THE TAKEOVER PANEL

PRACTICE STATEMENT NO. 26

SHAREHOLDER ACTIVISM

1. Introduction and summary

1.1 The Panel Executive understands that concerns have recently been expressed that certain provisions of the Takeover Code (the "Code") act as a barrier to co-operative action by fund managers and institutional shareholders. Specifically, concerns have been expressed that collective shareholder action (for example, shareholders jointly seeking to bring influence to bear on the board of a company) could be constrained by the Executive's application of the Code's "acting in concert" provisions and mandatory offer requirements.

1.2 The Executive does not believe that the relevant provisions of the Code have either the intention or the effect of acting as a barrier to co-operative action by fund managers and institutional shareholders or of constraining normal collective shareholder action. This Practice Statement therefore describes the way in which the Executive interprets and applies the relevant provisions of the Code in this area.

1.3 In summary, a mandatory offer may only be triggered by activist shareholders if both of the following tests are satisfied:

(a) those shareholders requisition a general meeting to consider a "board control-seeking" resolution or threaten to do so; and

(b) after an agreement or understanding is reached between the activist shareholders that a "board control-seeking" resolution should be proposed or threatened, those shareholders acquire interests in shares such that the shares in which they are interested together carry 30% or

more of the voting rights in the company (or, if they are already interested in shares carrying 30% or more of the voting rights of the company, they acquire further interests in shares).

For these purposes, a resolution will not normally be considered to be "board control-seeking" unless it seeks to replace existing directors with directors who have a significant relationship with the requisitioning shareholders with the result that those shareholders would effectively be in a position to control the board. A resolution will not normally be considered to be "board control-seeking" if the directors to be appointed are independent of the activist shareholders or if the primary purpose of the proposal is to appoint additional non-executive directors in order to improve the company's corporate governance.

1.4 As stated below, the following factors would not of themselves lead the Executive to conclude that a concert party had come together:

(a) discussions between shareholders about possible issues which might be raised with a company's board;

(b) joint representations by shareholders to the board; and

(c) the agreement by shareholders to vote in the same way on a particular resolution at a general meeting.

1.5 In addition, a proposal to change the manner in which a company is managed but which does not involve changes to the board will not normally be considered to be "board control-seeking" unless the activist shareholders make it known that, if their initial proposals are not implemented, they will put forward "board control-seeking" proposals.

1.6 In practice, "board control-seeking" resolutions are rare and, in the majority of normal collective shareholder actions, no mandatory offer issues would therefore arise. In any event, even if a "board control-seeking" resolution

were to be proposed by activist shareholders, no mandatory offer would be required if, at the time that any such agreement or understanding is reached, steps are taken to prevent the acquisition of interests in shares in the relevant company by the activist shareholders.

1.7 The current provisions of the Code regarding collective shareholder action were introduced into the Code following consultation in 2002, with the specific aim of assisting normal shareholder activism. Since that time, the Executive has not required any mandatory offer to be made in the context of a "board control-seeking" resolution. If interests in shares were to be acquired in the context of a "board control-seeking" resolution notwithstanding that appropriate measures had been taken to prevent any such acquisitions, the Executive would be much more likely to require the disposal of the relevant interests over an appropriate time period than to require a mandatory offer to be made. In view of this, the Executive believes that the risk of activist shareholders accidentally triggering a mandatory offer requirement is negligible.

1.8 The Executive is available for consultation if shareholders have any doubts as to the application of the Code in this area, in particular as to whether a particular proposal would be considered to be "board control-seeking", as described below. The Executive's experience indicates that, where it is consulted, concerns that particular proposals could be considered to be "board control-seeking" arise relatively infrequently.

2. Relevant provisions of the Code

2.1 Rule 9.1(a) of the Code provides that a mandatory offer must be made to all holders of any class of a company's equity share capital, and to holders of any other class of transferable securities carrying voting rights, when a person acquires an interest in shares which, taken together with shares in which persons acting in concert with him are interested, carry 30% or more of the voting rights of a company. Rule 9.1(b) provides that a mandatory offer must be made if a person, together with persons acting in concert with him, is

interested in shares which carry 30% or more of the voting rights of a company (but does not hold shares carrying more than 50% of such voting rights) and the person, or any person acting in concert with him, acquires further interests in shares which increases the percentage of shares carrying voting rights in which they are interested.

2.2 Note 1 on Rule 9.1 ("Coming together to act in concert") provides that, when a party has acquired an interest in shares without the knowledge of other persons with whom he subsequently comes together to co-operate as a group to obtain or consolidate control of a company, and the shares in which they are interested at the time of coming together carry 30% or more of the voting rights in that company, the Panel will not normally require a mandatory offer to be made under Rule 9.1.

2.3 Note 2 on Rule 9.1 sets out the Panel's approach to collective shareholder action. The first paragraph of the Note provides that:

(a) the Panel does not normally regard the action of shareholders voting together on a particular resolution as action which of itself indicates that such parties are acting in concert; but

(b) the Panel will normally presume shareholders who requisition or threaten to requisition the consideration of a "board control-seeking" proposal at a general meeting, together with their supporters as at the date of the requisition or threat, to be acting in concert with each other and with the proposed directors.

2.4 Subsequent paragraphs of Note 2 on Rule 9.1 set out non-exhaustive lists of factors to which the Panel will have regard in determining whether:

(a) a proposal is "board control-seeking" (these factors are discussed in section 3 below); and

(b) it is appropriate for members of a presumed concert party to be held no longer to be acting in concert (these factors were discussed in PCP 10 which was issued by the Code Committee in March 2002).

3. "Board control-seeking" proposals

(a) Significant relationship between the proposed directors and the activist shareholders/their supporters

3.1 The most important factor in determining whether a proposal put forward by activist shareholders is "board control-seeking" is whether there is a significant relationship between the proposed directors and the shareholders proposing them or their supporters. As indicated in Note 2 on Rule 9.1, relevant factors in this regard will include:

(a) whether there is, or has been, any prior relationship between any of the activist shareholders, or their supporters, and any of the proposed directors. For example, whether any of the proposed directors are, or have been, employees, directors or officers of any of the activist shareholders or any of their group companies;

(b) whether there are any agreements, arrangements or understandings between any of the activist shareholders, or their supporters, and any of the proposed directors with regard to their proposed appointment. For example, whether any of the proposed directors report to any of the activist shareholders; and

(c) whether any of the proposed directors will be remunerated in any way by any of the activist shareholders, or their supporters, as a result of, or following, their appointment.

3.2 In determining whether a significant relationship exists between any of the activist shareholders, or their supporters, and any of the proposed directors, the Executive will look at the strength of the overall relationship and the time

period over which the relationship has existed. In particular, the Executive will seek to gain an understanding of the likelihood of the proposed directors acting under the influence of the activist shareholders or their supporters rather than exercising their own independent judgement as to how the interests of shareholders generally may be advanced. If the Executive concludes that the relationship between the activist shareholders, or their supporters, and the proposed directors is insignificant, the proposal will not be considered to be "board control-seeking" (even if, for example, the activist shareholders propose to replace the entire board) and, therefore, no concert party will be presumed to exist. If an activist shareholder is concerned about whether the relationship between the shareholder, or its supporters, and a proposed director will be regarded by the Panel as "significant", the Executive may be consulted for guidance and/or a ruling as to how the relationship will be treated for Code purposes.

3.3 Even if there is a significant relationship, this will not, of itself, lead to the conclusion that a concert party exists. The other factors set out in Note 2 on Rule 9.1 will also need to be considered to determine whether the proposal is "board control-seeking", as described in sections (b) to (f) below. However, the following factors would not of themselves lead the Executive to conclude that a concert party had come together:

(a) discussions between shareholders about possible issues which might be raised with a company's board;

(b) joint representations by shareholders to the board; and

(c) the agreement by shareholders to vote in the same way on a particular resolution at a general meeting.

(b) Number of directors to be appointed or replaced compared with the total size of the board

3.4 As stated in Note 2 on Rule 9.1, if it is proposed to appoint or replace only one director, the proposal will not normally be considered to be "board control-seeking". This would be the case even if the director to be appointed or replaced is the chief executive and even if the proposed new director has a relationship with one or more of the activist shareholders. However, there may be exceptions, for example, where it is proposed to replace the executive chairman of a small board.

3.5 Similarly, if the implementation of the proposal would not result in the proposed directors representing a majority of the directors on the board, then the proposal would not normally be considered to be "board control-seeking".

3.6 The Executive will consider the number of directors to be appointed or replaced compared with the total size of the board at the time at which the relevant meeting is requisitioned or threatened in the light of all relevant information available at that time.

(c) Board positions held by the directors being replaced and to be held by the proposed directors

3.7 A proposal to appoint or replace two or more non-executive directors would not normally be considered to be "board control-seeking". However, a proposal to replace two or more of the chairman, chief executive and finance director would be more likely to be considered to be "board control-seeking".

(d) Nature of the mandate, if any, for the proposed directors

3.8 If, for example, the primary purpose of the proposal is to appoint additional non-executive directors in order to improve the company's corporate governance, this will not lead to the proposals being considered to be "board control-seeking", subject to other factors indicating to the contrary.

(e) Whether the activist shareholders/their supporters will benefit as a result of the implementation of the proposal, other than through their interests in shares in the company

3.9 By way of example, a proposal which would involve the company entering into a major contractual arrangement with one of the activist shareholders would be likely to be considered to be "board control-seeking".

(f) Relationship between the proposed directors and the existing directors and/or between the existing directors and the activist shareholders/their supporters

3.10 A board controlling position might be created in certain circumstances even if the proposed directors would not themselves represent a majority of the board. For example, there might be an existing relationship between the proposed directors and the existing directors, or between the existing directors and the activist shareholders.

(g) Other proposals regarding a company's management

3.11 In the absence of proposed changes to the board, a proposal by activist shareholders as to the manner in which a company should be managed (for example, a proposal that the company should sell one of its businesses and return the cash proceeds to shareholders) would not, of itself, be considered to be "board control-seeking". This is because the directors would continue to be in charge of the management of the company. However, if the activist shareholders make it known that, if their initial proposals are not implemented, they will put forward "board control-seeking" proposals, this may cause the Executive to determine that the initial proposals should be considered to be "board control-seeking", and that a concert party has arisen.

3.12 For example, if the activist shareholders inform the board that, unless their proposal is implemented, they will requisition a general meeting to replace the

three executive directors on a board of five directors with A, B and C, all of whom are non-independent appointees of the activist shareholders, then a concert party would normally arise. If, however, A, B and C are independent of the activist shareholders, or if they would be appointed as non-executive directors on a board of seven, then a concert party would not normally be considered to have arisen.

4. Other issues

(a) Time of "coming together"

4.1 As stated in the first paragraph of Note 2 on Rule 9.1, where a group of shareholders requisitions or threatens to requisition a general meeting to consider a "board control-seeking" resolution, they, and their supporters, will be presumed to have come into concert only once an agreement or understanding is reached between them in respect of the "board control-seeking" proposal. As indicated above, preliminary discussions between shareholders on particular matters would not give rise to a presumption of concertedness.

(b) Supporters subsequent to the date of the requisition not normally considered to be members of the concert party

4.2 Where a concert party is held to have arisen, its membership will normally be limited to the shareholders who requisition, or threaten to requisition, the general meeting to consider the "board control-seeking" proposal, together with their supporters as at the date of the requisition or threat. Once the requisition, or threat, has been announced, the soliciting of support, including proxies, by the activist shareholders will not result in the shareholders approached being considered to be members of the concert party (subject to there being no other factors evidencing concertedness).

(c) "Coming together" to act in concert does not, of itself, trigger a mandatory offer

4.3 As indicated above, even if a proposal is considered to be "board control-seeking", such that the activist shareholders behind the proposal are presumed to be acting in concert, and the aggregate number of shares in which the members of the concert party are interested carry 30% or more of the company's voting rights, the "coming together" of the concert party will not normally, of itself, result in a possible requirement to make a mandatory offer. A requirement to make a mandatory offer would only arise if a member of the concert party were to acquire additional interests in shares carrying voting rights. Even then, the Executive would not normally require a mandatory offer to be made if:

(a) such acquisitions were made as a result of an inadvertent mistake;

(b) the interests acquired were disposed of within a limited period; and

(c) appropriate voting restrictions were put in place pending the completion of such disposals.

(d) Disposals

4.4 The Executive notes that, although a concert party member might wish to put arrangements in place to ensure that a mandatory offer requirement would not be triggered by the acquisition of additional interests in shares carrying voting rights, there would be no restriction on the disposal of such interests by the members of the concert party. Accordingly, such persons will always be free to realise their investments at any time.

5. Consultation

If shareholders have concerns about the application of the Code to them, or are unsure whether their actions may have consequences in relation to "acting in concert", they

may seek guidance or a ruling from the Executive at any time. The Executive is experienced in regulating fast-moving transactions and events and understands the desire of persons who consult it for certainty as to their position under the Code, often within a short period of time.

Practice Statements are issued by the Panel Executive to provide informal guidance to companies involved in takeovers and practitioners as to how the Executive normally interprets and applies relevant provisions of the Takeover Code in certain circumstances. Practice Statements do not form part of the Code. Accordingly, they are not binding on the Executive or the Panel and are not a substitute for consulting the Executive to establish how the Code applies in a particular case. All Practice Statements issued by the Executive are available on the Panel's website at www.thetakeoverpanel.org.uk.

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