

RS 2005/3 Issued on 21 April 2006

THE TAKEOVER PANEL

DEALINGS IN DERIVATIVES AND OPTIONS

STATEMENT BY

THE CODE COMMITTEE OF THE PANEL

FOLLOWING THE EXTERNAL CONSULTATION

PROCESSES ON CONTROL ISSUES IN

PCP 2005/1 AND PCP 2005/3

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SECTION A

INTRODUCTION

1. The consultation papers on dealings in derivatives and options

1.1 This Response Statement provides details of the response of the Code Committee of the Takeover Panel (the “Code Committee”) to the external consultation processes on the outline proposals in Part C of PCP 2005/1 and on the detailed proposals in PCP 2005/3 (together, the “Control Issues”), including details of the provisions of the Takeover Code (the “Code”) which are being introduced or amended in relation to the Control Issues.

(a) PCP 2005/1

1.2 On 7 January 2005, the Code Committee published a Public Consultation Paper (“PCP 2005/1”) entitled “Dealings in Derivatives and Options – outline proposals relating to amendments proposed to be made to the Takeover Code and the SARs”. Part B of PCP 2005/1 dealt with issues in connection with the disclosure of dealings in derivatives and options. Part C of PCP 2005/1 dealt with issues in connection with dealings in derivatives and options by parties to an offer and persons whose interests fall into the 30% to 50% band.

(b) PCP 2005/2

1.3 On 13 May 2005, the Code Committee published a Public Consultation Paper (“PCP 2005/2”) entitled “Dealings in Derivatives and Options – detailed proposals relating to amendments proposed to be made to the Takeover Code. Part 1: Disclosure Issues”.

1.4 On 5 August 2005, the Code Committee published a Response Statement (“RS 2005/2”) on the external consultation processes on the issues in Part B of PCP 2005/1 and in PCP 2005/2 (together, the “Disclosure Issues”). The amendments adopted in RS 2005/2 took effect on 7 November 2005.

(c) ***PCP 2005/3***

1.5 On 2 November 2005, the Code Committee published a Public Consultation Paper (“PCP 2005/3”) entitled “Dealings in Derivatives and Options – detailed proposals relating to amendments proposed to be made to the Takeover Code. Part 2: Control Issues”. Section B of PCP 2005/3 proposed amendments to the Code in connection with dealings in derivatives and options by parties to an offer and persons whose interests fall into the 30% to 50% band. Section C proposed amendments to the Code in connection with the introduction of a new status for trading desks which trade as principal for client-serving purposes, to be known as “recognised intermediary” status. Section D proposed amendments to Rule 38.5 (disclosure of dealings by connected exempt principal traders). Section E proposed amendments to Rules 4 and 7.2.

(d) ***Responses to the Control Issues consultations***

1.6 Eighteen responses to PCP 2005/1 were received. Thirteen of the respondents submitted their comments on a non-confidential basis.

1.7 Nine responses to PCP 2005/3 were received. All respondents submitted their comments on a non-confidential basis.

1.8 A list of the non-confidential respondents to PCP 2005/1 and PCP 2005/3 can be found at Appendix C to this Response Statement.

2. Code amendments, transitional arrangements, review and new disclosure forms

(a) ***Code amendments***

2.1 Appendix A to this Response Statement sets out the provisions of the Code which are being introduced or amended as a result of the consultation exercises in relation to the Control Issues.

2.2 In addition to this Response Statement, the Code Committee is also publishing today three other Response Statements, namely RS 2005/4, RS 2005/5 and RS 2006/1. The amendments adopted by the four Response Statements will come into force on 20 May. Owing to the volume of changes, the Panel intends to publish a new edition of the Code which will be despatched to subscribers shortly before 20 May.

2.3 In some cases, the Code Committee has adopted amendments in different Response Statements which affect the same provision of the Code. In order to assist readers in understanding not only all the amendments, but also their origins, the Code Committee has, for the most part, included in the appropriate Appendix to each Response Statement only those amendments that arise out of the Code Committee's conclusions in relation to that particular Response Statement. However, in certain cases, where the same part of a provision of the Code has been changed by more than one Response Statement, that provision has been included in that Appendix as marked to show all changes from the current Code, i.e. incorporating the amendments made in the other Response Statement(s). The consolidated amendments, being the adopted amendments as marked to show all changes from the current Code, taking account of the amendments made by all the Response Statements, have today been made available on the Panel's website (www.thetakeoverpanel.org.uk). Where the numbering of a Rule or Note has been changed by any of the amendments, relevant cross references in other Rules or Notes have been changed in the new edition of the Code. For the most part, changes to cross references have not been included in the consolidated amendments available on the Panel's website.

(b) *Transitional arrangements*

2.4 The Code, as revised, will come into effect on 20 May and will be applied from that date to all companies and transactions to which it then relates, including those on-going transactions which straddle that date, except where to do so would give the amendments retroactive effect. **Where parties have**

doubts as to the consequences of any of the rule changes, in particular the impact on any transaction which is in existence or contemplation (including a transaction involving a company to which the Code does not currently relate but to which it will relate on or after 20 May), they should consult the Panel prior to 20 May to obtain a ruling or guidance.

2.5 Rules 6, 9.5 and 11, as amended by paragraph 6 below, will be applied after 20 May as follows.

(i) *Offers posted on or after 20 May*

2.6 In respect of an offer posted on or after 20 May, whether or not an announcement of a firm intention to make the offer was made under Rule 2.5 prior to 20 May, all acquisitions of interests in shares will be taken into account in determining the offer price and the nature of the consideration to be offered if they took place in the relevant periods referred to in each of Rules 6, 9.5 and 11, even if they took place prior to the implementation of the amendments in this Response Statement on 20 May.

(ii) *Offers posted prior to 20 May*

2.7 In respect of an offer posted prior to 20 May, since the current Code will continue to apply until 20 May, then, save as explained below, only purchases of shares prior to 20 May (and not acquisitions of other interests in shares prior to 20 May) will, be taken into account in determining the offer price and the nature of the consideration to be offered. In determining whether an offeror has an obligation to increase its offer or to introduce consideration of a particular nature, all acquisitions of interests in shares (and not just purchases of shares) made on or after 20 May will be relevant. If any such acquisitions are made then, for the purposes of Rules 9.5 and 11, any purchases of shares or acquisitions of other interests in shares in the relevant periods referred to in each of those Rules will be taken into account, even if they took place prior to the implementation of the amendments in this Response Statement on 20 May.

(c) *Code Committee review*

2.8 As stated in paragraph 2.3 of PCP 2005/3, the Code Committee recognises that the rule changes relating to the Disclosure Issues and the Control Issues may have significant implications for market participants. The Code Committee will therefore be undertaking a review of the operation of the new regime relating to dealings in derivatives and options in June 2007. The conclusions of that review will be published.

(d) *New disclosure forms*

2.9 Appendix B to this Response Statement sets out the new specimen disclosure forms referred to in paragraph 14 below, i.e. Form 38.5(a), Form 38.5(b) and Supplemental Form 38.5(b) (the “Rule 38.5 Disclosure Forms”). The Rule 38.5 Disclosure Forms are now available on the Panel’s website (www.thetakeoverpanel.org.uk) and should be used in relation to dealings from 20 May. Until that time, disclosures under Rule 38.5 should follow the format of the existing forms, which will continue to be available on the Panel’s website in the meantime.

2.10 In the case of doubt regarding the Rule 38.5 Disclosure Forms, please contact the Market Surveillance Unit of the Panel on 020 7638 0129.

SECTION B

PCP 2005/1 - OUTLINE PROPOSALS RELATING TO THE CONTROL ISSUES

- 3. Dealings in derivatives and options by parties to an offer and persons acting in concert with them and by persons whose interests, together with the interests of persons acting in concert with them, fall into the 30% to 50% band**
- Q15. Do you prefer the narrow approach or the broad approach and do you have any other comments on either the narrow approach or the broad approach?**
- 3.1 Paragraph 14 of PCP 2005/1 described two possible ways in which Rules 5, 6, 9 and 11, amongst others, could be amended to apply to dealings in derivatives and options, namely the “narrow approach” and the “broad approach”.
- 3.2 As described in paragraph 14.2 of PCP 2005/1, the key focus of the narrow approach was the prevention of the use of derivatives and options as a means of accumulating a long position in shares in excess of the relevant thresholds prescribed under Rule 5.1. The means by which this could be achieved were described to be, in summary, as follows:
- (a) by regarding long derivatives referenced to shares carrying voting rights in a company as equivalent to “rights over shares” for the purposes of Rule 5.1;
 - (b) by amending the second paragraph of Note 11 on Rule 9.1 to apply also to dealings in long derivatives referenced to shares and by listing the factors to be taken into account in determining whether effective control over shares to which a derivative was referenced, or which were subject to an option, had passed; and

- (c) by amending Rules 6 and 11 to provide that where (i) an offeror or a person acting in concert with it enters into a derivative referenced to, or an option in respect of, shares in the offeree company during the relevant period, and (ii) effective control over those shares has passed, Rules 6 and 11 would be triggered at the time that such effective control passed, by reference to the price paid to acquire such effective control.

3.3 As described in paragraph 14.6 of PCP 2005/1, under the broad approach, all long derivative and option transactions would, in effect, be treated as dealings in the underlying securities for the purposes of the Code. The means by which this could be achieved were described in paragraph 14.7 of PCP 2005/1 to be, in summary, as follows:

- (a) by amending Rule 5 in the same way as proposed for the narrow approach;
- (b) by amending Rule 9.1 so that the thresholds for the triggering of an obligation to make a mandatory cash offer would take into account the aggregate number of shares carrying voting rights, call options and written put options in respect of such shares, and long derivatives referenced to such shares. In addition, paragraph 14.7 of PCP 2005/1 envisaged the amendment of the first paragraph of Note 11 on Rule 9.1 so as to refer only to options to subscribe for new shares (and not to options to acquire existing shares) and the deletion of the second paragraph of Note 11 on Rule 9.1 (which would become redundant); and
- (c) by amending Rules 6, 9.5 and 11 so as to address the issue of the price at which an offer should be made in one of the two alternative ways described in paragraphs 14.7(b)(iii) and (c) of PCP 2005/1.

3.4 In paragraph 14.10 of PCP 2005/1, the Code Committee stated that it believed adopting the broad approach was the preferable course of action.

3.5 Ten of the respondents to PCP 2005/1 specifically addressed Question 15.

- 3.6 Four respondents preferred the narrow approach, either “on balance” or in the context of their wider objections to the Code Committee’s proposals.
- 3.7 Four respondents preferred the broad approach, although one (as well as one of the respondents who on balance preferred the narrow approach) believed that there should be a presumption, capable of rebuttal, that the holder of a long CFD exercised de facto control over the shares held by its counterparty in order to hedge its position.
- 3.8 One respondent, whose response focussed principally on the Disclosure Issues, opposed altogether the extension of the Code Committee’s proposals to the Control Issues.
- 3.9 Finally, one respondent opposed the broad approach but suggested that, in the event that it were to be adopted by the Code Committee, the required rules should be phased in over a period of time. This respondent also expressed concern as to the monitoring and enforcement of the broad approach.
- 3.10 Having considered the responses to PCP 2005/1, the Code Committee stated in PCP 2005/3 that, for the reasons set out in PCP 2005/1, it continued to prefer the broad approach. The broad approach is discussed in more detail in paragraph 4 below.

Q16. With regard to the minimum price obligations contained in Rules 6, 9.5 and 11, under the broad approach do you prefer Option 1 or Option 2?

- 3.11 Paragraphs 14.7(b)(iii) and (c) of PCP 2005/1 described two alternative ways of establishing the price at which an offer should be made pursuant to Rules 6, 9.5 and 11 under the broad approach where relevant dealings had taken place, namely “Option 1” and “Option 2”.
- 3.12 In summary, Option 1 proposed that the person dealing would be treated as having purchased shares at the highest derivative reference price or option exercise price (plus any option money paid) in the relevant period, whereas

Option 2 focussed on the highest price at which the counterparty to the offeror's long derivative or option position had acquired shares to hedge its position.

- 3.13 At the end of paragraph 14.7 of PCP 2005/1, the Code Committee stated that it preferred Option 1.
- 3.14 The respondents who addressed Question 16 were the same as those who addressed Question 15.
- 3.15 Five respondents preferred Option 1, although two did so "on balance" and one did so in the context of its objections to the broad approach. Of two other respondents who objected to the broad approach, one preferred Option 2 as being directly linked to the physical cash market, whilst another opposed Option 1 but made no comment on Option 2. Some respondents, whilst commenting on the two Options, did not express a preference for either.
- 3.16 The two respondents who most favoured Option 1 believed that, despite the fact that it might operate harshly for an offeror who had taken out-of-the-money positions, Option 1 was clear and simple and that the offer price would be within the control of the offeror rather than its counterparty. Four other respondents expressed reservations about determining the offer price by reference to the hedging activities (if any) of the offeror's counterparty, as contemplated by Option 2.
- 3.17 Five of the respondents questioned whether, in the case of an option, the option exercise price would always be an appropriate point of reference for the offer price, particularly where the option was out-of-the-money. One respondent noted that the exercise price of an option was not relevant to, or descriptive of, the market price of the underlying shares at any time. Similarly, another respondent believed that Option 1 might be unfair in the case of an out-of-the-money transaction which might not lead to the acquisition of hedge shares of any "significance".

- 3.18 Having considered the responses to PCP 2005/1, the Code Committee stated in PCP 2005/3 that, subject to certain modifications, it continued to believe Option 1 to be preferable. The price at which an offer is required to be made is discussed in more detail in paragraph 6 below.

SECTION C

PCP 2005/3 - DEALINGS IN DERIVATIVES AND OPTIONS BY PARTIES TO AN OFFER AND PERSONS WHOSE INTERESTS FALL INTO THE 30% TO 50% BAND

4. The broad approach: interests in shares and other securities

Q.1 Do you agree with the proposed amendments in order to implement the broad approach as described in paragraph 4 above?

4.1 Paragraph 4 of PCP 2005/3 described the amendments proposed by the Code Committee in order to implement the key elements of the broad approach (see paragraph 3.3 above).

4.2 Of the eight respondents to Question 1, five agreed and three disagreed with the proposed amendments in order to implement the broad approach.

(a) *Suggested modification of the broad approach*

4.3 The three respondents who disagreed with the broad approach believed that an investor should not always be regarded as controlling the shares underlying its derivative or option position for the purposes of Rule 9 or (in the case of two of the respondents) Rule 5. These three respondents believed that it should be open to an investor to demonstrate that control over the shares underlying its derivative or option position had not passed to it.

4.4 One of these respondents proposed a “modified broad approach”, whereby control would be presumed to have passed to an investor by virtue of its derivative or option position, but this presumption would be capable of being rebutted by the investor. This modified approach was supported by one of the other respondents who disagreed with the broad approach and noted by one of the respondents who supported the broad approach. Another respondent

had previously made a similar suggestion in its response to PCP 2005/1 (see paragraph 3.7 above).

- 4.5 The Code Committee has considered the suggestion of introducing a rebuttable presumption of control over the shares underlying an investor's derivative or option position, but continues to prefer the broad approach because:
- (a) the Code Committee believes the “modified” broad approach suffers from many of the drawbacks of the narrow approach (see paragraph 3 above) including, in particular, the fact that the holder of the derivative or option might be able to adduce evidence (including documentary evidence setting out the terms of the derivative or option) in support of his contention that he had no control over the underlying shares. However, the Panel, and the company concerned, might nonetheless be concerned that the holder of the derivative or option had effective control over the underlying shares but in practice would be unable to prove that that was the case. By contrast, under the broad approach, a mandatory bid obligation will be triggered where a person acquires an aggregate long position in shares, options and derivatives of 30% or more, without there being a need to establish whether actual control over any hedge shares has passed from the counterparty to the person concerned;
 - (b) under the broad approach, dealings in derivatives and options would be treated in a consistent manner across all Rules of the Code, namely as equivalent to dealings in the underlying shares; and
 - (c) whilst the broad approach might be considered to be tough, it would only apply to offerors, potential offerors and persons with substantial interests (and, in each case, persons acting in concert with them) who chose to deal in knowledge of the consequences. Importantly, the persons who are most likely to have substantial interests by virtue of derivative and option positions, namely the trading desks of investment banks and securities houses which trade as principal primarily for client-serving purposes, would be eligible to apply to the Panel for “recognised intermediary” status, which status would

afford the desk a dispensation from the requirements of Rule 9.1 in relation to derivative and option positions which it holds in a client-serving capacity (see Section D below).

(b) *Trading restriction on derivatives*

4.6 Two respondents believed that the broad approach as proposed in the PCP would restrict the trading of derivatives, particularly since the broad approach would take into account a person's gross long interests in shares and would not generally take account of the fact that an investor might have flattened a long derivative position by entering into an offsetting short position.

4.7 The Code Committee continues to believe its approach of not permitting short positions to be offset against long positions (other than in very limited circumstances) to be correct. Whilst a person may become economically "flat" if he takes out a short position in order to offset his long position, any control over the shares held by the counterparty with which he has entered into the long position will not be diminished by entering into a short position with a different counterparty.

4.8 In addition, the Code Committee does not believe that a clear case has been made that the introduction of the Control Issues amendments will have a material impact on the trading of derivatives for investment purposes. Other than those trading desks which are likely to qualify for recognised intermediary status, the Code Committee has been provided with little evidence of persons wishing to take out long positions in respect of 30% or more of the shares of a company. In addition, the Code Committee believes that any person wishing to take out such a position might be doing so not for investment purposes but for the purpose of controlling the company.

(c) *Definition of "interests in securities"*

4.9 One of the five respondents who agreed with the broad approach noted the breadth of the Code's definition of "interests in securities" and queried

whether there should be express carve-outs to the definition or, alternatively, whether the Panel would retain the discretion to grant dispensations in such circumstances as the Panel thought appropriate.

- 4.10 The definition of “interests in securities” was introduced on 7 November 2005 as part of the Disclosure Issues amendments adopted by RS 2005/2. The Code Committee acknowledges that the definition of “interests in securities” is drafted broadly but understands that this has not given rise to any particular difficulties since the implementation of the Disclosure Issues amendments. Nevertheless, the Code Committee confirms that it would be open to the Panel to grant a dispensation from a strict application of the definition in appropriate circumstances, whether in relation to the provisions introduced as a result of the Disclosure Issues changes or the Control Issues changes.

(d) Code amendments

- 4.11 In the light of the above, the Code Committee has concluded that the broad approach should be adopted and has therefore adopted various amendments to the Code as described in paragraphs 4.12 to 4.17 below and as set out in Appendix A to this Response Statement.

(i) Rule 9.1

- 4.12 In relation to Rule 9.1, the Code Committee has:

- (a) amended paragraphs (a) and (b) of Rule 9.1 as proposed in paragraph 4.6(a) of PCP 2005/3; and
- (b) deleted the second paragraph of Note 11 on Rule 9.1 (which, following the deletion by RS 2005/5 of Note 9 on Rule 9.1, has become Note 10) and has amended the first paragraph of the Note, as proposed in paragraph 4.6(b) of PCP 2005/3.

The paragraph following Rule 9.1(b) has been amended as described in RS 2005/5 issued today, PCP 2005/5 having proposed the deletion of the words in that paragraph which PCP 2005/3 had proposed to amend.

(ii) *Rule 5 and the definitions of “rights over shares” and “interests in securities”*

4.13 In relation to Rule 5 and the definitions of “rights over shares” and “interests in securities”, the Code Committee has:

- (a) deleted the definition of “rights over shares” from the Code, as proposed in paragraph 4.13(a) of PCP 2005/3;
- (b) introduced an additional paragraph (5) to the definition of “interests in securities”, as proposed in paragraph 4.13(b) of PCP 2005/3;
- (c) introduced a new preamble to Rule 5, as proposed in paragraph 4.13(c) of PCP 2005/3;
- (d) amended Rule 5.1 as proposed in paragraph 4.13(d) of PCP 2005/3; and
- (e) made the consequential amendments to Rule 5.3 and Note 1 thereon, and deleted the second sentence of Note 2 on Rule 5.2, as proposed in paragraph 4.13(e) of PCP 2005/3.

(iii) *Notes on the definition of “interests in securities”*

4.14 In relation to the Notes on the definition of “interests in securities”, the Code Committee has:

- (a) introduced a new Note 9(a) on the definition of “interests in securities” in relation to variations and other acquisitions of interests in shares or other securities, as proposed in paragraph 4.16(a) of PCP 2005/3;

- (b) deleted the definition of “purchases or other acquisitions of shares”, as proposed in paragraph 4.16(b) of PCP 2005/3;
- (c) introduced a new Note 9(b) on the definition of “interests in securities” in relation to irrevocable commitments, as proposed in paragraph 4.20 of PCP 2005/3;
- (d) introduced a new Note 9(c) on the definition of “interests in securities” in relation to conditional share sale and purchase agreements and options, as proposed in paragraph 4.23 of PCP 2005/3. As stated in paragraph 4.21 of the PCP, the Code Committee considers that, provided that:

- (i) the sale and purchase agreement or option is conditional upon the offer becoming or being declared wholly unconditional; and
- (ii) general control of the voting rights attached to the shares to which the agreement or option relates does not pass to the offeror at an earlier time,

an offeror’s entering into such an agreement or option should not normally be treated as an acquisition of an interest in such shares, other than for the purposes of Rule 5. In other words, the Code Committee considers that such an agreement should be treated in the same way as an irrevocable commitment to accept an offer.

(iv) *Other provisions*

4.15 Paragraphs 4.24 to 4.26 of PCP 2005/3 proposed a large number of minor changes to the Code which are required in order to implement the broad approach.

4.16 There having been no specific comments from respondents on these proposals, the Code Committee has:

- (a) adopted the amendments to the various provisions containing references to “shareholdings”, “shares”, “securities”, “holdings” and “percentage holdings” (or similar words or phrases) so as to refer instead to “interests in shares/securities”, “shares/securities in which a person is interested” and “percentages” (or similar words or phrases) as proposed in paragraph 4.25(a) of PCP 2005/3, save where the references in question have been amended or deleted by RS 2005/5;
- (b) amended Note 4 on the definition of “interests in securities” as proposed in paragraph 4.25(a) of PCP 2005/3, so as to make clear that a person will be treated as interested in securities which he has borrowed in the circumstances set out in Note 18 (to be renumbered Note 17) on Rule 9.1;
- (c) amended the references to “purchases” of shares or other securities (or similar words or phrases) so as to refer to “acquisitions” of interests in such shares or securities (or similar words or phrases) in the various provisions referred to in paragraph 4.25(b) of PCP 2005/3;
- (d) amended the definition of “cash purchases” so as to become a definition of “cash acquisitions” and amended the definition as proposed in paragraph 4.25(b)(i) of PCP 2005/3;
- (e) amended the heading to Note 6 on Rule 9.1 and introduced a new final paragraph to that Note as proposed in paragraph 4.25(b)(ii) of PCP 2005/3, in order to make clear that the Note is applicable to acquisitions of all types of interests in shares and not only to purchases of shares;
- (f) amended the references to a “controlling shareholder” (or similar words or phrases) so as to refer to a “controller” (or similar words or phrases) in the various provisions referred to in paragraph 4.25(c) of PCP 2005/3;
- (g) amended the references to a person “exercising” votes (or similar words or phrases) so as also to refer to a person “procuring the exercise” of votes (or

similar words or phrases) in the various provisions referred to in paragraph 4.25(d) of PCP 2005/3;

- (h) amended the current Note 9 (which will become Note 7) on Rule 5.1 and introduced a new Note 12 (proposed in PCP 2005/3 as Note 13) on Rule 9.1 in relation to the receipt of gifts. The amended Note 7 on Rule 5.1 and the new Note 12 on Rule 9.1, as set out in Appendix A to this Response Statement, take into account both the proposals in paragraph 4.25(e) of PCP 2005/3 and the amendments to Note 7 on Rule 5.1 adopted in RS 2005/5;
- (i) amended paragraph (c) of Note 6 on Rule 9.1 as proposed in paragraph 4.25(f) of PCP 2005/3;
- (j) amended the heading and the first sentence of Rule 9.6 as proposed in paragraph 4.25(g) of PCP 2005/3; and
- (k) amended each of Rules 2.8(c) and 35.1(c) as proposed in paragraph 4.25(g) of PCP 2005/3.

4.17 In addition, the Code Committee has:

- (a) amended Note 2 on Rule 9.1 to make clear that supporters of a board control-seeking proposal need not be shareholders of the company in question, as proposed in paragraph 4.26(a) of PCP 2005/3; and
- (b) amended Rule 36.5 to make clear that the “over 50%” approval requirement applies to over 50% of the voting rights held by shareholders who are “independent” of the offeror and persons acting in concert with it, rather than to over 50% of the voting rights not held by the offeror concert party, as proposed in paragraph 4.26(b) of PCP 2005/3. The amended Rule 36.5 set out in Appendix A to this Response Statement also takes into account the amendments to Rule 36.5 adopted in RS 2005/5 and RS 2006/1.

5. The acceptance condition and the 30% to 50% band

Q.2 Do you agree with the Code Committee's conclusions regarding the acceptance condition under Rules 9.3(a) and 10? In particular, do you agree that only shares, and not interests in shares arising by virtue of derivatives and options, should be taken into account under Rule 9.3(a)?

5.1 In paragraph 5.7 of PCP 2005/3, the Code Committee concluded that, whilst Rule 9.1 should be amended so as to be triggered as a result of acquiring interests in shares by virtue of derivatives and options, Rules 9.3(a) and 10 should remain unchanged, so that interests in shares arising by virtue of derivatives and options would not count towards satisfaction of an offeror's acceptance condition. In reaching this conclusion, the Code Committee took into account that the current requirement for all offers, whether voluntary or mandatory, to be subject to an acceptance condition requiring the acquisition of shares carrying over 50% of a company's voting rights (and not including derivative or option interests) ensures that:

- (a) a bidder is only able (or, in the case of a mandatory bid, required) to acquire shares via a general offer for a public company in circumstances where it will have statutory control of the company (or, in the case of a mandatory bid, where it and persons acting in concert with it will together have statutory control);
- (b) in a competitive situation, there can be only one successful bidder; and
- (c) offeree company shareholders can accept an offer in the firm knowledge that their acceptances will crystallise only in the event that statutory control of the company passes.

5.2 Of the eight respondents to Question 2, six agreed with the Code Committee's conclusions (although two of them noted the apparent inconsistency with the approach taken by the Code Committee in relation to the triggering of a mandatory offer) and one disagreed. The eighth respondent believed that this

was a particularly complicated area and suggested some amendments to the proposals in order to address the concerns it had identified, as discussed in paragraphs 5.3 to 5.14 below.

(a) *Ability to require derivative and option positions to be taken into account for the purposes of a mandatory offeror's acceptance condition*

5.3 The eighth respondent, whilst supportive of the objectives of the broad approach, was concerned that the proposal not to amend Rule 9.3(a) so as to take derivative and option positions into account for the purposes of the acceptance condition of a Rule 9 bid might be open to abuse, resulting in the purpose of the mandatory offer (i.e. the provision to shareholders of an opportunity to exit the company upon the passing of control) being frustrated in certain circumstances. The respondent suggested that the Code could be amended so as to allow the Panel, in appropriate circumstances, to require a mandatory offeror's derivative and option positions to be taken into account for the purposes of its acceptance condition.

5.4 The Code Committee recognises that a consequence of the proposals in PCP 2005/3 would be that the larger a person's derivative or option position, the more likely it would be that he would trigger a bid obligation, but the less likely it might be that the bid would become unconditional. To take an extreme example, a person could obtain a call option from a single shareholder in respect of the latter's 51% shareholding and, although this would result in Rule 9.1 being triggered, the mandatory offer could not, under Rule 9.3 in its current form, become unconditional in the absence of either (a) the offer being accepted by the single shareholder, or (b) the single shareholder being deemed to be acting in concert with the offeror (in which case the single shareholder's shares would be counted towards the satisfaction of the acceptance condition).

5.5 Such a situation might be considered to be contrary to the purpose of a mandatory offer and the spirit of Rule 9. Furthermore, if the offeror had been aware that its offer would not be accepted by the counterparty to its derivative or option position, then entering into the derivative or option, and thereby

triggering a Rule 9 bid, might have been in breach of the spirit of Rule 2.5(a). This is because Rule 2.5(a) provides that an announcement of an offer “should only be made when an offeror has every reason to believe that it can and will continue to be able to implement the offer”.

- 5.6 The respondent went on to argue that, therefore, the Code should include an express provision enabling the Panel, on a case by case basis, to deal with circumstances such as those described above, for example by determining that in such a case the shares the subject of the derivative or option should be counted towards the Rule 9.3(a) acceptance condition, notwithstanding that they would not count under the usual application of the Rule.
- 5.7 The Code Committee has given detailed consideration to this point, but has concluded on balance that it would not be practicable or appropriate to include a provision of the type suggested by the respondent in the Code. Whilst there may be extreme circumstances where it appears that an offer is unlikely to become unconditional because of the offeror’s derivative or option positions, the Code Committee considers that, in most circumstances, requiring the Panel to determine whether or not an offeror’s derivative and option positions should be taken into account for the purposes of its acceptance condition would give rise to various problems. For example:
- (a) although there might be concerns in certain circumstances that the offeror had entered into the derivative or option position with the intention of making its offer less likely to succeed (as described above), if a provision of the type suggested by the respondent were included there might equally be concerns that an offeror was seeking to take advantage of the provision and had entered into a derivative or option position with the specific intention of making its offer more likely to succeed (i.e. because those shares might be counted towards the acceptance condition when the offeror might not otherwise receive sufficient acceptances, or be able to buy enough shares in the market, in order for its offer to become unconditional). Accordingly, if a provision of the type suggested were included in the Code, the Panel would inevitably be called upon to make difficult and subjective judgments as to what the offeror’s

intentions were at the time of entering into the derivative or option and such judgments might often be crucial in determining the success or failure of the offer;

- (b) there might be circumstances where it would not be possible or practicable for the Panel to make the determination as to whether or not shares the subject of options or derivatives should count towards the acceptance condition before the offer was announced, for example because the Panel was not consulted by the parties in advance or because, in a hostile transaction, the Panel was not able to hear the views of the offeree company and its advisers at that time. In such cases, there would be considerable uncertainty at the time of announcement of the offer for the offeror, the offeree company and its shareholders, and other market participants as to whether or not the offeror's derivative or option positions would be taken into account. This would also raise practical difficulties for the offeror in terms of not knowing how its acceptance condition should be framed at the time of announcement; and
- (c) there would be practical difficulties for receiving agents in verifying the derivative and option positions that should be taken into account.

5.8 Also, if the Panel were to determine that derivative and option positions should be taken into account in a particular case (a) there would not be the certainty (referred to in paragraph 5.1 above) that only one bidder could be successful, and (b) offeree company shareholders who accepted the offer prior to the first closing date would not be able to do so knowing that their acceptances would crystallise only in the event that statutory control of the company passed.

5.9 In addition, the Code Committee believes that the circumstances in which this issue might arise are narrow and that the consequences of their arising should be mitigated by the fact that an offeror who would have had to declare its offer unconditional under the proposal in paragraph 5.6 above will in the future be required to make a further mandatory offer in the circumstances described in paragraph 5.12 below.

(b) *Changes in the nature of an interest following a lapsed mandatory offer*

5.10 In paragraph 7.6 of PCP 2005/3, the Code Committee stated that it believed it should be made clear in the Code that, for the purposes of Rule 9.1, a person will not normally be treated as having acquired an interest in shares just because the nature of his interest has changed (for example where he has acquired shares upon the exercise of a call option over existing shares).

5.11 In the context of the points raised in paragraphs 5.3 to 5.6 above, the same respondent also commented that the fact that shareholders might not have been afforded a genuine exit opportunity (for example, in the circumstances described in paragraph 5.4 above) would be rendered even more unpalatable if the lapsed offeror went on subsequently to close out its derivative or exercise its option in order to acquire the underlying shares. In this way, the lapsed offeror could increase the number of shares which it owned, possibly through 30% or so as to increase an existing holding of between 30% and 50%, but without a new mandatory offer being required. The respondent believed that this would be an abuse of Rule 9 and that the lapsed offeror should be required to make a further mandatory offer if it were to change the nature of its interests in offeree company shares in this way.

5.12 Having considered these points, the Code Committee believes that, in certain circumstances, the normal position of not treating a change in the nature of a person's interest in shares as an acquisition of an interest in shares should be set aside. The Code Committee believes that where a mandatory offer lapses the offeror should normally be required to make a further mandatory offer if:

(a) the original mandatory offer would have become unconditional if offeree company shares which had not been assented to the offer, and in which the offeror and persons acting in concert with it were interested at the time the offer lapsed by virtue of derivative and option positions, had in fact been assented to the offer;

- (b) the lapsed offeror, or any person acting in concert with it, subsequently acquires shares in the offeree company on closing out those derivative positions or exercising those options; and
- (c) following that acquisition the lapsed offeror and persons acting in concert with it between them own or control shares carrying 30% or more of the voting rights.

This is provided for in the new final paragraph of Note 2 on Rule 9.3 set out in paragraph 5.16 below.

- 5.13 In the event that a further mandatory offer is triggered in these circumstances, the Code Committee believes that offeree company shareholders should be given an opportunity to exit the company at no less than the offer price of the original offer (being the price at which shareholders were in effect previously denied an opportunity to exit by virtue of the shares to which the derivative positions were referenced or which were the subject of option positions not having been counted towards the satisfaction of the acceptance condition). The Code Committee therefore believes that the price at which the further offer should be made should be the higher of (a) the offer price of the original offer, and (b) the price determined in accordance with Note 2(a) on Rule 9.5 (see paragraph 6 below).
- 5.14 The new final paragraph of Note 2 on Rule 9.3 set out at paragraph 5.16 below will apply to a lapsed offeror in circumstances where the number of shares which were assented to its offer, when added to the number of the shares in which it and persons acting in concert with it were interested at the time the offer lapsed, amounted in aggregate to more than 50% of the offeree company shares carrying voting rights. This approach presumes that the offeree company shares to which the offeror and its concert party's derivative positions were referenced or which were the subject of their option positions were not assented to the offer. The Code Committee recognises that it is possible that in some cases those shares, or some of them, might in fact have been assented to the lapsed offer. If the offeror were able to prove that this

was the case, it could approach the Panel and seek to rebut the presumption that it should be required to make a further mandatory offer in the circumstances described in paragraph 5.12 above.

- 5.15 In addition, the Code Committee notes that Rule 35.1 (which prevents a lapsed offeror from making a further offer for a period of 12 months) would operate in the normal way following the lapsing of an offer in the circumstances described above. As a result, following the introduction of the changes described in paragraph 5.12 above, the offeror, and persons acting in concert with it, would normally be prohibited for 12 months from the lapsing of the original offer from acquiring any of the shares underlying any derivative or option held if, following such acquisition, they would own or control 30% or more of the voting rights. This is because satisfying the requirement to make a further offer if it did so would in turn be contrary to Rule 35.1.

(c) *Code amendments*

- 5.16 In the light of its conclusions set out in paragraphs 5.12 to 5.15 above, the Code Committee has introduced a new final paragraph to Note 2 on Rule 9.3 as follows:

“2. *Acceptance condition*

...

In the event that:

(a) an offer under Rule 9 lapsed by virtue of the acceptance condition not having been satisfied in circumstances where the shares which were assented to the offer, together with the shares in which the offeror and persons acting in concert with it were interested at the time the offer lapsed, amounted in aggregate to more than 50% of the shares carrying voting rights; and

(b) subsequently the offeror, or any person acting in concert with it, becomes interested in shares in the offeree company by virtue of paragraph (1) or paragraph (2) of the definition of interests in securities and, when the offer lapsed, the offeror or any person acting in concert with it at that time was interested in such number (or a greater number) of shares in the offeree company by virtue only of paragraph (3) or paragraph (4) of that definition,

then a further offer in accordance with Rule 9 must normally be made if the shares in which the offeror and any persons acting in concert with it are then interested by virtue of paragraph (1) and paragraph (2) of the definition of interests in securities carry 30% or more of the voting rights of the offeree company. The price at which such an offer must be made will normally be the higher of the price at which the lapsed offer was made and the price determined under Note 2(a) on Rule 9.5. The Panel should be consulted in all cases in which this Note may be relevant. (See also Rule 35.1).”.

(d) Review of the need for an acceptance condition in mandatory offers

5.17 The Code Committee recognises that an argument can be made that mandatory offers should not be subject to any acceptance condition, i.e. that a mandatory offer should be wholly unconditional from the outset on the basis that, control (in Code terms) of the offeree company having passed, shareholders should be guaranteed an exit in order that they can benefit from any bid premium. The Code Committee proposes to give further consideration to this point in due course.

Q.3 Do you agree with the Code Committee’s conclusions and proposals regarding the 30% to 50% bands?

5.18 In paragraph 5.8 of PCP 2005/3, the Code Committee concluded that, in the light of its proposal (a) to amend Rule 9.1 (as described in paragraph 3.3 above), but (b) to leave Rules 9.3(a) and 10 unchanged, the provisions of the Code which refer to the upper limits of the bands to which Rules 9.1 or 5.1 apply (i.e. those above which “buying freedom” will exist) should reflect the fact that these bands would range between:

- (a) interests in shares which in aggregate carry 30% of the voting rights of a company (bearing in mind that the definition of “interests in securities” is different for Rule 9.1 and Rule 5.1, as under Rule 5.1 it includes interests arising under an irrevocable commitment); and
- (b) holdings of shares which carry more than 50% of the voting rights of a company (i.e. not “interests in” such shares).

- 5.19 All but one of the eight respondents to Question 3 agreed with the Code Committee's conclusions and proposals regarding the 30% to 50% bands. The other respondent disagreed on the basis that it did not agree with the broad approach.
- 5.20 Save as described in RS 2005/5, the Code Committee has therefore adopted the relevant amendments as proposed, including the various amendments referred to in paragraph 5.8 of PCP 2005/3, as set out in Appendix A to this Response Statement.
- 5.21 In addition to the amendments proposed in PCP 2005/3, the Code Committee has taken this opportunity also to delete the words in brackets in what is currently the first sentence of the fourth paragraph of Note 11 on Rule 9.1 (and which will become the third paragraph of Note 10 on Rule 9.1) since, in the opinion of the Code Committee, these words are no longer relevant. Accordingly, the sentence will now read as follows:

“Where securities with conversion or subscription rights were issued at a time when no offer obligation on exercise of such rights would arise ~~(eg if they were issued before the existence of the Rules of the Code relating to such obligations)~~ and no independent shareholders' approval was obtained, the Panel will consider the case on its merits ...”.

- 6. The price at which an offer is required to be made: Rules 6, 9.5 and 11**
- Q.4 Do you agree with the proposed amendments in relation to the price at which an offer is required to be made as described in paragraph 6 above?**
- 6.1 In paragraph 6 of PCP 2005/3, the Code Committee proposed a number of amendments in order to address the issue of the price at which an offer should be made under the broad approach.
- 6.2 The principal proposal was to amend Note 2(a) on Rule 9.5 as follows:

“2. Calculation of the price

(a) ~~In calculating the price paid, The price paid for any acquisition of an interest in shares will be determined as follows:~~

(i) in the case of a purchase of shares, the price paid is the price at which the bargain between the purchaser (or, where applicable, his broker acting in an agency capacity) and the vendor (or principal trader) is struck;

(ii) in the case of an option, the price paid will be treated as the amount payable on exercise of the option together with any amount payable by the option-holder on entering into the option; and

(iii) in the case of a derivative, the price paid will normally be treated as the reference price of the underlying securities together with any fee payable on entering into the derivative. However, if the reference price is calculated as the average price of a number of acquisitions by the counterparty of interests in underlying securities, the price paid will normally be determined to be the highest price at which such acquisitions are actually made.

Any stamp duty and broker’s commission payable should be excluded.”.

Equivalent amendments were proposed to Note 4 on Rule 6 and Note 1 on Rule 11.1.

6.3 Of the eight respondents to Question 4, three agreed with the proposals without reservation and one agreed with them only in the context of its disagreement with the broad approach.

6.4 The four other respondents expressed varying degrees of concern with the proposals.

(a) **Options**

6.5 Two respondents believed the proposal that, in the case of the acquisition of an option, the price paid should be determined as “the amount payable on exercise of the option together with any amount payable by the option-holder on entering into the option” might operate unfairly where the option was an out-of-the-money call option and the option was not exercised. In such a case,

the exercise price of the option might be significantly above the market price of the underlying shares. If this were the case, and if the option were not exercised, it might provide an inappropriate basis for establishing the bid price.

- 6.6 The Code Committee accepts this argument. Therefore, having reflected further, the Code Committee believes that the price paid for an acquisition of a call option should (unless and until the option is exercised) normally be determined as the middle market price of the offeree company's shares at the time of entering into the option.
- 6.7 The Code Committee believes that using market price at the time of entering into the option avoids the problems described in paragraph 6.5 above. It is an appropriate determinant since, to the extent that the option-holder's counterparty had hedged its position by way of share purchases (thus providing an exit for some shareholders in consequence of the acquisition of the offeror's interest), it might have been expected to have made at least some such purchases from shareholders of the offeree company at the time that it wrote the option.
- 6.8 For the avoidance of doubt, the Code Committee notes that the Panel interprets the middle market price of a class of securities traded through an order book to be, at any time during trading hours, the mid-point between the best bid price and the cheapest offer price on the order book at that time.
- 6.9 The Code Committee continues to believe that the price paid for an acquisition of a call option which is subsequently exercised should be determined as set out in Note 2(a) on Rule 9.5 as proposed in paragraph 6.8 of PCP 2005/3.
- 6.10 Insofar as written put options are concerned, the Code Committee, on further reflection, believes that it is incorrect to determine the price paid for the acquisition of a written put option as "the amount payable on exercise of the option together with any amount payable by the option-holder on entering into the option". This is illustrated by the example of an option-holder who pays

2p per share for the right to put his shares on the writer at 100p per share, and who will therefore receive 100p per share from the writer upon exercising the option. The proposed drafting would produce a price of 102p. In fact, the net amount paid by the writer is 98p, i.e the amount payable on exercise of the option less the amount received on entering into the option. The Code Committee believes that this is the appropriate price for these purposes and has amended its proposals accordingly.

6.11 Finally, the Code Committee believes that the second sentence of the proposed paragraph (iii) of Note 2(a) on Rule 9.5 - which provided that, where a derivative reference price is calculated as the average price of a number of separate acquisitions of interests in securities by the derivative holder's counterparty in order to hedge its position, the relevant price should be the highest price at which such acquisitions were actually made by the counterparty (and at which the sellers of those securities therefore obtained an exit from the offeree company) - should also apply in relation to options. The Code Committee also notes the observation by one respondent that determining the price paid by an investor by reference to its counterparty's hedging activities might give rise to practical issues and therefore urges consultation with the Panel in such circumstances.

(b) *Derivatives*

6.12 In the case of derivatives, one respondent, who agreed that the reference price of a derivative was an appropriate determinant of the offer price, noted that derivative reference prices may be reset periodically. The respondent believed that such resetting of the reference price could lead to difficulties in determining the offer price unless the reference price to be taken into account was restricted to the initial reference price.

6.13 The Code Committee accepts that the relevant reference price of a derivative is the initial reference price as this is the level at which the offeror originally took economic exposure to changes in the price of the shares in which it is interested and, as noted by the respondent, is likely to be the price at which the

counterparty to its derivative will have hedged its position by way of share purchases (thus providing an exit for some shareholders). The Code Committee has therefore amended its proposals accordingly.

(c) *Rules 35.3 and 35.4*

6.14 In PCP 2005/3, as described above, equivalent provisions addressing the issue of the price at which an interest in shares would be treated as having been acquired under the broad approach were proposed in Note 2 on Rule 9.5, Note 4 on Rule 6 and Note 1 on Rule 11.1. No similar provision was proposed in relation to Rule 35.3 or Rule 35.4.

6.15 Under Rule 35.3 as proposed to be amended, a successful offeror is not permitted for a period of six months following the closure of the offer to make a further offer for, or to acquire an interest in shares of, the offeree company on more favourable terms than those made available under the original offer. Also, under Rule 35.4, where an offer is one of two or more competing offers and lapses, the failed offeror is not permitted to acquire any interest in shares of the offeree company on more favourable terms than under its lapsed offer until all competing offers have either become wholly unconditional or lapsed.

6.16 In order to clarify how the price at which an interest in shares is acquired should be determined for the purposes of Rules 35.3 and 35.4, the Code Committee is introducing a new Note on Rules 35.3 and 35.4, as set out in Appendix A to this Response Statement, the effect of which is equivalent to Note 4 on Rule 6 (see also paragraphs 7.7 to 7.10 below).

(d) *Code amendments*

6.17 In the light of its conclusions set out in paragraphs 6.6 to 6.13 above, the amendments to Note 2(a) on Rule 9.5 which the Code Committee has adopted are slightly different from those proposed in paragraph 6.8 of PCP 2005/3. The version of Note 2(a) set out below shows changes from that proposed in

PCP 2005/3, whereas the version set out in Appendix A shows the amendments which will be made to the current Code:

“2. *Calculation of the price*

(a) *The price paid for any acquisition of an interest in shares will be determined as follows:*

(i) *in the case of a purchase of shares, the price paid is the price at which the bargain between the purchaser (or, where applicable, his broker acting in an agency capacity) and the vendor (or principal trader) is struck;*

(ii) in the case of a call option which remains unexercised, the price paid will normally be treated as the middle market price of the shares which are the subject of the option at the time the option is entered into;

(iii) *in the case of a ~~an~~ call option which has been exercised, the price paid will normally be treated as the amount ~~payable~~ paid on exercise of the option together with any amount ~~payable~~ paid by the option-holder on entering into the option; ~~and~~*

(iv) in the case of a written put option (whether exercised or not), the price paid will normally be treated as the amount paid or payable on exercise of the option less any amount paid by the option-holder on entering into the option; and

~~(iiiiv)~~ *in the case of a derivative, the price paid will normally be treated as the initial reference price ~~of the underlying securities~~ together with any fee ~~payable~~ paid on entering into the derivative.*

In the case of an option or a derivative, ~~H~~however, if the option exercise price or derivative reference price is calculated ~~as~~ by reference to the average price of a number of acquisitions by the counterparty of interests in underlying securities, the price paid will normally be determined to be the highest price at which such acquisitions are actually made.

Any stamp duty and broker’s commission payable should be excluded.”.

6.18 In addition, the Code Committee has:

(a) made amendments to Note 4 on Rule 6 and Note 1 on Rule 11.1 equivalent to those set out in paragraph 6.17 above;

- (b) amended Rules 35.3 and 35.4 so as to restrict the acquisition of interests in shares on more favourable terms than those made available under the offer, as proposed in paragraph 6.9(b) of PCP 2005/3. In addition, the Code Committee has introduced a new Note on Rules 35.3 and 35.4 as explained in paragraph 6.16 above and as set out in paragraph 7.10 below; and
- (c) introduced a new sentence to each of Note 4 on Rule 9.5, Note 5 on Rule 6 and Note 9 on Rule 11.1 as proposed in paragraphs 6.9(c) and (d) of PCP 2005/3.
- 6.19 Details of the above amendments are set out in Appendix A to this Response Statement.

7. Changes in the nature of a person's interest

Q.5 Do you agree with the proposed amendments in relation to changes in the nature of a person's interest as described in paragraph 7 above?

- 7.1 Paragraph 7 of PCP 2005/3 proposed various amendments in relation to the circumstances where the nature of a person's interests in securities changes, but the overall number of securities in which he is "interested" remains the same.
- 7.2 Of the nine respondents to Question 5, seven agreed with the proposed amendments, subject to the comments referred to below; one disagreed on the basis that it disagreed with the broad approach; and one made drafting comments only.
- (a) *Relevant time periods*
- 7.3 In paragraph 7.5 of PCP 2005/3, the Code Committee stated that it believed that, for the purposes of the offer price determination provisions of Rules 6, 9.5 and 11, an acquisition of shares by a person by way of closing out a derivative or exercising an option which he held prior to the commencement

of the time periods during which acquisitions would be relevant should not normally be taken into account for the purpose of determining the price to be paid by an offeror, provided the shares were acquired on the original terms of the instrument. However, the Code Committee believed that where the shares were acquired at a different price, for example where the option exercise price or derivative reference price was subsequently varied, the new terms should be taken into account for the purpose of determining the price to be offered to shareholders pursuant to Rule 6, 9.5 or 11 (as appropriate).

7.4 In relation to paragraph 7.5 of PCP 2005/3, one respondent sought clarification that it was intended that only variations during the time periods described in Rules 6, 9.5 and 11 would be relevant and that variations prior to the commencement of the time period would not be taken into account. The Code Committee confirms this to be the case. However, on further reflection, the Code Committee has decided to simplify the drafting of the proposed new final paragraph of Note 2(a) on Rule 9.5, as set out in paragraph 7.15(d) below, and to make equivalent amendments to Note 4 on Rule 6 and Note 1 on Rule 11.1.

7.5 In addition, the description in the new final paragraph of Note 2(a) on Rule 9.5 of the time period during which the acquisition of an interest in shares is relevant for the purposes of Rule 9.5 has been amended to reflect the changes made to Rule 9.5 in RS 2005/5. The same time period is also relevant for the purposes of Note 2(c) on Rule 9.5, which has also been amended.

(b) *Changes in the nature of an interest following a lapsed mandatory offer*

7.6 See paragraph 5 above.

(c) *Rules 35.3 and 35.4*

7.7 As referred to in paragraphs 6.14 to 6.16 above, the Code Committee is introducing a new Note on Rules 35.3 and 35.4 to make clear how the price at

which an interest is acquired should be determined for the purposes of those Rules.

- 7.8 Under Rule 35.3 as it is to be amended, a successful offeror is not permitted for a period of six months of the closure of the offer to make a further offer for, or to acquire an interest in shares of, the offeree company on more favourable terms than those made available under the original offer. Also, under Rule 35.4, where an offer is one of two or more competing offers and lapses, the failed offeror is not permitted to acquire any interest in shares of the offeree company on more favourable terms than under its lapsed offer until all competing offers have either become wholly unconditional or lapsed.
- 7.9 Notwithstanding that a person will not normally be treated as having acquired an interest in shares just because the nature of his interest has changed, the Code Committee considers that where a call option has been entered into during the period which was relevant for Rule 6, or where appropriate Rule 9.5(a), in respect of a previous offer which lapsed or, having gone unconditional, subsequently closed, and that call option is exercised during the six month period referred to in Rule 35.3, or during the relevant period referred to in Rule 35.4, that exercise should be treated as an acquisition of an interest in shares for the purposes of Rule 35.3 or Rule 35.4, as the case may be.
- 7.10 In order to make this clear, the Code Committee is adding a further paragraph to the new Note on Rules 35.3 and 35.4 (see paragraph 6.16 above), such that the entire Note will read as follows:

“NOTE ON RULES 35.3 AND 35.4

Determination of price

The price paid for any acquisition of an interest in shares will be determined in the manner set out in Note 4 on Rule 6 (other than the final paragraph of that Note).

However, where:

(a) a call option was entered into during any period that was relevant for the purposes of Rule 6 (or Rule 9.5, where relevant) in relation to the previous or lapsed offer; and

(b) that call option is exercised:

(i) during the six month period referred to in Rule 35.3 (in the case of Rule 35.3); or

(ii) before any competing offer has either been declared unconditional in all respects or has itself lapsed (in the case of Rule 35.4),

then the person will be treated as having acquired an interest in shares at the time of such exercise and, for the purposes of Rule 35.3 or Rule 35.4 (as the case may be), the price paid will normally be treated as the amount paid on exercise of the option together with any amount paid by the option-holder on entering into the option.

Where a person acquired an interest in shares before the period referred to in paragraph (a) above as a result of any option, derivative or agreement to purchase and, during the relevant period referred to in paragraph (b) above, the person acquires any of the relevant shares, no obligation under this Rule will normally arise as a result of the acquisition of those shares. However, if the terms of the instrument have been varied in any way, or if the shares are acquired other than on the terms of the original instrument, the Panel should be consulted.”.

(d) Interests which become relevant for Rule 9.1 as a result of the rule changes

7.11 As mentioned in paragraph 5.10 above, paragraph 7.6 of PCP 2005/3 stated the Code Committee’s belief that, for the purposes of Rule 9.1, a person should not normally be treated as having acquired an interest in shares just because the nature of his interest has changed (for example where he has acquired shares upon the exercise of a call option over existing shares). The Code Committee proposed the introduction of the first sentence of a new Note 19 on Rule 9.1 to this effect. For the reasons described in paragraphs 5.12 and 5.16 above, that sentence will now be subject to the provisions of Note 2 on Rule 9.3.

7.12 The Code Committee also stated in paragraph 7.6 of the PCP that it believed that a person who changed the nature of his interests in the shares of a company should not be able to avoid a mandatory bid obligation simply by

virtue of the differences between the means of triggering a mandatory bid before and after the implementation of the amendments in this Response Statement on 20 May. For example, if a 29% shareholder acquired an option over another 5% holding, he would not have been required to make a mandatory bid if the acquisition of the option had taken place prior to the implementation of the amendments in this Response Statement on 20 May, but would be if the acquisition took place after the implementation of the amendments in this Response Statement. In order to ensure that the shareholder could not take advantage of the changes in the Code by exercising an option which pre-existed the implementation of the amendments in this Response Statement, the Code Committee proposed the introduction of the second sentence of the new Note 19 (which will now be Note 18) on Rule 9.1.

- 7.13 One respondent believed that the drafting of the second sentence of the proposed Note 19 on Rule 9.1 could be made clearer. The Code Committee accepts this and has made the amendments set out in paragraph 7.14 below.

(e) *Code amendments*

- 7.14 In the light of the above, the Code Committee has adopted the new Note 19 (renumbered as Note 18) on Rule 9.1. The version set out below shows changes from that proposed in PCP 2005/3, whereas the version set out in Appendix A shows the entire Note as new:

~~19~~18. *Changes in the nature of a person's interest*

Subject to Note 2 on Rule 9.3, f~~For~~ *the purpose of this Rule 9.1, a person will not normally be treated as having acquired an interest in shares as a result only of a transaction under which the number of shares in which he is interested under the different paragraphs of the definition of interests in securities changes but the aggregate number of shares in which he is interested following the transaction remains the same (for example, where the person acquires shares on exercise of a call option).*

However, a person who ~~became~~ was interested in any shares by virtue of paragraph (3) or paragraph (4) of the definition of interests in securities ~~as a result of on 20 May 2006 (when such interests first becoming~~ became relevant for the purpose of ~~this~~ Rule 9.1) will normally be treated as having acquired

an interest in shares if, ~~as a result of any transaction,~~ he subsequently becomes interested in such shares by virtue of paragraph (1) or paragraph (2) of the definition of interests in securities.

The Panel should be consulted in all such cases to establish whether, in the circumstances, any obligation arises under this Rule.”.

7.15 In addition, the Code Committee has:

- (a) deleted the current Note 13 on Rule 9.1, as proposed in paragraph 7.7(a) of PCP 2005/3;
- (b) deleted Note 3 on Rule 5.1, as proposed in paragraph 7.7(b) of PCP 2005/3 (and renumbered the current Notes 4 to 9 on Rule 5.1, including renumbering the cross-reference to Note 5 in Note 4 so as to refer to Note 3);
- (c) amended the current Note 7 on Rule 5.1 (which, following the deletion of Notes 2 and 3 on Rule 5.1, will become Note 5) as proposed in paragraph 7.7(c) of PCP 2005/3;
- (d) introduced a new final paragraph to Note 2(a) on Rule 9.5. As indicated in paragraph 7.5 above, the current relevant time period under Rule 9.5 has been amended by RS 2005/5 and the new final paragraph to Note 2(a) has therefore been adopted in a slightly different form from that proposed in paragraph 7.7(d) of PCP 2005/3. The version set out below shows changes from that proposed in PCP 2005/3, whereas the version set out in Appendix A shows the entire paragraph as new:

“Where a person acquired an interest in shares more than 12 months prior to the ~~commencement of the offer period~~ announcement of the offer made under Rule 9 as a result of any option, derivative or agreement to purchase and, either during the 12 months prior to such announcement or after the announcement and before the offer closes for acceptance ~~during the offer period or within 12 months prior to its commencement,~~ the person acquires any of the relevant shares at the option exercise price, the derivative reference price or the price provided for in the agreement to purchase, then no obligation under this Rule will normally arise as a result of the acquisition of those shares. However, ~~where~~ if the terms of the instrument have been varied in any way, or if the shares are acquired other than on the terms of the

original instrument, at a different price, or if the relevant price is varied, the adjusted terms will be relevant for the purpose of determining the terms to be offered to holders of shares of the same class. The Panel should be consulted in such cases.”; and

(e) introduced a new final paragraph to each of Note 4 on Rule 6 and Note 1 on Rule 11.1. In the light of the amendments described in paragraph 7.4 above, these paragraphs have been adopted in slightly different forms from those proposed in paragraph 7.7(d) of PCP 2005/3.

7.16 Details of the above amendments are set out in Appendix A to this Response Statement.

8. The “single shareholder” exception under Rule 5.2(a)

Q.6 Do you agree with the proposed amendments in relation to the single shareholder exception?

8.1 Rule 5.1, as amended by this Response Statement, restricts (inter alia) a person acquiring an interest in shares of an offeree company if following the acquisition he (and persons acting in concert with him) would be interested in aggregate in shares carrying 30% or more of the voting rights of that company.

8.2 The restrictions in Rule 5.1 are, however, subject to certain exceptions contained in Rule 5.2, one of which, known as the “single shareholder” exception, permits the acquisition of an interest in shares which would otherwise be restricted where it is from a single shareholder.

8.3 In paragraph 8 of PCP 2005/3, the Code Committee concluded that the single shareholder exception should not be extended to apply to an acquisition of an interest in shares by virtue of a derivative, since it has long been the Panel’s policy to apply the exception narrowly and the Code Committee concluded that acquisitions permitted by the exception should not be broadened as a result of the other amendments to the Code proposed in PCP 2005/3.

- 8.4 Of the nine respondents to Question 6, six agreed with the proposed amendments; one made drafting comments only; and two disagreed, one on the basis that it disagreed with the broad approach generally.
- 8.5 The other respondent who disagreed considered that the exclusion of derivatives per se from the ambit of the single shareholder exception was inconsistent with the general philosophy of the broad approach. Having considered the issue further, the Code Committee agrees. Furthermore, the Code Committee considers that the philosophy behind the single shareholder exception is to permit a shareholder to dispose of his holding of shares as he sees fit and without restriction under the Code, and that for the Code to prevent that shareholder from writing a derivative referenced to those shares would be inconsistent with this philosophy.
- 8.6 As a result, the Code Committee has concluded that an existing single shareholder should be able to write a derivative in respect of any shares held by it, after which the other party entering into the derivative will have an interest in shares in excess of 30%, in the same way as the single shareholder could sell (or grant an option in respect of) its shares to that other party, following which the latter's resultant interests in shares would also be over 30%. The single shareholder exception would therefore allow a person to enter into a derivative in respect of a pre-existing stake held by the counterparty, but not if the counterparty did not already own the shares and was obliged to acquire shares (possibly from a number of other existing shareholders) in order to hedge its exposure.
- 8.7 Another respondent, while agreeing with the proposed amendment, considered that it should be made clear in the Rule that the single shareholder exception could only be relied on at all (whether the acquisition was of the shares themselves or an interest via an option or derivative) if the shareholder actually owned the shares, as opposed to having an interest in them, at the time the acquisition took place. The Code Committee also agrees with this suggestion.

- 8.8 In the light of the above, therefore, the Code Committee has:
- (a) retained paragraph (a) of Rule 5.2 in its current form (and not made the amendments to paragraph (a) proposed in paragraph 8.5(a) of PCP 2005/3);
 - (b) amended Note 1 on Rule 5.2 as proposed in paragraph 8.5(b) of PCP 2005/3;
 - (c) introduced a new Note 1(b) on Rule 5.2 (and renumbered the existing Note 1 as Note 1(a)) as follows:

“(b) An acquisition of an interest in shares will only be permitted by Rule 5.2(a) if the acquisition relates to a pre-existing holding of shares of the single shareholder concerned.”; and
 - (d) amended Rule 5.4 as proposed in paragraph 8.5(c) of PCP 2005/3.

SECTION D

RECOGNISED INTERMEDIARIES

9. The rationale for recognised intermediary status

Q.7 Do you agree that it is not appropriate for investment banks and securities houses to be required to make a mandatory bid in the circumstances described above and, if so, do you agree with the introduction of the concept of recognised intermediary status?

9.1 Paragraph 9 of PCP 2005/3 explained the Code Committee's rationale for proposing the introduction of a new status, to be known as recognised intermediary ("RI") status, which the Panel would be able to grant to certain trading desks of investment banks and securities houses which trade as principal for client-serving purposes in order to fulfil client orders, to respond to a client's requests to trade or to hedge positions arising out of these activities.

9.2 In paragraph 9.2 of PCP 2005/3, the Code Committee explained that it did not consider it appropriate for a mandatory offer to be triggered by an acquisition by a trading desk of an interest in shares by virtue of a derivative or option position where:

- (a) the desk was a client-serving desk and was acting in that capacity;
- (b) the 30% threshold was only breached after taking into account the desk's long derivative and option positions (calculated on an aggregate gross basis) which were generated as a result of the investment decisions taken by its clients; and
- (c) the desk was appropriately authorised and permitted by the Financial Services Authority (or its relevant regulator overseas) to conduct such derivative and option business as principal.

- 9.3 All seven respondents who specifically addressed the issue agreed with the introduction of the concept of RI status.
- 9.4 One of these respondents agreed that RI status was a sensible pragmatic solution, but cautioned that it would need to be granted with care and monitored actively to ensure that the dispensations it afforded were not abused.
- 9.5 The Code Committee agrees with the respondent. RI status will be subject to the satisfaction of the criteria set out in paragraph 10.21 below, as well as certain other requirements, and will be monitored carefully by the Panel pending the Code Committee's review of the operation of the new regime relating to dealings in derivatives and options in June 2007.
- 9.6 A second respondent was concerned about "increasing regulatory complexity" and the burden on investment banks and securities houses of maintaining the new status, particularly in the light of the perceived similarities with exempt status.
- 9.7 As regards complexity, the Code Committee acknowledges that the regulation of multi-service financial organisations ("MSFOs") may be complex. However, this is a result of the complex nature of MSFOs and the Code Committee believes the availability of RI status to be the preferred solution to the issues which would otherwise arise if it were not introduced.
- 9.8 As regards exempt status, RI status will be entirely separate from exempt status, as explained below.
- 9.9 As was described in paragraph 1.6 of PCP 2004/3 (entitled "Market-Related Issues"), the effect of granting exempt status to a principal trading desk of an MSFO is to rebut the presumption of concertedness that would otherwise apply under paragraph (5) of the definition of "acting in concert" as between the principal trading desk and the group's corporate finance clients. Therefore, where exempt status has been granted, the principal trading desk

can continue its normal trading activities without Code consequences for the group's corporate finance clients. As a result, the principal factor to which the Panel has regard when granting exempt status to a principal trading desk is the ability of the desk to demonstrate its independence from the corporate finance operations within its organisation. Provided such independence can be established to the Panel's satisfaction, exempt status will be available to a group's principal trading activities, whether or not those trading activities are client-serving.

9.10 By contrast, the effects of granting RI status to a trading desk will be twofold. If a desk has RI status then, to the extent that that desk holds interests, or deals, in a client-serving capacity:

- (a) such interests (but not proprietary interests) in shares as a result of positions in derivatives or options will not be taken into account in establishing whether it (or the organisation of which it forms part) is interested, for the purposes of Rule 9.1, in 30% or more of a company's shares carrying voting rights; and
- (b) the RI desk will be exempted from disclosing such dealings (but not proprietary dealings) in relevant securities under Rule 8.3(d).

The principal factor to which the Panel will have regard when granting RI status is the client-serving nature of the relevant trading desk.

9.11 A third respondent believed that, in logic, the dispensation from Rule 9.1 should also apply to shares which are owned or controlled by an RI desk and should not be limited to interests in shares arising by virtue of derivative or option positions.

9.12 The Code Committee disagrees. Note 17 on Rule 9.1 currently provides that the aggregate holdings of shares of all persons under the same control (including any exempt fund manager or exempt principal trader) are relevant for determining whether a group's holding carries 30% or more of the voting rights of a company. The limited dispensation from Note 17 on Rule 9.1 from

which desks with RI status will benefit was proposed in PCP 2005/3 specifically in order to address the consequences which would otherwise arise for the client-serving desks of investment banks and other securities houses in relation to their derivative and option positions. The Code Committee, therefore, does not believe that the reasons for its proposing RI status (as set out in paragraph 9.3 of PCP 2005/3) justify a relaxation of the current position under Note 17 on Rule 9.1 in relation to holdings of shares.

9.13 Having taken into account the responses to Question 7 of PCP 2005/3, the Code Committee continues to believe that RI status should be introduced.

10. The availability of recognised intermediary status

Q.8 Do you agree with the criteria by reference to which it is proposed that the grant of recognised intermediary status should be determined? Are there any other matters which should be taken into account?

10.1 Paragraph 10 of PCP 2005/3 set out the matters as to which the Panel would need to be satisfied in order for a desk to be granted RI status.

10.2 Five of the six respondents who specifically commented on the criteria were in general agreement with them. The sixth respondent made drafting comments, but did not comment on the criteria generally.

(a) *Client-serving business and pure proprietary business*

10.3 In view of the client-serving rationale for RI status, the criterion in paragraph 10.1(b) of the PCP was drafted so as to exclude principal trading desks which carried out any “pure proprietary” business.

10.4 Two respondents believed that the criterion proposed in paragraph 10.1(b)(i) - that the desk’s business is the provision of dealing services to clients, and not proprietary dealing - was too narrow and should be broadened so as to allow for the fact that client-serving desks also deal for purposes that may not be

client initiated, i.e. with the result that the criterion should relate to the “primary” function of the desk.

- 10.5 In the light of those responses, the Code Committee has reflected further on the manner in which the client-serving desks of investment banks and other securities houses are established and operate.
- 10.6 The Code Committee accepts that in most, if not all, investment banks and securities houses, the trading desks which are primarily client-serving desks also undertake at least some proprietary trading business. In addition, the Code Committee recognises the considerable difficulties of establishing strictly objective bases by which to distinguish a desk’s client-serving business from its proprietary business.
- 10.7 The Code Committee has concluded that, for the time being, RI status should be available to a trading desk whose primary function is client-serving business, and not proprietary business, but that the dispensations afforded by RI status should be available to the desk only in relation to dealings undertaken and interests held in a client-serving capacity (and not a proprietary capacity).
- 10.8 Therefore, for example, if during an offer period an RI desk of an organisation undertakes a dealing in a class of the relevant securities of the offeree company in a proprietary capacity, that dealing will need to be disclosed under Rule 8.3(a) if the aggregate of the relevant securities of that class in which the group is interested in a proprietary capacity amounts to 1% or more. For the avoidance of doubt, all the interests which the group holds in a proprietary capacity should to be taken into account for the purpose of this calculation, i.e. both the proprietary interests held on its RI desks and all interests held on its non-RI desks.
- 10.9 Similarly, if a position acquired by an RI desk in a client-serving capacity is re-booked so as to be held in a proprietary capacity, this transfer of interest to the RI’s proprietary account will be treated as a dealing in a proprietary (as

opposed to a client-serving) capacity which will need to be disclosed under Rule 8.3(a).

- 10.10 Where the offer is one to which the RI desk's exempt principal trader status is relevant, dealing disclosures will be required under Rule 38.5 (see paragraph 14 below).
- 10.11 For the avoidance of doubt, where an RI desk takes a position to hedge a derivative or option position arising from an order received from a client or a client request to trade, the Code Committee considers that the desk would be acting in a client-serving, and not a proprietary, capacity.
- 10.12 The Code Committee acknowledges that the exception from the Code's dealing disclosure requirements for RI desks is a pragmatic solution. As mentioned in paragraph 11.3 of PCP 2005/3, it is founded on the argument that an exemption from disclosure is likely to increase the preparedness of market-makers and other intermediaries to take on large orders and, accordingly, assists such persons in the servicing of their clients' needs.
- 10.13 However, the Code Committee believes that the disclosure rules should strike an appropriate balance between, on the one hand, giving market-makers and other intermediaries sufficient freedom to execute client orders and, on the other, ensuring that shareholders are provided with information about dealings which may be significant to them. The Code Committee will continue to consider whether RI status strikes such an appropriate balance and, as indicated in paragraph 9.5 above, the dealing and disclosure behaviour of RI desks (including, for example, any circumstances in which disclosure has not been properly or promptly made owing to the incorrect categorisation of a proprietary dealing as client-serving) will be carefully monitored pending the Code Committee's review of the operation of the new regime relating to dealings in derivatives and options in June 2007.
- 10.14 The Code Committee anticipates that its review will re-examine the rationale for RI status and, in particular, whether or not it is appropriate that RI desks

should continue to be afforded the dealing disclosure exception under Rule 8.3(d). If it concludes that they should, the Code Committee intends that it will also re-examine the RI criteria and the other features of RI status.

(b) *Dealing in anticipation of client demand*

10.15 One of the respondents referred to in paragraph 10.4 above suggested that the criterion proposed in paragraph 10.1(b)(ii) of the PCP - that the desk deals as principal to fulfil client orders, to respond to a client's requests to trade, or to hedge positions arising out of these activities - should make specific reference to dealing in anticipation of client orders.

10.16 The Code Committee acknowledges that dealings which the Panel is persuaded are in anticipation of client demand will normally fall within the criterion as being dealings effected with the purpose of fulfilling orders from clients. However, the Code Committee does not believe that it is necessary for the criteria to state this. As indicated in paragraph 10.9 above, if a position acquired by an RI desk in anticipation of client demand comes to be held in a proprietary capacity, the transfer of interest to the RI's proprietary account will be treated as a discloseable dealing.

(c) *Functional separation of an organisation's activities*

10.17 In relation to proposed criterion (f)(iii) – the need to ensure that the RI activities of the entity of which the RI desk forms part are distinct from its proprietary trading (and other) activities – one respondent suggested that the distinction should be as between the desks which have the primary business function of providing dealing services to clients and desks which have the primary business function of proprietary trading.

10.18 The Code Committee does not believe that the distinction suggested by the respondent goes far enough. Notwithstanding that criterion (b) will be that a trading desk's primary function is client-serving and not proprietary business, it will nevertheless be essential that the entity of which the desk forms part has

appropriate systems and compliance policies and procedures in place in order to identify, distinguish between and monitor its client-serving activities and its proprietary trading activities on a trade by trade basis. The criteria have been amended so as clearly to reflect this.

10.19 Another respondent believed that proposed criterion (e) - that neither the desk nor the entity of which it forms part is primarily an investment adviser - was drafted too widely and should be subject to proposed criterion (i) - that the Panel should be satisfied as to functional separation where more than one activity is carried on.

10.20 The Code Committee accepts this point, which is also relevant in relation to criteria (c), (d) and (g), and has amended the criteria to reflect this.

(d) *The criteria for RI status*

10.21 In the light of the above, the Code Committee believes that, in determining whether a desk should be granted RI status, the Panel will need to be satisfied as to each of the following matters in respect of the desk in question:

- (a) that the entity of which the desk forms part has been authorised by the FSA with permission (without material limitation) to deal as principal in UK equities or in derivatives or options referenced to or in respect of such equities. Where it is based overseas, the entity must have been granted equivalent authorisation and permission by its home state regulator to deal in UK equities or in derivatives or options referenced to or in respect of such equities;
- (b) that where the desk deals as principal it does so primarily to fulfil orders received from clients, to respond to a client's requests to trade, or to hedge positions arising out of these dealings and not on a proprietary basis – i.e. where it deals as principal it does so primarily in a client-serving capacity;
- (c) that the desk is suitable for recognised intermediary status having regard to all the circumstances, including (i) the connection of the entity of which it forms

part with any other person, and (ii) the need to ensure that its activities will not be carried on with the purpose of assisting an offeror, potential offeror or offeree company or any of their respective associates;

- (d) that the desk and the entity of which it forms part have appropriate systems and compliance policies and procedures in place in order to identify, distinguish between and monitor their client-serving dealings and interests and their proprietary trading dealings and interests;
- (e) that if the desk is part of, or if the entity of which it forms part is or is part of, a wider organisation, or is associated with any other person, the desk's links with the rest of that organisation or with such person are not likely adversely to influence the Panel's supervision of its activities or its compliance with the Code; and
- (f) that if the desk is part of, or if the entity of which it forms part is or is part of, a wider organisation, or is associated with any other person, which deals as principal on a proprietary basis or carries out investment company, investment management, investment advisory or collective investment or other investment fund functions, there is appropriate functional separation between the activities of the desk and of those other functions.

10.22 The Code Committee understands that the Panel will be writing shortly to all investment banks and securities houses with principal trading desks in order to invite them to apply for RI status for appropriate desks ahead of the implementation of the amendments to the Code on 20 May.

10.23 The Code Committee suggests that the Panel should include the criteria for RI status on its website.

11. Rule 8.3(d)**Q.9 Do you agree that recognised intermediary status should also be used as the basis for determining whether the exception from disclosure in Rule 8.3(d) should be available?**

11.1 In paragraph 11.10 of PCP 2005/3, the Code Committee stated that it believed that RI status should be used as the status for determining which parts of the trading operations of an investment bank or securities house should benefit from the exception from disclosure in respect of dealings and interests in relevant securities in Rule 8.3(d).

11.2 All five respondents to Question 9 agreed that RI status should also be used as the basis for determining whether the exception from disclosure in Rule 8.3(d) should be available.

11.3 One respondent suggested (in response to both Question 9 and Question 11) that RI status should automatically be extended to the client-serving desks which had existing exempt principal trader status. The Code Committee does not believe that this is appropriate since, as noted in paragraph 9 above, the criteria for eligibility for RI status are altogether different to those for exempt status.

Q.10 Do you agree that the trading desks which may be eligible for recognised intermediary status should not be limited to trading desks which form part of a principal trader (as defined in the Code)?

11.4 Paragraph 11.12 of PCP 2005/3 stated the Code Committee's belief that the trading desks of entities which have not in the past benefited from the exception in Rule 8.3(d) (because the entity of which it formed part did not fall within the definition of "principal trader") should be eligible to apply for RI status.

11.5 All five respondents to Question 10 agreed that eligibility for RI status should not be limited to trading desks which form part of a principal trader and the Code Committee has therefore concluded that RI status should not be so limited.

12. Further features of recognised intermediary status

Q.11 Do you agree with the proposed features of recognised intermediary status referred to above?

12.1 Paragraph 12.2 of PCP 2005/3 described a number of the proposed features of RI status, in addition to the criteria listed in paragraph 10 of the PCP. Paragraph 12.3 of the PCP set out the circumstances in which a desk's RI status would fall away. In paragraph 12.4 of the PCP, the Code Committee stated that it was not currently proposing to impose limits on the size of the position which an RI desk could take in relevant securities of an offeror or offeree company but that it did not rule out the introduction of such limits (such that the disclosure of dealings would be required in the event that such limits were exceeded), or of other additional features of RI status, at a future date.

12.2 Four of the five respondents who addressed Question 11 agreed with the proposed features of RI status.

12.3 One respondent specifically welcomed the Code Committee's commitment to keep the issue of limits on position size under review. However, two respondents questioned what the purpose of such limits would be.

12.4 The Code Committee believes that if an RI desk were to take a large position in the relevant securities of an offeror or offeree company in the course of an offer period, this might indicate that the desk had acquired those relevant securities in a proprietary capacity rather than a client-serving capacity, particularly if the RI desk did not avail itself of opportunities to dispose of the securities. Whilst the Code Committee does not at this stage intend to

introduce any limits on the size of position above which an RI desk should be required to make disclosures under Rule 8.3, this is one of the issues which the Code Committee will be considering as part of the review referred to in paragraph 10.13 above.

- 12.5 In the light of the responses to Question 11, the Code Committee has concluded that, for the time being, the features of RI status should be those described in paragraphs 12.2 and 12.3 of PCP 2005/3.
- 12.6 In addition, the Code Committee notes that, in accordance with section 11(b)(iii) of the new Introduction to the Code as set out in RS 2005/5 today, if the Hearings Committee finds a breach of the Code or of a ruling of the Panel it may suspend or withdraw any special status (which will include RI status) which the Panel has granted to a person, or impose conditions on the continuing enjoyment of such special status, in respect of all or part of the activities to which such special status relates.
- 12.7 Subject to the conclusions of the review referred to in paragraph 10.13 above, the Code Committee would expect that RI desks will be subject to an annual review of their RI status, and to an annual fee, with effect from June 2007.
- 12.8 A summary of the application of RI status is set out in Appendix D to this Response Statement.

13. Code amendments

Q.12 Do you agree with the proposed amendments to the Code referred to above to take account of the introduction of recognised intermediary status?

- 13.1 Paragraph 13 of PCP 2005/3 set out the proposed amendments to the Code in relation to the introduction of RI status, with which the respondents to Question 12 all agreed. Therefore, save as described below, the Code

Committee has adopted the new definition of “recognised intermediary” and the Notes thereon as proposed in paragraph 13.1(a) of PCP 2005/3.

13.2 In the light of the amendments to the criterion proposed in paragraph 10.1(b) of PCP 2005/3, the Code Committee has:

(a) deleted the words “and is acting in its capacity as such” in the proposed definition of “recognised intermediary” so that it will now read as follows:

“A recognised intermediary is that part of the trading operations of a bank or securities house which is accepted by the Panel as a recognised intermediary for the purposes of the Code ~~and is acting in its capacity as such.~~”; and

(b) amended the proposed Note 2 on the definition of “recognised intermediary” so that it will now read as follows:

“2. Recognised intermediary status is relevant only for the purposes of Note ~~4716~~ on Rule 9.1, Note 1(c) on Rule 7.2 and Rule 8.3(d), in each case to the extent only that the recognised intermediary is acting in a client-serving capacity. As a result, subject to Note 3 below, a recognised intermediary will not be treated, for the purposes of Rule 9.1, as interested in (or as having acquired an interest in) any securities by virtue only of paragraph (3) or paragraph (4) of the definition of interests in securities, nor will any dealings by it in relevant securities during an offer period be required to be publicly disclosed under Rules 8.3(a) to (c), in each case to the extent only that the recognised intermediary is acting in a client-serving capacity.”;

(c) amended the final sentence of the second paragraph of the proposed Note 3 on the definition of “recognised intermediary” so that it will now read as follows:

“After such time, dealings should be disclosed under Rule 8.1(a) or, if the recognised intermediary is, or forms part of, an exempt principal trader whose exempt status has not fallen away, Rule 38.5(a) or (b).”;

(d) amended the proposed Note 4 on the definition of “recognised intermediary” so that it will now read as follows:

“4. Any dealings by a recognised intermediary which is not acting in ~~that a~~ client-serving capacity will not benefit from the dispensations afforded by Note ~~4716~~ on Rule 9.1, Note 1(c) on Rule 7.2 and Rule 8.3(d) with the result

that all such dealings by it will be subject to the provisions of the Code as if those dispensations did not apply.”;

- (e) amended the second sentence of each of Note 1(c) on Rule 7.2 and Note 17 (now Note 16) on Rule 9.1 (as proposed in paragraph 13.1(b) of PCP 2005/3) so that they will now read as follows:

“However, provided that recognised intermediary status has not fallen away (see Note 3 on the definition of recognised intermediary), a recognised intermediary acting in ~~that~~ a client-serving capacity will not be treated as interested in (or as having acquired an interest in) any securities by virtue only of paragraph (3) or paragraph (4) of the definition of interests in securities (other than those held in a proprietary capacity) for these purposes.”; and

- (f) adopted the amendments to Rule 8.3(d) as proposed in paragraph 13.1(c) of PCP 2005/3, save that the reference to a recognised intermediary “acting in that capacity” has been amended so as to refer to it “acting in a client-serving capacity”, as follows

“(d) Rules 8.3(a) to (c) do not apply to recognised intermediaries acting in ~~that~~ a client-serving capacity (see Note 9 below).”.

- 13.3 In addition, the Code Committee has, for clarity, introduced an additional sentence to the first paragraph of the proposed Note 3 on the definition of “recognised intermediary”, as follows:

“However, in accordance with Rule 7.2(c), where a recognised intermediary is, or forms part of, an exempt principal trader which is connected with either an offeror or potential offeror or with the offeree company for the sole reason that it is controlled# by, controls or is under the same control as a connected adviser to that party, the recognised intermediary will not be presumed to be acting in concert with that party and will therefore continue to benefit from the dispensations afforded by Note 16 on Rule 9.1 and Note 1(c) on Rule 7.2.

See Note at end of Definitions Section.”.

- 13.4 In addition, the Code Committee has:

- (a) amended the references to Note 17 on Rule 9.1 in Notes 2, 3, and 4 on the definition of “recognised intermediary” so as to refer to Note 16, following the deletion of Note 9 on Rule 9.1 in RS 2005/5;
- (b) adopted the amendments to Note 9 on Rule 8 as proposed in paragraph 13.1(d) of PCP 2005/3 and has also introduced a new penultimate paragraph to Note 9 on Rule 8, as follows:

“Where a desk with recognised intermediary status deals in relevant securities other than in a client-serving capacity (or re-books a position which was acquired in a client-serving capacity so as to hold it in a proprietary capacity), it should aggregate and, where appropriate, disclose the interests, short positions and rights to subscribe which it holds in a proprietary capacity with those of the rest of the group. However, in making such disclosures, it need not aggregate and disclose details of any interests, short positions and rights to subscribe which it holds in a client-serving capacity.”

- 13.5 Details of the above amendments are set out in Appendix A to this Response Statement.

SECTION E**RULE 38****14. Dealings by exempt principal traders**

Q.13 Do you agree with the Code Committee's proposal not to amend Rules 38.1 to 38.4?

Q.14 Do you agree with the proposed amendments to Rule 38.5?

Q.15 Do you have any comments on Form 38.5(a), Form 38.5(b) or Supplemental Form 38.5(b)?

14.1 In paragraph 14 of PCP 2005/3, it was proposed that Rule 38.5 be amended so as to require the disclosure of all details required pursuant to Note 5(a) on Rule 8 in circumstances where a trading desk of a connected exempt principal trader does not benefit from the exception under Rule 8.3(d), i.e. if the trading desk has exempt status but does not have "recognised intermediary" status. The Code Committee did not propose any amendments to Rules 38.1 to 38.4.

14.2 Paragraphs 14.11 and 14.12 of PCP 2005/3 explained that, as a result of the proposed amendments to Rule 38.5:

- (a) the current Form 38.5 would, in effect, become Form 38.5(a) (to be used by connected exempt principal traders acting in a recognised intermediary capacity); and
- (b) a new Form 38.5(b) and a new Supplemental Form 38.5(b) (to be used by connected exempt principal traders not acting in a recognised intermediary capacity) would be introduced.

These Forms were set out in Appendix C to the PCP.

- 14.3 The respondents to PCP 2005/3 either agreed with or did not comment on the proposed amendments to Rule 38.5 (and the proposed deletion of what was then Note 3 and is currently Note 4 on Rule 38.5).
- 14.4 However, the Code Committee has adopted minor amendments to the wording proposed in PCP 2005/3 so as to make clearer from the face of the Rule that:
- (a) a disclosure should be made under Rule 38.5(a) only where the relevant trading desk is dealing in a client-serving capacity; and
 - (b) where an RI desk deals in a proprietary capacity (and is therefore subject to Rule 38.5(b), and not Rule 38.5(a)), it need not disclose details of any interests which it holds in a client-serving capacity.
- 14.5 The Code Committee has therefore:
- (a) amended Rule 38.5 as follows:

“38.5 DISCLOSURE OF DEALINGS

Dealings in relevant securities, during the offer period, by an exempt 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:-

(a) if the relevant trading desk has recognised intermediary status and is dealing in a client-serving capacity:

- (i) total acquisitions and disposals; and**
- (ii) the highest and lowest prices paid and received; and or**
- ~~(iii) whether the connection is with an offeror or the offeree company~~**

(b) if the relevant trading desk does not have recognised intermediary status, or if it does but is not dealing in a client-serving capacity, the details required under Note 5(a) on Rule 8 (see Note 4 on this Rule).

In each case, it should be stated 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).”;

- (b) deleted the current Note 4 on Rule 38.5 (which was Note 3 on Rule 38.5 at the time of PCP 2005/3) as proposed in paragraph 14.10(b) of the PCP; and
- (c) introduced a new Note 4 on Rule 38.5 as follows:

“4. Recognised intermediaries dealing in a proprietary capacity

Where an exempt principal trader with recognised intermediary status deals in relevant securities other than in a client-serving capacity (or re-books a position which was acquired in a client-serving capacity so as to hold it in a proprietary capacity), it should aggregate and disclose under Rule 38.5(b) the interests, short positions and rights to subscribe which it holds in a proprietary capacity with those of the group’s exempt principal traders which do not have recognised intermediary status. However, in making such disclosures, it need not aggregate and disclose details of any interests, short positions and rights to subscribe which it holds in a client-serving capacity.”

- 14.6 The respondents to PCP 2005/3 either agreed with or did not comment on the proposal not to amend Rules 38.1 to 38.4.
- 14.7 No comments were received on Form 38.5(a), Form 38.5(b) or Supplemental Form 38.5(b). The new specimen disclosure forms set out at Appendix B to this Response Statement, and which are now available on the Panel’s website (www.thetakeoverpanel.org.uk), therefore remain unchanged from those set out in the PCP, other than the introduction of an additional paragraph to Note 2 on Form 38.5(b) in the terms of the new Note 4 on Rule 38.5 set out in paragraph 14.5(c) above. The new forms should be used in relation to dealings from 20 May. Until that time, disclosures should follow the format of the existing Form 38.5, which will continue to be available on the Panel’s website in the meantime.

SECTION F

OTHER PROVISIONS

15. Rule 4, Rule 7.2(b) and Note 5 on Rule 7.2

Q.16 Do you agree with the proposed amendments to Rules 4 and 7.2?

15.1 In paragraph 15 of PCP 2005/3, various minor amendments were proposed to Rule 4.1(a), Rules 4.2(a) and (b), Notes 2 to 6 on Rules 4.1 and 4.2, Rules 4.4(i) and (ii), Rule 7.2(b) and Note 5 on Rule 7.2.

15.2 All respondents to Question 16 agreed with the amendments which the Code Committee has therefore adopted as proposed in paragraphs 15.4, 15.6 and 15.7 of PCP 2005/3 and as set out in Appendix A to this Response Statement.

APPENDIX A

Amendments to the Code

DEFINITIONS

Acting in concert

...

(5) ... in each case in respect of the interests in shares ~~shareholdings~~ of that adviser and persons controlling[#], controlled by or under the same control as that adviser (except in the capacity of an exempt fund manager or an exempt principal trader); and

...

NOTES ON ACTING IN CONCERT

...

45. Standstill agreements

Agreements between a company, or the directors of a company, and a person shareholder which restrict that person ~~the shareholder~~ or the directors from either offering for, or accepting an offer for, the shares of the company or from increasing or reducing the number of shares in which he or they are interested ~~shareholdings~~, may be relevant for the purpose of this definition. In cases of doubt, the Panel should be consulted.

...

Cash purchases-acquisitions

~~Purchases~~ Acquisitions for cash include contracts or arrangements where the consideration consists of a debt instrument capable of being redeemed in less than 3 years.

...

Control

Control means an interest, or interests, in a holding, or aggregate holdings, of shares carrying in aggregate 30% or more of the voting rights (as defined below) of a company, irrespective of whether such interest or interests give the holding or holdings ~~gives~~ de facto control.

...

Interests in securities

...

In particular, a person will be treated as having an interest in securities if:-

...

(4) ... and

(5) in the case of Rule 5 only, he has received an irrevocable commitment in respect of them.

NOTES ON INTERESTS IN SECURITIES

1. Gross interests

The number of securities in which a person is treated as having an interest is normally the gross number, aggregating the number of securities falling under each of paragraphs (1) to (4) (and, for the purposes of Rule 5 only, also paragraph (5)) above. ...

...

4. Securities borrowing and lending

If a person has borrowed or lent securities, he will normally be treated as interested in any securities which he has lent but (except in the circumstances set out in Note 17 on Rule 9.1) will not normally be treated as interested in any securities which he has borrowed. If a person has on-lent securities which he has borrowed, he will not normally be treated as interested in those securities.

...

9. Acquisitions of interests in securities

(a) References to a person acquiring an interest in securities include any transaction or dealing (including the variation of the terms of an option in respect of, or derivative referenced to, securities) which results in an increase in the number of securities (including, where relevant, securities which have been assented to an offer) in which the person is treated as interested.

(b) A person will not be treated as acquiring an interest in securities which are the subject of an irrevocable commitment received by him as a result only of paragraph (3) of the definition of interests in securities.

(c) The Panel should be consulted if an offeror or any person acting in concert with it proposes to enter into a conditional share sale and purchase agreement or option in the context of the offer.

...

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 an interest, or aggregate holdings interests, of~~ in shares carrying in aggregate 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. (See also Rule 12.2 regarding competition reference periods.)

...

~~Purchases or other acquisitions of shares~~

~~Purchases or other acquisitions of shares, where relevant, include purchases of shares assented to an offer.~~

Recognised intermediary

A recognised intermediary is that part of the trading operations of a bank or securities house which is accepted by the Panel as a recognised intermediary for the purposes of the Code.

NOTES ON RECOGNISED INTERMEDIARY

1. If any part of the trading operations of a bank or securities house wishes to be accepted by the Panel as a recognised intermediary, it must apply to the Panel to be granted such status and it will have to comply with any requirements imposed by the Panel as a condition of its granting such status.

2. Recognised intermediary status is relevant only for the purposes of Note 16 on Rule 9.1, Note 1(c) on Rule 7.2 and Rule 8.3(d), in each case to the extent only that the recognised intermediary is acting in a client-serving capacity. As a result, subject to Note 3 below, a recognised intermediary will not be treated, for the purposes of Rule 9.1, as interested in (or as having acquired an interest in) any securities by virtue only of paragraph (3) or paragraph (4) of the definition of interests in securities, nor will any dealings by it in relevant securities during an offer period be required to be publicly disclosed under Rules 8.3(a) to (c), in each case to the extent only that the recognised intermediary is acting in a client-serving capacity.

3. Where a recognised intermediary is, or forms part of, a principal trader connected either with an offeror or potential offeror or with the offeree

company, the recognised intermediary will not benefit from the dispensations afforded by Note 16 on Rule 9.1 and Note 1(c) on Rule 7.2 after the time at which the principal trader is presumed to be acting in concert with either the offeror or potential offeror or with the directors of the offeree company (as the case may be) in accordance with Rule 7.2(a) and Rule 7.2(b) respectively. However, in accordance with Rule 7.2(c), where a recognised intermediary is, or forms part of, an exempt principal trader which is connected with either an offeror or potential offeror or with the offeree company for the sole reason that it is controlled# by, controls or is under the same control as a connected adviser to that party, the recognised intermediary will not be presumed to be acting in concert with that party and will therefore continue to benefit from the dispensations afforded by Note 16 on Rule 9.1 and Note 1(c) on Rule 7.2.

Where a recognised intermediary is, or forms part of, an associate of the offeree company, it will not benefit from the exception from disclosure afforded by Rule 8.3(d) after the commencement of the offer period. Where a recognised intermediary is an associate of an offeror or potential offeror, it will not benefit from the exception from disclosure afforded by Rule 8.3(d) after the identity of the offeror or potential offeror of which it is an associate is publicly announced. After such time, dealings should be disclosed under Rule 8.1(a) or, if the recognised intermediary is, or forms part of, an exempt principal trader whose exempt status has not fallen away, Rule 38.5(a) or (b).

For the avoidance of doubt, where a recognised intermediary is, or forms part of, an exempt principal trader, its recognised intermediary status will fall away only if its exempt status falls away.

See Note at end of Definitions Section.

4. Any dealings by a recognised intermediary which is not acting in a client-serving capacity will not benefit from the dispensations afforded by Note 16 on Rule 9.1, Note 1(c) on Rule 7.2 and Rule 8.3(d) with the result that all such dealings by it will be subject to the provisions of the Code as if those dispensations did not apply.

5. Any dealings carried out by a recognised intermediary for the purpose of avoiding the usual application of the Code to such dealings will constitute a serious breach of the Code. If the Panel determines that a recognised intermediary has carried out such dealings, it will be prepared to rule, inter alia, that recognised intermediary status should be withdrawn for such period of time as the Panel may consider appropriate in the circumstances.

...

Rights over shares

~~Rights over shares include any rights acquired by a person by virtue of an agreement to purchase shares or an option to acquire shares or an irrevocable commitment to accept an offer to be made by him or an agreement to acquire voting rights or general control of them. A futures contract or covered warrant~~

for which exercise includes the possibility of delivery of the underlying securities is treated as an option.

...

Treasury shares

All ~~percentage holdings~~ percentages of voting rights, share capital and relevant securities are to be calculated by reference to the relevant percentage held and in issue outside treasury. A transfer or sale of shares by a company from treasury will normally be treated in the same way as an issue of new shares.

Rule 2.2

2.2 WHEN AN ANNOUNCEMENT IS REQUIRED

...

(b) immediately upon an acquisition of any interest in shares which gives rise to an obligation to make an offer under Rule 9. The announcement that an obligation has been incurred should not be delayed while full information is being obtained; additional information can be the subject of a later supplementary announcement;

...

(f) when a purchaser is being sought for an interest ~~holding, or interests~~ aggregate holdings, of in shares carrying in aggregate 30% or more of the voting rights of a company or when the board of a company is seeking one or more potential offerors, and:

...

Rule 2.8

2.8 STATEMENTS OF INTENTION NOT TO MAKE AN OFFER

...

(a) announce an offer or possible offer for the offeree company (including a partial offer which would result in the offeror and persons acting in concert with it being interested in holding shares carrying 30% or more of the voting rights of the offeree company);

(b) acquire any interest in shares of the offeree company if any such person would thereby become obliged under Rule 9 to make an offer;

(c) acquire any interest in, or procure an irrevocable commitment in respect of, shares of the offeree company or any rights over such shares if the shares and rights over shares held by any in which such person, together with any persons acting in concert with him, would be interested and the shares in respect of which he, or they, had acquired irrevocable commitments would in aggregate carry 30% or more of the voting rights of the offeree company;

...

Rule 3.1

3.1 BOARD OF THE OFFEREE COMPANY

...

NOTES ON RULE 3.1

1. *Management buy-outs and offers by controllersecontrolling shareholders*

The requirement for competent independent advice is of particular importance in cases where the offer is a management buy-out or similar transaction or is being made by the existing controller or group of controllersecontrolling shareholder or group of shareholders. ...

...

Rule 3.2

3.2 BOARD OF AN OFFEROR COMPANY

...

NOTES ON RULE 3.2

...

3. *Conflicts of interest*

A conflict of interest will exist, for instance, when there are significant cross-shareholdings between an offeror and the offeree company, when there are a number of directors common to both companies or when a person has is-a substantial interest shareholder in both companies.

Rule 4

~~SECTION E. DEALINGS AND RESTRICTIONS ON DEALINGS THE
ACQUISITION OF
SHARES AND RIGHTS OVER SHARES~~

RULE 4

...

4.1 PROHIBITED DEALINGS BY PERSONS OTHER THAN THE OFFEROR

(a) No dealings of any kind in securities of the offeree company ~~(including options and derivatives in respect of or referenc~~ed to such securities) by any person, not being the offeror, who is privy to confidential price-sensitive information concerning an offer or contemplated offer may take place between the time when there is reason to suppose that an approach or an offer is contemplated and the announcement of the approach or offer or of the termination of the discussions.

...

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 acquire an interest in any securities of the offeree company ~~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 acquire an interest in any securities of ~~purchase any securities in the~~ offeree company through any anonymous order book system, or through any other means, unless, in either case, it can be established that the seller, or other party to the transaction in question, 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

...

2. *Consortium offers and joint offerors*

...

The Panel must be consulted before any acquisitions of interests in ~~purchases of~~ offeree company securities are made by members or potential members of a consortium. If there are existing interests in ~~holdings of~~ such securities, it will be necessary to satisfy the Panel that they were acquired before the consortium was formed or contemplated.

It will not normally be acceptable for members of a consortium to acquire interests in offeree company ~~purchase such~~ securities unless there are, for example, when a consortium company is to be the offeror, appropriate arrangements to ensure that such acquisitions ~~purchases~~ are made proportionate to members' interests in the consortium company or under arrangements which give no profit to the party making the acquisition ~~purchaser~~. The Panel will also be concerned to ensure that the purposes of the Code are not avoided through characterising persons acting in concert as joint offerors.

3. *No-profit arrangements*

Arrangements made by a potential offeror with a person acting in concert with it, whereby interests in offeree company securities are acquired ~~purchased~~ (which would include entering into options in respect of or derivatives referenced to securities of the offeree company) by the person acting in concert, on the basis that the offeror will bear all the risks and receive all the benefits, are not prohibited by this Rule. Arrangements which contain a benefit or potential benefit to the person acting in concert (beyond normal expenses and carrying costs) are, however, normally prohibited. In cases of doubt, the Panel must be consulted.

4. *When an offer will not proceed*

If, after an announcement has been made that offer discussions are taking place or that an approach or offer is contemplated, the discussions are terminated or the offeror decides not to proceed with an offer, no dealings in securities (including options and derivatives in respect of or referenced to such securities) of the offeree company or, where relevant, the offeror, by the offeror or by any person privy to this information may take place prior to an announcement of the position.

5. *No dealing contrary to published advice*

Directors and financial advisers to a company who have interests in own securities in that company must not deal in such securities (including options and derivatives in respect of or referenced to such securities) contrary to any advice they have given to shareholders, or to any advice with which it can reasonably be assumed that they were associated, without giving sufficient public notice of their intentions together with an appropriate explanation.

6. *Discretionary fund managers and principal traders*

~~Sales of Dealings in securities of the offeree company by non-exempt discretionary fund managers and principal traders which are connected with the offeror will be treated in accordance with Rule 7.2.~~

...

4.4 DEALINGS IN OFFEREE SECURITIES BY CERTAIN OFFEREE COMPANY ASSOCIATES

...

(i) **either for its own account or on behalf of discretionary clients purchase-acquire any interest in offeree company shares ~~or deal in derivatives referenced to, or options in respect of, such shares~~; or**

(ii) **make any loan to a person to assist him in making-acquiring any such interest purchases or carrying out any such dealings save for lending in the ordinary course of business and on normal commercial terms to persons with which they have an established customer relationship; or**

...

Rule 5

RULE 5. TIMING RESTRICTIONS ON ACQUISITIONS

NB For the purposes of this Rule 5 only, the number of shares in which a person will be treated as having an interest includes any shares in respect of which he has received an irrevocable commitment (see paragraph (5) of the definition of interests in securities).

5.1 RESTRICTIONS

Except as permitted by Rule 5.2:-

(a) **when a person (which for the purpose of Rule 5 includes any persons acting in concert with him) is interested in shares ~~holds shares or~~**

~~rights over shares~~ which in the aggregate carry less than 30% of the voting rights of a company, he may not acquire ~~any~~ an interest in any other shares carrying voting rights in that company ~~or any rights over such shares~~ which, when aggregated with the shares in which he is already interested ~~or rights over shares which he already holds~~, would carry 30% or more of the voting rights; and

(b) when a person is interested in shares ~~or rights over shares~~ which in the aggregate carry 30% or more of the voting rights of a company but does not hold shares which carry more than 50% of the voting rights, he may not acquire ~~any~~ an interest in any other shares carrying voting rights in that company ~~or any rights over such shares~~. See Note 75.

NOTES ON RULE 5.1

...

[The previous Note 2 on Rule 5.1 has been deleted by RS 2005/4.]

~~3. — Options over existing shares~~

~~The exercise of options over existing shares is not restricted by this Rule or Rule 5.3.~~

42. New shares, subscription rights, convertibles and options

...

(See also Note 53 on this Rule.)

53. Allotted but unissued shares

When shares of a company carrying voting rights have been allotted (even if provisionally) but have not yet been issued, for example, under a rights issue when the shares are represented by renounceable letters of allotment, the Panel should be consulted. This Rule may apply to the acquisition of an interest in such shares as it would in the case of an acquisition of an interest in registered shares.

64. “Whitewashes”

This Rule does not prohibit a person from obtaining ~~a holding of an interest in~~ shares carrying 30% or more of the voting rights in accordance with Note 1 of the Notes on Dispensations from Rule 9.

75. Maintenance of the percentage holding of the shares in which a person is interested

The restrictions in this Rule do not apply to an acquisition of an interest in shares ~~or rights over shares~~ which would not increase the percentage of the

shares carrying voting rights in which held by that person is interested, e.g. if a shareholder takes up his entitlement under a fully underwritten rights issue or if a person acquires shares on exercise of a call option.

86. ...

97. Gifts

~~The restrictions imposed by this Rule do not apply to the receipt of gifts. If a person receives a gift of shares or an interest in shares which takes his holding the aggregate number of shares carrying voting rights in which he is interested to 30% or more, he must consult the Panel. Such a person would not normally be required to make an offer under Rule 9 but would (after receipt of the gift) be subject to Rule 5.1(b) and Rule 9.1(b). (See also Note 3 on Rule 9.5.)~~

5.2 EXCEPTIONS TO RESTRICTIONS

The restrictions in Rule 5.1 do not apply to an acquisition of an interest in shares carrying voting rights in a company, or rights over such shares, by a person:-

...

NOTES ON RULE 5.2

1. Single shareholder

~~(a) 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. 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.~~

(b) An acquisition of an interest in shares will only be permitted by Rule 5.2(a) if the acquisition relates to a pre-existing holding of shares of the single shareholder concerned.

2. Rule 9

~~An acquisition permitted by Rule 5.2 may result in an obligation to make an offer under Rule 9, in which case an immediate announcement of such an offer must be made. Where the acquisition is of rights over shares, the provisions of Notes 11 and 13 on Rule 9.1 may be relevant and the Panel should be consulted in cases of doubt.~~

...

5.3 ACQUISITIONS FROM A SINGLE SHAREHOLDER - CONSEQUENCES

A person who ~~makes an acquisition~~ acquires an interest in shares from a single shareholder permitted by ~~paragraph (a) of Rule 5.2(a)~~ may not ~~make any further acquisitions of~~ acquire an interest in any other shares carrying voting rights in a company, ~~or rights over such shares~~, except in the circumstances set out in Rule 5.2(b), (c), (d) and (e). If that person makes an offer for the company which subsequently lapses, this restriction will cease to apply.

NOTES ON RULE 5.3

1. *If a person's interests are ~~holding is~~ reduced*

A person who is restricted by this Rule from making further acquisitions will cease to be so restricted if ~~his aggregate holdings of shares and rights over shares~~ the aggregate number of shares carrying voting rights in which he is interested falls below 30% (in which case he will become subject to Rule 5.1(a)).

2. *Rights or scrip issues and "whitewashes"*

The restrictions imposed by this Rule do not prevent a person from receiving his entitlement of shares through a rights or scrip issue as long as he does not increase ~~his~~ the percentage of ~~the~~ shares carrying voting rights in which he is interested. Nor do they prevent a person from acquiring further interests in shares in accordance with the Notes on Dispensations from Rule 9.

5.4 ACQUISITIONS FROM A SINGLE SHAREHOLDER - DISCLOSURE

A person who ~~makes an acquisition of~~ acquires an interest in shares carrying voting rights in a company, ~~or rights over such shares~~, from a single shareholder permitted by Rule 5.2(a) must notify ~~that acquisition and his consequent total holding of shares and rights over shares to~~ the company, a RIS and the Panel, not later than 12 noon on the business day following the date of the acquisition, of details of:

(a) that acquisition; and

(b) any shares of the company in which he has an interest or in respect of which he has a right to subscribe, in each case specifying the nature of the interests or rights concerned (see Note 5(a) on Rule 8). Similar details of any short position (whether conditional or absolute and whether in the money or otherwise), including any short position under a derivative, any agreement to sell or any delivery obligation or right to require another person to purchase or take delivery, must also be disclosed. The

~~notification must distinguish between shares and rights over shares, specifying the nature of any rights concerned and giving the relevant numbers and the resulting holding in each case.~~

...

Rule 6

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

6.1 ~~ACQUISITIONS PURCHASES~~ BEFORE A RULE 2.5 ANNOUNCEMENT

Except with the consent of the Panel in cases falling under (a) or (b), when an offeror or any person acting in concert with it has acquired an interest in purchased shares in the offeree company:-

...

(b) during the period, if any, between the commencement of the offer period and an announcement made by the offeror purchaser in accordance with Rule 2.5; or

...

the offer to the holders of shares ~~shareholders~~ of the same class shall not be on less favourable terms.

If a ~~purchase of an acquisition of an interest in shares~~ in the offeree company has given rise to an obligation under Rule 11, compliance with that Rule will normally be regarded as satisfying any ~~obligations obligation~~ under this Rule in respect of ~~that acquisition~~ those purchases.

6.2 ~~ACQUISITIONS PURCHASES~~ AFTER A RULE 2.5 ANNOUNCEMENT

(a) If, after an announcement made in accordance with Rule 2.5 and before the offer closes for acceptance, an offeror or any person acting in concert with it acquires any interest in purchased shares at above the offer price (being the then current value of the offer), it shall increase its offer to not less than the highest price paid for the interest in shares so acquired.

(b) Immediately after the acquisition purchase, ... (see also Rule 32). Whenever practicable, the announcement should also state the number of shares concerned purchased and the price paid.

(c) ~~Purchases of Acquisitions of interests in shares~~ in the offeree company may also give rise to an obligation under Rule 11. Where an obligation is incurred under Rule 11 by reason of any such acquisition purchases, compliance with that Rule will normally be regarded as satisfying any obligation obligations under this Rule in respect of that acquisition those purchases.

NOTES ON RULE 6

1. *Adjusted terms*

...

(a) *whether the relevant acquisition purchase was made on terms then prevailing in the market;*

(b) *changes in the market price of the shares since the relevant acquisition purchase;*

(c) *the size and timing of the relevant acquisition purchase;*

...

(e) *whether interests in shares have been acquired purchased at high prices from directors or other persons closely connected with the offeror or the offeree company; and*

...

2. *Acquisitions Purchases prior to the three month period*

The discretion given to the Panel in Rule 6.1(c) will not normally be exercised unless the vendors, or other parties to the transactions giving rise to the interests, are directors of, or other persons closely connected with, the offeror or the offeree company.

3. *No less favourable terms*

For the purpose of Rule 6.1, except where Rule 9 (mandatory offer) or Rule 11.1 (requirement for cash offer) applies, it will not be necessary to make a cash offer available even if interests in shares have been acquired purchased for cash. However, any securities offered as consideration must, at the date of the announcement of the firm intention to make the offer, have a value at least equal to the highest relevant purchase price paid. If, during the period ending when the market closes on the first business day after the announcement, the value is not maintained, the Panel will be concerned to ensure that the offeror acted with all reasonable care in determining the consideration.

...

4. Purchase-Highest price paid

For the purpose of this Rule, the price at which shares are purchased-paid for any acquisition of an interest in shares will be determined as follows:

(a) in the case of a purchase of shares, the price paid is the price at which the bargain between the purchaser (or, where applicable, his broker acting in an agency capacity) and the vendor (or principal trader) is struck;

(b) in the case of a call option which remains unexercised, the price paid will normally be treated as the middle market price of the shares which are the subject of the option at the time the option is entered into;

(c) in the case of a call option which has been exercised, the price paid will normally be treated as the amount paid on exercise of the option together with any amount paid by the option-holder on entering into the option;

(d) in the case of a written put option (whether exercised or not), the price paid will normally be treated as the amount paid or payable on exercise of the option less any amount paid by the option-holder on entering into the option; and

(e) in the case of a derivative, the price paid will normally be treated as the initial reference price together with any fee paid on entering into the derivative.

In the case of an option or a derivative, however, if the option exercise price or derivative reference price is calculated by reference to the average price of a number of acquisitions by the counterparty of interests in underlying securities, the price paid will normally be determined to be the highest price at which such acquisitions are actually made.

Any stamp duty and broker's commission payable should be excluded. ~~Stamp duty and broker's commission payable by the purchaser are not regarded as part of the purchase price.~~

The Panel should be consulted in advance if it is proposed to acquire the voting rights attaching to shares, or general control of them.

Where a person acquired an interest in shares more than three months prior to the commencement of the offer period as a result of any option, derivative or agreement to purchase and, within the three month period prior to the commencement of the offer period or after the announcement made in accordance with Rule 2.5 and before the offer closes for acceptance, the person acquires any of the relevant shares, no obligation under this Rule will normally arise as a result of the acquisition of those shares. However, if the terms of the instrument have been varied in any way, or if the shares are acquired other than on the terms of the original instrument, the Panel should be consulted.

5. *Cum dividend*

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

6. *Convertible securities, warrants and options*

Acquisitions of ~~Purchases of convertible securities convertible into, warrants in respect of, or options or other subscription rights to subscribe for, new shares~~ will normally only be relevant to this Rule if they are converted or exercised (as applicable). Such ~~acquisitions purchases~~ will then be treated as if they were ~~acquisitions purchases~~ of the underlying shares at a price calculated by reference to the ~~acquisition purchase~~ price and the relevant conversion or exercise terms. In any case of doubt, the Panel should be consulted.

...

Rule 7.1

7.1 IMMEDIATE ANNOUNCEMENT REQUIRED IF THE OFFER HAS TO BE AMENDED

The acquisition of an interest in ~~Purchases of~~ offeree company shares by an offeror or any person acting in concert with it may give rise to an obligation ~~obligations~~ under Rule 6 (requirement to increase offer), Rule 9 (mandatory offer) or Rule 11 (nature of consideration to be offered). Immediately after such an ~~acquisition purchase~~, an appropriate announcement must be made.... Whenever practicable, the announcement should also state the nature of the interest, the number of shares concerned ~~purchased~~ and the price paid.

NOTE ON RULE 7.1

Potential offerors

The requirement of this Rule to make an immediate announcement applies to any publicly announced potential offeror (whether named or not) either where a public indication of the level of its probable offer has been made and the potential offeror or any person acting in concert with it acquires an interest in ~~buys~~ shares above that level or where there already exists an offer from a third party and the potential offeror or any person acting in concert with it

~~acquires an interest in shares buys~~ at above the level of that offer. Disclosure will also be required in accordance with Rule 8.1.

Rule 7.2

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 time at which the connected party had actual knowledge of the possibility of an offer being made by a person with whom it is connected. Rules 5, 6, 9, 11 and 36 will then be relevant to acquisitions of interests in 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 to securities borrowing and lending transactions.

(b) ... Rules ~~4.4, 5~~ and 9 may then be relevant to acquisitions of interests in 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 to securities borrowing and lending transactions.

...

NOTES ON RULE 7.2

1. *Dealings prior to a concert party relationship arising*

...

(c) Rule 9 will, however, be relevant if the aggregate number holdings of shares in which of all persons under the same control# (including any exempt fund manager or exempt principal trader) are interested carry 30% or more of the voting rights of a company. However, provided that recognised intermediary status has not fallen away (see Note 3 on the definition of recognised intermediary), a recognised intermediary acting in a client-serving capacity will not be treated as interested in (or as having acquired an interest in) any securities by virtue only of paragraph (3) or paragraph (4) of the definition of interests in securities (other than those held in a proprietary capacity) for these purposes.

~~Notwithstanding this, if~~ If such a group of persons includes a principal trader and the group's aggregate number holding of shares in a company in which the group is interested approaches or exceeds 30% of the voting rights, the

Panel may consent to the principal trader continuing to acquire interests in 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 number of shares~~ which the principal trader holds does not at any relevant time exceed 3% of the voting rights of the company. The Panel should be consulted in such cases.

...

3. Dealings by principal traders

After a principal trader is presumed to be acting in concert by virtue of Rules 7.2(a) or (b), it may stand down from its dealing activities. In such circumstances, with the prior consent of the Panel, the principal trader may reduce its interest in ~~holding of~~ offeree company securities or offeror securities, or may acquire interests in 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, notwithstanding the usual application of the presumptions of acting in concert and Rules 7.2(a) and (b). The Panel will also normally, pursuant to Rule 4.6, consent to connected principal traders taking action to unwind a securities borrowing or lending transaction in such circumstances. The Panel will not normally require such dealings to be disclosed under Rules 4.6, 8.1(a), 24.3 or 25.3. Any such dealings must take place within a time period agreed in advance by the Panel.

4. Dealings by discretionary fund managers

(a) After a discretionary fund manager is presumed to be acting in concert with an offeror or potential offeror by virtue of Rule 7.2(a), any acquisition by it of any interest in ~~purchases by it of~~ offeree company securities will normally be relevant for Rules 5, 6, 9, 11 and 36. Similarly, any acquisition of any interest in ~~purchases of~~ offeree company securities by a discretionary fund manager after it is presumed to be acting in concert by virtue of Rule 7.2(b) will not normally be permitted by virtue of Rule 4.4(i). However, with the prior consent of the Panel, a discretionary fund manager connected with either the offeree company or an offeror or potential offeror will normally be permitted to acquire an interest in ~~purchase~~ offeree company securities, with a view to reducing any short position, without such acquisitions ~~purchases~~ being relevant for the purposes of Rules 4.4(i), 5, 6, 9, 11 and 36, notwithstanding the usual application of the presumptions of acting in concert and Rules 7.2(a) and (b). The Panel will also normally, pursuant to Rule 4.6, consent to connected discretionary fund managers taking action to unwind securities borrowing transactions in such circumstances. Any such acquisitions ~~purchases~~ or unwinding arrangements must take place within a time period agreed in advance by the Panel and should be disclosed pursuant to Rule 8.1(b)(i) or Note 3 on Rule 4.6, as appropriate.

...

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 the number of shares in which 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, are interested carry ~~or relate to~~ in aggregate 30% or more of the voting rights of the offeree company.

6. Disclosure of dealings in offer documentation

~~Holdings of Interests in relevant securities and dealings~~ (whether before or after the presumptions in Rules 7.2(a) and (b) 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. This will not apply in respect of a dealing that has been permitted by Note 3 above and has not been required to be disclosed.

...

Rule 7.3

7.3 PARTIAL OFFERS AND “WHITEWASHES”

~~Purchases of~~ The acquisition of an interest in offeree company shares by an offeror or any person acting in concert with it may result in the Panel refusing to exercise its discretion to permit a partial offer or to grant a dispensation under Note 1 of the Notes on Dispensations from Rule 9.

Rule 8

8.3 DEALINGS BY PERSONS WITH INTERESTS IN SECURITIES REPRESENTING 1% OR MORE

...

(d) Rules 8.3(a) to (c) does not apply to ~~principal traders recognised intermediaries~~ acting in ~~that~~ a client-serving capacity (see Note 9 below).

...

NOTES ON RULE 8

...

9. Principal traders Recognised intermediaries

~~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.~~

The exception in relation to ~~principal traders~~ recognised intermediaries must not be used to avoid or delay disclosure of dealings. For example, a dealing in relevant securities by a ~~principal trader~~ recognised intermediary, backed by a firm commitment by a person to purchase the relevant securities from the ~~principal trader~~ recognised intermediary, will be regarded as a dealing 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 ~~principal trader~~ recognised intermediary 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 ~~principal trader~~ recognised intermediary under Rule 8.1).

Where a desk with recognised intermediary status deals in relevant securities other than in a client-serving capacity (or re-books a position which was acquired in a client-serving capacity so as to hold it in a proprietary capacity), it should aggregate and, where appropriate, disclose the interests, short positions and rights to subscribe which it holds in a proprietary capacity with those of the rest of the group. However, in making such disclosures, it need not aggregate and disclose details of any interests, short positions and rights to subscribe which it holds in a client-serving capacity.

Exempt principal traders connected with an offeror or the offeree company should, subject to the above, disclose dealings in the manner set out in Rule 38.5. Recognised intermediaries which are associates of the offeror or the offeree company and to which exempt status is not applicable should disclose dealings under Rule 8.1.

Rule 9.1

9.1 **WHEN IT-A MANDATORY OFFER IS REQUIRED AND WHO IS PRIMARILY RESPONSIBLE FOR MAKING IT**

Except with the consent of the Panel, when:-

- (a) any person acquires, whether by a series of transactions over a period of time or not, **an interest in shares which (taken together with shares in which held or acquired by persons acting in concert with him are interested)** carry 30% or more of the voting rights of a company; or

(b) any person who, together with persons acting in concert with him, is interested in shares which in the aggregate carry holds not less than 30% but not more than 50% of the voting rights of a company but does not hold shares carrying more than 50% of such voting rights and such person, or any person acting in concert with him, acquires additional an interest in any other shares which increases his the percentage of the shares carrying voting rights in which he is interested,

...

NOTES ON RULE 9.1

...

1. ~~Shareholders coming~~ Coming together to act in concert

Acting in concert requires the co-operation of two or more parties. When a party has acquired an interest in shares without the knowledge of other persons with whom he shareholders or potential shareholders but subsequently comes together with other shareholders to co-operate as a group to obtain or consolidate control of a company, and their existing shareholdings the shares in which they are interested at the time of coming together carry amount to 30% or more of the voting rights in that company, the Panel will not normally require a general offer to be made under this Rule. Such parties having once come together, however, the provisions of the Rule will apply so that:-

(a) *if the shares in which they are interested together carry combined shareholdings amount to less than 30% of the voting rights in that company, an obligation to make an offer will arise if any member of that group acquires an interest in any further shares so that the shares in which they are interested total shareholdings reach together carry 30% or more of such voting rights; or*

(b) *if the shares in which they are interested together carry combined shareholdings amount to between 30% or more of the voting rights in that company and they do not hold shares carrying more than 50% of the voting rights in that company, no member of that group may acquire an interest in any other shares carrying voting rights in that company which would increase the total percentage shareholding of the group without incurring a similar obligation.*

...

2. Collective shareholder action

... *Such parties will be presumed to have come into concert once an agreement or understanding is reached between them in respect of a board control-seeking proposal with the result that subsequent acquisitions of*

interests in purchases of shares by any member of the group could give rise to an offer obligation.

In determining whether a proposal is board control-seeking, the Panel will have regard to a number of factors, including the following:

(a) the relationship between any of the proposed directors and any of the shareholders proposing ~~or supporting them~~ or their supporters. Relevant factors in this regard will include:

(i) whether there is or has been any prior relationship between any of the activist shareholders, or their supporters, and any of the proposed directors;

(ii) 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; and

(iii) 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.

If, on this analysis, there is no relationship between any of the proposed directors and any of the activist shareholders or their supporters, or if any such relationship is insignificant ...

...

(e) whether any of the activist shareholders, or any of their supporters, will benefit, either directly or indirectly, as a result of the implementation of the proposal other than through its interest in holding of shares in the company; and

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

In respect of a proposal to replace some or all of the directors and the investment manager of an investment trust company, the relationship between the proposed new investment manager and any of the activist shareholders, or their supporters, will also be relevant to the analysis of the factors set out at paragraph (a) above and, if appropriate, paragraphs (c) to (f) above.

In determining whether it is appropriate for such parties to be held no longer to be acting in concert, the Panel will take account of a number of factors, including the following:

...

(c) whether there is any evidence of an ongoing struggle between the activist shareholders, or their supporters, and the board of the company;

...

(e) the relationship between the activist shareholders, or their supporters, and the proposed/new directors.

3. Directors of a company

Directors of a company will be presumed to be acting in concert during an offer period or when they have reason to believe that a bona fide offer might be imminent. The normal provisions of this Rule will apply in these circumstances. At other times, directors of a company are not presumed to be acting in concert in relation to control of the company of which they are directors. Subject to the constraints imposed by the Rules, ~~and in particular to the normal application of this Rule to the holdings which each controls,~~ directors are, so far as the Code is concerned, free to deal in the shares of their company. The Panel reserves the right, however, to examine situations closely should the actions of the directors suggest that they may be acting in concert.

If ~~any persons shareholders~~ who have indicated their support for the offeree company's directors against an offer thereafter ~~buy~~ acquire an interest in shares to frustrate the offer, the Panel would consider their position in relation to the directors. The directors of companies defending against an offer, their supporters or their advisers, should consult the Panel before acquiring an interest in the purchase of any shares which might lead to the incurring of an obligation under this Rule.

...

4. Acquisition of interests in shares by members of a group acting in concert

While the Panel accepts that the concept of persons acting in concert recognises a group as being the equivalent of a single person, the membership of such groups may change at any time. This being the case, there will be circumstances when the acquisition of an interest in shares by one member of a group acting in concert from another member will result in the acquirer of the interest in shares having an obligation to make an offer. Whenever ~~the holdings of a group acting in concert~~ is interested in shares which together carry ~~total~~ 30% or more of the voting rights in a company and as a result of an acquisition of an interest in shares from another member of the group a single member comes to be interested in shares carrying ~~hold~~ 30% or more or, if already interested in shares carrying ~~holding~~ over 30%, acquires an interest in any other shares carrying voting rights ~~increases his percentage holding,~~ the factors which the Panel will take into account in considering whether to waive the obligation to make an offer include:-

(a) whether the leader of the group or the member with the largest individual ~~shareholding~~ interest in shares has changed and whether the balance between the shareholdings interests in the group has changed significantly;

(b) the price paid for the interest in shares acquired; and

...

When the group is interested in shares carrying ~~holds between 30% or more of the voting rights in a company but does not hold shares carrying more than and 50% of such voting rights,~~ an offer obligation will arise if an interest in any other shares carrying voting rights is acquired ~~there are any acquisitions~~ from non-members of the group. When the group holds shares carrying over 50% of the voting rights in a company, no obligations normally arise from acquisitions by any member of the group. However, subject to considerations similar to those set out in the previous paragraph, the Panel may regard as giving rise to an obligation to make an offer the acquisition by a single member of the group of an interest in shares sufficient to increase the shares carrying voting rights in which he is interested ~~his holding to 30% or more or, if he is already interested in ~~holds 30% or more,~~ which increases the ~~his~~ percentage ~~shareholding of shares carrying voting rights in which he is interested.~~~~

For the purpose of calculating the highest price paid in the event of an offer under this Rule, the prices paid for an interest in shares acquired by one member ~~transferred between members~~ of a group acting in concert from another may be relevant where, for example, all shares or interests in shares held within a group are acquired by ~~transferred to~~ that member making the offer or where prices paid between members are materially above the market price.

5. Employee Benefit Trusts

The Panel must be consulted in advance of any proposed acquisition of an interest in ~~new or existing~~ shares if the aggregate number of shares in which ~~holdings of the directors, any other shareholders~~ persons acting, or presumed to be acting, in concert with any of the directors and the trustees of an employee benefit trust ("EBT") are interested will, as a result of the acquisition, equal or exceed ~~carry~~ 30% or more of the voting rights or, if already exceeding ~~carrying~~ 30% or more, will increase further. The Panel must also be consulted in any case where a shareholder ~~person~~ (or group of shareholders ~~persons~~ acting, or presumed to be acting, in concert) holds ~~is interested in shares carrying 30% or more (but does not hold shares carrying more than 50%) of the voting rights and it is proposed that an EBT acquires an interest in any other shares.~~

The mere establishment and operation of an EBT will not by itself give rise to a presumption that the trustees are acting in concert with the directors and/or a controller ~~controlling shareholder~~ (or group of shareholders ~~persons~~ acting,

or presumed to be acting in concert). The Panel will, however, consider all relevant factors including: the identities of the trustees; the composition of any remuneration committee; the nature of the funding arrangements; the percentage of the issued share capital in which held by the EBT is interested; the number of shares held to satisfy awards made to directors; the number of shares in which the EBT is interested ~~held in excess of those required to satisfy existing awards~~; the prices at which, method by which and persons from whom any interests in existing shares have been or are to be acquired; the established policy or practice of the trustees as regards decisions to acquire interests in shares or to exercise, or procure the exercise of, votes in respect of shares ~~held by in which the EBT is interested~~; whether or not the directors themselves are presumed to be in concert; and the nature of any relationship existing between a controller controlling shareholder (or group of ~~shareholders persons~~ acting, or presumed to be acting in concert) and both the directors and the trustees. Its consideration of these factors may lead the Panel to conclude that the trustees are acting in concert with the directors and/or a controller controlling shareholder (or group).

...

6. Vendor of part only of a ~~shareholding an~~ interest in shares

Shareholders sometimes wish to sell part only of their shareholdings or a purchaser may be prepared to purchase part only of a shareholding. This arises particularly where a purchaser wishes to acquire shares carrying just under 30% of the voting rights in a company, thereby avoiding an obligation under this Rule to make a general offer. ...

...

(c) ~~If the parties negotiate options over the retained shares, it may be more difficult for them to satisfy the Panel that a significant degree of control is absent. On the other hand, where~~ Where the retained shares are in themselves a significant part of the company's capital (or even in certain circumstances represent a significant sum of money in absolute terms), a correspondingly greater element of independence may be presumed.

...

Similar considerations will arise where the vendor remains interested in shares but without itself owning any of such shares, or where the acquisition is not of the shares themselves but of another type of interest in shares.

7. Placings and other arrangements

When a ~~purchaser person~~ is to acquire an interest in shares which will result in his holding being interested in shares carrying 30% or more of the voting rights of a company, the Panel will consider waiving the requirements of this Rule if firm arrangements are made for the number of shares carrying voting rights in which he is interested to be reduced ~~placing of sufficient shares to~~

~~reduce the holding to below 30% prior to the acquisition (for example, by a placing of shares) or, in certain exceptional circumstances, if an undertaking is given to make such a reduction placing within a very short period after the acquisition. In all such cases, the Panel must be consulted in advance. The Panel will be concerned to ensure that none of the persons with whom the acquirer enters into transactions in order to reduce his interests places~~ is acting in concert with the acquirer ~~purchaser~~; for example, an obligation under this Rule will not be avoided by placing ~~the~~ shares with a number of persons having a common link, such as the discretionary clients of a fund manager who would be connected with the acquirer ~~purchaser~~ if he were an offeror (unless, in such circumstances, the fund manager would have exempt status).

8. The chain principle

Occasionally, a person or group of persons acting in concert acquiring shares resulting in a holding of over 50% of the voting rights of a company (which need not be a company to which the Code applies) will thereby acquire or consolidate control, as defined in the Code, of a second company because the first company itself ~~holds~~ is interested, either directly or indirectly through intermediate companies, in a controlling block of shares in the second company, or holds is interested in shares which, when aggregated with those which already held by the person or group is already interested in, secure or consolidate control of the second company. The Panel will not normally require an offer to be made under this Rule in these circumstances unless either:-

(a) the interest in shares which the first company has ~~shareholding~~ in the second company is significant in relation to the first company. In assessing this, the Panel will take into account a number of factors including, as appropriate, the assets and profits of the respective companies. Relative values of 50% or more will normally be regarded as significant; or

...

[The previous Note 9 on Rule 9.1 has been deleted by RS 2005/5.]

~~109.~~ Triggering Rule 9 during an offer period

...

Subject to Note 3 on Rule 9.3, where no change in the consideration is involved it will be sufficient, following the announcement, simply to notify offeree company shareholders in writing of the new ~~total shareholding number~~ of shares in which the offeror and persons acting in concert with it are interested, of the fact that the acceptance condition (in the form required by Rule 9.3) is the only condition remaining and of the period for which the offer will remain open following posting of the document.

...

410. *Convertible securities, warrants and options*

In general, the acquisition of ~~convertible securities~~ convertible into, warrants in respect of, or options or other rights to subscribe for, new shares does not give rise to an obligation under this Rule to make a general offer but the exercise of any conversion or subscription rights or options will be considered to be an acquisition of an interest in shares for the purpose of the Rule.

~~The taking of an option will, however, normally be regarded as constituting the acquisition of shares giving rise to such an obligation where the relationship and arrangements between the two parties concerned are such that effective control over those shares has passed to the taker of the option.~~

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. However, if the potential controller proposes to acquire any interest in ~~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.

Where securities with conversion or subscription rights were issued at a time when no offer obligation on exercise of such rights would arise (~~eg if they were issued before the existence of the Rules of the Code relating to such obligations~~) and no independent shareholders' approval was obtained, the Panel will consider the case on its merits and will have regard, inter alia, to the votes cast on any relevant resolution, the number of shares concerned ~~size of shareholding involved~~ and the attitude of the board of the company. It is always open to the holder of such rights to dispose of sufficient rights so that, on exercise, the shares in which he would be interested ~~his shareholding~~ would together carry ~~amount to~~ less than 30% of the voting rights in the company. In circumstances where such rights could not be transferred prior to exercise, the Panel would consider waiving the offer obligation arising upon an exercise of rights provided there was an undertaking to reduce the number of shares carrying voting rights in which he would be interested to sell, within a reasonable period of time, sufficient shares to reduce the shareholding below 30% within a reasonable time.

Any holder of conversion or subscription rights who intends to exercise such rights and so to be interested in shares carrying ~~hold~~ 30% or more of the voting rights of a company should consult the Panel before doing so to determine whether an offer obligation would arise under the Rule and if so at what price (see also Note 2(c) on Rule 9.5).

...

(See also Note ~~1514~~ on Rule 9.1.)

1211. *The reduction or dilution of a shareholding*

If a ~~person shareholder~~ or a group of ~~shareholders~~ ~~persons acting in concert interested in shares carrying~~ ~~is holding~~ ~~more than 30% of the voting rights of a company reduces its interest but not~~ ~~sells shares but without reducing the holding~~ to less than 30%, such ~~shareholder or shareholders~~ ~~person or persons~~ may subsequently acquire an interest in further shares without incurring an obligation to make a general offer subject to both of the following limitations:

(a) *the total number of shares in which interests may be acquired under this Note in any period of 12 months must not exceed 1% of the voting share capital for the time being (and, in determining the number of shares in which interests have been acquired in any such 12 month period, any reductions in the number of shares in which the person or group is interested ~~sales of shares~~ may not be netted off against ~~purchases or other acquisitions~~); and*

(b) *the percentage of shares in which ~~holding of the~~ relevant ~~person shareholder~~ or group of ~~persons shareholders~~ acting in concert is interested following ~~resulting from~~ any acquisition of shares under this Note must not exceed the highest percentage of shares in which ~~holding of~~ such ~~person shareholder~~ or group of ~~persons shareholders~~ was interested in the previous 12 months.*

Both these restrictions apply, and must be tested, at the time of any ~~purchase acquisition~~ proposed under this Note, and by reference to the position which would result immediately upon implementation of the proposed ~~purchase acquisition~~. On each such occasion, the test must take account of the total issued voting share capital at the relevant time, and total number of shares purchases and highest percentage concerned holding during the immediately preceding twelve months. As a result, it will not be permitted to increase percentage ~~holdings~~ ~~interests~~ progressively from one year to another.

The Panel will regard ~~the~~ a reduction of the percentage of shares in which the person or group is interested as a result of ~~holdings~~ ~~by~~ dilution following the issue of new shares as also being relevant ~~equivalent to sales~~ for these purposes. Accordingly, dilution of an interest in shares carrying voting rights ~~a holding~~ of more than 30% will give rise to the ability to acquire an interest in further shares on the basis set out in this Note provided that the total percentage of shares carrying voting rights in which the person or group is interested ~~shareholding~~ has not been reduced below 30% and subject to the limits stipulated above.

If a shareholding has remained above 50% of the voting rights of a company, or is restored to more than 50% by acquisitions permitted under this Note, further ~~purchases~~ ~~acquisitions~~ are unrestricted by the Rule. Otherwise, a percentage interest in shares carrying voting rights ~~shareholding~~ of more than 30% which is reduced or diluted may not be restored to its original level without giving rise to an obligation to make a general offer except as

permitted under this Note. However, nothing in this Note affects or restricts subscriptions for new shares approved by independent shareholders in the manner outlined in Note 1 of the Notes on Dispensations from Rule 9. Additionally, in the case of dilution following the issue of new shares, the Panel will also consider waiving the requirements of the Rule if an arrangement can be made whereby shareholders approve, in the manner outlined in Note 1 of the Notes on Dispensations from Rule 9, the restoration of a diluted percentage interest holding by ~~purchases-acquisitions~~ from those to whom new shares are issued.

12. Gifts

If a person receives a gift of shares or an interest in shares which takes the aggregate number of shares carrying voting rights in which he is interested to 30% or more, he must consult the Panel. (See also Note 3 on Rule 9.5.)

13. Acquisition or control of voting rights

~~If voting rights, or general control of them, as distinct from the shares themselves are acquired, the Panel will deem this to be the acquisition of the relevant shares for the purpose of this Rule. This will not normally apply in the case of a bank taking security over shares in the normal course of its business (see also Note 2 of the Notes on Dispensations from Rule 9).~~

...

1716. Aggregation of holdings across a group and recognised intermediaries

Rule 9 will be relevant if the aggregate ~~number holdings~~ of shares in which of all persons under the same control# (including any exempt fund manager or exempt principal trader) are interested carry 30% or more of the voting rights of a company. However, provided that recognised intermediary status has not fallen away (see Note 3 on the definition of recognised intermediary), a recognised intermediary acting in a client-serving capacity will not be treated as interested in (or as having acquired an interest in) any securities by virtue only of paragraph (3) or paragraph (4) of the definition of interests in securities (other than those held in a proprietary capacity) for these purposes.

~~Notwithstanding this, if~~ If such a group of persons includes a principal trader and the ~~group's~~ aggregate ~~number holding~~ of shares in a company in which the group is interested 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~~ number of shares which the principal trader holds does not at any relevant time exceed 3% of the voting rights of the company. The Panel should be consulted in such cases.

#See Note at end of Definitions Section.

17. Borrowed or lent shares

For the purpose of this Rule, if a person has borrowed or lent shares he will be treated as holding the voting rights in respect of such shares save for any borrowed shares which he has either on-lent or sold. A person must consult the Panel before acquiring or borrowing shares which, when taken together with shares in which he or any person acting in concert with him is already interested, and 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.

18. Changes in the nature of a person's interest

Subject to Note 2 on Rule 9.3, for the purpose of this Rule 9.1, a person will not normally be treated as having acquired an interest in shares as a result only of a transaction under which the number of shares in which he is interested under the different paragraphs of the definition of interests in securities changes but the aggregate number of shares in which he is interested following the transaction remains the same (for example, where the person acquires shares on exercise of a call option).

However, a person who was interested in any shares by virtue of paragraph (3) or paragraph (4) of the definition of interests in securities on 20 May 2006 (when such interests first became relevant for the purpose of Rule 9.1) will normally be treated as having acquired an interest in shares if he subsequently becomes interested in such shares by virtue of paragraph (1) or paragraph (2) of the definition of interests in securities.

The Panel should be consulted in all such cases to establish whether, in the circumstances, any obligation arises under this Rule.

Rule 9.2**9.2 OBLIGATIONS OF OTHER PERSONS**

...

NOTE ON RULE 9.2*Prime responsibility*

The prime responsibility for making an offer under this Rule normally attaches to the person who makes the acquisition which imposes the obligation to make an offer. If such person is not a principal member of the group acting in concert, the obligation to make an offer may attach to the principal member or members and, in exceptional circumstances, to other members of the group acting in concert. This could include a member of the group who at the time when the obligation arises does not have any interest in ~~hold any~~ shares. In

this context, the Panel will not normally regard the underwriter of a mandatory offer, by virtue of his underwriting alone, as being a member of a group acting in concert and, therefore, responsible for making the offer (but see Note 23 on the definition of acting in concert).

An agreement between a person shareholder and a bank under which the person shareholder borrows money for the acquisition of shares or an interest in shares which gives rise to an obligation under the Rule will not of itself fall within the above.

Rule 9.3

9.3 CONDITIONS AND CONSENTS

...

(b) no acquisition of any interest in shares which would give rise to a requirement for an offer under this Rule may be made if the making or implementation of such offer would or might be dependent on the passing of a resolution at any meeting of shareholders of the offeror or upon any other conditions, consents or arrangements.

NOTES ON RULE 9.3

...

2. *Acceptance condition*

...

In the event that an offer under Rule 9 lapses because a purchase may not be counted as a result of Note 5 on Rule 10 and subsequently the purchase is completed, the Panel should be consulted. It will require appropriate action to be taken such as the making of a new offer or the reduction of the percentage of shares in which the offeror and persons acting in concert with it are interested~~offeror's holding~~.

In the event that:

(a) an offer under Rule 9 lapsed by virtue of the acceptance condition not having been satisfied in circumstances where the shares which were assented to the offer, together with the shares in which the offeror and persons acting in concert with it were interested at the time the offer lapsed, amounted in aggregate to more than 50% of the shares carrying voting rights; and

(b) subsequently the offeror, or any person acting in concert with it, becomes interested in shares in the offeree company by virtue of paragraph (1) or paragraph (2) of the definition of interests in securities and, when the offer lapsed, the offeror or any person acting in concert with it at that time

was interested in such number (or a greater number) of shares in the offeree company by virtue only of paragraph (3) or paragraph (4) of that definition,

then a further offer in accordance with Rule 9 must normally be made if the shares in which the offeror and any persons acting in concert with it are then interested by virtue of paragraph (1) and paragraph (2) of the definition of interests in securities carry 30% or more of the voting rights of the offeree company. The price at which such an offer must be made will normally be the higher of the price at which the lapsed offer was made and the price determined under Note 2(a) on Rule 9.5. The Panel should be consulted in all cases in which this Note may be relevant. (See also Rule 35.1).

3. When dispensations may be granted

...

(a) ...

(ii) until posting of the offer document in respect of that new offer, the offeror and persons acting in concert with it ~~will not~~ must consult the Panel as to their ability to exercise, or procure the exercise of, more than 29.9% of the voting rights of the offeree company attaching to the shares in which they have an interest.

...

Rule 9.4

9.4 THE COMPETITION COMMISSION AND THE EUROPEAN COMMISSION

...

NOTES ON RULE 9.4

1. *If an offer lapses pursuant to Rule 12.1(a) or (b)*

If an offer under Rule 9 lapses pursuant to Rule 12.1(a) or (b), the obligation under the Rule does not lapse and, accordingly, if thereafter the merger is allowed, the offer must be reinstated on the same terms and at not less than the same price as soon as practicable. If the merger is prohibited, the offer cannot be made and the Panel will consider whether, if there is no order to such effect, to require the offeror to reduce the percentage of shares carrying voting rights in which it and persons acting in concert with it are interested ~~its holding~~ to below 30% or to its original level before the obligation to offer was incurred, if this was 30% or more. The Panel would normally expect an offeror whose offer has lapsed pursuant to Rule 12.1(a) or (b) to proceed with all due diligence before the Competition Commission or the European Commission. However, if, with the consent of the Panel and within a limited

~~period, an offeror reduces the percentage of shares carrying voting rights in which it and persons acting in concert with it are interested sells to unconnected parties within a limited period sufficient shares to reduce its holding to below 30%, or to its original level before the obligation to offer was incurred if that was 30% or more, the Panel will regard the obligation as having lapsed.~~

2. *Further acquisitions*

While the Competition Commission or the European Commission is considering the case (following a reference or initiation of proceedings) where an obligation to make an offer under this Rule has been incurred, the offeror or persons acting in concert with it may not acquire any interest in further shares in the offeree company.

Rule 9.5

9.5 CONSIDERATION TO BE OFFERED

(a) ... must, in respect of each class of share capital involved, be in cash or be accompanied by a cash alternative at not less than the highest price paid by the offeror or any person acting in concert with it for any interest in shares ...

...

NOTES ON RULE 9.5

1. *Nature of consideration*

When an interest in shares has ~~have~~ been acquired for a consideration other than cash, the offer must nevertheless be in cash or be accompanied by a cash alternative of at least equal value, which must be determined by an independent valuation.

...

2. *Calculation of the price*

(a) ~~In calculating the price paid,~~ The price paid for any acquisition of an interest in shares will be determined as follows:

(i) in the case of a purchase of shares, the price paid is the price at which the bargain between the purchaser (or, where applicable, his broker acting in an agency capacity) and the vendor (or principal trader) is struck;

(ii) in the case of a call option which remains unexercised, the price paid will normally be treated as the middle market price of the

shares which are the subject of the option at the time the option is entered into;

(iii) in the case of a call option which has been exercised, the price paid will normally be treated as the amount paid on exercise of the option together with any amount paid by the option-holder on entering into the option;

(iv) in the case of a written put option (whether exercised or not), the price paid will normally be treated as the amount paid or payable on exercise of the option less any amount paid by the option-holder on entering into the option; and

(v) in the case of a derivative, the price paid will normally be treated as the initial reference price together with any fee paid on entering into the derivative.

In the case of an option or a derivative, however, if the option exercise price or derivative reference price is calculated by reference to the average price of a number of acquisitions by the counterparty of interests in underlying securities, the price paid will normally be determined to be the highest price at which such acquisitions are actually made.

Any stamp duty and broker's commission payable should be excluded.

Where a person acquired an interest in shares more than 12 months prior to the announcement of the offer made under Rule 9 as a result of any option, derivative or agreement to purchase and, either during the 12 months prior to such announcement or after the announcement and before the offer closes for acceptance, the person acquires any of the relevant shares, no obligation under this Rule will normally arise as a result of the acquisition of those shares. However, if the terms of the instrument have been varied in any way, or if the shares are acquired other than on the terms of the original instrument, the Panel should be consulted.

(b) If any interest in shares has ~~have~~ been acquired ...

(c) If any interest in shares has ~~have~~ been acquired by the conversion or exercise (as applicable) of ~~convertible~~ securities convertible into, warrants in respect of, or options or other ~~subscription~~ rights to subscribe for new shares, the price will normally be established by reference to the middle market price of the shares in question at the close of business on the day on which the relevant notice was submitted. If, however, the convertible securities, warrants, options or other subscription rights were acquired either during the offer period or within 12 months prior to the announcement of the offer made under Rule 9 or after the announcement and before the offer closes for acceptance-its commencement, they will be treated as if they were purchases of the underlying shares at a price calculated by reference to the acquisition purchase-price and the relevant conversion or exercise terms.

The Panel should be consulted in advance if it is proposed to acquire the voting rights attaching to shares, or general control of them, and in the circumstances described in (b) and (c) above.

3. ~~Dispensation from~~ Adjustment of highest price

...

(a) *the size and timing of the relevant acquisitions~~purchases~~;*

(b) ...;

(c) *whether interests in shares had been acquired~~purchased~~ at high prices from directors or other persons closely connected with the offeror or the offeree company; ~~and~~*

(d) *the number of shares in which interests have been acquired~~purchased~~ in the preceding 12 months;*

...

4. *Cum dividend*

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

Rule 9.6

9.6 OBLIGATIONS OF DIRECTORS SELLING SHARES

When directors (and their close relatives and related trusts) sell shares to a person purchaser—(or enter into options, derivatives or other transactions) as a result of which that person the purchaser is required to make an offer under this Rule, the directors must ensure that as a condition of the sale (or other relevant transaction) the person purchaser undertakes to fulfil his obligations under the Rule. In addition, except with the consent of the Panel, such directors should not resign from the board until the first closing date of the offer or the date when the offer becomes or is declared wholly unconditional, whichever is the later.

Rule 9.7**9.7 RESTRICTIONS ON EXERCISE OF CONTROL BY AN OFFEROR**

Except with the consent of the Panel, no nominee of an offeror or persons acting in concert with it may be appointed to the board of the offeree company, nor may an offeror and persons acting in concert with it exercise, or procure the exercise of, the votes attaching to any shares held in the offeree company until the offer document has been posted.

NOTES ON DISPENSATIONS FROM RULE 9

1. *Vote of independent shareholders on the issue of new securities (“Whitewash”)*

...

The appropriate provisions of the Code apply to whitewash proposals. Full details of the potential number and percentage of shares in which the person or group of persons acting in concert might become interested (together with details of the different interests concerned) ~~shareholding~~ must be disclosed in the document sent to shareholders relating to the issue of the new securities, which must also include competent independent advice on the proposals the shareholders are being asked to approve, together with a statement that the Panel has agreed to waive any consequent obligation under this Rule to make a general offer. The resolution must be made the subject of a poll. The Panel must be consulted and a proof document submitted at an early stage.

When a person or group of persons acting in concert may, as a result of such arrangements, come to ~~control~~ hold shares carrying more than 50% of the voting rights of the company, specific and prominent reference to the possibility must be contained in the document and to the fact that the person or group ~~controlling shareholders~~ will be able to acquire interests in further shares exercise their control and increase their overall shareholding without incurring any further obligation under Rule 9 to make a general offer.

...

Notwithstanding the fact that the issue of new securities is made conditional upon the prior approval of a majority of the shareholders independent of the transaction at a general meeting of the company:-

(a) *the Panel will not normally waive an obligation under this Rule if the person to whom the new securities are to be issued or any persons acting in concert with him have acquired any interest in ~~purchased~~ shares in the company in the 12 months prior to the posting to shareholders of the circular relating to the proposals but subsequent to negotiations, discussions or the*

reaching of understandings or agreements with the directors of the company in relation to the proposed issue of new securities;

(b) a waiver will be invalidated if any acquisitions of interests in shares ~~purchases~~ are made in the period between the posting of the circular to shareholders and the shareholders' meeting.

...

2. Enforcement of security for a loan

Where shares or other securities are ~~a shareholding in a company is~~ charged as security for a loan and, as a result of enforcement, the lender would otherwise incur an obligation to make a general offer under this Rule, the Panel will not normally ~~waive the requirement provided that the security was not given at a time when the lender had reason to believe that enforcement was likely~~ an offer if sufficient interests in shares are disposed of within a limited period to persons unconnected with the lender, so that the percentage of shares carrying voting rights in which the lender, together with persons acting in concert with it, is interested is reduced to below 30% in a manner satisfactory to the Panel. The lender must consult the Panel as to its ability to exercise or procure the exercise of the voting rights attaching to the shares in which it is interested at any time before sufficient interests are disposed of, or if the interest in excess of 29.9% is likely to be temporary (for example because the company will be issuing more shares).

...

... Although a receiver, liquidator or administrator of a company is not required to make an offer when he acquires an interest in shares carrying ~~takes control of a holding of 30% or more of the voting rights in another company,~~ the provisions of the Rule apply to a purchaser from such a person.

...

4. Inadvertent mistake

If, due to an inadvertent mistake, a person incurs an obligation to make an offer under this Rule, the Panel will not normally require an offer if sufficient interests in shares are ~~sold~~ disposed of within a limited period to persons unconnected with him, so that the percentage of shares carrying voting rights in which the person, together with persons acting in concert with him, is interested is reduced to below 30% in a manner satisfactory to the Panel. Any such person must consult the Panel as to his ability to exercise or procure the exercise of the voting rights attaching to the shares in which he is interested at any time before sufficient interests are disposed of, or if the interest in excess of 29.9% is likely to be temporary (for example because the company will be issuing more shares).

...

6. *Enfranchisement of non-voting shares*

There is no requirement to make a general offer under this Rule if a person interested in ~~holder of non-voting shares~~ becomes upon enfranchisement of those shares interested in shares carrying ~~a holder of 30%~~ or more of the voting rights of a company, except where shares or interests in shares have been ~~acquired purchased~~ at a time when the ~~person purchaser~~ had reason to believe that enfranchisement would take place.

Rule 11.1

11.1 WHEN A CASH OFFER IS REQUIRED

Except with the consent of the Panel in cases falling under (a) or (b), a cash offer is required where:-

(a) the shares of any class under offer in the offeree company in which interests are ~~acquired purchased~~ for cash (but see Note 5) by an offeror and any person acting in concert with it during the offer period and within 12 months prior to its commencement carry 10% or more of the voting rights currently exercisable at a class meeting of that class, in which case the offer for that class shall be in cash or accompanied by a cash alternative at not less than the highest price paid by the offeror or any person acting in concert with it for any interest in shares of that class ~~acquired~~ during the offer period and within 12 months prior to its commencement; or

(b) subject to paragraph (a) above, any interest in shares of any class under offer in the offeree company ~~is acquired are purchased~~ for cash (but see Note 5) by an offeror or any person acting in concert with it during the offer period, in which case the offer for that class shall be in cash or accompanied by a cash alternative at not less than the highest price paid by the offeror or any person acting in concert with it for any interest in shares of that class ~~acquired~~ during the offer period; or

...

NOTES ON RULE 11.1

1. *Price*

For the purpose of this Rule, the price paid for any acquisition of an interest in shares will be determined as follows:

(a) in the case of a purchase of shares, the price paid is the price at which the bargain between the purchaser (or, where applicable, his broker acting in an agency capacity) and the vendor (or principal trader) is struck;

(b) in the case of a call option which remains unexercised, the price paid will normally be treated as the middle market price of the shares which are the subject of the option at the time the option is entered into;

(c) in the case of a call option which has been exercised, the price paid will normally be treated as the amount paid on exercise of the option together with any amount paid by the option-holder on entering into the option;

(d) in the case of a written put option (whether exercised or not), the price paid will normally be treated as the amount paid or payable on exercise of the option less any amount paid by the option-holder on entering into the option; and

(e) in the case of a derivative, the price paid will normally be treated as the initial reference price together with any fee paid on entering into the derivative.

In the case of an option or a derivative, however, if the option exercise price or derivative reference price is calculated by reference to the average price of a number of acquisitions by the counterparty of interests in underlying securities, the price paid will normally be determined to be the highest price at which such acquisitions are actually made.

In calculating the price paid, Any stamp duty and broker's commission payable should be excluded.

The Panel should be consulted in advance if it is proposed to acquire the voting rights attaching to shares, or general control of them.

Where a person acquired an interest in shares more than 12 months prior to the commencement of the offer period as a result of any option, derivative or agreement to purchase and, during the offer period or within 12 months prior to its commencement, the person acquires any of the relevant shares, no obligation under this Rule will normally arise as a result of the acquisition of those shares. However, if the terms of the instrument have been varied in any way, or if the shares are acquired other than on the terms of the original instrument, the Panel should be consulted.

2. Gross acquisitions purchases

The Panel would normally regard Rule 11.1(a) as applying to the gross number purchases of shares in which interests are acquired over the relevant period, and would not allow the deduction of any shares Shares sold over that period or which are the subject of any short position should not normally be deducted. However, in exceptional circumstances and with the consent of the Panel, shares sold some considerable time before the beginning of the offer period (or shares which are the subject of any short position entered into some considerable time before the beginning of the offer period) may be deducted.

3. *When the obligation is satisfied*

The obligation to make cash available under this Rule will be considered to have been met if, at the time the ~~acquisition purchase~~ was made, a cash offer or cash alternative at a price per share not less than that required by this Rule was open for acceptance, even if that offer or alternative closes for acceptance immediately thereafter.

4. *Equality of treatment*

The discretion given to the Panel in Rule 11.1(c) ~~to require cash to be made available in certain cases where less than 10% has been purchased in the previous 12 months~~ will not normally be exercised unless the vendors or other parties to the transactions giving rise to the interests are directors of, or other persons closely connected with, the offeror or the offeree company. In such cases, relatively small ~~acquisitions purchases~~ could be relevant.

Rule 11.1(c) may also be relevant when interests in shares carrying 10% or more of the voting rights of a class have ~~has been~~ acquired in the previous 12 months for a mixture of securities and cash. The Panel should be consulted in all relevant cases.

5. *Acquisitions for securities*

For the purpose of this Rule, interests in shares acquired by an offeror and any person acting in concert with it in exchange for securities, either during or in the 12 months preceding the commencement of the offer period, will normally be deemed to be ~~acquisitions purchases~~ for cash on the basis of the value of the securities at the time of the purchase. However, if the vendor of the offeree company shares or other party to the transaction giving rise to the interest is required to hold the securities received or receivable in exchange until either the offer has lapsed or the offer consideration has been posted to accepting shareholders, no obligation under Rule 11.1 will be incurred.

...

9. *Cum dividend*

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

10. *Convertible securities, warrants and options*

Acquisitions of ~~Purchases of convertible securities~~ convertible into, warrants in respect of, or options or other subscription rights to subscribe for, new

shares will normally only be relevant to this Rule if they are converted or exercised (as applicable). Such ~~acquisitions purchases~~ will then be treated as if they were ~~acquisitions purchases~~ of the underlying shares at a price calculated by reference to the ~~acquisition purchase~~ price and the relevant conversion or exercise terms. In any case of doubt, the Panel should be consulted.

...

12. Competition reference period

If an offer is announced in accordance with Note (a)(iii) on Rule 35.1, any ~~purchases of acquisitions of interests in~~ offeree company shares for cash during the competition reference period will be deemed to be acquisitions ~~purchases~~ during the new offer period for the purposes of Rule 11.1(b).

Rule 11.2

11.2 WHEN A SECURITIES OFFER IS REQUIRED

Where interests in shares ~~purchases~~ of any class of the offeree company ~~shares~~ carrying 10% or more of the voting rights currently exercisable at a class meeting of that class have been acquired ~~made~~ by an offeror and any person acting in concert with it in exchange for securities in the three months prior to the commencement of and during the offer period, such securities will normally be required to be offered to all other holders of shares of that class.

Unless the vendor or other party to the transaction giving rise to the interest is required to hold the securities received or receivable until either the offer has lapsed or the offer consideration has been posted to accepting shareholders, an obligation to make an offer in cash or to provide a cash alternative will also arise under Rule 11.1.

NOTES ON RULE 11.2

1. *Basis on which securities are to be offered*

Any securities required to be offered pursuant to this Rule must be offered on the basis of the same number of consideration securities received or receivable by the vendor or other party to the transaction giving rise to the interest for each offeree company share rather than on the basis of securities equivalent to the value of the securities received or receivable by the vendor or such other party at the time of the relevant purchase. Where there has been more than one relevant ~~acquisition purchase~~, offeror securities must be offered on the basis of the greater or greatest number of consideration securities received or receivable for each offeree company share.

2. *Equality of treatment*

The Panel may require securities to be offered on the same basis to all other holders of shares of that class even though the amount purchased is less than 10% or the purchase took place more than three months prior to the commencement of the offer period. However, this discretion will not, normally, be exercised unless the vendors of the relevant shares or other parties to the transactions giving rise to the interests are directors of, or other persons closely connected with, the offeror or the offeree company.

3. *Vendor placings*

Shares acquired in exchange for securities will normally be deemed to be acquisitions ~~purchases~~ for cash for the purposes of this Rule if an offeror or any of its associates arranges the immediate placing of such consideration securities for cash, in which case no obligation to make a securities offer under this Rule will arise.

...

5. *Acquisitions for a mixture of cash and securities*

The Panel should be consulted where interests in shares carrying 10% or more of the voting rights of a class have ~~has~~ been acquired during the offer period and within 12 months prior to its commencement for a mixture of securities and cash.

6. *Acquisitions ~~Purchases~~ in exchange for securities to which selling restrictions are attached*

Where an offeror and any person acting in concert with it has acquired interests in shares carrying ~~purchased~~ 10% or more of the voting rights of any class of shares in the offeree company during the offer period and within 12 months prior to its commencement and the consideration received or receivable by the vendor or other party to the transaction giving rise to the interest includes shares to which selling restrictions of the kind set out in the second sentence of Rule 11.2 are attached, the Panel should be consulted.

7. *Applicability of the Notes on Rule 11.1 to Rule 11.2*

...

In addition, if an offer is announced in accordance with Note (a)(iii) on Rule 35.1, any ~~purchases of acquisitions of interests in offeree company shares~~ during the competition reference period will be deemed to be acquisitions ~~purchases~~ during the new offer period for the purposes of this Rule.

Rule 11.3**11.3 DISPENSATION FROM HIGHEST PRICE**

...

*NOTE ON RULE 11.3**Relevant factors*

Factors which the Panel might take into account when considering an application for an adjusted price include:-

- (a) the size and timing of the relevant acquisitions~~purchases~~;*
- (b) the attitude of the ~~offeree~~ board of the offeree company;*
- (c) whether interests in shares had ~~have been~~ acquired ~~purchased~~ at high prices from directors or other persons closely connected with the offeror or the offeree company; and*
- (d) the number of shares in which interests have been acquired ~~purchased~~ in the preceding 12 months.*

Rule 19.5**19.5 TELEPHONE CAMPAIGNS**

Except with the consent of the Panel, campaigns in which shareholders or other persons interested in shares are contacted by telephone may be conducted only by staff of the financial adviser who are fully conversant with the requirements of, and their responsibilities under, the Code. Only previously published information which remains accurate, and is not misleading at the time it is quoted, may be used in telephone campaigns. Shareholders and other persons interested in shares must not be put under pressure and must be encouraged to consult their professional advisers.

NOTES ON RULE 19.5

...

2. *New information*

If, in spite of this Rule, new information is given to some shareholders or other persons interested in shares, such information must immediately be made generally available ~~to shareholders~~ in the manner described in Note 3 on Rule 20.1.

...

4. *Statutory and other regulatory provisions*

...

Any view expressed by the Panel in relation to the telephoning of shareholders or other persons interested in shares can only relate to the Code and must not be taken to extend to any other regulatory requirement, for example the provisions of the FSMA or the FSA's conduct of business rules.

Rule 32.1

32.1 OFFER OPEN FOR 14 DAYS AFTER ~~REVISION~~ POSTING OF REVISED OFFER DOCUMENT

...

NOTES ON RULE 32.1

...

2. *When revision is required*

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

...

4. *Triggering Rule 9*

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

Rule 35

RULE 35

35.1 DELAY OF 12 MONTHS

...

(a) announce an offer or possible offer for the offeree company (including a partial offer which could result in the offeror and persons acting in concert with it being interested in holding shares carrying 30% or more of the voting rights of the offeree company);

(b) acquire any interest in shares of the offeree company if the offeror or any such person would thereby become obliged under Rule 9 to make an offer;

(c) acquire any interest in, or procure an irrevocable commitment in respect of, shares of the offeree company ~~or any rights over such shares if the shares and rights over shares held by any in which~~ such person, together with any persons acting in concert with him, would be interested and the shares in respect of which he, or they, had acquired irrevocable commitments would in aggregate carry 30% or more of the voting rights of the offeree company;

...

35.2 PARTIAL OFFERS

The restrictions in Rule 35.1 will also apply following a partial offer:-

(a) ~~for which could result in the offeror and persons acting in concert with it being interested in shares carrying~~ not less than 30% but not holding shares carrying and not more than 50% of the voting rights of the offeree company whether or not the offer has become or been declared wholly unconditional. When such an offer has become or been declared wholly unconditional, the period of 12 months runs from that date; and

...

The restrictions in Rule 35.1 will not normally apply following a partial offer which could only result in the offeror and persons acting in concert with it being interested in shares carrying a ~~holding of~~ less than 30% of the voting rights of the offeree company.

...

35.3 DELAY OF 6 MONTHS BEFORE ACQUISITIONS ABOVE THE OFFER VALUE

Except with the consent of the Panel, if a person, together with any person acting in concert with him, holds shares carrying more than 50% of the voting rights of a company, neither that person nor any person acting in concert with him may, within 6 months of the closure of any previous offer made by him to the shareholders of that company which became or was declared wholly unconditional, make a second offer to, ~~or acquire shares from,~~ any shareholder in that company, or acquire any interest in shares in that company, on more favourable better terms than those made available under the previous offer (see also Rule 6.2(a)). For this purpose the value of a securities exchange offer shall be calculated as at the date the offer closed. In addition, special deals with favourable conditions attached may not be entered into during this 6 months period (see also Rule 16).

35.4 RESTRICTIONS ON DEALINGS BY A COMPETING OFFEROR WHOSE OFFER HAS LAPSED

Except with the consent of the Panel, where an offer has been one of two or more competing offers and has lapsed, neither that offeror, nor any person acting in concert with that offeror, may acquire any interest in shares in the offeree company on more favourable terms better than those made available under its lapsed offer until each of the competing offers has either been declared unconditional in all respects or has itself lapsed. For these purposes, the value of the lapsed offer shall be calculated as at the day the offer lapsed.

NOTE ON RULES 35.3 AND 35.4

Determination of price

The price paid for any acquisition of an interest in shares will be determined in the manner set out in Note 4 on Rule 6 (other than the final paragraph of that Note).

However, where:

(a) a call option was entered into during any period that was relevant for the purposes of Rule 6 (or Rule 9.5, where relevant) in relation to the previous or lapsed offer; and

(b) that call option is exercised:

(i) during the six month period referred to in Rule 35.3 (in the case of Rule 35.3); or

(ii) before any competing offer has either been declared unconditional in all respects or has itself lapsed (in the case of Rule 35.4),

then the person will be treated as having acquired an interest in shares at the time of such exercise and, for the purposes of Rule 35.3 or Rule 35.4 (as the case may be), the price paid will normally be treated as the amount paid on exercise of the option together with any amount paid by the option-holder on entering into the option.

Where a person acquired an interest in shares before the period referred to in paragraph (a) above as a result of any option, derivative or agreement to purchase and, during the relevant period referred to in paragraph (b) above, the person acquires any of the relevant shares, no obligation under this Rule will normally arise as a result of the acquisition of those shares. However, if the terms of the instrument have been varied in any way, or if the shares are acquired other than on the terms of the original instrument, the Panel should be consulted.

Rule 36

RULE 36

36.1 PANEL'S CONSENT REQUIRED

The Panel's consent is required for any partial offer. In the case of an offer which could not result in the offeror and persons acting in concert with it being interested in holding shares carrying 30% or more of the voting rights of a company, consent will normally be granted.

36.2 BUYING ACQUISITIONS BEFORE THE OFFER

In the case of an offer which could result in the offeror and persons acting in concert with it being interested in holding shares carrying 30% or more but holding less than 100% of the voting rights of a company, such consent will not normally be granted if the offeror or persons acting in concert with it have acquired, selectively or in significant numbers, interests in shares in the offeree company during the 12 months preceding the application for consent or if interests in shares have been acquired purchased—at any time after the partial offer was reasonably in contemplation.

36.3 BUYING ACQUISITIONS DURING AND AFTER THE OFFER

The offeror and persons acting in concert with it may not acquire any interest in purchase shares in the offeree company during the offer period. In addition, in the case of a successful partial offer, neither the offeror, nor any person who acted in concert with the offeror in the course of the partial offer, nor any person who is subsequently acting in

concert with any of them, may, except with the consent of the Panel, acquire any interest in ~~purchase~~ such shares during a period of 12 months after the end of the offer period.

NOTES ON RULE 36.3

...

2. *Partial offer resulting in an interest of less than 30%*

The consent of the Panel will normally be granted for acquisitions of interests in shares ~~share purchases~~ within 12 months of the end of the offer period when a partial offer has resulted in the offeror and persons acting in concert with it being interested in shares ~~a holding~~ carrying less than 30% of the voting rights of a company.

...

36.4 OFFER FOR BETWEEN 30% AND 50%

When an offer is made which could result in the offeror and persons acting in concert with it being interested in ~~holding~~ shares carrying not less than 30% but not holding shares carrying and not more than 50% of the voting rights of a company, the precise number of shares offered for must be stated and the offer may not be declared unconditional as to acceptances unless acceptances are received for not less than that number.

36.5 OFFER FOR 30% OR MORE REQUIRES 50% APPROVAL

Any offer which could result in the offeror and persons acting in concert with it being interested in ~~holding~~ shares carrying 30% or more of the voting rights of a company must ~~normally~~ be conditional, not only on the specified number of acceptances being received, but also on approval of the offer, normally signified by means of a separate box on the form of acceptance, being given in respect of over 50% of the voting rights held by shareholders who are independent of ~~holding over 50% of the voting rights not held by~~ the offeror and persons acting in concert with it. This requirement may on occasion be waived if over 50% of the voting rights of the offeree company are held by one shareholder.

36.6 WARNING ABOUT CONTROL POSITION

In the case of a partial offer which could result in the offeror, either alone or with persons acting in concert with it, holding shares carrying over 50% of the voting rights of the offeree company, the offer document must contain specific and prominent reference to this and to the fact that, if the offer succeeds, the offeror or, where appropriate, the offeror and persons acting in concert with it, will be free, subject to Rule 36.3 and, where

relevant, to Note 4 on Rule 9.1, to acquire further interests in shares without incurring any obligation under Rule 9 to make a general offer.

...

36.8 COMPARABLE OFFER

When an offer is made for a company with more than one class of equity share capital which could result in the offeror and persons acting in concert with it being interested in holding shares carrying 30% or more of the voting rights, a comparable offer must be made for each class.

NOTES ON RULE 36

1. *Allotted but unissued shares*

When shares of a company carrying voting rights have been allotted (even if provisionally) but have not yet been issued, for example, under a rights issue when the shares are represented by renounceable letters of allotment, the Panel should be consulted. It is likely that such shares, and the acquisition of an interest in such shares, will be taken into account for the purpose of this Rule.

...

Rule 37.1

37.1 POSSIBLE REQUIREMENT TO MAKE A MANDATORY OFFER

When a company redeems or purchases its own voting shares, any resulting increase in the percentage of shares carrying voting rights in which a person held by a shareholder or group of persons shareholders acting in concert is interested will be treated as an acquisition for the purpose of Rule 9. Subject to prior consultation, the Panel will normally waive any resulting obligation to make a general offer if there is a vote of independent shareholders and a procedure on the lines of that set out in Appendix 1 is followed.

NOTES ON RULE 37.1

1. *Persons ~~Shareholders~~ who will not be required to make a mandatory offer*

A person ~~shareholder~~ who comes to exceed the limits in Rule 9.1 in consequence of a company's redemption or purchase of its own shares will not normally incur an obligation to make a mandatory offer unless that person ~~shareholder~~ is a director, or the relationship of the person ~~shareholder~~ with any one or more of the directors is such that the person ~~shareholder~~ is, or is

presumed to be, acting in concert with any of the directors. A person shareholder who has appointed a representative to the board of the company, and investment managers of investment trusts, will be treated for these purposes as a director. ...

2. Acquisitions of interests in shares ~~Purchases~~ preceding a redemption or purchase

The exception in Note 1 will not apply, and an obligation to make a mandatory offer may therefore be imposed, if a person shareholder (or any relevant member of a group of persons shareholders acting in concert) has acquired an interest in purchased shares at a time when he had reason to believe that such a redemption or purchase of its own shares by the company would take place. This Note will not normally be relevant unless the relevant person shareholder has knowledge that a redemption or purchase for which requisite shareholder authority exists is being, or is likely to be, implemented (whether in whole or in part).

3. Situations where a mandatory obligation may arise

Where the directors are aware that a company's redemption or purchase of its own shares would otherwise give rise to an obligation for a person shareholder (or group of persons shareholders acting in concert) to make a mandatory offer, the board of directors should ensure that an appropriate resolution to approve a waiver of this obligation is put to independent shareholders prior to implementation of the relevant redemption or purchase and as a pre-condition to its implementation. Additionally, each individual director should draw the attention of the board at the time any redemption or purchase of the company's own shares is proposed, and whenever shareholders' authority for any such redemption or purchase is to be sought, to interests in shares ~~shareholdings~~ of parties acting in concert, or presumed to be acting in concert, with that director.

4. Prior consultation

The Panel must be consulted in advance in any case where Rule 9 might be relevant. This will include any case where a person shareholder or group of persons shareholders acting in concert is interested in shares carrying holds 30% or more but does not hold shares carrying more than 50% of the voting rights of a company, or may become interested in come to hold 30% or more on full implementation of the proposed redemption or purchase of own shares. In addition, the Panel should always be consulted if the aggregate interests in shares ~~holdings~~ of the directors and any other persons shareholders acting in concert, or presumed to be acting in concert, with any of the directors amount to 30% or more, or may be increased to 30% or more on full implementation of the proposed redemption or purchase of own shares.

5. *Disqualifying transactions*

Notwithstanding that the redemption or purchase of voting shares is made conditional upon the prior approval of a majority of the shareholders independent of the transaction at a general meeting of the company:

(a) the Panel will not normally waive an obligation under Rule 9 if the relevant ~~person~~shareholder, or any member of the relevant group of ~~persons~~shareholders acting in concert, has acquired an interest in shares in the knowledge that the company intended to seek permission from its shareholders to redeem or purchase its own shares; and

(b) a waiver will be invalidated if any ~~acquisitions~~purchases are made by the relevant ~~person~~shareholder, or by any member of the relevant group of ~~persons~~shareholders acting in concert, in the period between the posting of the circular to shareholders and the shareholders' meeting.

...

7. *Responsibility for making an offer*

If an obligation arises under this Rule for a general offer to be made and a dispensation is not granted, the prime responsibility for making an offer will normally attach to the ~~person~~shareholder who obtains or consolidates control as a result of the redemption or purchase of its own shares by the company. Where control is obtained or consolidated by a group of persons acting in concert, the prime responsibility will normally attach to the principal member or members of the group acting in concert. In exceptional cases, responsibility for making an offer may attach to one or more directors if, in the view of the Panel, there has been a failure by the board as a whole, or by any one or more individual directors, to address satisfactorily the implications of a redemption or purchase by the company of its own shares in relation to interests in shares ~~shareholdings~~ of directors or parties acting in concert with one or more of the directors.

...

Rule 37.2

37.2 LIMITATION ON SUBSEQUENT ACQUISITIONS ~~OF SHARES~~

Subsequent to the redemption or purchase by a company of its own voting shares, all ~~persons~~shareholders will be subject, in acquiring further interests in making acquisitions of shares in the company, to the provisions of Rule 9.1.

...

Rule 38.5

38.5 DISCLOSURE OF DEALINGS

Dealings in relevant securities, during the offer period, by an exempt 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:-

(a) if the relevant trading desk has recognised intermediary status and is dealing in a client-serving capacity:

- (i) total acquisitions and disposals; and
- (ii) the highest and lowest prices paid and received; and or
- ~~(iii) whether the connection is with an offeror or the offeree company~~

(b) if the relevant trading desk does not have recognised intermediary status, or if it does but is not dealing in a client-serving capacity, the details required under Note 5(a) on Rule 8 (see Note 4 on this Rule).

In each case, it should be stated 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

...

~~4. Rule 8~~

~~See Note 9 on Rule 8.~~

4. Recognised intermediaries dealing in a proprietary capacity

Where an exempt principal trader with recognised intermediary status deals in relevant securities other than in a client-serving capacity (or re-books a position which was acquired in a client-serving capacity so as to hold it in a proprietary capacity), it should aggregate and disclose under Rule 38.5(b) the interests, short positions and rights to subscribe which it holds in a proprietary capacity with those of the group's exempt principal traders which do not have recognised intermediary status. However, in making such disclosures, it need not aggregate and disclose details of any interests, short positions and rights to subscribe which it holds in a client-serving capacity.

Appendix 1

APPENDIX 1

WHITEWASH GUIDANCE NOTE

...

1 INTRODUCTION

(a) This note sets out the procedures to be followed if the Panel is to be asked to waive the obligation to make a general offer under Rule 9 which would otherwise arise where, as a result of the issue of new securities as consideration for an acquisition or a cash injection or in fulfilment of obligations under an agreement to underwrite the issue of new securities, a person or group of persons acting in concert acquires an interest, or interests, in shares to an extent which would normally give rise to an obligation to make a general offer.

(b) Where the word “offeror” is used in a particular Rule, it should be taken in the context of a whitewash as a reference to the potential controllersecontrolling—shareholders. Similarly, the phrase “offeree company” should be taken as a reference to the company which is to issue the new securities and in which the actual or potential controlling position will arise.

...

3 DISQUALIFYING TRANSACTIONS

...

(a) the Panel will not normally waive an obligation under Rule 9 if the person to whom the new securities are to be issued or any person acting in concert with him has acquired any interest in purchased—shares in the company in the 12 months prior to the posting to shareholders of the circular relating to the proposals but subsequent to negotiations, discussions or the reaching of understandings or agreements with the directors of the company in relation to the proposed issue of new securities;

(b) a waiver will be invalidated if any purchases—acquisitions of interests in shares are made in the period between the posting of the circular to shareholders and the shareholders’ meeting.

4 CIRCULAR TO SHAREHOLDERS

...

(b) full details of the maximum potential controlling ~~shareholding position~~:

(i) where this is dependent upon the outcome of underwriting arrangements, it should be assumed that the potential ~~controlling shareholders~~ controllers will, in addition to any other entitlement, take up their full underwriting participation; and

(ii) where convertible securities, options or securities with subscription rights are to be issued, the potential ~~controlling shareholding controller~~ must be indicated on the assumption that only the ~~controlling shareholders~~ controllers will convert or exercise the subscription rights, and will do so in full and at the earliest opportunity (the date of which must also be given);

(c) where the maximum potential shareholding resulting from the proposed transaction will exceed 50% of the voting rights of the company, specific and prominent reference to this possibility and to the fact that, subject to Section 7 below, the potential ~~controlling shareholders~~ controllers may ~~increase their shareholding~~ acquire further interests in shares without incurring any further obligation under Rule 9 to make a general offer;

(d) in cases where the potential controlling ~~shareholding position~~ will be held by more than one person, the identity of the potential ~~controlling shareholders~~ controllers and their individual potential ~~shareholdings~~ interests in shares in addition to the information required under (i) below;

...

6 ANNOUNCEMENTS FOLLOWING SHAREHOLDERS' APPROVAL

(a) Following the meeting at which the proposals are considered by shareholders, an announcement must be made by the offeree company giving the result of the meeting and the number and percentage of offeree company shares ~~to~~ in which the potential ~~controlling shareholders~~ have become entitled controllers are, or are entitled to be, interested as a result. The announcement must be published in accordance with the requirements of Rule 2.9.

(b) Where the final controlling ~~shareholding position~~ is dependent on the results of underwriting, the offeree company must make an announcement following the issue of the new securities stating the number and percentage of shares in which the controllers are interested ~~held by the controlling shareholders~~ at that time.

(c) Where convertible securities, options or securities with subscription rights are to be issued:-

(i) the announcement of the potential controlling shareholding position must be made on the basis of the assumptions described in Section 4(b) above;

(ii) following each issue of new securities a further announcement must be made confirming the number and percentage of shares held by in which the controllers are interested ~~the controlling shareholders at that time; and~~

...

7 SUBSEQUENT ACQUISITIONS BY POTENTIAL CONTROLLERS ~~CONTROLLING SHAREHOLDERS~~

Immediately following approval of the proposals at the shareholders' meeting, the potential ~~controlling shareholders~~ controllers will be free to acquire ~~additional shares~~ further interests in shares of 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, if the potential ~~controlling shareholders~~ controllers propose to acquire further interests in ~~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.

...

Appendix 2

APPENDIX 2

FORMULA OFFERS GUIDANCE NOTE

...

6 RULE 6

Since in a formula offer the current value of the offer is only determinable by reference to the value, at any relevant time, of the assets to which the formula is related, an offeror can only be confident that purchase acquisitions of interests in shares during an offer are in conformity with Rule 6 if it is able to calculate the price which would have been payable on the basis of the formula at the time of the purchase acquisitions. Where such calculation is possible and the purchase price paid exceeds the

formula price so calculated, it follows that the ~~purchase-acquisitions~~ will have been made on the basis of an improved formula and the offeror will, therefore, be required to increase the offer by making the improved formula generally available.

Calculation of the formula price at the time of a ~~purchase~~ an acquisition will only be possible if there is co-operation from the board of the offeree company. It is not acceptable for the procedure set out in the previous paragraph to be applied on the basis of estimated net asset values, eg those contained in brokers' circulars. Where there is no co-operation from the board of the offeree company, therefore, the offeror will not be able to use this procedure and any ~~purchase-acquisitions~~ which fall to be taken into account for the purposes of Rule 6 will create an obligation to pay at least the same price to all accepting shareholders. Where there are alternative offers, however, the offeror may choose which of the alternatives should be subject to the minimum price.

7 RULES 9 AND 11

Rules 9 and 11 apply equally to formula offers; thus, if appropriate, the cash offer must contain a term guaranteeing a minimum price under the offer at the highest cash price paid in respect of the ~~share-purchases~~ acquisitions of interests in shares to which the Rules apply.

APPENDIX B

New Disclosure Forms

See following pages

**DEALINGS BY CONNECTED EXEMPT PRINCIPAL TRADERS
WITH RECOGNISED INTERMEDIARY STATUS
DEALING IN A CLIENT-SERVING CAPACITY
(Rule 38.5(a) of the Takeover Code)**

1. KEY INFORMATION

Name of exempt principal trader	
Company dealt in	
Class of relevant security to which the dealings being disclosed relate (Note 1)	
Date of dealing	

2. DEALINGS (Note 2)**(a) Purchases and sales**

Total number of securities purchased	Highest price paid (Note 3)	Lowest price paid (Note 3)

Total number of securities sold	Highest price received (Note 3)	Lowest price received (Note 3)

(b) Derivatives transactions (other than options)

Product name, e.g. CFD	Long/short (Note 4)	Number of securities (Note 5)	Price per unit (Note 3)

(c) Options transactions in respect of existing securities**(i) Writing, selling, purchasing or varying**

Product name, e.g. call option	Writing, selling, purchasing, varying etc.	Number of securities to which the option relates (Note 5)	Exercise price	Type, e.g. American, European etc.	Expiry date	Option money paid/received per unit (Note 3)

(ii) Exercising

Product name, e.g. call option	Number of securities	Exercise price per unit (Note 3)

3. OTHER INFORMATION

Agreements, arrangements or understandings relating to options or derivatives

<p>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 or 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.</p>

Date of disclosure	
Contact name	
Telephone number	
Name of offeree/offeror with which connected	
Nature of connection (Note 6)	

Notes

The Notes on Form 38.5(a) can be viewed on the Takeover Panel's website at www.thetakeoverpanel.org.uk

NOTES ON FORM 38.5(a)

1. *See the definition of “relevant securities” in the Definitions Section of the Code.*
2. *See the definition of “dealings” in the Definitions Section of the Code.*
3. *For all prices and other monetary amounts, the currency must be stated.*
4. *If a long position has been increased or a short position reduced as a result of the dealing, write “long”. If a short position has been increased or a long position reduced as a result of the dealing, write “short”. If the dealing has not resulted in a long or short position being increased or reduced, give details of the variation or other dealing.*
5. *See Note 3 on the definition of “interests in securities” in the Definitions Section of the Code.*
6. *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 and 38.5 and their Notes which can be viewed on the Takeover Panel’s website at www.thetakeoverpanel.org.uk

**DEALINGS BY CONNECTED EXEMPT PRINCIPAL TRADERS
WITHOUT RECOGNISED INTERMEDIARY STATUS, OR WITH RI STATUS
BUT NOT DEALING IN A CLIENT-SERVING CAPACITY
(Rule 38.5(b) of the Takeover Code)**

1. KEY INFORMATION

Name of exempt principal trader	
Company dealt in	
Class of relevant security to which the dealings being disclosed relate (Note 1)	
Date of dealing	

2. INTERESTS, SHORT POSITIONS AND RIGHTS TO SUBSCRIBE

(a) Interests and short positions (following dealing) in the class of relevant security dealt in (Note 2)

	Long		Short	
	Number	(%)	Number	(%)
(1) Relevant securities				
(2) Derivatives (other than options)				
(3) Options and agreements to purchase/sell				
Total				

(b) Interests and short positions in relevant securities of the company, other than the class dealt in (Note 2)

Class of relevant security:	Long		Short	
	Number	(%)	Number	(%)
(1) Relevant securities				
(2) Derivatives (other than options)				
(3) Options and agreements to purchase/sell				
Total				

(c) Rights to subscribe (Note 2)

Class of relevant security:	Details

3. DEALINGS (Note 3)

(a) Purchases and sales

Purchase/sale	Number of securities	Price per unit (Note 4)

(b) Derivatives transactions (other than options)

Product name, e.g. CFD	Long/short (Note 5)	Number of securities (Note 6)	Price per unit (Note 4)

(c) Options transactions in respect of existing securities

(i) Writing, selling, purchasing or varying

Product name, e.g. call option	Writing, selling, purchasing, varying etc.	Number of securities to which the option relates (Note 6)	Exercise price	Type, e.g. American, European etc.	Expiry date	Option money paid/received per unit (Note 4)

(ii) Exercising

Product name, e.g. call option	Number of securities	Exercise price per unit (Note 4)

(d) Other dealings (including new securities) (Note 3)

Nature of transaction (Note 7)	Details	Price per unit (if applicable) (Note 4)

4. OTHER INFORMATION

Agreements, arrangements or understandings relating to options or derivatives

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 or 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.

--

Is a Supplemental Form 38.5(b) attached? (Note 8)

YES/NO

Date of disclosure	
Contact name	
Telephone number	
Name of offeree/offerator with which connected	
Nature of connection (Note 9)	

Notes

The Notes on Form 38.5(b) can be viewed on the Takeover Panel's website at www.thetakeoverpanel.org.uk

SUPPLEMENTAL FORM 38.5(b)

DETAILS OF OPEN POSITIONS
(This form should be attached to Form 38.5(b))

OPEN POSITIONS (Note 1)

Product name, e.g. call option	Written or purchased	Number of securities to which the option or derivative relates	Exercise price (Note 2)	Type, e.g. American, European etc.	Expiry date

Notes

- 1. Where there are open option positions or open derivative positions (except for CFDs), full details should be given. Full details of any existing agreements to purchase or to sell should also be given on this form.*
- 2. For all prices and other monetary amounts, the currency must be stated.*

For details of the Code's dealing disclosure requirements, see Rules 8 and 38.5 and their Notes which can be viewed on the Takeover Panel's website at www.thetakeoverpanel.org.uk

NOTES ON FORM 38.5(b)

1. See the definition of “relevant securities” in the Definitions Section of the Code.
2. See Note 5 on Rule 8 and the definition of “interests in securities” in the Definitions Section of the Code. Rights to subscribe for new shares should be disclosed separately from interests and short positions in existing securities. Rights to subscribe include directors’ and other executive options.

Where an exempt principal trader with recognised intermediary status deals in relevant securities other than in a client-serving capacity (or re-books a position which was acquired in a client-serving capacity so as to hold it in a proprietary capacity), it should aggregate and disclose under Rule 38.5(b) the interests, short positions and rights to subscribe which it holds in a proprietary capacity with those of the group’s exempt principal traders which do not have recognised intermediary status. However, in making such disclosures, it need not aggregate and disclose details of any interests, short positions and rights to subscribe which it holds in a client-serving capacity.
3. See the definition of “dealings” in the Definitions Section of the Code.
4. For all prices and other monetary amounts, the currency must be stated.
5. If a long position has been increased or a short position reduced as a result of the dealing, write “long”. If a short position has been increased or a long position reduced as a result of the dealing, write “short”. If the dealing has not resulted in a long or short position being increased or reduced, give details of the variation or other dealing.
6. See Note 3 on the definition of “interests in securities” in the Definitions Section of the Code.
7. State type of dealing, e.g. “subscription”, “conversion”, “exercise” etc.
8. Where there are open option positions or open derivative positions (other than CFDs), or where there is an agreement to purchase or to sell, Supplemental Form 38.5(b) should be completed.
9. 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 and 38.5 and their Notes which can be viewed on the Takeover Panel’s website at www.thetakeoverpanel.org.uk

APPENDIX C

Non-confidential respondents

Respondents to PCP 2005/1

1. Alternative Investment Management Association (AIMA)
2. Association of British Insurers (ABI)
3. Hermes Pensions Management Ltd
4. Insinger de Beaufort
5. The Institute of Chartered Accountants in England & Wales (ICAEW), Corporate Finance Faculty
6. International Swaps and Derivatives Association, Inc. (ISDA)
7. Investment Management Association (IMA)
8. Legal & General Investments
9. London Investment Banking Association (LIBA)
10. Managed Funds Association (MFA)
11. National Association of Pension Funds (NAPF)
12. Takeovers Joint Working Party of the City of London Law Society Company Law Sub-Committee and the Law Society of England and Wales' Standing Committee on Company Law
13. Professor Andrew Weiss

Respondents to PCP 2005/3

1. CBI
2. Hermes Pensions Management Ltd
3. The Institute of Chartered Accountants in England & Wales (ICAEW), Corporate Finance Faculty
4. International Swaps and Derivatives Association, Inc. (ISDA)
5. Investment Management Association (IMA)
6. London Investment Banking Association (LIBA)
7. National Association of Pension Funds (NAPF)
8. Numis Securities Ltd
9. Takeovers Joint Working Party of the City of London Law Society Company Law Sub-Committee and the Law Society of England and Wales' Standing Committee on Company Law

APPENDIX D
Summary of the application of recognised intermediary (“RI”) status

	CONNECTED EXEMPT PRINCIPAL TRADER (“EPT”) DESKS House is connected. EPT status is relevant and has not fallen away (i.e. sole reason for being connected is that the group includes a connected adviser)		ASSOCIATE/CONNECTED “NON-EXEMPT” DESKS House is associate/connected. EPT status not relevant because: (a) desk does not have EPT status; or (b) EPT status has fallen away (i.e. connection is other than solely advisory)		NON-ASSOCIATE/ NON-CONNECTED DESKS House is independent. Rule 8.1/EPT status irrelevant	
	RI DESKS	NON-RI DESKS	RI DESKS AND NON-RI DESKS		RI DESKS	NON-RI DESKS
Disclosure of dealings/ interests	R38.5(a) total dealings, no interests (if dealing in a CS capacity)	R38.5(b) all dealings/ interests	R8.1 all dealings/ interests		R8.3(d) i.e. exempt from disclosure (if acting in a CS capacity)	R8.3(a) all dealings/interests if long 1%+
Aggregation of interests for disclosure purposes	N/A since no disclosure of interests	All non-RI EPT desks aggregate, subject to normal dispensations	All associate “non-exempt” desks aggregate, subject to normal dispensations		N/A since exempt from disclosure	All non-RI desks aggregate, subject to normal dispensations
Share, derivative & option acquisitions relevant for offeror concert party under RR5, 6, 9 & 11?	NO desk not presumed to be acting in concert with offeror because EPT		YES once presumed to be acting in concert with offeror under R7.2 (or otherwise in concert)		N/A if desk is not acting in concert with offeror	
Derivative & option (“D&O”) interests relevant for house under N17 on R9.1/N1(c) on R7.2?	NO (if acting in a CS capacity)	YES	YES i.e. house aggregates all shares and D&O interests (excluding D&O interests of EPT RI desks)		NO (if acting in a CS capacity)	YES
Shares relevant for house under N17 on R9.1/ N1(c) on R7.2?	YES				YES	

References to “RI desks”, and interests held and dealings made by them, relate only to desks acting, and interests held and dealings made, in a client-serving (“CS”) capacity.