate" and paragraph (3) of the definition of "connected fund managers and principal traders"

14.1 Under presumption (5) of the definition of "acting in concert", a financial or other professional adviser (including a stockbroker) is presumed to be acting in concert with its client in respect of the shareholdings of the adviser and persons controlling, controlled by or under the same control as the adviser (except in the capacity of an exempt fund manager or exempt principal trader). Such persons will also be associates by virtue of paragraph (2) of the definition of "associate". In addition, under paragraph (3) of the definition of "connected fund managers and principal traders", a fund manager or principal trader which is controlled by, controls or is under the same control as any bank or financial or other professional advisers (including stockbrokers) to an offeror or the offeree company is treated as connected with the offeror or the offeree company, as the case may be.

14.2 As was made clear in Panel Statement 2004/12, presumption (5) of the definition of acting in concert (and thereby also paragraph (2) of the definition of associate and paragraph (3) of the definition of connected fund managers and principal traders) does not apply only to advisers which have been engaged to act on the offer or a transaction related to the offer. Although advisers which are acting in connection with the offer will invariably be subject to presumption (5), other advisers which have an advisory relationship with the offeror or offeree company (or a concert party thereof – see paragraph 15 below) will be presumed to be acting in concert with such party and the question of whether this presumption is rebutted will depend on the facts of the case. In considering whether the presumption is rebutted, the Panel will take account of all relevant factors, including those set out in Panel Statement 2004/12. Accordingly, by way of example, an adviser which is named as such in a company's annual report and accounts will be subject to presumption (5)

even if it is not advising on the offer or a transaction related to the offer and the presumption will only be rebutted if the Panel is satisfied, applying all relevant factors, that that should be the case. Presumption (5) will not, however, be capable of being rebutted in respect of advisers which are acting in connection with the offer.

14.3 The Code Committee supports the application by the Panel of presumption (5) in the manner set out above. The Code Committee has also been considering the extent to which presumption (5) should be capable of being rebutted through the adviser standing down from acting for its client. In this context, the Code Committee notes that one of the factors cited by the Panel in Statement 2004/12 as being relevant to the question of whether the presumption has been rebutted was "where an adviser has stood down or has offered to stand down, the reasons for so doing". In addition, the second paragraph of Note 2 on the Definitions currently provides as follows:

"*References to "financial and other professional advisers (including stockbrokers)", in relation to a party to an offer, do not include an organisation which has stood down, because of a conflict of interest or otherwise, from acting for that party in connection with the offer. If the organisation is to have a continuing involvement with that party during the offer, the Panel must be consulted. Unless the Panel is satisfied that the involvement is entirely unconnected with the offer, the above exclusion will not normally apply*."

14.4 The Code Committee considers that although the act of standing down is sufficient to rebut the presumption of concertedness that would otherwise apply if the reason for standing down is on account of a conflict of interest, it is less relevant where the reason for doing so is not related to a conflict of interest (and is, for example, in order to avoid undesirable consequences under the Code or other regulations). In particular, the Code Committee believes that, absent a conflict of interest, standing down should not of itself be sufficient to rebut presumption (5), especially in the context of a relationship which is ongoing, such as a broking relationship, and well established (such that it would most likely be the parties' intention to resume the relationship following the conclusion of the offer).

14.5 In addition, the Code Committee is concerned that the implication of the last two sentences of Note 2 is that presumption (5) will be rebutted if an adviser is not acting in connection with the offer, even if the adviser is continuing to act in a capacity which is unconnected with the offer. As explained above, this is not correct: an adviser will be subject to presumption (5) even if it is not acting in connection with the offer and, in considering whether the presumption should be rebutted, the Panel will take account of all relevant factors. Indeed, the fact that the adviser is continuing to act, albeit in a capacity which is unconnected with the offer, may be a factor in favour of the Panel concluding that presumption (5) should not be rebutted, depending upon the nature and amount of work which the adviser is carrying out.

14.6 In the light of the above, the Code Committee proposes to amend Note 2 at the end of the Definitions section as follows:

"*References to "financial and other professional advisers (including stockbrokers)", in relation to a party to an offer, do not normally include an organisation which has stood down~~,~~ because of a conflict of interest ~~or otherwise,~~ from acting for that party in connection with the offer. ~~If the organisation is to have a continuing involvement with that party during the offer, the Panel must be consulted. Unless the Panel is satisfied that the involvement is entirely unconnected with the offer, the above exclusion will not normally apply.~~ In other circumstances and with the consent of the Panel, presumption (5) of the definition of "acting in concert", paragraph (2) of the definition of "associate" and paragraph (3) of the definition of "connected fund managers and principal traders" may be rebutted or disapplied as appropriate. In making its decision, the Panel will take account of all relevant factors.*"

Q.25 Do you agree with the proposed amendments to the second paragraph of Note 2 on the Definitions?

15. Status of financial and other professional advisers to persons acting in concert with an offeror or with the directors of the offeree company

15.1 It is the Panel's practice to regard financial and other professional advisers to a person acting in concert with either an offeror or the directors of the offeree

company as themselves acting in concert with, being associates of and being connected with that offeror or the offeree company, as the case may be. For example, where a person has agreed to purchase an offeree company asset from an offeror in the event that the latter's offer is successful, the purchaser will normally be considered to be acting in concert with the offeror, as will its financial and other professional advisers.

15.2 The rationale for treating advisers to a concert party in the same way as advisers to the offeror or offeree company is that a concert party is likely to have the same view as to the most favourable outcome of the offer as the person with whom it is in concert. In turn, there is likely to be a community of interest in the outcome of the offer between an adviser and its client simply because the adviser concerned will normally wish to assist its client to achieve the client's objectives. As a result, the advisers to a concert party and the offeror or offeree company board with whom their client is acting in concert are likely to share the same view as to the most favourable outcome of the offer.

15.3 Presumption (5) of the definition of "acting in concert", paragraph (2) of the definition of "associate" and the preamble to the definition of "connected fund managers and principal traders" all make clear that where a financial or other professional adviser is part of a larger group, all parts of that group are also treated as within the "acting in concert", "associate" or "connected" relationship, as the case may be. As a result, under the above practice, fund managers and principal traders controlling, controlled by or under the same control as a financial adviser to a person acting in concert with an offeror or with the directors of the offeree company (except in an exempt capacity - see paragraph 1 above) will be considered to be "acting in concert" with, "associates" of or "connected" with (as the case may be) the relevant offeror or the offeree company respectively, and will be subject to the Code accordingly.

15.4 The Code Committee believes that this practice should be clear in the Code and, accordingly, proposes to amend the definitions of "acting in concert",

"associate" and "connected fund managers and principal traders" and Note 2 on the definition of "exempt fund manager" and "exempt principal trader" as set out below:

(a) by amending presumption (5) of the definition of "acting in concert" as follows:

"(5) a financial or other professional adviser (including a stockbroker) with its client and, if its client is acting in concert with an offeror or with the directors of the offeree company, with that offeror or with those directors respectively, in each case in respect of the shareholdings of the adviser and persons controlling, controlled by or under the same control as the adviser (except in the capacity of an exempt ~~market-maker~~ fund manager or an exempt principal trader);"

(*The words "exempt fund manager or" have been included at the end of presumption (5) of the definition of acting in concert on the basis that the exception applies equally to exempt principal traders and exempt fund managers.*);

(b) by amending paragraph (2) of the definition of "associate" as follows:

"(2) banks, ~~and~~ financial and other professional advisers (including stockbrokers) to an offeror, the offeree company or any company covered in (1) or to any person who is acting in concert with an offeror or with the directors of the offeree company, and ~~including~~ persons controlling, controlled by or under the same control as such banks, financial and other professional advisers;";

(c) by amending the definition of "connected fund managers and principal traders" as follows:

"A fund manager or ~~market-maker~~ principal trader will normally be connected with an offeror or the offeree company, as the case may be, if the fund manager or ~~market-maker~~ principal trader is controlled by, controls or is under the same control as:

(1) an offeror or any person acting in concert with it;

(2) the offeree company or any person acting in concert with the directors of the offeree company;

(3) any bank or financial or other professional advisers (including stockbrokers) to ~~an offeror or the offeree company~~ any person covered in (1) or (2);

…"; and

(d) by amending Note 2 on the definition of "exempt fund manager" and "exempt principal trader" as follows:

"2. When a principal trader or fund manager is connected with the offeror or offeree company, exempt status is not relevant unless the sole reason for the connection is that the principal trader or fund manager is controlled by, controls or is under the same control as a financial or other professional adviser (including stockbrokers) to:

(1) the offeror; ~~or~~
(2) the offeree company; or
(3) a concert party of either the offeror (for example as a result of being an investor in a consortium) or the directors of the offeree company.

…"

(*The above assumes that the proposed amendments to the opening paragraph of Note 2 on the definition of "exempt fund manager" and "exempt principal trader" referred to in paragraph 1.25 will be adopted.*)

15.5 It has been the Panel's long-standing practice to agree, in appropriate cases, that where a person is presumed to be in concert under presumption (1) of the definition of "acting in concert", that presumption may be rebutted. For example, where offerors have joint ventures with third parties, and the joint ventures are not material to those third parties, the Panel is likely to agree that the presumption of concertedness in respect of the third parties may be rebutted. Where this presumption cannot be rebutted, it may nonetheless be possible for an adviser to a company, or other person, which is acting in concert with an offeror to rebut its presumed concertedness. An important factor in considering the position of the adviser, in the context of Note 2 on the Definitions, will be the nature of the relationship between the adviser's client and the offeror and the reasons for regarding that person as a concert party. For example, where that person is regarded as a concert party because it has an agreement with the offeror to purchase an offeree company asset from the offeror if the offer is successful, its interest in the outcome of the offer is likely

to be strong. As a result, the Panel is likely to regard the adviser to the purchaser, as well as the purchaser itself, as in concert with the offeror. On the other hand, where, for example, a company is presumed to be in concert under presumption (1), and that presumption has not been rebutted, but the outcome of the offer is not material to it and it is not actively involved in the offer process, the Panel is likely to accept that the presumed concertedness of the company's advisers should be rebutted.

Q.26 Do you agree with the proposed amendments to the definitions of "acting in concert", "associate", and "connected fund managers and principal traders" and to Note 2 on the definitions of "exempt fund manager" and "exempt principal trader"?

16. Consortium members and acting in concert

16.1 Under Note 5 on the definition of "acting in concert" an investor in an offer consortium is presumed to be acting in concert with the offeror. Where the investor is part of a larger group, the Panel will often also regard other parts of that group, which might include a fund manager or principal trader, as acting in concert with the offeror. Note 5 provides as follows:

"*Investors in a consortium (eg through a vehicle company formed for the purpose of making an offer) will normally be treated as acting in concert with the offeror. Where such an investor is part of a larger organisation, the Panel should be consulted to establish which other parts of the organisation will also be regarded as acting in concert. (See also Connected fund managers and principal traders in the Definitions Section and Rule 7.2 regarding discretionary fund managers.)*"

16.2 In the case of a fund manager which is connected with an offeror by reason of paragraph (4) of the existing definition of "connected fund managers and principal traders" (i.e. because it is part of the same group as an investor in a consortium), the current Note 1(d) on Rule 7.2 explains that, in certain circumstances, for example where the investor's investment in the consortium is insignificant, the Panel may waive the acting in concert presumption that

would otherwise apply in relation to a fund manager. The relevant part of the definition of "connected fund managers and principal traders" provides that:

"A fund manager or principal trader will be connected with an offeror … if the fund manager or principal trader is controlled by, controls or is under the same control as:-

…

(4) an investor in a consortium (eg through a vehicle company formed for the purpose of making an offer)."

Note 1(d) on Rule 7.2 (as currently drafted) in turn provides that:

"*(d) Where a fund manager is connected with an offeror by reason of paragraph (4) of the definition of connected fund managers and market-makers, the Panel may, in appropriate circumstances, waive the acting in concert presumption in Rule 7.2(a), for example where the investment in a consortium is insignificant.*"

16.3 It is the Panel's normal practice to treat an investment in a consortium of 5% or less of the equity share capital (or other similar securities) of the offeror as "insignificant" for the purposes of Note 1(d) on Rule 7.2 (assuming the investor is not otherwise interested in the offer). It is also the Panel's practice to extend the effect of Note 1(d) on Rule 7.2 to principal traders that are connected with an offeror as a result of being under the same control as an investor in a consortium and also to other parts of the same organisation provided, in each case, that the Panel is satisfied that adequate Chinese Walls exist between the part of the organisation that is investing in the consortium and other parts of the organisation in question. Where the investment in the consortium is more than 5% but less than 20%, the Panel might also be prepared to waive the acting in concert presumption for parts of the group, depending on the circumstances of the case.

16.4 The Code Committee is proposing that these practices be made clear in Note 5 on the definition of "acting in concert" and is, therefore, proposing the following changes to that Note:

"*5. Consortium offers*

Investors in a consortium (eg through a vehicle company formed for the purpose of making an offer) will normally be treated as acting in concert with the offeror. Where such an investor is part of a larger organisation, the Panel should be consulted to establish which other parts of the organisation will also be regarded as acting in concert.

Where the investment in the consortium is, or is likely to be, 5% or less of the equity share capital (or other similar securities) of the offeror, the Panel will normally be prepared to waive the acting in concert presumption in relation to other parts of the organisation, including any connected fund manager or principal trader, provided it is satisfied as to the independence of those other parts from the investor. Where the investment is, or is likely to be, of 5% or more but less than 20%, the Panel may be prepared to waive the acting in concert presumption in relation to other parts of the organisation depending on the circumstances of the case. (See also Connected fund managers and ~~market makers~~ principal traders in the Definitions Section and Rule 7.2 ~~regarding discretionary fund managers~~.)".

16.5 The deletion of the existing Note 1(d) on Rule 7.2 (as proposed in paragraph 2.11 above) is consistent with these changes to Note 5 on the definition of "acting in concert". The Code Committee is, however, proposing that the Notes on Rule 7.2 should now cross-refer to the revised Note 5. The Code Committee is therefore proposing to add a new Note 7 on Rule 7.2 (as redrafted – see paragraph 2 above) as follows:

"*7. Consortium offers*

See also Note 5 on the definition of acting in concert where the connected fund manager or principal trader is part of the same organisation as an investor in a consortium."

16.6 The Code Committee also believes that, given the proposed amendments to the definition of "connected fund managers and principal traders" set out in paragraph 15 above, it is now unnecessary to retain paragraph (4) of that definition. This is on the basis that the proposed amendments to the definition of when a fund manager or principal trader is "connected" with an offeror or offeree company will now include when it is connected via a concert party of the offeror or the offeree company directors (as the case may be). As members of an offer consortium will be concert parties of an offeror in accordance with Note 5 on the definition of "acting in concert", it is no longer

necessary to include being "connected" to an investor in a consortium as a separate category within the definition of "connected fund managers and principal traders".

16.7 The Code Committee believes, however, that it would be helpful for there to be a reference to investors in a consortium and Note 5 on the definition of "acting in concert" within the revised paragraph (1) of the definition of "connected fund managers and principal traders". The Code Committee is therefore proposing the following further amendments to the definition:

"A fund manager or principal trader will normally be connected with an offeror or the offeree company, as the case may be, if the fund manager or principal trader is controlled by, controls or is under the same control as:-

(1) an offeror or any person acting in concert with it (for example as a result of being an investor in a consortium (see also Note 5 on the definition of acting in concert));

(2) the offeree company or any person acting in concert with the directors of the offeree company; or

(3) any bank or financial or other professional advisers (including stockbrokers) to any person covered in (1) or (2).~~; or~~

~~(4) an investor in a consortium (eg through a vehicle company formed for the purpose of making an offer).~~"

(*The above assumes that the proposed changes to the definition of "connected fund managers and principal traders" referred to in paragraph 15.4 above will be adopted.*)

Q.27 Do you agree with the amendments relating to consortium members set out above?

17. Acting in concert and pension funds

(a) Rebuttal of the presumption

17.1 Presumption (3) of the definition of "acting in concert" states that a company will be presumed to be acting in concert with any of its pension funds. In

many cases, however, pension funds are managed entirely independently of the company that has established them. Where the terms of the agreement relating to the management of the fund are such that absolute discretion is given to the third party manager regarding all dealing, voting and offer acceptance decisions, the Panel will normally regard the presumption of concertedness as having been rebutted. However, if the fund manager and the company are in fact acting in concert, the Panel will treat them as such, regardless of the terms of the fund management agreement.

17.2 In order to assist companies and their advisers in deciding whether a pension fund should be regarded as acting in concert with the company which established it, the Code Committee is proposing to amend the Code to draw attention to the factors to which the Panel has regard in deciding whether the presumption should be rebutted. It is therefore proposed to include a new Note 6 on the definition of "acting in concert" definition as follows:

"*6. Pension funds*

The presumption that a company is acting in concert with any of its pension funds will normally be rebutted if it can be demonstrated to the Panel's satisfaction that the assets of the pension fund are managed under an agreement or arrangement with an independent third party which gives such third party absolute discretion regarding all dealing, voting and offer acceptance decisions relating to the fund.".

Q.28 Do you agree with the inclusion of new Note 6 on the definition of "acting in concert"?

(b) Extension to group pension funds

17.3 Also in relation to pension funds, presumption (1) of the definition of "acting in concert" provides that "a company, its parent, subsidiaries and fellow subsidiaries, and their associated companies and companies of which such companies are associated companies" are all considered to be in concert with each other (a holding of 20% of the equity share capital of a company being the test to determine associated company status).

17.4 In a complex group, there may be different pension funds for different companies within the group. Each group company (as detailed in presumption (1)) will be presumed to be in concert with its relevant pension fund and also with each other company in the group. As a logical extension, in practice, it is the Panel's normal policy that each group company should be presumed to be in concert with each of the group's pension funds. By way of comparison, paragraph (4) of the definition of "associate" makes it clear that the pension funds of all companies in the offeror or offeree company's group (described in the same way as in presumption (1) of the definition of "acting in concert") are considered to be "associates".

17.5 The Code Committee believes that it would be useful to expand presumption (3) to spell out the connections described above. This would codify current practice and bring presumption (3) of the definition of "acting in concert" into line with paragraph (4) of the definition of "associate". Presumption (3) of the definition of "acting in concert" would, therefore, be amended to read:

"(3) a company with any of its pension funds and the pension funds of any company covered in (1);".

Q.29 Do you agree that paragraph (3) of the definition of "acting in concert" should be amended as proposed?

18. Treatment of funds where the management of part of the fund has been sub-contracted to another fund manager

18.1 The effect of presumption (4) of the definition of "acting in concert" is that a fund manager is presumed to be acting in concert with and in respect of the funds which it manages on a discretionary basis. In the light of this, the Code Committee has considered the situation where a fund manager sub-contracts the management of some of its funds under management to another fund manager (for example, because the other firm has a particular expertise in a specialist sector). If the terms of the agreement under which the funds are sub-

contracted are such that absolute discretion is given to the third party manager regarding all dealing, voting and offer acceptance decisions, the Panel will normally regard the presumption of concertedness as having been rebutted and the relevant funds as being controlled by the sub-contracted fund manager. In such circumstances, presumption (4) will be applied to the sub-contracted fund manager in respect of the sub-contracted funds.

18.2 The Code Committee is, therefore, proposing to include the following new Note 7 on the definition of "acting in concert" to address this:

"*7. Sub-contracted fund managers*

Where a fund manager sub-contracts discretionary management of funds to another fund manager, the Panel will normally regard those funds as controlled by the latter if absolute discretion regarding all dealing, voting and offer acceptance decisions relating to the funds has been transferred to that fund manager and presumption (4) will apply to the sub-contracted fund manager in respect of those funds."

18.3 The Code Committee is also proposing to make the amendments set out below to Note 8 on Rule 8 so that it is clear that discretionary fund managers are not expected to aggregate sub-contracted investment accounts for the purposes of Rule 8 disclosures. In addition, the Code Committee is proposing to refer to Note 8 on Rule 8 in Note 2 on SAR 5 which addresses aggregation of funds controlled by discretionary fund managers for the purposes of SAR 5. The text of the amendment to Note 2 on SAR 5 is set out in Appendix A.

"*8. Discretionary fund managers*

The principle normally applied by the Panel is that where the investment decision is made by a discretionary fund manager the relevant securities are treated as controlled by him and not by the person on whose behalf the fund is managed. For that reason, Rule 8.3(c) requires a discretionary fund manager to aggregate the investment accounts which he manages for the purpose of determining whether he has an obligation to disclose. The beneficial owner would not normally, therefore, be concerned with disclosure to the extent that his investment is managed on a discretionary basis. However, where any of the funds managed on behalf of a beneficial owner are not managed by the fund manager originally contracted to do so but are managed by a different independent third party who has absolute discretion regarding all dealing, voting and offer acceptance decisions, the fund manager to whom the

management of the funds has been sub-contracted (and not the originally contracted fund manager) is required to aggregate those funds and to comply with the relevant disclosure obligations accordingly. This approach assumes that the discretionary fund manager does not take instructions from the beneficial owner (or, in the case of sub-contracted funds, from the originally contracted manager or the beneficial owner) on the dealings in question and that fund management arrangements are not established or used to avoid disclosure."

Q.30 Do you agree with the proposed inclusion of the new Note 7 on the definition of "acting in concert" and the changes to Note 8 on Rule 8 and to Note 2 on SAR 5?

19. Deletion of paragraph (6) of the definition of "associate"

19.1 Paragraph (6) of the definition of "associate" provides that where a person owns or controls 5% or more of any class of relevant securities issued by either an offeror or the offeree company, he will be regarded as an associate of that company. Under Rule 8.1(a), associates are required to disclose all dealings in relevant securities of either an offeror or the offeree company, whichever party they are associates of. If a person is not regarded as an associate, an obligation to make disclosures will arise under Rule 8.3 where that person owns or controls 1% or more of any class of relevant securities issued by either an offeror or the offeree company (or comes to own 1% or more as a result of a dealing), but only in relation to further dealings in those relevant securities of that company.

19.2 The Code Committee believes that there is no significant benefit for the market in being informed of dealings in relevant securities in one company (e.g. an offeror) by a person who holds, before and after the dealing, less than 1% simply because he holds over 5% of a class of relevant securities in another company (e.g. the offeree company). In any event, if such a person comes to own or control 1% or more of the relevant securities in the other company, he will be subject to Rule 8.3 and will be obliged to disclose any further dealings in relevant securities of that company under that Rule.

19.3 The Code Committee believes the disclosure obligations of Rule 8 would be simplified if paragraph (6) of the definition of associate were deleted and it is, therefore, proposing to do this and to make the consequential changes referred to below:

(a) delete the existing paragraph (6) of the definition of associate;

(b) replace the second paragraph of Rule 8.1(b)(ii) as follows:

"~~**If, however, the exempt fund manager is an associate by virtue of paragraph (6) of the definition of associate or if Rule 8.3 applies, the exempt fund manager must disclose publicly under Rules 8.1 or 8.3 as appropriate in addition to disclosing privately.**~~ **If, however, Rule 8.3 applies, an exempt fund manager must disclose publicly under that Rule in addition to disclosing privately.**";

(c) amend the current final paragraph of Note 5(a) on Rule 8 as follows:

"*If an associate is an associate for more than one reason ~~(for example because he falls within paragraphs (6) and (7) of the definition of associate)~~, all the reasons must be specified.*"; and

(d) amend Note 9 on Rule 8 as follows:

"~~*A recognised market maker which is an associate by virtue only of paragraph (6) of the definition of associate is not required to make disclosure under Rule 8.1 provided that the market maker acts in a market making capacity. If he is an associate for any other reason but is not an exempt market maker, he will have an obligation under Rule 8.1.*~~

The exception~~s~~ in relation to ~~recognised market makers~~ principal traders ~~for both Rules 8.1 and 8.3~~ must not be used to avoid or delay disclosure of dealings.

… ".

Q.31 Do you agree with the proposed deletion of paragraph (6) of the definition of associate and with the consequential changes?

20. Disclosure of dealings by employee benefit trusts

20.1 It is common for companies to set up employee trusts or plans in order to encourage and/or facilitate the ownership of company shares by employees. The structures of employee share schemes vary considerably and for the purposes of this Consultation Paper and the proposed amendment to the Code referred to below, all such schemes are collectively referred to as employee benefit trusts ("EBTs").

20.2 It is the Panel's policy to regard an EBT as an associate of the relevant company which established it and, therefore, to require any dealings in relevant securities by the EBT to be disclosed in accordance with Rule 8. Transfers of securities by an EBT to an underlying beneficiary, however, are not regarded as dealings by the Panel for the purposes of the disclosure requirements of Rule 8. The Code Committee agrees with the Panel's policy and is, therefore, proposing to include the following new paragraph in the definition of "associate":

"(6) an employee benefit trust of an offeror, the offeree company or any company covered in (1);".

Q.32 Do you agree with the inclusion of a specific reference to employee benefit trusts in the definition of "associate"?

SECTION D
IRREVOCABLE COMMITMENTS AND LETTERS OF INTENT

21. Introduction

21.1 The Code Committee has been considering a number of issues relating to the obtaining by an offeror or offeree company (as appropriate) of irrevocable commitments and/or letters of intent to accept or not to accept an offer or to vote in favour of or against a resolution of an offeror or the offeree company in the context of the offer. In particular, the Code Committee has been considering the extent to which the Code should require the obtaining of such commitments and/or letters to be disclosed publicly.

21.2 Under the SARs and the Code, irrevocable commitments to accept an offer amount to rights over shares and, as a result, the speed with which they can be gathered is restricted by SAR1 and Rule 5.1. The Panel does not, however, regard irrevocable commitments not to accept an offer or a competing offer as constituting rights over shares under the SARs or the Code on the basis that they do not confer any positive rights on the offeree company or offeror which has obtained the commitment. Similarly, letters of intent do not amount to rights over shares on the basis that they are not legally binding. As a result, like irrevocable commitments not to accept an offer, there is no restriction under the SARs or the Code on the speed with which letters of intent may be gathered.

21.3 The Code Committee understands that the Panel interprets Note 2 on Rule 17.1 and Note 2 on Rule 19.3 to mean that an offeror or offeree company respectively is only permitted to make statements about the level of support it has obtained in favour of or against the offer if those statements have been verified to the satisfaction of the Panel. In practice, this means that, inter alia, the shareholders concerned must have confirmed their support in writing to the offeror or offeree company.

21.4 It should also be noted that an offeror which has already announced a firm offer must not obtain an irrevocable commitment or a letter of intent to accept a revised offer until it is in a position to make a firm offer announcement in respect of the revised offer under Rule 2.5 of the Code. This is because, on the basis that the obtaining of the irrevocable commitment or the letter of intent will be disclosable (as to which see paragraph 22 below), the announcement of the irrevocable commitment or letter of intent in respect of a possible revised offer will be in breach of the prohibition in Rule 19.3 on an offeror from making a statement to the effect that it may improve its offer without committing itself to doing so and specifying the improvement.

22. Disclosure by offerors and offeree companies of irrevocable commitments and letters of intent

22.1 The SARs and Rule 8 of the Code do not specifically require the obtaining or giving of irrevocable commitments and/or letters of intent to be disclosed. However, during an offer period it is the Panel's practice to require the obtaining by an offeror or offeree company of an irrevocable commitment or a letter of intent to accept or not to accept an offer to be disclosed publicly. The Panel has justified this requirement on the basis of Note 6 on Rule 8 which requires the public disclosure of, inter alia, any agreement, arrangement or understanding relating to relevant securities which may be an inducement to deal or refrain from dealing.

22.2 The Code Committee considers that the obtaining of irrevocable commitments and letters of intent of this nature should be disclosed and believes that there should be a specific provision in the Code to require this. Furthermore, the Code Committee believes that this disclosure obligation should apply not only to irrevocable commitments and letters of intent to accept or not to accept an offer, but also to irrevocable commitments and letters of intent to vote in favour of or against any shareholder resolution of an offeror or the offeree company in the context of the offer. So, for example, where an offer is to be implemented by means of a scheme of arrangement, the obtaining of irrevocable undertakings and/or letters of intent to vote in favour of or against

the relevant shareholder resolutions should be disclosed as, in all cases, should the obtaining of irrevocable commitments and/or letters of intent to vote in favour of or against an offeree company shareholder resolution required under Rule 21.1 or an offeror shareholder resolution upon which the offer is conditional. In addition, the Code Committee believes that this disclosure obligation should apply to irrevocable commitments and/or letters of intent obtained by an offeror not to accept a competing offer.

22.3 The Code Committee believes that requiring such disclosure is justified for the following reasons:

(a) the obtaining of such irrevocable commitments and/or letters of intent is important information in evaluating the likely outcome of an offer and as such should be disclosed to shareholders and to the market generally; and

(b) in recent years the nature of the obligations which persons giving irrevocable commitments undertake to carry out (or, in the case of letters of intent, intend to carry out) has become increasingly complicated, often extending beyond simply an agreement or intention to accept or not to accept an offer (or to vote in favour of or against a particular resolution), with the consequence that it is now more important that their precise terms are disclosed to and understood by offeree shareholders and by the market generally.

22.4 The Code Committee has considered whether the obligation to disclose the obtaining of an irrevocable commitment or a letter of intent should fall solely on the offeror or offeree company (as appropriate) in whose favour it is given or whether it should also extend to the shareholder concerned. The Code Committee has concluded that this disclosure obligation should lie solely with the offeror or offeree company in question and that there should be no requirement for a separate disclosure by the shareholder. However, as explained further below, the Code Committee considers that the disclosure made by the offeror or offeree company should contain full details of the irrevocable commitment or the letter of intent, including the identity of the shareholder concerned.

22.5 In certain cases, an irrevocable commitment or letter of intent may be obtained by an associate of the offeror or offeree company rather than by the offeror or offeree company itself. For example, it may be obtained by the financial adviser to such a party. In such cases, the Code Committee believes that the offeror or offeree company should be under an obligation to disclose the obtaining by its associate of an irrevocable commitment or letter of intent.

22.6 In the light of the above, the Code Committee proposes to introduce a new Rule 8.4(a) and a new definition of "irrevocable commitments and letters of intent", in each case as set out below:

"**8.4 IRREVOCABLE COMMITMENTS AND LETTERS OF INTENT**

(a) During an offer period, if an offeror or offeree company or any of their respective associates obtains an irrevocable commitment or a letter of intent, the offeror or offeree company (as appropriate) must publicly disclose the details in accordance with Notes 3, 4 and 14.";

and

"**Irrevocable commitments and letters of intent**

Irrevocable commitments and letters of intent include irrevocable commitments and letters of intent to accept or not to accept an offer and also irrevocable commitments and letters of intent to vote in favour of or against a resolution of an offeror or the offeree company in the context of the offer."

Q.33 Do you agree that the obtaining by an offeror or offeree company or any of their respective associates of an irrevocable commitment and/or a letter of intent should be publicly disclosed and, if so, do you agree with the proposed new Rule 8.4(a)?

Q.34 Do you agree with the proposed new definition of "irrevocable commitments and letters of intent"?

22.7 The Code Committee believes that the precise details of what should be disclosed under Rule 8.4(a) should be set out in a new Note on Rule 8. The

Code Committee believes that full details of the irrevocable commitment or letter of intent should be required to be disclosed, including:

- the number of shares to which the irrevocable commitment or letter of intent relates;

- the identity of the shareholder from whom the irrevocable commitment or letter of intent has been obtained. In this context, the information which should be disclosed is that which would be required by Note 5(a) on Rule 8 if the shareholder concerned were disclosing a dealing in relevant securities – i.e. such that the name of the owner or controller of the shares must be specified, and the naming of nominees or vehicle companies is insufficient;

- in respect of an irrevocable commitment, the circumstances (if any) in which it will cease to be binding; and

- in respect of an irrevocable commitment or a letter of intent to accept an offer obtained prior to a firm offer announcement, full details of the value (and other material terms) of the possible offer in respect of which the commitment or letter has been obtained. Following the expected introduction of Rule 2.4(c) (see PCP 2004/2), a potential offeror will be bound by the price set out in the announcement of the irrevocable commitment or letter of intent unless it reserves the right not to be so bound at the time that the reservation is made (and the reservation has been approved by the Panel).

22.8 As a result, the Code Committee proposes to introduce new Note 14 on Rule 8 in the following terms:

"*14. Irrevocable commitments and letters of intent*

A disclosure of the obtaining of an irrevocable commitment or a letter of intent must provide full details of the nature of the commitment or letter including:

(a) the number of shares of each class to which the irrevocable commitment or letter of intent relates;

(b) the identity of the shareholder from whom the irrevocable commitment or letter of intent has been obtained. For this purpose, the information which should be disclosed is that which would be required by Note 5(a) on Rule 8 if the shareholder concerned were disclosing a dealing in relevant securities;

(c) in respect of an irrevocable commitment, the circumstances (if any) in which it will cease to be binding; and

(d) in the case of an irrevocable commitment or a letter of intent obtained prior to the announcement of a firm intention to make an offer under Rule 2.5, the value (and any other material terms) of the possible offer in respect of which the commitment or letter has been obtained. (See Rule 2.4(c))."

22.9 Consistent with the proposed new disclosure obligation referred to above, the Code Committee also believes a shareholder who has given a letter of intent and who either (i) becomes aware that he will not be able to comply with its terms or (ii) intends no longer to do so, should be required to announce that fact promptly. This may arise because the shareholder has sold some or all of the shares in question or because he has simply changed his mind. Similarly, in the unlikely event that a shareholder who has given an irrevocable commitment breaches the terms of that commitment (for example, because he has accepted a competing offer), he should be required promptly to announce that fact together with all relevant details. The Code Committee believes that this information should be disclosed on the basis that it will be material for shareholders in the offeree company and for the market generally. For the avoidance of doubt, the Code Committee does not consider that a shareholder who is released from an irrevocable commitment in accordance with its terms (because, for example, a higher offer has been announced) should be required to announce that fact.

22.10 In the light of the above, the Code Committee proposes to introduce a new Rule 8.4(b) in the following terms:

"**(b) If a shareholder who has given a letter of intent either (i) becomes aware that he will not be able to comply with the terms of that letter or (ii) no longer intends to do so, he must promptly announce that fact.**

Likewise, if a shareholder who has given an irrevocable commitment breaches the terms of that commitment, he must promptly announce that fact together with all relevant details.".

22.11 In addition, in order to make it clear that the disclosure of irrevocable commitments and letters of intent is governed by Rule 8.4 and Note 14 on Rule 8, and not Note 6 on Rule 8, the Code Committee also proposes to introduce a new paragraph (c) to Note 6 on Rule 8 (and to renumber the existing paragraph (c) as paragraph (d)) as follows:

"*(c) This Note does not apply to irrevocable commitments or letters of intent, which are subject to Rule 8.4 and Note 14.*

~~*(c)*~~*(d) See also Rule 4.4.*"

22.12 Similarly, in order to make clear that Rule 4.4(iii) does not prohibit the advisers (including stockbrokers) to an offeree company from obtaining irrevocable commitments or letters of intent not to accept an offer, the Code Committee proposes to introduce a new Note on Rule 4.4 in the following terms:

"*NOTE ON RULE 4.4*

Rule 4.4(iii) does not prevent an adviser to an offeree company from obtaining irrevocable commitments or letters of intent not to accept an offer."

Q.35 Do you agree that when an offeror or offeree company is disclosing the obtaining of an irrevocable commitment or letter of intent under Rule 8.4(a) it should be required to disclose the information set out in the proposed new Note 14 on Rule 8?

Q.36 Do you agree with the inclusion in the Code of the proposed Rule 8.4(b)?

Q.37 Do you agree with the proposed amendment to Note 6 on Rule 8 to make it clear that the disclosure of irrevocable commitments and letters of intent is governed by Rule 8.4 and Note 14 on Rule 8 and not by Note 6 on Rule 8?

Q.38 Do you agree with the inclusion in the Code of the proposed Note on Rule 4.4?

23. Documents to be on display

23.1 The Code Committee has been considering the extent to which offerors and offeree companies should be required to put on display copies of any irrevocable commitments and/or letters of intent so that they can be reviewed by other shareholders in the offeree company and by other interested parties.

23.2 In line with its conclusions set out above in connection with the disclosure of irrevocable commitments and letters of intent generally, the Code Committee considers that there should be an obligation to put on display a copy of any irrevocable commitment or letter of intent obtained by an offeror or by the offeree company.

23.3 Given this conclusion, the Code Committee also believes that there should be an equivalent obligation to put on display a copy of any agreements or arrangements of the kind referred to in Note 6 on Rule 8. If such agreements or arrangements have not been reduced to writing, there should be an obligation to put a memorandum of the terms of such agreements or arrangements on display.

23.4 The Code Committee considers that the obligation to put these documents on display should be triggered, as is currently the case, at the time that the offer document or offeree board circular, as appropriate, is published and should continue throughout the offer period. Accordingly, if, for example, an offeree company obtains an irrevocable commitment not to accept an offer after it has posted its defence document, it should put a copy on display when the irrevocable commitment is disclosed under Rule 8.4.

23.5 In the light of the above, the Code Committee proposes to amend paragraph (i) of Rule 26 and to introduce a new paragraph (o) of Rule 26 in each case as follows:

"**(i) any document evidencing an irrevocable commitment ~~to accept an offer~~ or a letter of intent;**"; and

"**(o) any agreements or arrangements, or, if not reduced to writing, a memorandum of the terms of such agreements or arrangements, of the kind referred to in Note 6 on Rule 8.**"

Q.39 Do you agree with the proposed amendments to Rule 26?

24. Disclosure of irrevocable commitments and letters of intent in offer documents and offeree board circulars

24.1 In view of the proposed amendments to the Code referred to above, the Code Committee has also been considering whether any amendments should be made to the Code to require the disclosure of irrevocable commitments and/or letters of intent, and of the shareholdings and dealings of persons giving such support, in offer documents and offeree company circulars. At present, the Code requires, under Rule 24.3(a)(iv), only that offer documents include details of the shareholdings in the offeror (in the case of a securities exchange offer only) and in the offeree company owned or controlled by persons who, prior to the posting of the offer document, have irrevocably committed themselves to accept the offer (together with the names of such persons) and also details of all dealings for value in the shares in question during the period beginning 12 months prior to the offer period and ending with the latest practicable date prior to the posting of the offer document.

24.2 The Code Committee does not consider the shareholdings and dealings of shareholders who have given an irrevocable commitment or a letter of intent to be material information for a shareholder in the offeree company and as a result the Code Committee does not propose that there should be a requirement in Rule 24.3 or Rule 25.3 for such information to be disclosed in

an offer document or an offeree company circular respectively. Accordingly, the Code Committee proposes to delete the existing sub-paragraph (a)(iv) of Rule 24.3 (and to renumber the existing sub-paragraph (v) accordingly) and the existing Note 5 on Rule 24.3 (and to renumber Note 6 accordingly). As a result, the second sentence of paragraph (b) of Rule 24.3 will also be amended as follows:

"**(b) If in any of the above categories there are no shareholdings, this fact should be stated; if, however, the person concerned has a short position, full details should be given. This will not apply to ~~categories~~ category (a)(iv) ~~or (v)~~ if there are no such ~~irrevocable commitments or~~ arrangements.**"

(*The above assumes that the proposed amendment to Rule 24.3(b) referred to in paragraph 7.3(a) will be adopted.*)

Q.40 Do you agree that it should not be necessary for the shareholdings and dealings of shareholders who have given irrevocable commitments or letters of intent to accept or not to accept an offer to be disclosed in the offer document or offeree company circular and, accordingly, do you agree with the proposed deletion of paragraph (a)(iv) of Rule 24.3 and Note 5 on Rule 24.3 and with the consequential amendment to Rule 24.3(b)?

24.3 However, the Code Committee considers that it is still important for there to be a requirement for the offer document to disclose details of any shareholdings in the offeree company (and, if appropriate, the offeror) in respect of which the offeror or any of its associates has received an irrevocable commitment or a letter of intent. Furthermore, the details which should be disclosed are those set out in Note 14 on Rule 8. As a result, the Code Committee proposes to introduce a new sub-paragraph (viii) to Rule 24.2(d) as follows (and to renumber the existing sub-paragraphs (viii) and (ix) accordingly):

"**(viii) details of any shareholdings in the offeree company (or, if appropriate, the offeror) in respect of which the offeror or any of its**

associates has received an irrevocable commitment or a letter of intent (see Note 14 on Rule 8);".

24.4 The Code Committee also proposes to amend Rule 2.5(b)(iii)*(c)* to refer also to letters of intent as follows:

"***(c)*** **in respect of which the offeror or any of its associates has received an irrevocable commitment ~~to accept the offer~~ or a letter of intent (see Note 14 on Rule 8);**"

In the light of this amendment, the existing Note 3 on Rule 2.5 will also be deleted (and the existing Notes 4 to 6 will be renumbered accordingly).

24.5 Likewise, the Code Committee proposes to make a similar amendment to Rule 25 to require the disclosure in an offeree board circular of any irrevocable commitments or letters of intent obtained by the offeree company or any of its associates. The Code Committee proposes to do this by amending Rule 25.6 as follows:

"**25.6 MATERIAL CONTRACTS, IRREVOCABLE COMMITMENTS AND LETTERS OF INTENT**

The first major circular from the offeree board advising shareholders on an offer must contain:

(a) a summary of the principal contents of each material contract (not being a contract entered into in the ordinary course of business) entered into by the offeree company or any of its subsidiaries during the period beginning two years before the commencement of the offer period, including particulars of dates, parties, terms and conditions and any consideration passing to or from the offeree company or any of its subsidiaries; and

(b) details of any shareholdings in the offeree company in respect of which the offeree company or any of its associates has received an irrevocable commitment or a letter of intent (see Note 14 on Rule 8)."

24.6 In addition, the Code Committee proposes to amend Rule 27.1(a) as follows to reflect the changes made to Rules 24.2(d) and 25.6:

"**(a) changes or additions to material contracts, irrevocable commitments or letters of intent (Rules 24.2(a), ~~and~~ (c) and (d)(viii) and 25.6);**".

Q.41 Do you agree with the proposed amendments to Rules 24.2(d)(viii), 2.5(b)(iii)*(c)*, 25.6 and 27.1(a) and with the consequential deletion of Note 3 on Rule 2.5?

25. Announcements of acceptance levels

The Code Committee believes that it is important that an announcement made by an offeror under Rule 17.1 of, inter alia, its level of acceptances should make clear the extent to which it has received acceptances in respect of shares which were subject to an irrevocable commitment or a letter of intent. This is to avoid the risk of double-counting such shares and to ensure that shareholders in the offeree company are, and the market generally is, properly able to understand the offeror's progress in satisfying the minimum offer acceptance level. As a result, the Code Committee proposes to amend Note 7 on Rule 17.1 as follows:

"*7. Irrevocable commitments, letters of intent and ~~P~~persons acting in concert*

An announcement under this Rule must make it clear to what extent acceptances have been received in respect of shares which were subject to an irrevocable commitment or a letter of intent to accept the offer or from persons acting in concert with the offeror. The announcement must also state the number of shares and rights over shares (as nearly as practicable) held before the offer period and acquired or agreed to be acquired during the offer period by persons acting in concert with the offeror."

Q.42 Do you agree with the proposed amendment to Note 7 on Rule 17.1?

26. Other minor amendments

(a) No requirement for separate disclosure under Rule 8.4 if all relevant details are included in a Rule 2.5 announcement

26.1 The Panel's existing practice is that where an offeror discloses that it has obtained irrevocable commitments and/or letters of intent in an announcement of a firm intention to make an offer under Rule 2.5, there is no need for a separate disclosure to be made under Rule 8.4. This is often the case with regard to irrevocable commitments to accept an offer as, on account of Rule 5.2(b), these are generally gathered the night before the announcement of the offer. Accordingly, the Code Committee proposes to include the following wording as the final paragraph of Note 14 on Rule 8:

"*No separate disclosure by an offeror is required under Rule 8.4 where the relevant information is included in an announcement made under Rule 2.5 which is released no later than 12 noon on the business day following the date on which the irrevocable commitment or letter of intent is obtained.*"

Q.43 Do you agree that no separate disclosure should be required under Rule 8.4 where the relevant information relating to the irrevocable commitments and/or letters of intent is included in a Rule 2.5 announcement?

(b) Consequential amendment to Note 12 on Rule 8 in the light of Rule 8.4

26.2 Under Note 12 on Rule 8, if a potential offeror has been the subject of an announcement that talks are taking place (whether or not the potential offeror has been named), or has announced that he is considering making an offer, the potential offeror and persons acting in concert with it must disclose dealings in accordance with Rule 8.1 and such disclosures must include the identity of the potential offeror. The Code Committee believes that a potential offeror to which Note 12 on Rule 8 applies which obtains (or an associate of which obtains) an irrevocable commitment or letter of intent should equally have to disclose that fact in accordance with Rule 8.4 and, accordingly, the Code Committee proposes to amend Note 12 on Rule 8 as follows:

"*If a potential offeror has been the subject of an announcement that talks are taking place (whether or not the potential offeror has been named) or has announced that ~~he~~ it is considering making an offer, the potential offeror and persons acting in concert with it must disclose dealings in accordance with*

Rule 8.1 and must disclose the obtaining of irrevocable commitments or letters of intent in accordance with Rule 8.4 and such disclosures must include the identity of the potential offeror ~~as required by Note 5~~."

Q.44 Do you agree with the proposed amendments to Note 12 on Rule 8?

SECTION E
MISCELLANEOUS

27. Stock borrowing and lending

(a) Stock borrowing and lending by persons other than offerors, offeree companies and certain persons associated with them

27.1 Stock borrowing and lending transactions on normal market terms are not usually regarded by the Panel as dealings for the purposes of Rule 8. Accordingly, the actions of borrowing or lending relevant securities, and of returning relevant securities which have been borrowed to the lender, are not required to be disclosed.

27.2 The Panel has taken this stance because although stock borrowing and lending transactions involve a transfer of title to the securities, the borrower is under an obligation to return the borrowed (or equivalent) securities to the lender (i.e. such that title to those securities is likely to be transferred back). Persons who borrow securities generally do so for the purpose of on-lending those securities on better terms or in order to settle transactions where the person concerned has sold securities which it does not own and therefore has a short position.

27.3 Consistent with this, it is also the Panel's practice (except in the context of Rule 9 (as to which see (e) below)) to treat lent securities as controlled by the lender notwithstanding that his name will not be on the share register in respect of the lent securities. This is because the borrower will be under an obligation to return to the lender in due course the securities which have been lent (or equivalent securities). Similarly, the Panel does not normally regard stock which has been borrowed as controlled by the borrower (again, except in the context of Rule 9). If the borrower has not on-lent or delivered the securities to another person, he will be in a position to exercise the voting rights attaching to the securities or to accept such shares to an offer. However,

he will be obliged to return them (or equivalent securities) to the lender in due course.

27.4 This practice has consequences in terms of determining when a person is obliged to disclose dealings under Rule 8.3 and also what resultant total holding should be disclosed when a person discloses a dealing. The following example, involving persons A and B, neither of whom are associates of the offeror or offeree company, illustrates these points. If A holds 2% of the offeree company's issued ordinary shares, lends them to B (who does not own any other offeree company shares) and then purchases 0.5% of such shares, A will be required to disclose its purchase under Rule 8.3 and to disclose that the resultant total holding of such shares owned or controlled by it is 2.5%. Irrespective of whether B on-lends or delivers the shares which it has borrowed to another person, if B then purchases 0.5% of such shares it will not be obliged to disclose its purchase under Rule 8.3. This is because the Panel will regard B as owning or controlling 0.5% of the offeree company's issued ordinary shares rather than 2.5%.

27.5 The Code Committee believes that the Panel's general policy with regard to stock borrowing and lending as set out above should be set out in the Code. Accordingly, the Code Committee proposes to:

(a) add the following additional sentence to Note 2 on Rule 8:

"*The taking, granting or exercising of an option (including a traded option contract) in respect of any of the foregoing or the exercise or conversion of any security under (d) above whether in respect of new or existing securities and the acquisition of, entering into, closing out, exercise (by either party) of any rights under, or variation of, a derivative will be regarded as a dealing in relevant securities (see also Notes 5 and 7 below). Subscribing or agreeing to subscribe for new relevant securities will also be regarded as a dealing. <u>The borrowing or lending of relevant securities will not normally be regarded as a dealing in relevant securities.</u>*"

(*The above assumes that the proposed amendment to Note 2 on Rule 8 referred to in paragraph 8.2 above will be adopted.*); and

(b) introduce a new Rule 8.5, the first part of which will be in the following terms:

"**8.5 STOCK BORROWING AND LENDING**

Relevant securities which have been lent by one person to another will normally be regarded as controlled by the lender rather than the borrower and will not normally be regarded as owned by the borrower for the purpose of Rule 8. Similarly, the borrowing or lending of relevant securities will not normally be regarded as a dealing in relevant securities."

27.6 However, the Code Committee also recognises that securities may sometimes be borrowed for other purposes, such as to enable the borrower to exercise the voting rights attaching to the securities. In the context of an offer, a person may wish to borrow shares in order to vote them on a resolution required by Rule 21.1 or to accept the shares to the offer. In such circumstances, there could be concerns about a lack of transparency if the borrower does not disclose his interest with the consequence that shareholders would have no knowledge that the borrower controls the voting rights at a particular (and potentially sensitive) moment in time.

27.7 In the light of paragraph 27.6 above, one option would be to amend Rule 8.3 to require the disclosure of all stock borrowing and lending transactions in relevant securities during an offer period by persons to whom Rule 8.3 applies (or to whom Rule 8.3 would apply if borrowing was treated as a dealing). However, the Code Committee understands that this could lead to voluminous disclosures of stock borrowing and lending transactions, the vast majority of which would have been carried out in accordance with normal market activity and would not therefore be of any relevance to the offer. In addition, although securities controlled by the fund management community represent a very significant proportion of the stock available to be lent, the day to day lending activities in respect of such securities are conducted by the custodians of the stock, operating within guidelines established by the fund manager.

Accordingly, the information which the fund management organisations would require in order to comply with such a disclosure obligation may not be readily available to them and the establishment of the necessary systems to achieve this could lead to considerable costs having to be incurred and a substantial increase in the volume of Rule 8 disclosures, most of which would be immaterial in the context of an offer.

27.8 In view of these cost/benefit issues, the Code Committee considers that, on balance, the appropriate and proportionate way of addressing the point raised in paragraph 27.6 above is to require a person to whom Rule 8.3 applies (or to whom Rule 8.3 would apply if borrowing was treated as a dealing) to consult the Panel prior to borrowing securities for a reason connected with an offer. In such circumstances, the Panel could then determine what consequences should result from such a transaction, including whether it should be disclosed.

27.9 The advantage of such a proposal is that normal stock borrowing and lending activities (by persons other than the offeror, the offeree company and certain persons associated with them, as to which see (b) below), for example, for the purposes of filling a short position or on-lending could continue without any consequence under the Code. However, where, for example, a person wishes to borrow securities for a reason connected with an offer, for example in order to vote the shares at an offer related general meeting or to accept them to an offer, he would be required to consult the Panel in advance and would normally be required to disclose such a transaction.

27.10 In the light of the above, the Code Committee proposes that the new Rule 8.5 should go on to provide as follows:

"**8.5 STOCK BORROWING AND LENDING**

…

However, if a person to whom Rule 8.3 applies (or to whom Rule 8.3 would apply if borrowing was regarded as a dealing) wishes to borrow relevant securities during an offer period for a reason connected with an

offer, he should consult the Panel before entering into such a transaction. In such circumstances, the Panel will normally require the transaction to be disclosed by that person as if it were a dealing in relevant securities. (See also Rule 4.6.)"

(*The reference to Rule 4.6 is explained in (b) below*.)

Q.45 Do you agree that stock borrowing and lending should not normally be regarded as a dealing and that borrowed stock should be regarded as controlled by the lender rather than the borrower? If so, do you agree with the proposed amendment to Note 2 on Rule 8 and with the first part of proposed new Rule 8.5?

Q.46 Do you agree that a person to whom Rule 8.3 applies (or to whom Rule 8.3 would apply if borrowing was regarded as a dealing) should consult the Panel before borrowing relevant securities for a reason connected with an offer and, if so, do you agree with the proposed addition to the proposed new Rule 8.5?

(b) Borrowing and lending by offerors, offeree companies and certain persons associated with them

27.11 It is rare for offerors, offeree companies or persons associated with them to borrow or lend relevant securities, or to seek to unwind such transactions, during an offer period. The Panel has, however, encountered some instances of such activity in recent years. Relevant securities may have been borrowed or lent before the commencement of the offer period or it may be the wish of such parties to borrow or lend relevant securities during the offer period. In such cases the Panel has had concerns that the purpose underlying the borrowing or lending may have been to secure a tactical advantage or to manipulate the price or location of relevant securities and, accordingly, that there was a risk of potential abuse.

27.12 The Code Committee agrees that there is a risk of potential abuse. It recognises, however, that the possible circumstances in which stock borrowing

or lending issues may arise are many and varied and that such activity may in certain cases be perfectly legitimate. Accordingly, whilst one way of addressing the risk of potential abuse would be to prohibit offerors, offeree companies and persons associated with them from borrowing or lending relevant securities during an offer period, the Code Committee considers that that would be disproportionately restrictive. On balance, the Code Committee believes that the most appropriate way of addressing this issue is to oblige offerors, offeree companies and certain persons associated with them to obtain the Panel's consent before carrying out stock borrowing or lending transactions. It therefore proposes to add a new Rule 4.6 to the Code as follows:

"**4.6 RESTRICTION ON STOCK BORROWING AND LENDING TRANSACTIONS BY OFFERORS, THE OFFEREE COMPANY AND CERTAIN OTHER PARTIES**

During the offer period, none of the following persons may, except with the consent of the Panel, enter into or take action to unwind a stock borrowing or lending transaction in respect of relevant securities:

(a) the offeror and persons acting in concert with it;

(b) the offeree company or persons acting in concert with the directors of the offeree company;

(c) a company which is an associate of the offeror or the offeree company by virtue of paragraph (1) of the definition of associate;

(d) a financial or professional adviser to the offeror or the offeree company, to a company which is an associate of the offeror or the offeree company by virtue of paragraph (1) of the definition of associate or to a person acting in concert with the offeror or with the directors of the offeree company, and persons controlling, controlled by or under the same control as any such adviser (except for an exempt principal trader or an exempt fund manager); and

(e) a pension fund of the offeror or the offeree company or of a company which is an associate of the offeror or the offeree company by virtue of paragraph (1) of the definition of associate.

NOTES ON RULE 4.6

1. Return of borrowed relevant securities

Returning relevant securities which have been borrowed, or receiving relevant securities (or equivalent securities), in each case in accordance with an existing stock borrowing or lending agreement, will not normally be treated as taking action to unwind a stock borrowing or lending transaction.

2. Pension funds

Rule 4.6(e) does not apply in respect of any pension funds which are managed under an agreement or arrangement with an independent third party in the terms set out in Note 6 on the definition of acting in concert."

27.13 The Code Committee does not consider that this will be an onerous restriction because, first, activity of this kind by the persons restricted is likely to arise infrequently and, secondly, the restriction is not an absolute prohibition. The Panel will retain the flexibility to permit such activity where it is persuaded that its purpose is not manipulative. If the Panel were to permit a stock borrowing or lending transaction by a person to whom Rule 4.6 applies to take place, the Code Committee would expect that the Panel would normally require it to be disclosed as if it were a dealing in the relevant securities. It is proposed that this should be reflected in new Note 3 on Rule 4.6 as follows:

"3. *Disclosure of transaction where consent is given*

Where the Panel consents to a person to whom Rule 4.6 applies entering into or taking action to unwind a stock borrowing or lending transaction in respect of relevant securities, the Panel will normally require the transaction to be disclosed by that person as if it were a dealing in the relevant securities."

27.14 As described above in paragraph 2, the Code Committee is proposing that Rule 7.2 and its Notes should be replaced. It is also proposing certain consequential amendments to the Notes on each of the Rules referred to in Rule 7.2. The new Rule 4.6 will also be referred to in Rule 7.2 and the Notes on Rule 7.2 (as such provisions are proposed to be amended) and the Code Committee is therefore proposing that there should be an equivalent Note on Rule 4.6 as follows:

"*4. Discretionary fund managers and principal traders*

Stock borrowing or lending transactions by non-exempt discretionary fund managers and principal traders which are subject to Rule 4.6(c) will be treated in accordance with Rule 7.2."

Q.47 Do you agree that the persons listed in proposed Rule 4.6 should be prevented from entering into or unwinding stock borrowing or lending transactions in respect of relevant securities and with the proposed restriction in the new Rule 4.6 and its Notes?

(c) Note 5(a) on Rule 8

27.15 In the light of the proposed new Rules 4.6 and 8.5, the Code Committee proposes to introduce the following two new paragraphs to Note 5(a) on Rule 8 in the following terms:

"*Where a disclosure of a stock borrowing or lending transaction is made under Rule 4.6 or Rule 8.5, all relevant details should be given.*

Where offerors, offeree companies or persons acting in concert with the offeror or the directors of the offeree company disclose a dealing in relevant securities and have previously borrowed relevant securities from, or lent such securities to, another person, all relevant details should be given."

Q.48 Do you agree with the amendment to Note 5(a) on Rule 8 in respect of stock borrowing and lending transactions?

(d) Treatment of borrowed or lent stock in the context of a Rule 10 acceptance condition

27.16 From time to time, the Panel has encountered cases where an offeror has borrowed or lent offeree company shares prior to the commencement of the offer period and the question has arisen of which shares the offeror may count towards the satisfaction of its Rule 10 acceptance condition.

27.17 The Panel has taken the view that an offeror should not count offeree company shares which it has borrowed towards its Rule 10 acceptance condition because, although it will be the registered owner of such shares, it will be

obliged to return the shares to the lender in due course. If the offeror were permitted to count such shares and this enabled the offeror to declare its offer unconditional as to acceptances, then the unwinding of the borrowing could reduce the offeror's position to below 50%. This would be unsatisfactory since the offeror would not then have majority control of the offeree company and yet the offer would be unconditional as to acceptances.

27.18 The Panel has also regarded it as unacceptable for an offeror to count offeree company shares which it has lent to another person merely by virtue of the right to have the shares returned. In such circumstances, the offeror will not be the registered owner of the shares and although it will have a right to call for the return of the shares from the borrower, it can never guarantee that the borrower will in fact return the shares when called upon to do so. The borrower might, for example, renege on the contract or be unable to return the shares to the offeror for some reason. The Panel has always placed great importance on an offeror achieving a clear and indisputable majority before it is able to declare its offer unconditional as to acceptances.

27.19 Under Rule 10, a contractual acceptance of an offer cannot be counted towards fulfilling an acceptance condition unless, broadly speaking, it is either accompanied by the relevant share certificate or, if the shares are held in CREST, the transfer of the shares to the escrow account has settled. In both cases, the offeror should then be able to complete the transfer of title to itself without further involvement of the offeree shareholder. By contrast, a contractual right for an offeror to call for the return of shares which it has lent would not, in the Panel's opinion, provide a sufficient level of certainty that the offeror will secure ownership of those shares as this is not ultimately within its control. It is not therefore acceptable for an offeror to count such shares towards satisfaction of an offer acceptance condition by virtue of the right to have the shares returned. However, a person to whom the offeror has lent the shares may accept the offer and that acceptance may be counted towards the Rule 10 acceptance condition if it satisfies the requirements of Note 4 on Rule 10.

27.20 The Code Committee therefore considers that the position should be clarified in the Code. It therefore proposes that the Code be amended by adding a new Note 8 on Rule 10 as follows:

"*8. Borrowed shares*

Except with the consent of the Panel, shares which have been borrowed by the offeror may not be counted towards fulfilling an acceptance condition.".

27.21 The Code Committee does not believe that it is necessary or appropriate for Note 8 on Rule 10 to refer to shares lent by the offeror on the basis that the borrower and not the offeror will be registered as the owner of such shares.

Q.49 Do you agree with the proposed new Note 8 on Rule 10?

(e) Treatment of borrowed or lent stock in the context of Rule 9

27.22 In the context of Rule 9 (and therefore also Rule 5), the Panel considers that it is appropriate to treat a person who has borrowed or lent shares as itself holding the voting rights in respect of the shares which have been borrowed or lent (as applicable). This is because the Panel believes that, given the importance of the control threshold in the Code, it is appropriate to take a conservative approach in the context of Rule 9 and, in respect of borrowed stock, the borrower will be registered as the owner of such shares and will therefore hold the voting rights in respect of them; and, in respect of lent stock, the borrower will be under an obligation to return the relevant shares (or equivalent shares) to the lender.

27.23 The Code Committee considers that this practice should be made clear in the Code and proposes to introduce a new Note 18 on Rule 9.1 to this effect. Furthermore, the Code Committee considers that there should be a requirement that the Panel is consulted before a person acquires or borrows shares which, when taken together with any shares already held, borrowed or lent by him or by any person acting in concert with him, would result in Rule 9 being triggered. The Panel will then be in a position to decide whether the

shares which have been borrowed or lent should be counted towards the acceptance condition, and, if they are not to be counted, what action should be taken in the event that the offer lapses on account of insufficient acceptances but would not have lapsed if the borrowed or lent shares had counted towards the acceptance condition. For example, in order to safeguard shareholders' interests, it may be appropriate in such circumstances for an offeror or concert party which has lent shares to be required not to unwind the transaction for a specified period, or, if the lending is unwound (such that title in respect of the shares is transferred to the offeror or its concert party), for the offeror to be required to make a new offer or to reduce its shareholding.

27.24 In the light of the above, the Code Committee proposes to introduce a new Note 18 on Rule 9.1 in the following terms:

"*18. Borrowed or lent stock*

If a person has borrowed or lent shares, the voting rights in respect of such shares will be treated as being held by that person for the purpose of this Rule. A person must consult the Panel before acquiring or borrowing shares which, when taken together with shares already held, borrowed or lent by him or any person acting in concert with him, would result in this Rule being triggered. In such circumstances, the Panel will then decide, inter alia, how the borrowed or lent shares should be treated for the purpose of the acceptance condition."

Q.50 Do you agree with the proposed new Note 18 on Rule 9?

28. Derivatives referenced to baskets or indices of securities

28.1 The market price and location of underlying securities is likely to be affected by dealings in derivative products because the counter-parties will usually wish to hedge their financial exposure under the derivative by taking a position, long or short, in the underlying securities to which the derivative is referenced. Market prices and the location of stock may therefore be influenced at one remove by persons dealing in derivatives. In view of the knock-on impact of derivative dealings on the cash market, and the possibility that derivative dealings might be transacted for manipulative purposes, the

Code provisions which require the disclosure of dealings in/or holdings of certain securities were extended in 1996 to cover derivatives referenced to relevant securities.

28.2 For similar reasons, certain dealings in derivatives are restricted by the Code. For example, under Rule 4.4, which prohibits certain offeree company associates from purchasing offeree company shares, such parties are also prohibited from dealing in derivatives referenced to offeree company shares. Without this prohibition, offeree company associates could transact dealings in derivatives which would be likely to cause the counter-parties to buy offeree company shares, thereby circumventing the restrictions in Rule 4.4.

28.3 The Code definition of a derivative is drawn extremely widely. This is intentional because derivatives are bespoke investment products. If a narrower definition were adopted, it would be easy for persons who wished to avoid the Code's requirements and restrictions to do so by designing derivatives which fell outside the definition.

28.4 The Panel has, however, always been of the view that, where the characteristics of a derivative are such that it may reasonably be regarded as not having a connection with an offer or potential offer, there is no need for dealing restrictions or disclosure. This stance is relevant to the many derivative products which are referenced to baskets or indices of securities rather than to single stocks. Where that is the case, and relevant securities make up only a small part of the basket or index, concerns about possible manipulation are diminished because manipulation by this method tends not to be cost efficient.

28.5 Accordingly, it has been the Panel's practice in respect of derivatives referenced to a basket or index to say that where at the time of dealing relevant securities to which the derivative is referenced represent less than 1% of the class in issue and, in addition, less than 10% of the referenced securities by value, the derivative will normally not be regarded as having a connection with an offer or potential offer. In other words, dealings and holdings of

derivatives which meet these tests will not be required to be disclosed and dealings in such derivatives will not be restricted by the Code. These tests for deciding whether a derivative has a connection with an offer or potential offer are not determinative and only represent guidance. If the tests were determinative, it would be possible to design derivative products which met the tests in an artificial manner with the consequence that the Code provisions relevant to derivatives would not apply to them. This would be unsatisfactory. For example, the moving value of a derivative referenced to a basket which included cash or gilt-edged securities representing 91% of the value of the basket and relevant securities representing 9% of that value would clearly be closely linked to movements in the price of the relevant securities in the basket. The Code Committee believes that such a derivative should be regarded as having a connection with an offer or potential offer.

28.6 In administering this practice the Panel has not required a disclosure to be made if as a result of movements in the market price of the securities in the basket or index the 10% value test has ceased to be met but no dealing in the derivative product itself has taken place. In such circumstances, however, if a further dealing in the derivative were to be transacted at a time when the value of the relevant securities represented 10% or more of the value of the referenced securities, a disclosure would be required. As stated in Note 2 on Rule 8, the acquisition of, entering into, closing out, exercise (by either party) of any rights under, or variation of, a derivative will be regarded as a dealing.

28.7 In the event that there are relevant securities of more than one company in a basket or index, for example relevant securities of both the offeror company and the offeree company, the Panel has applied the 10% value test to the securities of each company separately and not to all the relevant securities in the basket or index collectively.

28.8 The Code Committee considers that the 10% value test could be replaced with a 20% value test without compromising market transparency or creating a serious risk of abuse. It believes that this practice should be spelt out in the

Code and that certain other minor changes should be made to the Note on the definition of "derivative" so that it would read as follows:

"*The term ''derivative'' is intentionally widely defined to encompass all types of derivative transactions. However, it is not the intention of the Code to restrict dealings in, or require disclosure of, derivatives which ~~have no connection~~ are not connected with an offer or ~~anticipated~~ potential offer. ~~Offerors, offeree companies and their financial advisers should consult the Panel at the earliest stage in order to determine whether a dealing in a derivative is to be regarded as having a connection with the offer or potential offer.~~ The Panel will not normally regard a derivative which is referenced to a basket or index of securities, including relevant securities, as connected with an offer or potential offer if at the time of dealing the relevant securities in the basket or index represent less than 1% of the class in issue and, in addition, less than 20% of the value of the securities in the basket or index. In the case of any doubt, the Panel should be consulted.*"

Q.51 Do you agree with the policy in respect of derivatives referenced to baskets or indices of securities and the proposed amendments to the Note on the definition of "derivative"?

29. The application of Rule 4.2 to dealings in options and derivatives

29.1 Rule 4.2 (which it is proposed in paragraph 3 above will become Rule 4.2(a)) of the Code provides as follows:

"**During an offer period, the offeror and persons acting in concert with it must not sell any securities in the offeree company except with the prior consent of the Panel and following 24 hours public notice that such sales might be made. The Panel will not give consent for sales where a mandatory offer under Rule 9 is being made. Sales below the value of the offer will not be permitted. After there has been an announcement that sales may be made, neither the offeror nor persons acting in concert with it may make further purchases and only in exceptional circumstances will the Panel permit the offer to be revised.**"

29.2 This Rule is designed to prevent offerors and persons acting in concert with them from misleading or manipulating the market, and is also therefore a reflection of General Principle 6 which addresses false markets. For example, a false market might be created in the shares of the offeree company if an offeror or potential offeror, which would reasonably be considered to be a

purchaser of those shares, in fact disposes of its interest during the offer period. In other words, the market might reasonably consider such a sale to be an indication that the offeror or potential offeror did not intend to proceed or continue with an offer for the offeree company.

29.3 In the case of an offeror or potential offeror which has entered into a long contract for differences referenced to the shares of the offeree company, the Panel's practice is to regard the closing out of such a contract for differences during the offer period as being equivalent to the sale of the underlying offeree company shares represented by the contract for differences and, as such, subject to Rule 4.2 (as currently numbered). This is because the party with whom the contract for differences was entered into will generally hedge its exposure by acquiring an equivalent number of securities in the offeree company, and on the contract for differences being closed out, will then sell the shares. Similar issues arise with other derivatives where the counter-party is likely to hedge its exposure under the derivative through dealings in offeree securities or, in some instances, with option arrangements in respect of such securities.

29.4 The Code Committee is therefore proposing to add the following new sentence to the end of Rule 4.2:

"…

The Panel should be consulted whenever the offeror or a person acting in concert with it proposes to enter into or close out any type of transaction which may result in securities in the offeree company being sold during the offer period either by that party or by the counterparty to the transaction."

Q.52 Do you agree with the proposed amendment of Rule 4.2 to refer to transactions which might result in securities being sold?

30. Disclosure of dealings in offeree board circulars

30.1 Rule 25 sets out the information that must be included in any document issued by the offeree company to its shareholders and, in particular, Rule 25.3 sets

out details of the holdings of, and dealings in, relevant securities by the offeree company and its associates that must be included in any such offeree board circular.

30.2 In relation to holdings of relevant securities, Rule 25.3(a) requires disclosure to be made in respect of (broadly):

(a) the offeree company;

(b) the directors of the offeree company;

(c) subsidiaries of the offeree company, pension funds of the offeree company and its subsidiaries and advisers to the offeree company;

(d) persons who have entered into arrangements of the kind referred to in Note 6 on Rule 8 with the offeree company or with certain of its associates; and

(e) discretionary fund managers and, if the proposals are adopted, principal traders connected with the offeree company (save for where such fund managers or principal traders benefit from exempt status).

30.3 In relation to dealings in relevant securities by the persons whose holdings are required to be disclosed, Rule 25.3(c)(i) requires dealings by the offeree company and its directors to be disclosed during the period beginning 12 months prior to the offer period. However, in relation to the other persons whose dealings in relevant securities must be disclosed, Rule 25.3(c)(ii) only requires their dealings during the offer period (and not during any earlier period) to be set out in the offeree board circular.

30.4 The Code Committee has considered these disclosure requirements and believes, in order to make Rule 25.3 consistent with certain amendments proposed elsewhere in this document and in order also to remove the existing overlap between paragraphs (a)(iii) and (a)(v) of Rule 25.3 in respect of advisers, that the Rule should apply to the following categories of person (in

the place of the categories referred to in sub-paragraphs (c) and (e) of paragraph 30.2 above):

(a) companies which are associates of the offeree company by virtue of paragraph (1) of the definition of associate;

(b) pension funds of the offeree company or of a company which is an associate of the offeree company by virtue of paragraph (1) of the definition of "associate", save for any such pension funds which are managed by an independent third party in the terms set out in proposed Note 6 on the definition of "acting in concert";

(c) employee benefit trusts of the offeree company or of a company which is an associate of the offeree company by virtue of paragraph (1) of the definition of "associate"; and

(d) advisers (including persons controlling, controlled by or under the same control as the adviser) to the offeree company, to a company which is an associate of the offeree company by virtue of paragraph (1) of the definition of "associate" or to a person who is acting in concert with the directors of the offeree company, including discretionary fund managers and principal traders connected with the offeree company (save for where such fund managers of principal traders benefit from exempt status).

30.5 With regard to the disclosure of share dealings, the Code Committee believes there is no compelling reason for any distinction between the position of those persons currently required to disclose their dealings during the period beginning 12 months prior to the offer period and those who only need disclose dealings since the beginning of the offer period. The Code Committee therefore proposes to harmonise the disclosure requirements of Rule 25.3(c).

30.6 At the same time, the Code Committee considers it is unnecessary always to require dealing disclosures during the 12 month period prior to the beginning of the offer period in respect of the offeree company and its associates.

Whereas disclosure for this period is appropriate in relation to dealings by the offeror and its concert parties (given the application of Rule 11.1 and Rule 9.5), the Code Committee believes that disclosure only during the offer period should be adequate for the offeree company and its associates.

30.7 The Code Committee is therefore proposing to amend Rule 25.3 and the Note on Rule 25.3 as set out below:

"**(a) The first major circular from the offeree board advising shareholders on an offer (whether recommending acceptance or rejection of the offer) must state:-**

(i) the shareholdings of the offeree company in the offeror;

(ii) the shareholdings in the offeree company and in the offeror in which directors of the offeree company are interested;

(iii) the shareholdings in the offeree company and (in the case of a securities exchange offer only) in the offeror owned or controlled by a ~~subsidiary of the offeree company, by a pension fund of the offeree company or of a subsidiary of the offeree company, or by an adviser to the offeree company as specified in paragraph (2) of the definition of associate but excluding exempt market makers~~company which is an associate of the offeree company by virtue of paragraph (1) of the definition of associate;

(iv) the shareholdings in the offeree company and (in the case of a securities exchange offer only) in the offeror owned or controlled by a pension fund of the offeree company or by a pension fund of a company which is an associate of the offeree company by virtue of paragraph (1) of the definition of associate;

(v) ~~except with the consent of the Panel,~~ the shareholdings in the offeree company and (in the case of a securities exchange offer only) in the offeror ~~which are managed on a discretionary basis by fund managers (other than exempt fund managers) connected with the offeree company (the beneficial owner need not be named);~~ owned or controlled by an employee benefit trust of the offeree company or by an employee benefit trust of a company which is an associate of the offeree company by virtue of paragraph (1) of the definition of associate;

(vi) the shareholdings in the offeree company and (in the case of a securities exchange offer only) in the offeror owned or controlled by an adviser to the offeree company, by an adviser to a company which is an associate of the offeree company by virtue of

paragraph (1) of the definition of associate, by an adviser to a person who is acting in concert with the directors of the offeree company or by a person controlling, controlled by or under the same control as any such adviser, including the shareholdings of a principal trader which is connected with the offeree company and the shareholdings which are managed on a discretionary basis by a fund manager connected with the offeree company (except for the shareholdings of exempt principal traders and exempt fund managers respectively);

(vii) the shareholdings in the offeree company and (in the case of a securities exchange offer only) in the offeror owned or controlled by a person who has an arrangement of the kind referred to in Note 6(b) on Rule 8 with the offeree company or with any person who is an associate of the offeree company by virtue of paragraphs (1), (2), (3) or (4) of the definition of associate; and

(viii) whether the directors of the offeree company intend, in respect of their own beneficial shareholdings, to accept or reject the offer.

(b) If in any of the above categories there are no shareholdings, then this fact should be stated; if, however, the person concerned has a short position, full details should be given. This will not apply to category (a) ~~(iv)~~ (vii) if there are no such arrangements.

(c) ~~(i)~~If any party whose shareholdings are required by ~~paragraphs (a)(i) or (ii) of~~ this Rule to be disclosed (whether there is a existing holding or not) has dealt for value in the shares in question during ~~the period beginning 12 months prior to~~ the offer period and ending with the latest practicable date prior to the posting of the circular, the details, including dates and prices, must be stated.

~~(ii) If any party whose shareholdings are required by paragraphs (a)(iii), (iv) or (v) of this Rule to be disclosed (whether there is an existing holding or not) has dealt for value in the shares in question during the offer period and ending with the latest practicable date prior to the posting of the circular, similar details must be stated.~~

~~(iii)~~ In all cases, if no such dealings have taken place this fact should be stated.

(*If the amendment to Rule 25.3(a)(v) above is adopted, the amendment proposed in paragraph 2.17(b) will not be made. The amendment to Rule 25.3(b) above assumes that the amendments proposed in paragraphs 2.17(c) and 7.3(b) above will be adopted.*)

NOTES ON RULE 25.3

(See also Notes on Rule 24.3 which apply equally to this Rule.)

1. When directors resign

When, as part of the transaction leading to an offer being made, some or all of the directors of the offeree company resign, this Rule applies to them and their shareholdings and dealings must be disclosed in the circular in the usual way.

2. Pension funds

Rule 25.3(a)(iv) does not apply in respect of any pension funds which are managed under an agreement or arrangement with an independent third party in the terms set out in Note 6 on the definition of acting in concert."

30.8 As consequential amendments, the Code Committee is also proposing to:

(a) amend Rule 37.4(b) by deleting the words "**the period commencing 12 months prior to**"; and

(b) amend paragraph 4(i) of Appendix 1 as follows:

"**(i) Rules 24.3 and 25.3 (disclosure of shareholdings and dealings). Dealings in respect of Rule 24.3 should be covered for the 12 months prior to the posting of the circular; but ~~this does not apply in respect of Rule 25.3(a)(iii), (iv) or (v)~~ dealings in respect of Rule 25.3 need not be disclosed as there is no offer period ~~(see Rule 25.3(c)(ii))~~.**"

Q.53 Do you agree with the proposed amendments to the disclosure of dealings in relevant securities in offeree board circulars and the consequential amendments referred to above?

31. Acquisitions from a single shareholder

31.1 The Panel's 2002-2003 Annual Report stated as follows:

"Rule 5.1 and SAR 1 both impose certain restrictions on the acquisition of shares and/or rights over shares. Broadly, Rule 5.1 restricts acquisitions that take a person's voting rights in a company through 30%; and SAR 1 restricts

the speed with which a person may accumulate between 15% and 30% of the voting rights in a company. In each case, an exception exists in the case of an acquisition from a single shareholder (see Rule 5.2(a) and SAR 2(a)).

A fund manager managing investment accounts on behalf of a number of underlying clients (whether or not on a discretionary basis) is not regarded as a single shareholder. Accordingly, the exceptions in Rule 5.2(a) and SAR 2(a) will not apply to a purchase from a fund manager unless the interest acquired represents the interest of a single underlying entity. In cases of doubt, the Panel should be consulted."

31.2 The single shareholder exception referred to in the above extract (or its predecessors) has been a part of the SARs and Rule 5 since their respective inceptions. However, it has always been the Panel's policy to apply the exemption narrowly.

31.3 Whilst a fund manager is generally required to aggregate the holdings it manages on a discretionary basis for Code purposes, the Panel believes the single shareholder exception is founded on rights of ownership and not control (or management). The Code Committee considers that ownership of shares managed by a fund manager rests ultimately with its underlying clients and that it is, accordingly, inappropriate to apply the single shareholder exception in the case of a fund manager who does not own the shares in question.

31.4 The Code Committee considers that it would be helpful for the Code and the SARs to be clear on this point and is, therefore, proposing to make the amendments to Note 1 on Rule 5.2 and the Note on SAR 2 set out below. Both Notes currently refer to the fact that a market-maker will not be considered to be a single shareholder for the purpose of the relevant Rules. These Notes will be amended first, to refer to principal traders and secondly, by the inclusion of the word "normally" as discussed in paragraph 31.5 below. One effect of this policy is that the closing out of a derivative contract and the purchase from a principal trader of the relevant hedge stock will normally be subject to the restrictions contained in Rule 5.1 and SAR 1.

31.5 The Code Committee is conscious that there may be cases where a principal trader should be entitled to benefit from the single shareholder exception. The existence of the word "normally" in each of Note 1 on Rule 5.2 and the Note on SAR 2 will give the Panel discretion to permit this. In deciding whether this might be appropriate, the Panel will have regard to the circumstances under which the holding has been acquired, how long it has been held, where within the principal trader's organisation it is held (both legally and for trading purposes) and any other relevant factors.

31.6 The amendments proposed are:

(a) to amend Note 1 on Rule 5.2 as follows:

"*1. Single shareholder*

For the purpose of Rule 5.2(a), a number of shareholders wishing to dispose of their shares or rights over their shares will be regarded as a single shareholder only if they are all members of the same family or of a group of companies which is regarded as one for disclosure purposes under Section 203(2) to (4) of the Companies Act 1985. ~~*Except with the consent of the Panel, a market maker*~~ *A principal trader or a fund manager managing investment accounts on behalf of a number of underlying clients (whether or not on a discretionary basis) will not normally be considered to be a single shareholder for the purpose of this Rule. The Panel should be consulted in cases of doubt.*"; and

(b) to amend the Note on SAR 2 as follows:

"*NOTE ON RULE 2*

~~*Market makers*~~ *Principal traders and fund managers*

~~*Except with the consent of the Panel, a market maker*~~*A principal trader or a fund manager managing investment accounts on behalf of a number of underlying clients (whether or not on a discretionary basis) will not normally be considered to be a single shareholder for the purpose of this Rule. The Panel should be consulted in cases of doubt.*"

Q.54 Do you agree with the proposed amendments to Note 1 on Rule 5.2 and the Note on Rule 2 of the SARs?

32. Clarification of details to be disclosed pursuant to Rule 5.4

32.1 Where a person has made a purchase from a single shareholder permitted by Rule 5.2(a), Rule 5.4 requires a public announcement to be made. However, the Rule does not state what details must be included in the announcement regarding the identity of the purchaser. The Code Committee believes this should be clarified and is, therefore, proposing to add a Note on Rule 5.4 which would cross refer to Note 5(a) on Rule 8. That Note requires the identity of the person dealing and, if different, the owner or controller of the relevant securities to be disclosed in any disclosure made pursuant to Rule 8 and gives the Panel discretion to require additional information to be disclosed if it considers it appropriate.

32.2 The Code Committee is, therefore, proposing to include the following new Note on Rule 5.4:

"*NOTE ON RULE 5.4*

Disclosure of the identity of the person dealing

Any announcement must comply with the requirements of Note 5(a) on Rule 8 regarding the disclosure of the identity of the person dealing and, if different, the owner or controller."

Q.55 Do you agree with the inclusion of the Note on Rule 5.4?

33. Purchases of securities by whitewash offerors

33.1 Paragraph 7 of Appendix 1 of the Code (the Whitewash Guidance Note) states that:

"**Immediately following approval of the proposals at the shareholders' meeting, the controlling shareholders will be free to acquire additional shares in the offeree company, subject to the provision of Rules 5 and 9.**

Where shareholders approve the issue of convertible securities, or the issue of warrants or the grant of options to subscribe for new shares

where no immediate voting rights are obtained, the Panel will view the approval as sanctioning maximum conversion or subscription at the earliest possible moment without the necessity for the making of an offer under Rule 9. If the potential controlling shareholders purchase further voting shares after the date of the resolution, the waiver will only apply to conversion into, or subscription for, such number of shares as, when added to the purchases, does not exceed the number originally approved by shareholders.

(See also Note 4 on Rule 9.1.)"

33.2 The Code Committee has considered the operation of paragraph 7 and has examined a number of scenarios where it may be relevant. Following this review, the Code Committee has concluded that, as drafted, paragraph 7 may in certain circumstances result in a potential controlling shareholder being able to obtain, by the purchase of shares following the date of the relevant resolution, a greater degree of control than shareholders in the offeree company may have intended.

33.3 By way of example, if shareholders of an offeree company which has 600 shares in issue approve the issue (at a later date) of 400 new shares to A, the whitewashed controlling shareholder, these shares would, on issue, represent 40% of the enlarged share capital of the offeree company. However, if , prior to the issue of these shares, A had purchased 179 existing shares in the offeree company, representing 29.8 per cent of the share capital then in issue, he would be entitled, under paragraph 7 as drafted, to be issued 221 new shares (i.e. 400 shares less the 179 shares purchased). This would, however, result in A coming to hold 48.7% as opposed to 40% of the company (because the enlarged share capital would be 821 shares not 1,000 shares).

33.4 Further complications can arise in this area where the offeree company repurchases shares following the date of the whitewash resolution. This is because, unless shares are repurchased from the potential controlling shareholder in proportion to his potential controlling stake, the size of that stake in percentage terms will increase. In such circumstances, the normal provisions of Rule 37 will apply, such that if the potential controlling shareholder is a director or is acting in concert with a director, a further

whitewash should be obtained. If, however, the potential controlling shareholder is not a director and is not acting in concert with a director, the increase in the potential controlling shareholding as a result of the repurchase of shares will not be treated as an acquisition for the purposes of Rule 9 unless, at the time that the potential controlling shareholder purchased shares, he had knowledge that the share repurchase authority was being, or was likely to be, implemented - see Note 2 on Rule 37.1.

33.5 The Panel's stance on this issue has always been to have regard to the terms of the relevant whitewash resolution with a view to ensuring that the potential controlling shareholder does not manipulate the terms of a waiver by purchasing shares in order to end up with a higher percentage of voting rights than that to which he would have been entitled under the terms of the transaction which gave rise to the need to obtain the waiver. Equally, the Panel may, as contemplated by Note 2 on Rule 37.1, permit the controlling shareholder to end up with a higher percentage of voting rights than that set out in the whitewash resolution if this arises as a result of a corporate action of the offeree company of which the controlling shareholder had no knowledge at the time that he purchased the shares.

33.6 The Code Committee considers that the issues which arise as a result of share purchases by a potential controlling shareholder following the date of the whitewash resolution are extremely complex, but it agrees with the Panel's approach as set out in paragraph 33.5 above. These issues do not arise very frequently and, as a result, the Code Committee does not believe that it is sensible or practicable to try to set out in the Code all the possible permutations. However, the Code Committee considers that paragraph 7 should be amended to require a potential controlling shareholder to consult with the Panel before purchasing (or subscribing for) further shares following the whitewash resolution. In addition, the Code Committee believes that it would be helpful to include a cross reference to Rule 37. Accordingly, the Code Committee proposes to amend paragraph 7 as follows:

"7 SUBSEQUENT ACQUISITIONS BY POTENTIAL CONTROLLING SHAREHOLDERS

Immediately following approval of the proposals at the shareholders' meeting, the potential controlling shareholders will be free to acquire additional shares in the offeree company, subject to the provisions of Rules 5 and 9.

Where shareholders approve the issue of convertible securities, or the issue of warrants or the grant of options to subscribe for new shares where no immediate voting rights are obtained, the Panel will view the approval as sanctioning maximum conversion or subscription at the earliest possible moment without the necessity for the making of an offer under Rule 9. However, ~~I~~if the potential controlling shareholders propose to purchase or subscribe for further voting shares ~~after the date of~~ following the ~~resolution~~ relevant meeting, ~~the waiver will only apply to conversion into, or subscription for, such number of shares as, when added to the purchases, does not exceed the number originally approved by shareholders~~ the Panel should be consulted to establish the number of shares to which the waiver will be deemed to apply.

(See also Note 4 on Rule 9.1 and Rule 37.1.)"

33.7 The Code Committee is also proposing to repeat the proposed new final sentence of the second sub-paragraph of paragraph 7 of Appendix 1 as set out above in the place of the existing final sentence at the end of the third paragraph of Note 11 on Rule 9.1.

Q.56 Do you agree with the proposed amendments to paragraph 7 of Appendix 1 and to Note 11 on Rule 9.1?

34. Consequential amendments arising as a result of changes to the Disclosure Forms

34.1 The Panel makes specimen disclosure forms (the "Disclosure Forms") available to assist persons required to make disclosures pursuant to Rules 8.1, 8.2, 8.3 and 38.5 and SARs 3 and 5. It is proposing to amend these forms to reflect a number of the changes proposed in this Consultation Paper. It is also proposing to make all the Disclosure Forms publicly available on its website. Currently some of the Disclosure Forms are set out at the end of the Code and

they will be removed. The revised forms are set out in Appendix B of this Consultation Paper.

34.2 As a result of these changes, the Code Committee is proposing to make the following consequential amendments to the Code and the SARs:

(a) by amending the first paragraph of Note 5(a) on Rule 8 as follows:

"*~~A specimen disclosure form, as set out in the Dealing Disclosure Forms Section, may be obtained from the Panel.~~ Specimen disclosure forms are available on the Panel's website (www.thetakeoverpanel.org.uk) or may be obtained from the Panel. Public disclosure should follow ~~that~~ the format of those forms. Where a disclosure is made pursuant to Rule 8.1(a) or (b), it is not necessary to disclose the same information pursuant to Rule 8.3.*";

(b) by deleting paragraph (v) of Note 5(a) on Rule 8 in its entirety;

(c) by amending Note 5(b) as follows:

"*Private disclosure under Rule 8.1(b)(ii) by exempt fund managers connected with an offeror or the offeree company must be in the form required by the Panel. A specimen disclosure form is available on the Panel's website (www.thetakeoverpanel.org.uk) or may be obtained from the Panel.*

A private disclosure under Rule 8.2 must include the identity of the associate dealing, the total of relevant securities purchased or sold and the prices paid or received (in the case of an average price bargain, each underlying trade should be disclosed). A specimen disclosure form~~, as set out in the Dealing Disclosure Forms Section,~~ is available on the Panel's website (www.thetakeoverpanel.org.uk) or may be obtained from the Panel. Rule 8.2 disclosures should follow that format. In the case of dealings in options or derivatives the same information as specified in Note 5(a) is required."

(d) by amending Note 1 on Rule 38.5 as follows:

"*… A specimen disclosure form is available on the Panel's website (www.thetakeoverpanel.org.uk) or may be obtained from the Panel. Disclosures under this Rule should follow that format.*"; and

(e) by amending both Note 4 on SAR 3 and Note 4 on SAR 5 as follows:

"…*A specimen disclosure form~~, as set out in the Dealing Disclosure Forms Section,~~ is available on the Panel's website (www.thetakeoverpanel.org.uk) or may be obtained from the Panel. Disclosures under this Rule should follow that format.*"

Q.57 Do you agree with the proposed changes to the Disclosure Forms set out in Appendix B?

Q.58 Do you agree with the proposed changes to the Code that arise as a result of the changes to the Disclosure Forms?

COST/BENEFIT IMPLICATIONS

The Code Committee believes that the Code amendments proposed in this Consultation Paper will serve to increase market transparency. This should deliver benefits to shareholders and others who deal in the securities markets. In addition, those amendments which codify the Panel's existing practices will improve the clarity of the Panel's regulatory regime to the benefit of market practitioners.

The cost of the proposed amendments varies;

- the proposed amendments in paragraphs 13.3, 19.3, 30.7 and 30.8 delete provisions from the Code or reduce their scope and will lead to a cost saving;

- those in paragraphs 1.21-1.22, 1.25, 1.29, 1.32, 2.11, 2.13-2.15, 2.17, 3.5, 4.2, 5.3, 5.4, 6.15, 6.20, 6.22, 7.2, 7.3, 10.4, 15.4, 16.4, 16.5, 16.7, 17.2, 17.5, 18.2, 18.3, 20.2, 22.6, 22.10-22.12, 23.5, 24.2-24.6, 25, 26.1, 26.2, 27.5, 27.20, 27.24, 28.8, 29.4, and 31.6 are essentially codification of existing Panel practices and should therefore lead to little or no incremental cost;

- those in paragraphs 11, 12.2, 13.6, 13.8, 32.2, 33.6, 33.7 and 34.2, whilst not being codification of existing practices, should lead to no meaningful increase in cost; and

- those in paragraphs 6.6, 6.11, 8.2-8.4, 9.2, 14.6, 22.8, 27.10 and 27.12-27.15 which add to the Code's requirements, may involve market participants in some element of additional cost. The amount of this cost will vary, depending on the systems and procedures which individual market participants have in place already. The Code Committee believes that any incremental costs will be outweighed by the benefits of increased transparency described above.

APPENDIX A

Proposed amendments to the Code and the SARs

Note: In this Appendix, it has been assumed that the proposed replacement throughout the Code and the SARs of "exempt market-maker" and "market-maker" with "exempt principal trader" and "principal trader", as appropriate, (referred to in paragraph 1.21(c)) has already been effected. If these changes are not implemented, appropriate changes to refer to market-makers will be made in any proposed amendments which currently refer to principal traders.

PART A - THE CODE

DEFINITIONS

Acting in concert

…

(3) a company with any of its pension funds and the pension funds of any company covered in (1);

…

(5) a financial or other professional adviser (including a stockbroker) with its client and, if its client is acting in concert with an offeror or with the directors of the offeree company, with that offeror or with those directors respectively, in each case in respect of the shareholdings of the adviser and persons controlling, controlled by or under the same control as the adviser (except in the capacity of an exempt ~~market-maker~~ fund manager or an exempt principal trader);

…

NOTES ON ACTING IN CONCERT

…

5. Consortium offers

Investors in a consortium (eg through a vehicle company formed for the purpose of making an offer) will normally be treated as acting in concert with the offeror. Where such an investor is part of a larger organisation, the Panel should be consulted to establish which other parts of the organisation will also be regarded as acting in concert.

Where the investment in the consortium is, or is likely to be, 5% or less of the equity share capital (or other similar securities) of the offeror, the Panel will normally be prepared to waive the acting in concert presumption in relation to other parts of the organisation, including any connected fund manager or principal trader, provided it is satisfied as to the independence of those other parts from the investor. Where the investment is, or is likely to be, of 5% or more but less than 20%, the Panel may be prepared to waive the acting in concert presumption in relation to other parts of the organisation depending on the circumstances of the case. (See also Connected fund managers and ~~market makers~~ principal traders in the Definitions Section and Rule 7.2 ~~regarding discretionary fund managers~~.)

6. Pension funds

The presumption that a company is acting in concert with any of its pension funds will normally be rebutted if it can be demonstrated to the Panel's satisfaction that the assets of the pension fund are managed under an agreement or arrangement with an independent third party which gives such third party absolute discretion regarding all dealing, voting and offer acceptance decisions relating to the fund.

7. Sub-contracted fund managers

Where a fund manager sub-contracts discretionary management of funds to another fund manager, the Panel will normally regard those funds as controlled by the latter if absolute discretion regarding all dealing, voting and offer acceptance decisions relating to the funds has been transferred to that fund manager and presumption (4) will apply to the sub-contracted fund manager in respect of those funds.

Associate

…

Without prejudice to the generality of the foregoing, the term associate will normally include the following:-

…

(2) banks, ~~and~~ financial and other professional advisers (including stockbrokers) to an offeror, the offeree company or any company covered in (1) or to any person who is acting in concert with an offeror or with the directors of the offeree company, and ~~including~~ persons controlling, controlled

by or under the same control as such banks, financial and other professional advisers;

…

(6) ~~a person who owns or controls 5% or more of any class of relevant securities (as defined in paragraphs (a) to (d) in Note 2 on Rule 8) issued by an offeror or an offeree company, including a person who as a result of any transaction owns or controls 5% or more. When two or more persons act pursuant to an agreement or understanding (formal or informal) to acquire or control such securities, they will be deemed to be a single person for the purpose of this paragraph. Such securities managed on a discretionary basis by an investment management group will, unless otherwise agreed by the Panel, also be deemed to be those of a single person (see Note 8 on Rule 8)~~ an employee benefit trust of an offeror, the offeree company or any company covered in (1); and

…

Connected fund managers and ~~market makers~~ principal traders

A fund manager or ~~market maker~~ principal trader will normally be connected with an offeror or the offeree company, as the case may be, if the fund manager or ~~market maker~~ principal trader is controlled by, controls or is under the same control as:-

(1) an offeror or any person acting in concert with it (for example as a result of being an investor in a consortium (see also Note 5 on the definition of acting in concert));

(2) the offeree company or any person acting in concert with the directors of the offeree company; or

(3) any bank or financial or other professional advisers (including stockbrokers) to ~~an offeror or the offeree company~~ any person covered in (1) or (2).~~; or~~

~~(4) an investor in a consortium (eg through a vehicle company formed for the purpose of making an offer).~~

Derivative

…

NOTE ON DEFINITION OF DERIVATIVE

The term ‘‘derivative’’ is intentionally widely defined to encompass all types of derivative transactions. However, it is not the intention of the Code to

restrict dealings in, or require disclosure of, derivatives which ~~have no connection~~ are not connected with an offer or ~~anticipated~~ potential offer. ~~Offerors, offeree companies and their financial advisers should consult the Panel at the earliest stage in order to determine whether a dealing in a derivative is to be regarded as having a connection with the offer or potential offer.~~ The Panel will not normally regard a derivative which is referenced to a basket or index of securities, including relevant securities, as connected with an offer or potential offer if at the time of dealing the relevant securities in the basket or index represent less than 1% of the class in issue and, in addition, less than 20% of the value of the securities in the basket or index. In the case of any doubt, the Panel should be consulted.

…

Exempt fund manager

…

Exempt ~~market maker~~ principal trader

~~An exempt market maker is a person who is registered as a market maker with the Stock Exchange in relation to the relevant securities, or is accepted by the Panel as a market maker in those securities, and, in either case, is recognised by the Panel as an exempt market maker for the purposes of the Code.~~ An exempt principal trader is a principal trader who is recognised by the Panel as an exempt principal trader for the purposes of the Code.

…

NOTES ON EXEMPT FUND MANAGER AND EXEMPT ~~MARKET MAKER~~ PRINCIPAL TRADER

…

2. When a ~~market maker~~ principal trader or fund manager is connected with the offeror or offeree company, exempt status is not relevant ~~only where~~ unless the sole reason for the connection is that the ~~market maker~~ principal trader or fund manager is controlled by, controls or is under the same control as a financial or other professional adviser (including stockbrokers) to:

(1) the offeror; ~~or~~
(2) the offeree company; or
(3) a concert party of either the offeror (for example as a result of being an investor in a consortium) or the directors of the offeree company.

References in the Code to exempt ~~market makers~~ principal traders or exempt fund managers should be construed accordingly. (See also Rule 7.2 ~~regarding discretionary fund managers~~.)

3. ~~Dealings by a connected exempt market-maker in a market-making capacity will not normally be considered as coming within the acting in concert presumptions, although dealings in any other capacity will be. (See Rule 38.)~~ *The effect of a principal trader or fund manager having exempt status is that presumption (5) of the definition of acting in concert will not apply. However, the principal trader or fund manager will still be regarded as connected with the offeror or offeree company, as appropriate. Connected principal traders, but not connected exempt fund managers, must comply with Rule 38.*

4. In appropriate cases, a fund manager based overseas may be granted special exempt status subject to its satisfying certain conditions. References in the Code to exempt fund managers (with the exception of those in Rule 8.1(b)) include such special exempt fund managers, subject always to the conditions on which such special exempt status is granted in any particular case.

5. In appropriate cases, a trading entity may be granted exempt status on an ad hoc basis subject to the satisfaction of certain conditions. References in the Code to exempt principal traders include persons granted such ad hoc exempt status, for so long as the grant of such exempt status remains valid and subject always to the conditions on which such ad hoc exempt status is granted in any particular case.

…

Irrevocable commitments and letters of intent

Irrevocable commitments and letters of intent include irrevocable commitments and letters of intent to accept or not to accept an offer and also irrevocable commitments and letters of intent to vote in favour of or against a resolution of an offeror or the offeree company in the context of the offer.

…

Principal trader

A principal trader is a person who:

(1) is registered as a market-maker with the Stock Exchange, or is accepted by the Panel as a market-maker; or

(2) is a Stock Exchange member firm dealing as principal in order book securities.

NOTES ON DEFINITIONS

…

References to "financial and other professional advisers (including stockbrokers)", in relation to a party to an offer, do not normally include an organisation which has stood down, because of a conflict of interest ~~or otherwise~~, from acting for that party in connection with the offer. ~~If the organisation is to have a continuing involvement with that party during the offer, the Panel must be consulted. Unless the Panel is satisfied that the involvement is entirely unconnected with the offer, the above exclusion will not normally apply~~. In other circumstances and with the consent of the Panel, presumption (5) of the definition of "acting in concert", paragraph (2) of the definition of "associate" and paragraph (3) of the definition of "connected fund managers and principal traders" may be rebutted or disapplied as appropriate. In making its decision, the Panel will take account of all relevant factors.

Rule 2.4

2.4 THE ANNOUNCEMENT OF A POSSIBLE OFFER

Except in the case of a mandatory offer under Rule 9, until a firm intention to make an offer has been notified a brief announcement that talks are taking place (there is no requirement to name the potential offeror in such an announcement) or that a potential offeror is considering making an offer will normally satisfy the obligations under this Rule. ~~In most cases where such an announcement is made to a stock exchange outside the United Kingdom on which any relevant securities are listed or traded, a summary of the provisions of Rule 8.3 should be given.~~ Except with the consent of the Panel, such an announcement should also include a summary of the provisions of Rule 8 (see the Panel's website at www.thetakeoverpanel.org.uk).

…

Rule 2.5

2.5 THE ANNOUNCEMENT OF A FIRM INTENTION TO MAKE AN OFFER

…

(b) When a firm intention to make an offer is announced, the announcement must contain:-

…

(iii) details of any existing holding in the offeree company:

…

(c) **in respect of which the offeror or any of its associates has received an irrevocable commitment ~~to accept the offer~~ or a letter of intent (see Note 14 on Rule 8);**

(d) **in respect of which the offeror holds an option to purchase or right to subscribe;**

(e) **in respect of which any person acting in concert with the offeror holds an option to purchase or right to subscribe;**

…

(viii) ~~in cases where the offer is announced to a stock exchange outside the United Kingdom on which any relevant securities are listed or traded,~~ a summary of the provisions of Rule 8~~.3~~ (see the Panel's website at www.thetakeoverpanel.org.uk).

NOTES ON RULE 2.5

…

~~*3. Irrevocable commitments*~~

~~*References to commitments to accept an offer must specify in what circumstances, if any, they will cease to be binding, for example, if a higher offer is made.*~~

~~4.~~3. Subjective conditions

…

~~5.~~4. New conditions for increased or improved offers

…

~~6.~~5. Pre-conditions

…

Rule 2.6

2.6 OBLIGATION ON THE OFFEREE COMPANY TO CIRCULATE ANNOUNCEMENTS

Promptly after the commencement of an offer period, a copy of the relevant announcement, or a circular summarising the terms and conditions of the offer, must be sent by the offeree company to its

shareholders and to the Panel. Where necessary the board should explain the implications of the announcement. Any circular published under this Rule should also include a summary of the provisions of Rule 8 (see the Panel's website at www.thetakeoverpanel.org.uk).

Rule 4.2

4.2 RESTRICTION ON DEALINGS BY THE OFFEROR AND CONCERT PARTIES

(a) During an offer period, the offeror and persons acting in concert with it must not sell any securities in the offeree company except with the prior consent of the Panel and following 24 hours public notice that such sales might be made. The Panel will not give consent for sales where a mandatory offer under Rule 9 is being made. Sales below the value of the offer will not be permitted. After there has been an announcement that sales may be made, neither the offeror nor persons acting in concert with it may make further purchases and only in exceptional circumstances will the Panel permit the offer to be revised. The Panel should be consulted whenever the offeror or a person acting in concert with it proposes to enter into or close out any type of transaction which may result in securities in the offeree company being sold during the offer period either by that party or by the counterparty to the transaction.

(b) During an offer period, the offeror and persons acting in concert with it must not purchase any securities in the offeree company:

(i) through any anonymous order book system; or

(ii) through any other means unless it can be established that the seller is not an exempt principal trader connected with the offeror. In the case of dealings through an inter-dealer broker or other similar intermediary, "seller" includes the person who has transferred the securities to the intermediary as well as the intermediary itself. (See also Rule 38.2.)

NOTES ON RULES 4.1 and 4.2

…

6. Discretionary ~~clients~~ fund managers and principal traders

Sales of securities of the offeree company ~~for discretionary clients~~ by non-exempt discretionary fund managers and principal traders which are connected with the offeror~~, unless they are exempt fund managers, may be relevant (see~~ will be treated in accordance with Rule 7.2~~).~~

~~7. Dealings between an offeror and connected exempt market makers~~

~~*See Rule 38.2.*~~

Rule 4.4

…

NOTE ON RULE 4.4

Rule 4.4(iii) does not prevent an adviser to an offeree company from obtaining irrevocable commitments or letters of intent not to accept an offer.

Rule 4.6

4.6 RESTRICTION ON STOCK BORROWING AND LENDING TRANSACTIONS BY OFFERORS, THE OFFEREE COMPANY AND CERTAIN OTHER PARTIES

During the offer period, none of the following persons may, except with the consent of the Panel, enter into or take action to unwind a stock borrowing or lending transaction in respect of relevant securities:

(a) the offeror and persons acting in concert with it;

(b) the offeree company or persons acting in concert with the directors of the offeree company;

(c) a company which is an associate of the offeror or the offeree company by virtue of paragraph (1) of the definition of associate;

(d) a financial or professional adviser to the offeror or the offeree company, to a company which is an associate of the offeror or the offeree company by virtue of paragraph (1) of the definition of associate or to a person acting in concert with the offeror or with the directors of the offeree company, and persons controlling, controlled by or under the same control as any such adviser (except for an exempt principal trader or an exempt fund manager); and

(e) a pension fund of the offeror or the offeree company or of a company which is an associate of the offeror or the offeree company by virtue of paragraph (1) of the definition of associate.

NOTES ON RULE 4.6

1. Return of borrowed relevant securities

Returning relevant securities which have been borrowed, or receiving relevant securities (or equivalent securities), in each case in accordance with an existing stock borrowing or lending agreement, will not normally be treated as taking action to unwind a stock borrowing or lending transaction.

2. Pension funds

Rule 4.6(e) does not apply in respect of any pension funds which are managed under an agreement or arrangement with an independent third party in the terms set out in Note 6 on the definition of acting in concert.

3. Disclosure of transaction where consent is given

Where the Panel consents to a person to whom Rule 4.6 applies entering into or taking action to unwind a stock borrowing or lending transaction in respect of relevant securities, the Panel will normally require the transaction to be disclosed by that person as if it were a dealing in the relevant securities.

4. Discretionary fund managers and principal traders

Stock borrowing or lending transactions by non-exempt discretionary fund managers and principal traders which are subject to Rule 4.6(c) will be treated in accordance with Rule 7.2.

Rule 5.1

5.1 RESTRICTIONS

…

NOTES ON RULE 5.1

…

8. Discretionary ~~clients~~ fund managers and principal traders

Dealings ~~for~~ by non-exempt discretionary ~~clients by~~ fund managers and principal traders which are connected with an offeror~~, unless they are exempt fund managers, may be relevant (see~~ will be treated in accordance with Rule 7.2~~).~~

Rule 5.2

5.2 EXCEPTIONS TO RESTRICTIONS

…

NOTES ON RULE 5.2

1. Single shareholder

For the purpose of Rule 5.2(a), a number of shareholders wishing to dispose of their shares or rights over their shares will be regarded as a single shareholder only if they are all members of the same family or of a group of companies which is regarded as one for disclosure purposes under Section 203(2) to (4) of the Companies Act 1985. ~~Except with the consent of the Panel, a market maker~~ A principal trader or a fund manager managing investment accounts on behalf of a number of underlying clients (whether or not on a discretionary basis) will not normally be considered to be a single shareholder for the purpose of this Rule. The Panel should be consulted in cases of doubt.

...

Rule 5.4

5.4 ACQUISITIONS FROM A SINGLE SHAREHOLDER - DISCLOSURE

…

NOTE ON RULE 5.4

Disclosure of the identity of the person dealing

Any announcement must comply with the requirements of Note 5(a) on Rule 8 regarding the disclosure of the identity of the person dealing and, if different, the owner or controller.

Rule 6

6.1 PURCHASES BEFORE A RULE 2.5 ANNOUNCEMENT

…

6.2 PURCHASES AFTER A RULE 2.5 ANNOUNCEMENT

…

NOTES ON RULE 6

…

8. Discretionary ~~clients~~ fund managers and principal traders

Dealings ~~for~~ by non-exempt discretionary ~~clients by~~ fund managers and principal traders which are connected with an offeror~~, unless they are exempt fund managers, may be relevant (see~~ will be treated in accordance with Rule 7.2~~).~~

Rule 7.2

Rule 7.2 and the Notes thereon have been deleted in their entirety and replaced by:

7.2 DEALINGS BY CONNECTED DISCRETIONARY FUND MANAGERS AND PRINCIPAL TRADERS

(a) Discretionary fund managers and principal traders who, in either case, are connected with an offeror or potential offeror, will not normally be presumed to be acting in concert with that person until its identity as an offeror or potential offeror is publicly announced or, if prior to that, the connected party had actual knowledge of the possibility of an offer being made. Rules 5, 6, 9, 11 and 36 will then be relevant to purchases of offeree company securities and Rule 4.2 to sales of offeree company securities by such persons. Rule 4.6 will also be relevant.

Similarly, discretionary fund managers and principal traders who, in either case, are connected with the offeree company, will not normally be presumed to be acting in concert with the directors of the offeree company until the commencement of the offer period. Rules 5 and 9 may then be relevant to purchases of offeree company securities and Rule 4.4 will be relevant to purchases of offeree company shares and dealings in derivatives referenced to, or options in respect of, such shares. Rule 4.6 will also be relevant.

(See also the Definition of connected fund managers and principal traders.)

(b) An exempt fund manager or exempt principal trader which is connected for the sole reason that it is controlled by, controls or is under the same control# as a financial or other professional adviser (including stockbrokers) to the offeror or offeree company or to a concert party of either the offeror or the directors of the offeree company will not be presumed to be in concert even after the commencement of the offer period or the identity of the offeror being publicly announced (as the case may be). (See Note 2 on the Definitions of exempt fund manager and exempt principal trader.)

 # See Note 1 at end of Definitions Section.

NOTES ON RULE 7.2

1. Prior dealings

(a) As a result of Rule 7.2(a) and notwithstanding the usual application of the presumptions of acting in concert, dealings and stock borrowing and lending transactions by discretionary fund managers and principal traders

connected with the offeree company will not normally be relevant for the purposes of Rules 4.6, 5 or 9 before the commencement of the offer period.

(b) Similarly, notwithstanding the usual application of the presumptions of acting in concert, dealings and stock borrowing and lending transactions by discretionary fund managers and principal traders connected with an offeror or potential offeror will not normally be relevant for the purposes of Rules 4.2, 4.6, 5, 6, 9, 11 and 36 before the identity of the offeror or potential offeror has been publicly announced.

(c) Rule 9 will, however, be relevant if the aggregate holdings of shares of all persons under the same control# (including any exempt fund manager or exempt principal trader) carry 30% or more of the voting rights of a company. Notwithstanding this, if such a group includes a principal trader and the group's aggregate holding of shares in a company approaches or exceeds 30% of the voting rights, the Panel may consent to the principal trader continuing to acquire further shares in the company without consequence under Rule 9.1 provided that the company is not in an offer period and the holding of the principal trader does not at any relevant time exceed 3% of the voting rights of the company.

 # See Note 1 at end of Definitions Section.

2. Qualifications

(a) If a connected discretionary fund manager or principal trader is in fact acting in concert with an offeror or with the directors of the offeree company, the usual concert party consequences will apply irrespective of whether the offeree company is in an offer period or the identity of the offeror or potential offeror has been publicly announced.

(b) Similarly, if a connected discretionary fund manager or principal trader is aware of the possibility of an offer for the offeree company or by an offeror or potential offeror, it will be considered to be acting in concert with the party with which it is connected as a result of the usual application of the presumptions of acting in concert irrespective of whether the offeree company is in an offer period or the identity of the offeror or potential offeror has been publicly announced.

(c) If an offeror or potential offeror, or any company in its group, has funds managed on a discretionary basis by an exempt fund manager, Rule 7.2 may be relevant. If, for example, any securities of the offeree company are managed by such exempt fund manager for the offeror or potential offeror, the exception in Rule 7.2(b) in relation to exempt fund managers may not apply in respect of those securities. The Panel should be consulted in such cases.

3. Standing down

After the identity of an offeror or potential offeror is publicly announced, a principal trader connected with the offeror or potential offeror may stand

down from its dealing activities. Similarly, a principal trader connected with the offeree company may stand down from its dealing activities after the commencement of the offer period. In such circumstances, with the prior consent of the Panel, the principal trader may reduce its holding of offeree company securities or offeror securities, or may acquire such securities with a view to reducing any short position, without such dealings being relevant for the purposes of Rules 4.2, 4.4, 5, 6, 9, 11 and 36 or falling to be disclosed under Rule 8.1(a), notwithstanding the usual application of the presumptions of acting in concert and Rule 7.2(a). Any such dealings must take place within a time period agreed in advance by the Panel.

4. Sales by discretionary fund managers connected with an offeror

After the commencement of the offer period, with the prior consent of the Panel, a discretionary fund manager connected with an offeror will normally be permitted to sell offeree company securities without such sales being relevant for the purposes of Rule 4.2, notwithstanding the usual application of the presumptions of acting in concert and Rule 7.2(a). Any such sale should be disclosed under Rule 8.1(a).

5. Rule 9

The Panel should be consulted if, once the identity of the offeror or potential offeror is publicly known, it becomes apparent that relevant securities in the offeree company (including options in respect of and derivatives referenced to such relevant securities) held by the offeror or potential offeror and persons acting in concert with it, including any connected discretionary fund managers and principal traders to which Rule 7.2(a) applies, carry or relate to in aggregate 30% or more of the voting rights of the offeree company.

6. Disclosure of dealings

Holdings of relevant securities and dealings (whether before or after the presumptions in Rule 7.2(a) apply) by connected discretionary fund managers and principal traders (unless exempt) must be disclosed in any offer document in accordance with Rule 24.3 and in any offeree board circular in accordance with Rule 25.3, as the case may be.

7. Consortium offers

See also Note 5 on the definition of acting in concert where the connected fund manager or principal trader is part of the same organisation as an investor in a consortium.

Rule 8

RULE 8. DISCLOSURE OF DEALINGS DURING THE OFFER PERIOD; ALSO INDEMNITY AND OTHER ARRANGEMENTS

~~*NB 1 Disclosure of dealings in relevant securities of an offeror is only required (a) following the announcement of a securities exchange offer, or (b) following the earlier commencement of an offer period, if it has not been announced that any offer is likely to be solely in cash (see Note 2).*~~
~~*NB 2 This Rule applies only during an offer period. Offer period means the period from the time when an announcement is made of a proposed or possible offer (with or without terms) until the first closing date or, if this is later, the date when the offer becomes or is declared unconditional as to acceptances or lapses. An announcement that a holding, or aggregate holdings, of shares carrying 30% or more of the voting rights of a company is for sale or that the board of a company is seeking potential offerors will be treated as the announcement of a possible offer.*~~
~~*NB 3 Attention is drawn to ''associate'' in the Definitions Section.*~~

8.1 DEALINGS BY PARTIES AND BY ASSOCIATES FOR THEMSELVES OR FOR DISCRETIONARY CLIENTS

…

(b) For discretionary clients

…

(ii) Except with the consent of the Panel, all dealings in relevant securities made during an offer period for the account of discretionary investment clients by an associate which is an exempt fund manager connected with the offeror or the offeree company must be privately disclosed in accordance with Notes 3, 4 and 5.

~~If, however, the exempt fund manager is an associate by virtue of paragraph (6) of the definition of associate or if Rule 8.3 applies, the exempt fund manager must disclose publicly under Rules 8.1 or 8.3 as appropriate in addition to disclosing privately.~~ <u>If, however, Rule 8.3 applies, an exempt fund manager must disclose publicly under that Rule in addition to disclosing privately.</u>

…

8.3 DEALINGS BY 1% SHAREHOLDERS

(a) During an offer period, if a person, whether or not an associate, owns or controls (directly or indirectly) 1% or more of any class of relevant securities of an offeror or of the offeree company or as a result of any transaction will so own or control 1% or more, dealings in ~~such~~ <u>any</u>

relevant securities of that company by such person (or any other person through whom ownership or control is derived) must be publicly disclosed in accordance with Notes 3, 4 and 5.

…

(d) Rule 8.3 does not apply to ~~recognised market makers~~ principal traders acting in that capacity (see Note 9 below).

…

8.4 IRREVOCABLE COMMITMENTS AND LETTERS OF INTENT

(a) During an offer period, if an offeror or offeree company or any of their respective associates obtains an irrevocable commitment or a letter of intent, the offeror or offeree company (as appropriate) must publicly disclose the details in accordance with Notes 3, 4 and 14.

(b) If a shareholder who has given a letter of intent either (i) becomes aware that he will not be able to comply with the terms of that letter or (ii) no longer intends to do so, he must promptly announce that fact. Likewise, if a shareholder who has given an irrevocable commitment breaches the terms of that commitment, he must promptly announce that fact together with all relevant details.

8.5 STOCK BORROWING AND LENDING

Relevant securities which have been lent by one person to another will normally be regarded as controlled by the lender rather than the borrower and will not normally be regarded as owned by the borrower for the purpose of Rule 8. Similarly, the borrowing or lending of relevant securities will not normally be regarded as a dealing in relevant securities. However, if a person to whom Rule 8.3 applies (or to whom Rule 8.3 would apply if borrowing was regarded as a dealing) wishes to borrow relevant securities during an offer period for a reason connected with an offer, he should consult the Panel before entering into such a transaction. In such circumstances, the Panel will normally require the transaction to be disclosed by that person as if it were a dealing in relevant securities. (See also Rule 4.6.)

NOTES ON RULE 8

…

2. Relevant securities

…

The taking, granting or exercising of an option (including a traded option contract) in respect of any of the foregoing or the exercise or conversion of any security under (d) above whether in respect of new or existing securities and the acquisition of, entering into, closing out, exercise (by either party) of any rights under, or variation of, a derivative will be regarded as a dealing in relevant securities (see also Notes 5 and 7 below). Subscribing or agreeing to subscribe for new relevant securities will also be regarded as a dealing. The borrowing or lending of relevant securities will not normally be regarded as a dealing in relevant securities.

~~*Disclosure of dealings in relevant securities of an offeror is only required (a) following the announcement of a securities exchange offer, or (b) following the earlier commencement of an offer period, if it has not been announced that any offer is likely to be solely in cash.*~~ *Where it has been announced that an offer or possible offer is, or is likely to be, solely in cash, there is no requirement to disclose dealings in relevant securities of the offeror.*

~~*All percentage holdings of relevant securities are to be calculated by reference to the percentage of the class of relevant security held and in issue outside treasury — see the reference to treasury shares in the Definitions.*~~

…

5. Details to be included in disclosures (public or private)

(a) Public disclosure (Rules 8.1(a), 8.1(b)(i) and 8.3)

~~*A specimen disclosure form, as set out in the Dealing Disclosure Forms Section, may be obtained from the Panel.*~~ *Specimen disclosure forms are available on the Panel's website (www.thetakeoverpanel.org.uk) or may be obtained from the Panel. Public disclosure should follow* ~~*that*~~ *the format of those forms. Where a disclosure is made pursuant to Rule 8.1(a) or (b), it is not necessary to disclose the same information pursuant to Rule 8.3.*

A public disclosure of dealings must include the following information:—

(i) the total of the relevant securities in question of an offeror or of the offeree company purchased or sold;

(ii) the prices paid or received (in the case of an average price bargain, each underlying trade should be disclosed);

(iii) the identity of the associate or other person dealing and, if different, the owner or controller;

(iv) if the dealing is by an associate, an explanation of how that status arises;

~~*(v) if the disclosure is made under Rule 8.3, a statement to that effect;*~~

~~*(vi) the resultant total amount of relevant securities owned or controlled by the associate or other person in question (including those of any person with whom there is an agreement or understanding) and the percentage which it represents; and*~~

~~*(vii) if relevant, details of any arrangements required by Note 6 below.*~~

(v) the resultant total amount, and the percentage which it represents, of each class of relevant securities of an offeror or the offeree company (as the case may be) owned or controlled by the associate or other person disclosing. Where a person required to make a disclosure has a short position in any relevant security of the company concerned, the number of relevant securities of which that person is short (and the percentage of the class of relevant securities which it represents) should be disclosed;

(vi) details of all outstanding options in respect of, and derivatives referenced to, relevant securities of an offeror or the offeree company (as the case may be) entered into by the associate or other person disclosing (see also below); and

(vii) details of any arrangements of the kind referred to in Note 6 below entered into by the associate or other person disclosing, including the total amount and the percentage which it represents of each class of relevant securities to which the arrangements relate.

For the avoidance of doubt, when a person transacts two or more separate but related dealings executed at or around the same time (for example, the entering into of a derivative referenced to relevant securities and the acquisition of such securities for the purposes of hedging), the disclosure must include the required information in relation to each such dealing so executed.

For the purpose of disclosing identity the owner or controller must be specified, in addition to the person dealing. The naming of nominees or vehicle companies is insufficient. The Panel may require additional information to be disclosed when it appears to be appropriate, for example to identify other persons who have an interest in the securities in question.

However, in the case of disclosure of dealings by fund managers on behalf of discretionary clients, the clients need not be named.

Where an offeror or any person acting in concert with it purchases offeree company securities on a specially cum or specially ex dividend basis, details of that fact should also be disclosed.

Percentages should be calculated by reference to the numbers of relevant securities given in a company's latest announcement required by Rule 2.10. In the case of a disclosure relating to a right to subscribe, or subscription, for new securities, the Panel should be consulted regarding the appropriate number of relevant securities to be used in calculating the relevant percentage.

In the case of option business or dealings in derivatives full details should be given so that the nature of the dealings can be fully understood. For options this should include a description of the options concerned, the number of securities under option, the exercise period (or in the case of exercise, the exercise date), the exercise price and any option money paid or received. For derivatives this should include, at least, a description of the derivatives concerned, the number of reference securities to which they relate (when relevant), the maturity date (or, if applicable, the closing out date) and the reference price.

In addition, if there exists any agreement, arrangement or understanding, formal or informal, between the person dealing and any other person relating to the voting rights of any relevant securities under option or relating to the voting rights or future acquisition or disposal of any relevant securities to which a derivative is referenced (as the case may be), full details of such agreement, arrangement or understanding, identifying the relevant securities in question, must be included in the disclosure. If there are no such agreements, arrangements, or understandings, this fact should be stated. Where such an agreement, arrangement or understanding is entered into at a later date than the derivative or option to which it relates, it will be regarded as a dealing in relevant securities.

If, following a public disclosure made under Rule 8, relevant securities are transferred into or out of a person's management, a reference to the transfer must be included in the next public disclosure made by that person under Rule 8.

If an associate is an associate for more than one reason ~~(for example because he falls within paragraphs (6) and (7) of the definition of associate)~~, all the reasons must be specified.

Where a disclosure of a stock borrowing or lending transaction is made under Rule 4.6 or Rule 8.5, all relevant details should be given.

Where offerors, offeree companies or persons acting in concert with the offeror or the directors of the offeree company disclose a dealing in relevant securities and have previously borrowed relevant securities from, or lent such securities to, another person, all relevant details should be given.

(b) Private disclosure (Rules 8.1(b)(ii) and 8.2)

Private disclosure under Rule 8.1(b)(ii) by exempt fund managers connected with an offeror or the offeree company must be in the form required by the Panel. A specimen disclosure form is available on the Panel's website (www.thetakeoverpanel.org.uk) or may be obtained from the Panel.

A private disclosure under Rule 8.2 must include the identity of the associate dealing, the total of relevant securities purchased or sold and the prices paid or received (in the case of an average price bargain, each underlying trade

should be disclosed). A specimen disclosure form~~, as set out in the Dealing Disclosure Forms Section,~~ is available on the Panel's website (www.thetakeoverpanel.org.uk) or may be obtained from the Panel. Rule 8.2 disclosures should follow that format. In the case of dealings in options or derivatives the same information as specified in Note 5(a) is required.

6. Indemnity and other arrangements

…

(c) This Note does not apply to irrevocable commitments or letters of intent, which are subject to Rule 8.4 and Note 14.

~~(c)~~(d) See also Rule 4.4.

7. Dealings in options and derivatives

Under Rule 8.3, a disclosure of dealings in options in respect of, or derivatives referenced to, any relevant securities of an offeror or the offeree company is only required if the person dealing in such options or derivatives owns or controls 1% or more of ~~the~~ any class of relevant securities ~~which is the subject of the option or to whose price the derivative is referenced~~ of that company.

8. Discretionary fund managers

The principle normally applied by the Panel is that where the investment decision is made by a discretionary fund manager the relevant securities are treated as controlled by him and not by the person on whose behalf the fund is managed. For that reason, Rule 8.3(c) requires a discretionary fund manager to aggregate the investment accounts which he manages for the purpose of determining whether he has an obligation to disclose. The beneficial owner would not normally, therefore, be concerned with disclosure to the extent that his investment is managed on a discretionary basis. However, where any of the funds managed on behalf of a beneficial owner are not managed by the fund manager originally contracted to do so but are managed by a different independent third party who has absolute discretion regarding all dealing, voting and offer acceptance decisions, the fund manager to whom the management of the funds has been sub-contracted (and not the originally contracted fund manager) is required to aggregate those funds and to comply with the relevant disclosure obligations accordingly. This approach assumes that the discretionary fund manager does not take instructions from the beneficial owner (or, in the case of sub-contracted funds, from the originally contracted manager or the beneficial owner) on the dealings in question and that fund management arrangements are not established or used to avoid disclosure.

9. Principal traders~~Market makers~~

Except with the consent of the Panel, the exception in relation to principal traders for Rule 8.3(d) is only available to principal traders who were recognised market-makers in any security prior to the introduction of the Stock Exchange Electronic Trading Service.

~~A recognised market-maker which is an associate by virtue only of paragraph (6) of the definition of associate is not required to make disclosure under Rule 8.1 provided that the market-maker acts in a market-making capacity. If he is an associate for any other reason but is not an exempt market-maker, he will have an obligation under Rule 8.1.~~

The exception~~s~~ in relation to ~~recognised market-makers~~ principal traders ~~for both Rules 8.1 and 8.3~~ must not be used to avoid or delay disclosure of dealings. For example, purchases of relevant securities by a ~~market-maker~~ principal trader, backed by a firm commitment by a person to purchase the relevant securities from the ~~market-maker~~ principal trader, will be regarded as purchases by that person. A commitment may effectively be firm even if not legally binding, for example because of market practice. Such arrangements, therefore, should not be entered into unless appropriate disclosures are to be made. In addition, if such an arrangement is entered into with an offeror or a person acting in concert with the offeror, it might mean that the ~~market-maker~~ principal trader is acting in concert with the offeror and normal concert party consequences might follow (such as the application of Rules 4, 5, 6, 7, 9, 11 and 24 and disclosure of dealings by the ~~market-maker~~ principal trader under Rule 8.1).

10. Responsibilities of stockbrokers, banks and other intermediaries

~~Stockbrokers, banks and others who deal in relevant securities on behalf of clients have a general duty to ensure, so far as they are able, that those clients are aware of the disclosure obligations attaching to associates and other persons under Rule 8 and that those clients are willing to comply with them. Market-makers and dealers who deal directly with investors should, in appropriate cases, likewise draw attention to the relevant Rules. However, this does not apply when the total value of dealings (excluding stamp duty and commission) in any relevant security undertaken for a client during any 7 day period is less than £50,000.~~

~~This dispensation does not alter the obligation of principals, associates and other persons themselves to initiate disclosure of their own dealings, whatever total value is involved.~~

Intermediaries are expected to co-operate with the Panel in its dealings enquiries. Therefore, those who deal in relevant securities should appreciate that stockbrokers and other intermediaries will supply the Panel with relevant information as to those dealings, including identities of clients and full client contact information, as part of that co-operation.

…

12. Potential offerors

If a potential offeror has been the subject of an announcement that talks are taking place (whether or not the potential offeror has been named) or has announced that ~~he~~ it is considering making an offer, the potential offeror and persons acting in concert with it must disclose dealings in accordance with Rule 8.1 and must disclose the obtaining of irrevocable commitments or letters of intent in accordance with Rule 8.4 and such disclosures must include the identity of the potential offeror ~~as required by Note 5~~.

…

14. Irrevocable commitments and letters of intent

A disclosure of the obtaining of an irrevocable commitment or a letter of intent must provide full details of the nature of the commitment or letter including:

(a) the number of shares of each class to which the irrevocable commitment or letter of intent relates;

(b) the identity of the shareholder from whom the irrevocable commitment or letter of intent has been obtained. For this purpose, the information which should be disclosed is that which would be required by Note 5(a) on Rule 8 if the shareholder concerned were disclosing a dealing in relevant securities;

(c) in respect of an irrevocable commitment, the circumstances (if any) in which it will cease to be binding; and

(d) in the case of an irrevocable commitment or a letter of intent obtained prior to the announcement of a firm intention to make an offer under Rule 2.5, the value (and any other material terms) of the possible offer in respect of which the commitment or letter has been obtained. (See Rule 2.4(c)).

No separate disclosure by an offeror is required under Rule 8.4 where the relevant information is included in an announcement made under Rule 2.5 which is released no later than 12 noon on the business day following the date on which the irrevocable commitment or letter of intent is obtained.

Rule 9

9.1 WHEN IT IS REQUIRED AND WHO IS PRIMARILY RESPONSIBLE FOR MAKING IT

…

NOTES ON RULE 9.1

…

11. Convertible securities, warrants and options

…

The Panel will not normally require an offer to be made following the exercise of conversion or subscription rights provided that the issue of convertible securities, or rights to subscribe for new shares carrying voting rights, to the person exercising the rights is approved by a vote of independent shareholders in general meeting in the manner described in Note 1 of the Notes on Dispensations from Rule 9. ~~If the person exercising the rights has purchased further voting shares since the date of the relevant meeting, this dispensation will only apply to conversion into, or subscription for, such number of shares as, when added to the purchases, does not exceed the number originally approved by independent shareholders.~~ However, if the potential controlling shareholders propose to purchase or subscribe for further voting shares following the relevant meeting, the Panel should be consulted to establish the number of shares to which the waiver will be deemed to apply.

…

14. Discretionary ~~clients~~ fund managers and principal traders

Dealings ~~for~~ by non-exempt discretionary ~~clients by~~ fund managers and principal traders which are connected with an offeror or the offeree company~~, unless they are exempt fund managers, may be relevant (see~~ will be treated in accordance with Rule 7.2~~)~~.

…

17. Aggregation of holdings across a group

Rule 9 will be relevant if the aggregate holdings of shares of all persons under the same control# (including any exempt fund manager or exempt principal trader) carry 30% or more of the voting rights of a company. Notwithstanding this, if such a group includes a principal trader and the group's aggregate holding of shares in a company approaches or exceeds 30% of the voting rights, the Panel may consent to the principal trader continuing to acquire shares in the company without consequence under Rule 9.1 provided that the company is not in an offer period and the holding of the principal trader does not at any relevant time exceed 3% of the voting rights of the company.

 # See Note 1 at end of Definitions Section.

18. Borrowed or lent stock

If a person has borrowed or lent shares, the voting rights in respect of such shares will be treated as being held by that person for the purpose of this Rule. A person must consult the Panel before acquiring or borrowing shares which, when taken together with shares already held, borrowed or lent by him or any

person acting in concert with him, would result in this Rule being triggered. In such circumstances, the Panel will then decide, inter alia, how the borrowed or lent shares should be treated for the purpose of the acceptance condition.

Rule 10

RULE 10. THE ACCEPTANCE CONDITION

…

NOTES ON RULE 10

…

8. Borrowed shares

Except with the consent of the Panel, shares which have been borrowed by the offeror may not be counted towards fulfilling an acceptance condition.

Rule 11.1

11.1 WHEN A CASH OFFER IS REQUIRED

…

NOTES ON RULE 11.1

…

7. Discretionary ~~clients~~ fund managers and principal traders

Dealings ~~for~~ by non-exempt discretionary ~~clients by~~ fund managers and principal traders which are connected with an offeror~~, unless they are exempt fund managers, may be relevant (see~~ will be treated in accordance with Rule 7.2~~)~~.

Rule 17.1

17.1 TIMING AND CONTENTS

…

NOTES ON RULE 17.1

…

7. Irrevocable commitments, letters of intent and ~~P~~persons acting in concert

An announcement under this Rule must make it clear to what extent acceptances have been received in respect of shares which were subject to an irrevocable commitment or a letter of intent to accept the offer or from persons acting in concert with the offeror. The announcement must also state the number of shares and rights over shares (as nearly as practicable) held before the offer period and acquired or agreed to be acquired during the offer period by persons acting in concert with the offeror.

Rule 24.2

24.2 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:

…

(viii) details of any shareholdings in the offeree company (or, if appropriate, the offeror) in respect of which the offeror or any of its associates has received an irrevocable commitment or a letter of intent (see Note 14 on Rule 8);

(~~viii~~ix) in the case of a securities exchange offer, particulars of the first dividend or interest payment in which the new securities will participate and how the securities will rank for dividends or interest, capital and redemption and a statement indicating the effect of acceptance on the capital and income position of the offeree company's shareholders (if the new securities are not to be identical in all respects with an existing security admitted to the Official List, full particulars of the rights attaching to the securities must also be included together with a statement of whether an application for listing has been or will be made to the UKLA and whether admission to listing on any other stock exchange or the facility to deal on any other market has been or will be sought); ~~and~~

(~~i~~x) in the case of a securities exchange offer, the effect of full acceptance of the offer upon the offeror's assets, profits and business which may be significant for a proper appraisal of the offer; and

(xi) a summary of the provisions of Rule 8 (see the Panel's website at www.thetakeoverpanel.org.uk);

…

Rule 24.3

24.3 SHAREHOLDINGS AND DEALINGS

(a) The offer document must state:-

…

(iii) …; and

~~**(iv) the shareholding in the offeror (in the case of a securities exchange offer only) and in the offeree company owned or controlled by any persons who, prior to the posting of the offer document, have irrevocably committed themselves to accept the offer, together with the names of such persons; and**~~

~~**(v)**~~**(iv) …**

(b) If in any of the above categories there are no shareholdings, this fact should be stated; if, however, the person concerned has a short position, full details should be given. This will not apply to ~~**categories**~~**category (a)(iv)** ~~**or (v)**~~ **if there are no such** ~~**irrevocable commitments or**~~ **arrangements.**

…

NOTES ON RULE 24.3

1. Relevant shareholdings

References in this Rule to shareholdings should be taken to mean:—

(a) in the case of shareholdings in the offeree company, holdings of:
(i) securities which are being offered for or which carry voting rights; and
(ii) securities convertible into (i), rights to subscribe for (i), options (including traded options) in respect of (i) and derivatives referenced to (i); and

(b) in the case of shareholdings in the offeror company, holdings of:
(i) equity share capital;
(ii) securities which carry substantially the same rights as any to be issued as consideration for the offer; and

(iii) securities convertible into (i) or (ii), rights to subscribe for (i) or (ii), options (including traded options) in respect of (i) or (ii) and derivatives referenced to (i) or (ii).

…

~~*5. Irrevocable commitments*~~

~~*References to irrevocable commitments to accept an offer must make it clear if there are circumstances in which they cease to be binding, for example, if a higher offer is made.*~~

~~*6*~~*5. Discretionary ~~clients~~ fund managers and principal traders*

Shareholdings of ~~the~~ non-exempt discretionary ~~clients of~~ fund managers and principal traders which are connected with the offeror~~, unless they are exempt fund managers,~~ and their dealings since the date 12 months prior to ~~commencement of~~ the offer period ~~may be relevant and the Panel should be consulted.~~ will need to be disclosed under Rules 24.3(a)(iii) and 24.3(c) respectively.

6. Dealings

For the purpose of this Rule, dealings includes any action which is regarded as a dealing for the purposes of Note 2 on Rule 8.

Rule 25.3

25.3 SHAREHOLDINGS AND DEALINGS

(a) The first major circular from the offeree board advising shareholders on an offer (whether recommending acceptance or rejection of the offer) must state:-

(i) the shareholdings of the offeree company in the offeror;

(ii) the shareholdings in the offeree company and in the offeror in which directors of the offeree company are interested;

(iii) the shareholdings in the offeree company and (in the case of a securities exchange offer only) in the offeror owned or controlled by a ~~subsidiary of the offeree company, by a pension fund of the offeree company or of a subsidiary of the offeree company, or by an adviser to the offeree company as specified in paragraph (2) of the definition of associate but excluding exempt market makers~~company which is an associate of the offeree company by virtue of paragraph (1) of the definition of associate;

(iv) the shareholdings in the offeree company and (in the case of a securities exchange offer only) in the offeror owned or controlled by a pension fund of the offeree company or by a pension fund of a company which is an associate of the offeree company by virtue of paragraph (1) of the definition of associate;

(v) ~~except with the consent of the Panel,~~ the shareholdings in the offeree company and (in the case of a securities exchange offer only) in the offeror ~~which are managed on a discretionary basis by fund managers (other than exempt fund managers) connected with the offeree company (the beneficial owner need not be named);~~ owned or controlled by an employee benefit trust of the offeree company or by an employee benefit trust of a company which is an associate of the offeree company by virtue of paragraph (1) of the definition of associate;

(vi) the shareholdings in the offeree company and (in the case of a securities exchange offer only) in the offeror owned or controlled by an adviser to the offeree company, by an adviser to a company which is an associate of the offeree company by virtue of paragraph (1) of the definition of associate, by an adviser to a person who is acting in concert with the directors of the offeree company or by a person controlling, controlled by or under the same control as any such adviser, including the shareholdings of a principal trader which is connected with the offeree company and the shareholdings which are managed on a discretionary basis by a fund manager connected with the offeree company (except for the shareholdings of exempt principal traders and exempt fund managers respectively);

(vii) the shareholdings in the offeree company and (in the case of a securities exchange offer only) in the offeror owned or controlled by a person who has an arrangement of the kind referred to in Note 6(b) on Rule 8 with the offeree company or with any person who is an associate of the offeree company by virtue of paragraphs (1), (2), (3) or (4) of the definition of associate; and

(viii) whether the directors of the offeree company intend, in respect of their own beneficial shareholdings, to accept or reject the offer.

(b) If in any of the above categories~~, with the exception of (a)(v),~~ there are no shareholdings, then this fact should be stated; if, however, the person concerned has a short position, full details should be given. This will not apply to category (a) ~~(iv)~~ (vii) if there are no such arrangements.

(c) ~~(i)~~If any party whose shareholdings are required by ~~paragraphs (a)(i) or (ii) of~~ this Rule to be disclosed (whether there is a existing holding or not) has dealt for value in the shares in

question during ~~the period beginning 12 months prior to~~ the offer period and ending with the latest practicable date prior to the posting of the circular, the details, including dates and prices, must be stated.

~~(ii) If any party whose shareholdings are required by paragraphs (a)(iii), (iv) or (v) of this Rule to be disclosed (whether there is an existing holding or not) has dealt for value in the shares in question during the offer period and ending with the latest practicable date prior to the posting of the circular, similar details must be stated.~~

~~(iii)~~ In all cases, if no such dealings have taken place this fact should be stated.

…

NOTES ON RULE 25.3

(See also Notes on Rule 24.3 which apply equally to this Rule.)

1. When directors resign

When, as part of the transaction leading to an offer being made, some or all of the directors of the offeree company resign, this Rule applies to them and their shareholdings and dealings must be disclosed in the circular in the usual way.

2. Pension funds

Rule 25.3(a)(iv) does not apply in respect of any pension funds which are managed under an agreement or arrangement with an independent third party in the terms set out in Note 6 on the definition of acting in concert.

Rule 25.6

25.6 MATERIAL CONTRACTS, IRREVOCABLE COMMITMENTS AND LETTERS OF INTENT

The first major circular from the offeree board advising shareholders on an offer must contain:-

(a) a summary of the principal contents of each material contract (not being a contract entered into in the ordinary course of business) entered into by the offeree company or any of its subsidiaries during the period

beginning two years before the commencement of the offer period, including particulars of dates, parties, terms and conditions and any consideration passing to or from the offeree company or any of its subsidiaries; and

(b) details of any shareholdings in the offeree company in respect of which the offeree company or any of its associates has received an irrevocable commitment or a letter of intent (see Note 14 on Rule 8).

Rule 26

RULE 26. DOCUMENTS TO BE ON DISPLAY

…

(i) any document evidencing an irrevocable commitment ~~to accept an offer~~ or a letter of intent;

…

(o) any agreements or arrangements, or, if not reduced to writing, a memorandum of the terms of such agreements or arrangements, of the kind referred to in Note 6 on Rule 8.

Rule 27.1

27.1 MATERIAL CHANGES

Documents subsequently sent to shareholders of the offeree company by either party must contain details of any material changes in information previously published by or on behalf of the relevant party during the offer period; if there have been no such changes, this must be stated. In particular, the following matters must be updated: -

(a) changes or additions to material contracts, irrevocable commitments or letters of intent (Rules 24.2(a), ~~and~~ (c) and (d)(viii) and 25.6);

…

Rule 36.3

36.3 BUYING DURING AND AFTER THE OFFER

…

NOTES ON RULE 36.3

1. Discretionary ~~clients~~ fund managers and principal traders

Dealings ~~for~~ by non-exempt discretionary ~~clients by~~ fund managers and principal traders which are connected with an offeror~~, unless they are exempt fund managers, may be relevant (see~~ will be treated in accordance with Rule 7.2~~).~~

…

Rule 37.4

37.4 REDEMPTION OR PURCHASE OF SECURITIES BY THE OFFEROR COMPANY

…

(b) Disclosure in the offer document

The offer document must state (in the case of a securities exchange offer only) the amount of relevant securities of the offeror which the offeror has redeemed or purchased during ~~the period commencing 12 months prior to~~ the offer period and ending with the latest practicable date prior to the posting of the offer document and details of any such redemptions and purchases, including dates and prices and the extent to which the shares redeemed or purchased were cancelled or held in treasury.

Rule 38.2

38.2 DEALINGS BETWEEN OFFERORS AND CONNECTED EXEMPT ~~MARKET-MAKERS~~ PRINCIPAL TRADERS

An offeror and any person acting in concert with it must not deal as principal with an exempt ~~market-maker~~ principal trader connected with the offeror in relevant securities (as defined in Rule 8) of the offeree company during the offer period. It will generally be for the advisers to the offeror to ensure compliance with this Rule rather than the ~~market-maker~~ principal trader. (See also Rule 4.2(b).)

Rule 38.3

38.3 ASSENTING SECURITIES AND DEALINGS IN ASSENTED SECURITIES

~~Securities owned by an exempt market-maker~~ An exempt principal trader connected with the offeror must not assent offeree company securities ~~be assented~~ to the offer or purchase such securities in assented form until the offer is unconditional as to acceptances.

Rule 38.5

38.5 DISCLOSURE OF DEALINGS

Dealings in relevant securities (as defined by Rule 8), during the offer period, by an exempt ~~market-maker~~ principal trader connected with an offeror or the offeree company should be aggregated and disclosed to a RIS and the Panel not later than 12 noon on the business day following the date of the transactions, stating the following details:—

(i) total purchases and sales;

(ii) the highest and lowest prices paid and received; and

(iii) whether the connection is with an offeror or the offeree company.

In the case of dealings in options or derivatives, full details should be given so that the nature of the dealings can be fully understood (see Note 5 on Rule 8).

NOTES ON RULE 38.5

1. Method of disclosure

Dealings should be disclosed to a RIS by electronic delivery. A copy must be faxed or e-mailed to the Panel. A specimen disclosure form is available on the Panel's website (www.thetakeoverpanel.org.uk) or may be obtained from the Panel. Disclosures under this Rule should follow that format.

2. Exception

~~If the offer is not a securities exchange offer, there is no requirement to disclose dealings in securities of the offeror.~~ Where it has been announced that an offer or possible offer is, or is likely to be, solely in cash, there is no requirement to disclose dealings in relevant securities of the offeror.

…

Appendix 1

APPENDIX 1

WHITEWASH GUIDANCE NOTE

…

4 CIRCULAR TO SHAREHOLDERS

…

(i) Rules 24.3 and 25.3 (disclosure of shareholdings and dealings). Dealings in respect of Rule 24.3 should be covered for the 12 months prior to the posting of the circular; but ~~this does not apply in respect of Rule 25.3(a)(iii), (iv) or (v)~~ dealings in respect of Rule 25.3 need not be disclosed as there is no offer period ~~(see Rule 25.3(c)(ii))~~.

…

7 SUBSEQUENT ACQUISITIONS BY POTENTIAL CONTROLLING SHAREHOLDERS

Immediately following approval of the proposals at the shareholders' meeting, the potential controlling shareholders will be free to acquire additional shares in the offeree company, subject to the provisions of Rules 5 and 9.

Where shareholders approve the issue of convertible securities, or the issue of warrants or the grant of options to subscribe for new shares where no immediate voting rights are obtained, the Panel will view the approval as sanctioning maximum conversion or subscription at the earliest possible moment without the necessity for the making of an offer under Rule 9. However, ~~I~~if the potential controlling shareholders propose to purchase or subscribe for further voting shares ~~after the date of~~ following the ~~resolution~~ relevant meeting, ~~the waiver will only apply to conversion into, or subscription for, such number of shares as, when added to the purchases, does not exceed the number originally approved by shareholders~~ the Panel should be consulted to establish the number of shares to which the waiver will be deemed to apply.

(See also Note 4 on Rule 9.1 and Rule 37.1.)

PART B - THE SARS

SAR 2

RULE 2. EXCEPTIONS TO RESTRICTIONS

…

NOTE ON RULE 2

~~*Market makers*~~ *Principal traders and fund managers*

~~Except with the consent of the Panel, a market-maker~~A principal trader or a fund manager managing investment accounts on behalf of a number of underlying clients (whether or not on a discretionary basis) will not normally be considered to be a single shareholder for the purpose of this Rule. The Panel should be consulted in cases of doubt.

SAR 3

RULE 3. DISCLOSURE

…

NOTES ON RULE 3

…

4. Method of disclosure

Dealings should be disclosed to a RIS or, if the shares are traded on OFEX, to Newstrack, in typed format, by fax or electronic delivery. A copy must also be faxed or e-mailed to the Panel. A specimen disclosure form~~, as set out in the Dealing Disclosure Forms Section~~, is available on the Panel's website (www.thetakeoverpanel.org.uk) or may be obtained from the Panel. Disclosures under this Rule should follow that format.

SAR 5

RULE 5. PERSONS ACTING BY AGREEMENT OR UNDERSTANDING

…

NOTES ON RULE 5

…

2. Investment managers

Investments managed by a fund manager on a discretionary basis and shares owned by the fund manager or by any company controlling#, controlled by or under the same control as the fund manager, are regarded as being the holding of one person for the purpose of this Rule. However, where the Panel accepts that a part of a group is operating independently and without regard to the interests of any other part (for example, where, in an offer, the fund manager or ~~market maker~~ principal trader, as appropriate, would have exempt status for the purposes of the Code), aggregation of the holdings of such independent parts of the group will not be required.

If a person manages investment accounts on a discretionary basis, shares so managed will be treated, for the purpose of this Rule, as held by that person and not by the person on whose behalf the shares are managed. Except with the consent of the Panel, where more than one discretionary investment management operation is conducted in the same group, shares held by all such operations will be treated, for the purpose of this Rule, as those of a single person and must be aggregated.

See also Note 8 on Rule 8 of the Code regarding aggregation of sub-contracted funds.

In cases of doubt, the Panel should be consulted.

…

4. Method of disclosure

Dealings should be disclosed to a RIS or, if the shares are traded on OFEX, to Newstrack, in typed format, by fax or electronic delivery. A copy must also be faxed or e-mailed to the Panel. A specimen disclosure form~~, as set out in the Dealing Disclosure Forms Section~~ , is available on the Panel's website (www.thetakeoverpanel.org.uk) or may be obtained from the Panel. Disclosures under this Rule should follow that format.

PART C – AMENDMENTS TO THE CODE AND THE SARS TO REFLECT THE SUBSTITUTION OF MARKET-MAKERS WITH PRINCIPAL TRADERS

(a) The Code currently contains references to "exempt market-maker" in the following locations:

- page A7, paragraph (f)(iii);
- presumption (5) of the definition of acting in concert;
- the definition of exempt market-maker and its Notes;
- Note 7 on Rule 4.2;
- Rule 4.4;
- Rule 7.2(b);
- Note 9 on Rule 8;
- Rule 25.3(a)(iii);
- Rule 38; and
- Section 2(b) of Appendix 3.

If the changes recommended by this consultation paper are adopted in full, each of these references will be amended to "exempt principal trader".

(b) The Code currently contains references to "market-maker" or "market-making" in the following locations:

- page A7, paragraph (f)(iii);
- Note 5 on the definition of acting in concert;
- the definition of connected;
- the definition of exempt market-maker and its Notes;
- Note 1 on Rule 5.2;
- Note 4 on Rule 6;
- Note 9 on Rule 8;
- Note 10 on Rule 8;
- Rule 38;
- the introduction to the SARs;
- Note 6 on SAR1;
- the Note on SAR2;
- Note 2 on SAR5; and
- Section 2(b) of Appendix 3.

If the changes recommended by this consultation paper are adopted in full, each of these references will be amended to “principal trader” or “principal trading”, as appropriate.

APPENDIX B

Proposed new Disclosure Forms

See following pages

FORM 8.1

DEALINGS BY OFFERORS, OFFEREE COMPANIES OR THEIR ASSOCIATES FOR THEMSELVES OR FOR DISCRETIONARY CLIENTS
(Rules 8.1(a) and (b)(i) of The City Code on Takeovers and Mergers)

Name of purchaser/vendor *	
Company dealt in	
Relevant security dealt in	
Name of offeree/offeror with whom associated	
Specify category and nature of associate status #	
Date of dealing	

DEALINGS †

Amount bought	**Price per unit (currency must be stated)**
Amount sold	**Price per unit (currency must be stated)**

Resultant total amount and percentage of the same relevant security owned or controlled	

HOLDINGS OF OTHER RELEVANT SECURITIES OF THE COMPANY TO WHICH THIS DISCLOSURE RELATES †

Relevant security	**Total amount and percentage owned or controlled**

IS A SUPPLEMENTAL FORM 8 (DERIVATIVE)/FORM 8 (OPTION) ATTACHED? YES/ NO

Date of disclosure	
Contact name	
Telephone number	

* Specify the owner, not a nominee or vehicle company. If relevant, also identify the controller or owner, eg where an owner normally acts on the instructions of a controller. If dealing for discretionary clients, the name of the fund management organisation should be stated.
\# See the definition of "associate" in the Definitions Section of the Code.
† If disclosing dealings/holdings in derivatives or options, please attach Supplemental Form 8 (Derivative) or Supplemental Form 8 (Option), as appropriate.

For details of the Code's dealing disclosure requirements, see Rule 8 and its Notes which can be viewed on the Takeover Panel's website at www.thetakeoverpanel.org.uk

FORM 8.1(b)(ii)
(NOT FOR PUBLIC DISCLOSURE)

DEALINGS BY CONNECTED EXEMPT FUND MANAGERS ON BEHALF OF DISCRETIONARY CLIENTS
(Rule 8.1(b)(ii) of The City Code on Takeovers and Mergers)

Name of exempt fund manager	
Company dealt in	
Relevant security dealt in	
Name of offeree/offeror with whom connected	
Nature of connection #	
Date of dealing	

DEALINGS †

Amount bought	**Price per unit (currency must be stated)**
Amount sold	**Price per unit (currency must be stated)**

Resultant total amount and percentage of the same relevant security owned or controlled*	

HOLDINGS OF OTHER RELEVANT SECURITIES OF THE COMPANY TO WHICH THIS DISCLOSURE RELATES †

Relevant security	**Total amount and percentage owned or controlled**

IS A SUPPLEMENTAL FORM 8 (DERIVATIVE)/FORM 8 (OPTION) ATTACHED? YES/ NO

Date of disclosure	
Contact name	
Telephone number	

\# See the definition of "connected fund managers and principal traders" in the Definitions Section of the Code.
† If disclosing dealings/holdings in derivatives or options, please attach Supplemental Form 8 (Derivative) or Supplemental Form 8 (Option), as appropriate.
***** Where relevant securities are held within a fund in respect of which seed capital represents 10% or more of the funds under management, specify the percentage of seed capital in addition to the amount of stock held within that fund.

For details of the Code's dealing disclosure requirements, see Rule 8 and its Notes which can be viewed on the Takeover Panel's website at www.thetakeoverpanel.org.uk

FORM 8.2
(NOT FOR PUBLIC DISCLOSURE)

DEALINGS BY OFFERORS, OFFEREE COMPANIES OR THEIR ASSOCIATES FOR NON-DISCRETIONARY CLIENTS
(Rule 8.2 of The City Code on Takeovers and Mergers)

Name of entity dealing	
Company dealt in	
Relevant security dealt in	
Name of offeree/offeror with whom associated	
Specify category and nature of associate status #	
Date of dealing	

DEALINGS †

Amount bought	**Price per unit (currency must be stated)**
Amount sold	**Price per unit (currency must be stated)**

IS A SUPPLEMENTAL FORM 8 (DERIVATIVE)/FORM 8 (OPTION) ATTACHED? YES/ NO

Date of disclosure	
Contact name	
Telephone number	

See the definition of "associate" in the Definitions Section of the Code.
† If disclosing dealings/holdings in derivatives or options, please attach Supplemental Form 8 (Derivative) or Supplemental Form 8 (Option), as appropriate.

For details of the Code's dealing disclosure requirements, see Rule 8 and its Notes which can be viewed on the Takeover Panel's website at www.thetakeoverpanel.org.uk

FORM 8.3

DEALINGS BY PERSONS WHO OWN OR CONTROL 1% OR MORE OF ANY CLASS OF RELEVANT SECURITY
(Rule 8.3 of The City Code on Takeovers and Mergers)

Name of purchaser/vendor *	
Company dealt in	
Relevant security dealt in	
Date of dealing	

DEALINGS †

Amount bought	**Price per unit (currency must be stated)**
Amount sold	**Price per unit (currency must be stated)**

Resultant total amount and percentage of the same relevant security owned or controlled	

HOLDINGS OF OTHER RELEVANT SECURITIES OF THE COMPANY TO WHICH THIS DISCLOSURE RELATES †

Relevant security	**Total amount and percentage owned or controlled**

IS A SUPPLEMENTAL FORM 8 (DERIVATIVE)/FORM 8 (OPTION) ATTACHED? YES/ NO

Date of disclosure	
Contact name	
Telephone number	

* Specify the owner, not a nominee or vehicle company. If relevant, also identify the controller or owner, eg where an owner normally acts on the instructions of a controller. If dealing for discretionary clients, the name of the fund management organisation should be stated.

† If disclosing dealings/holdings in derivatives or options, please attach Supplemental Form 8 (Derivative) or Supplemental Form 8 (Option), as appropriate.

For details of the Code's dealing disclosure requirements, see Rule 8 and its Notes which can be viewed on the Takeover Panel's website at www.thetakeoverpanel.org.uk

SUPPLEMENTAL FORM 8 (DERIVATIVE)

DEALINGS/HOLDINGS IN DERIVATIVES

(This form should be attached to Form 8.1, Form 8.1(b)(ii), Form 8.2 or Form 8.3, as appropriate)

Description of all derivative products disclosed on this form.	
Full details of any agreement, arrangement or understanding between the person disclosing and any other person relating to the voting rights or future acquisition or disposal of any relevant securities to which any derivative referred to on this form is referenced. If none, this should be stated.	

WRITING/ENTERING INTO A DERIVATIVE

Product name eg long CFD	**Transaction date**	**Writing/entering into (indicate as applicable)**	**Number of securities to which the derivative is referenced**	**Reference price (currency must be stated)**	**Maturity date**

CLOSING OUT A DERIVATIVE

Product name eg long CFD	**Transaction date**	**Number of securities to which the derivative is referenced**	**Reference price (currency must be stated)**	**Closing out price (currency must be stated)**

DETAILS OF OPEN DERIVATIVES (excluding any transaction set out above)

Product name eg long CFD	**Transaction date**	**Written/entered into (indicate as applicable)**	**Number of securities to which the derivative is referenced**	**Reference price (currency must be stated)**	**Maturity date**

For details of the Code's dealing disclosure requirements, see Rule 8 and its Notes which can be viewed on the Takeover Panel's website at www.thetakeoverpanel.org.uk

SUPPLEMENTAL FORM 8 (OPTION)

DEALINGS/HOLDINGS IN OPTIONS

(This form should be attached to Form 8.1, Form 8.1(b)(ii), Form 8.2 or Form 8.3, as appropriate)

Description of all option products disclosed on this form.	
Full details of any agreement, arrangement or understanding between the person disclosing and any other person relating to the voting rights of any relevant securities under any option referred to on this form. If none, this should be stated.	

WRITING/PURCHASE OF OPTION

Product name eg call option	**Transaction date**	**Writing/purchase (indicate as applicable)**	**Number of securities under option**	**Exercise price (currency must be stated)**	**Expiry date**	**Option money paid/received (currency must be stated)**

EXERCISE OF OPTION

Product name eg call option	**Transaction date**	**Number of securities under option**	**Exercise price (currency must be stated)**

DETAILS OF OPEN OPTIONS (excluding any transaction set out above)

Product name eg call option	**Transaction date**	**Written/purchased (indicate as applicable)**	**Number of securities under option**	**Exercise price (currency must be stated)**	**Expiry date**	**Option money paid/received (currency must be stated)**

For details of the Code's dealing disclosure requirements, see Rule 8 and its Notes which can be viewed on the Takeover Panel's website at www.thetakeoverpanel.org.uk

FORM 38.5

DEALINGS BY CONNECTED EXEMPT PRINCIPAL TRADERS
(Rule 38.5 of The City Code on Takeovers and Mergers)

Name of exempt principal trader	
Company dealt in	
Relevant security dealt in	
Name of offeree/offeror with whom connected	
Nature of connection #	
Date of dealing	

Total number of securities bought	
Highest price paid (currency must be stated)	
Lowest price paid (currency must be stated)	

Total number of securities sold	
Highest price paid (currency must be stated)	
Lowest price paid (currency must be stated)	

Date of disclosure	
Contact name	
Telephone number	

See the definition of "connected fund managers and principal traders" in the Definitions Section of the Code.

For details of the Code's dealing disclosure requirements, see Rules 8, 38.5 and their Notes which can be viewed on the Takeover Panel's website at www.thetakeoverpanel.org.uk

FORM 38.5 (DERIVATIVE)

DEALINGS IN DERIVATIVES BY CONNECTED EXEMPT PRINCIPAL TRADERS
(Rule 38.5 of The City Code on Takeovers and Mergers)

Name of exempt principal trader	
Company dealt in	
Description of all derivative products disclosed on this form	
Relevant security to which the derivative is referenced	
Name of offeree/offeror with whom connected	
Nature of connection #	
Full details of any agreement, arrangement or understanding between the person disclosing and any other person relating to the voting rights or future acquisition or disposal of any relevant securities to which any derivative referred to on this form is referenced. If none, this should be stated.	
Date of dealing	

WRITING/ENTERING INTO A DERIVATIVE

Product name eg long CFD	**Transaction date**	**Writing/entering into (indicate as applicable)**	**Number of securities to which the derivative is referenced**	**Reference price (currency must be stated)**	**Maturity date**

CLOSING OUT A DERIVATIVE

Product name eg long CFD	**Transaction date**	**Number of securities to which the derivative is referenced**	**Reference price (currency must be stated)**	**Closing out price (currency must be stated)**

Date of disclosure	
Contact name	
Telephone number	

See the definition of "connected fund managers and principal traders" in the Definitions Section of the Code.

For details of the Code's dealing disclosure requirements, see Rules 8, 38.5 and their Notes which can be viewed on the Takeover Panel's website at www.thetakeoverpanel.org.uk

FORM 38.5 (OPTION)

DEALINGS IN OPTIONS BY CONNECTED EXEMPT PRINCIPAL TRADERS
(Rule 38.5 of The City Code on Takeovers and Mergers)

Name of exempt principal trader	
Company dealt in	
Description of all option products disclosed on this form	
Relevant security under option	
Name of offeree/offeror with whom connected	
Nature of connection #	
Full details of any agreement, arrangement or understanding between the person disclosing and any other person relating to the voting rights of any relevant securities under any option referred to on this form. If none, this should be stated.	
Date of dealing	

WRITING/PURCHASE OF OPTION

Product name eg call option	**Transaction date**	**Writing/purchase (indicate as applicable)**	**Number of securities under option**	**Exercise price (currency must be stated)**	**Expiry date**	**Option money paid/received (currency must be stated)**

EXERCISE OF OPTION

Product name eg call option	**Transaction date**	**Number of securities under option**	**Exercise price (currency must be stated)**

Date of disclosure	
Contact name	
Telephone number	

See the definition of "connected fund managers and principal traders" in the Definitions Section of the Code.

For details of the Code's dealing disclosure requirements, see Rules 8, 38.5 and their Notes which can be viewed on the Takeover Panel's website at www.thetakeoverpanel.org.uk

FORM SAR 3

DISCLOSURE OF ACQUISITIONS
(Rule 3 of The Rules Governing Substantial Acquisitions of Shares)

Name of acquiror	
Beneficial owner, if different from above	
Names of any other persons acting by agreement or understanding (see SAR 5)	
Company dealt in	
Class of voting shares (eg ordinary shares)	
Date of acquisition	

Number of shares acquired	
Number of rights over shares acquired #	
Nature of rights over shares	

Total holding of voting shares (and percentage of total voting shares in issue)	
Total holding of rights over shares (and percentage of total voting shares in issue)	
Combined total holding (and percentage) of voting shares and rights over shares	

Date of disclosure	
Contact name	
Telephone number	

See the definition of "rights over shares" in the Definitions Section of the SARs.

For details of the SARs disclosure requirements, see SARs 3 and 5 and their Notes which can be viewed on the Takeover Panel's website at www.thetakeoverpanel.org.uk

FORM SAR 5

DISCLOSURE OF DISPOSALS
(Rule 5 of The Rules Governing Substantial Acquisitions of Shares)

Name of seller	
Beneficial owner, if different from above	
Names of any other persons acting by agreement or understanding (see SAR 5)	
Company dealt in	
Class of voting shares (eg ordinary shares)	
Date of disposal	

Number of shares disposed of	
Number of rights over shares disposed of #	
Nature of rights over shares	

Total holding of voting shares (and percentage of total voting shares in issue)	
Total holding of rights over shares (and percentage of total voting shares in issue)	
Combined total holding (and percentage) of voting shares and rights over shares	

Date of disclosure	
Contact name	
Telephone number	

See the definition of "rights over shares" in the Definitions Section of the SARs.

For details of the SARs disclosure requirements, see SARs 3 and 5 and their Notes which can be viewed on the Takeover Panel's website at www.thetakeoverpanel.org.uk

APPENDIX C

Proposed summary of Rule 8 requirements for inclusion on the Panel's website

A summary of the principal provisions of Rule 8 in the following form would normally be acceptable for the purposes of Rules 2.4, 2.5(b)(viii), 2.6 and 24.2(d)(xi). Any material variation should be specifically agreed by the Panel in advance.

"Dealing Disclosure Requirements

Under the provisions of Rule 8.3 of the City Code on Takeovers and Mergers (the "City Code"), any person who, alone or acting together with any other person(s) pursuant to an agreement or understanding (whether formal or informal) to acquire or control securities of [*the offeror* or] *the offeree company*, owns or controls, or becomes the owner or controller, directly or indirectly, of one per cent. or more of any class of securities of [*the offeror* or] *the offeree company* is required to disclose, by not later than 12.00 noon (London time) on the London business day following the date of the relevant transaction, every dealing in any relevant securities of that company (or in any option in respect of, or derivative referenced to, any such securities) during the period to the date on which the offer becomes or is declared unconditional as to acceptances or lapses or is otherwise withdrawn.

Under the provisions of Rule 8.1 of the City Code, any such dealings by [*the offeror* or] *the offeree company*, or by any of their respective "associates" (within the meaning of the City Code) must also be disclosed.

If you are in any doubt as to the application of Rule 8 to you, please contact an independent financial adviser authorised under the Financial Services and Markets Act 2000, consult the Panel's website at www.thetakeoverpanel.org.uk or contact the Panel on telephone number +44 20 7638 0129; fax +44 20 7236 7013."

NB1 Where it has been announced that an offer or possible offer is, or is likely to be, solely in cash, there is no requirement to disclose dealings in relevant securities of the offeror.

NB2 References above to the offeror and the offeree company should be replaced with the names of the relevant companies.