

THE TAKEOVER PANEL

MULTI-SERVICE FINANCIAL ORGANISATIONS AND THE TAKE-OVER CODE

The Panel has determined its approach following Big Bang to those issues for the Code raised by the emergence of multi-service financial organisations arising from, for example, the acquisition by banks of firms of stockbrokers and jobbers.

In its statement of 29 May, the Panel dealt with the question of market-making by multi-service financial organisations until Big Bang. That statement continues to apply until 27 October. The position from that date regarding such market-making and other ancillary questions is dealt with in this statement.

The Panel has also taken the opportunity to review the Code position of dealings by fund managers on behalf of discretionary clients in securities of companies concerned in an offer, when the fund managers are a part of the same organisation as the financial or other adviser to an offeror or the offeree company.

The Panel now announces amendments to the Code, set out in full as Appendix 1 to this statement, to come into effect on 27 October 1986 to deal with all of the relevant issues.

Dealing as principal — market-making

The fundamental question which has been addressed is the basis on which any part of a multi-service financial organisation may deal as principal, whether as a market-maker or otherwise, in the securities of companies involved in a takeover, when some other part of the same organisation is acting as financial or other adviser to one of those companies.

The Panel has decided that, when a multi-service financial organisation is (as banker, stockbroker or otherwise) advising an offeror, then all principal dealings in relevant securities by any part of that organisation will be presumed to be in concert with the offeror, with one important exception in respect of dealings in a market-making capacity, provided the market-maker concerned is an "exempt market-maker" as explained below.

The Panel accepts that in general it is the intention of multi-service financial organisations to run their market-making operations wholly independently and, in particular, without regard to the interests of clients of the corporate finance arm of the organisation. In addition the Panel has been particularly concerned to avoid damage to the liquidity of the market in relevant securities which might otherwise arise from a forced withdrawal of a significant market-maker at the time of the announcement of an offer because of its connection with the offeror. Accordingly, the Code is to provide for a category of exempt market-makers to whom the above-mentioned presumption will not normally apply. Market-makers who wish to seek this exemption should apply to the Panel. Amongst other things, an applicant market-maker will have to demonstrate to the Panel that the organisation in question has in place arrangements satisfactory to the Panel relating to the separation of the market-making side from other relevant parts of its business, in particular corporate finance.

Whenever another part of its organisation is acting for an offeror or an offeree company in a take-over, an exempt market-maker will have to adhere to the important general principle that it must not use its exemption to carry out transactions intended to assist clients of the advisory side. There are three important Rules which will reinforce that principle:-

First, the offeror, or any person acting in concert with the offeror, must not deal as a principal with a connected exempt market-maker in relevant securities of the offeree company during

the offer period. The purpose of this Rule is to ensure that there is no possibility of the consequences of certain fundamental Rules of the Code each of which imposes minimum price levels for an offer - Rule 6 (purchases at above offer price), Rule 9 (mandatory offer) and Rule 11 (obligation to offer cash)- being evaded.

The second Rule, for the same reason, prohibits an exempt market-maker connected with an offeror from assenting relevant securities owned by it to the offer until the offer has been declared unconditional as to acceptances.

Under the third Rule, an exempt market-maker must not vote relevant securities owned by it in the context of a take-over or possible take-over.

Dealings in relevant securities by an exempt market-maker, connected with either an offeror or the offeree side, will have to be publicly disclosed, on an aggregated basis with highest and lowest prices paid and received, by noon on the business day following that on which they take place.

Discretionary fund management

The Code currently includes provisions relating to the management of investment accounts on a discretionary basis by one part of a multi-service financial organisation, when another part is acting as adviser to an offeror or the offeree company. These provisions acknowledge the separation of the different operations prior to the announcement of an offer. However, at present, once the involvement of the advisory side becomes public, the relevant fund managers are required by Rule 7.2 of the Code to consult with the Panel where purchases of securities could, if the purchases in question were to have been made by the offeror or potential offeror itself, have consequences under certain Rules including Rules 6, 9 or 11 of the Code referred to above.

Under the new proposals, the position of discretionary fund managers connected with an offeror through the advisory side of the organisation is to remain the same as now as regards the period prior to the involvement of the advisory side becoming public. Therefore, until that time, there will be no presumption that the fund managers so connected are acting in concert with the offeror with regard to discretionary investment accounts, although if there is actual concertedness then the usual concert party consequences will follow.

The Panel now wishes to clarify and develop its approach with regard to dealings in relevant securities by discretionary fund managers, where they are connected with an offeror or the offeree company, once the involvement of the advisory side is publicly known, including the application of Rule 7.2 which has therefore been amended. This approach, which is explained below, is prompted by the recognition that the investment management sides of many banks and other institutions operate as wholly independent businesses and that, in these cases, the effect of continuing to treat them as if they were acting in concert with the advisory sides would be to prejudice unfairly the interests of the clients whose funds are under that management.

It will be open to discretionary fund managers to apply to the Panel for an exemption from certain Code consequences which would otherwise flow because for example of the involvement of the corporate finance or broking sides of their organisation in a take-over. It will be necessary for an applicant, as with market-making, to satisfy the Panel that the fund management operations are run entirely independently and without regard to the interests of the rest of the relevant organisation including the advisory side.

If the Panel grants to a particular fund manager an exemption, that fund manager, where another part of its organisation is advising an offeror, will not normally be presumed to be acting in concert with the offeror in relation to its discretionary accounts and, provided that there is no actual concertedness,

will be free to deal for discretionary clients in securities relevant to the take-over without regard to Code restrictions affecting the offeror.

Naturally where an exempt fund manager in fact acts in concert with an offeror the usual concert party consequences will apply. In addition in the unusual case of an exempt fund manager being in the same group as an offeror (or offeree company) itself, as opposed to the same group as the financial or other adviser, the fund manager will be treated as if it is not exempt for the purpose of the take-over concerned.

An exempt fund manager which is associated* with a party to a take-over will not normally be required to disclose publicly details of its dealings in relevant securities, although they will have to be disclosed privately to the Panel. Public disclosure will, however, be necessary where associate status arises because the total holding of the discretionary investment accounts represents 10% or more of the issued equity capital of an offeror or the offeree company (see paragraph (6) of "Associate"*).

A fund manager, in an organisation which is advising an offeror or the offeree company, and which is not an exempt fund manager, must have regard to Rule 7.2 after the involvement of the advisory side in the offer is publicly known. In general, dealings by such fund managers for their discretionary clients will be deemed to be in concert with the offeror client of the advisory side or, in the case of a defensive concert party where the offeree company is such a client, with, for example, directors of the offeree company who are also shareholders. The Panel is, however, retaining its discretion to agree in appropriate cases that this general Rule should not apply. Fund managers will have to approach the Panel in advance before

* See "Associate" as defined in the Code.

dealing in relevant securities where Code consequences might result. Public disclosure of dealings by such fund managers, who are not exempt fund managers, will continue as now under Rule 8.1.

Stockbrokers' reports

Rule 19 of the Code imposes restrictions during a take-over on the information which may be distributed, for example in research reports, by associates to an offeror or the offeree company, such as stockbrokers. Therefore, stockbrokers who are so associated (because another part of the same financial organisation is advising one of the parties to an offer) will be subject to the same restrictions even though such stockbrokers may not have a direct role in the offer.

Independent advisers

The position outlined in the Panel statement of 29 May in this respect is to continue; that is, where a firm of stockbrokers is grouped with a bank and the latter is acting as the financial adviser to an offeror, such stockbrokers must not act as the independent "Rule 3" financial adviser to the offeree company in the relevant take-over.

Other amendments

Certain other minor amendments to the Code and the SARs fall to be made consequent on Big Bang. These are set out as Appendix 2 to this statement.

Compliance

A multi-service financial organisation must ensure that each part of its operations, to which the Code, including these amendments, may be relevant, is fully appraised of the applicable Rules.

Applications for exemptions — market-making and discretionary
fund management

Market-makers and fund managers to whom these changes are likely to be relevant should apply to the Panel to be considered for the relevant exemption.

Commencement

The changes to the Code announced in this statement come into effect on 27 October 1986. Where their application would produce major difficulties (for example because of the state of an offer then in progress) the Panel should be consulted and will endeavour to agree a solution which is fair to the parties.

6 October 1986

APPENDIX 1**DISCRETIONARY FUND MANAGEMENT AND MARKET-MAKING –
CODE AMENDMENTS****I Introduction**

On page A5 add a new paragraph after the second paragraph as follows:-

"A right of appeal to the Appeal Committee will also lie in respect of any refusal by the Panel to recognise, or any decision of the Panel to cease to recognise, a market-maker or fund manager as an exempt market-maker or exempt fund manager as the case may be."

II Definitions

- (1) Add new definitions of "connected fund managers and market-makers", "exempt fund manager" and "exempt market-maker" as follows:-

""Connected fund managers and market-makers"

A fund manager or market-maker will be connected with an offeror or the offeree company, as the case may be, if the fund manager or market-maker is controlled by, controls or is under the same control as an offeror, the offeree company, or any bank, stockbroker, financial or other professional adviser to an offeror or the offeree company. (** See new note at the end of this Section II)

"Exempt fund manager"

An exempt fund manager is a person who manages investment accounts on a discretionary basis and is recognised by the Panel as an exempt fund manager for the purposes of the Code.

"Exempt market-maker"

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

- Notes, (i) Persons who manage investment accounts on a discretionary basis and market-makers must apply to the Panel in order to seek the relevant exempt status and will have to comply with any requirements imposed by the Panel as a condition of its granting such status.
- (ii) Dealings by a connected exempt market-maker in a market-making capacity will not normally be considered as coming within the acting in concert presumptions, although dealings in any other capacity will be.
- (iii) Dealings by a connected exempt fund manager will not, in the absence of actual concertedness and the circumstances referred to in Note 1(b) on Rule 7.2, be considered relevant for the purposes of Rule 7.2.
- (iv) Relevant securities (as defined in Rule 8) owned by associates of the offeror or by associates of the offeree company, which are managed or dealt in on a discretionary basis by an exempt fund manager, will, in the absence of the circumstances referred to in Note 1 on Rule 7.2, be treated in the same way as they would be if the owner was not an associate."

(2) Changes to "Acting in Concert"

(a) Paragraph (4) will read as follows:-

"a fund manager (including an exempt fund manager) with any investment company, unit trust or other person whose investments such fund manager manages on a discretionary basis in respect of the relevant investment accounts;"

(b) Paragraph (5) will read as follows:-

"a financial or other professional adviser (including a stockbroker) with its client in respect of the shareholdings of the adviser and persons controlling, controlled by or under the same control as the adviser (except in the capacity of an exempt market-maker)." (** See the new note at the end of this Section II)

(3) Changes to "Associate"

Paragraph (2) will read as follows:-

"(2) bankers*, stockbrokers, financial and other professional advisers to the offeror, the offeree company or any company covered in (1), including persons controlling, controlled by or under the same control as such bankers, stockbrokers, financial and other professional advisers." (** See the new note at the end of this Section II)

(4) New note

Add a new note as follows:-

*** The normal test for whether a person is controlled by, controls or is under the same control as another person will be by reference to the definition of "Control" as defined in the Code. There may be other circumstances which the Panel will regard as giving rise to such a relationship and, in

cases of doubt, the Panel should be consulted (for example where a majority of the equity is owned by another person, who does not have a majority of the voting rights)."

III Rule 3

Rule 3.3 will read as follows:-

"The Panel will not regard as an appropriate person to give independent advice a person who is in the same group as the financial adviser to the offeror or who has a significant interest in or financial connection with either the offeror or the offeree company of such a kind as to create a conflict of interest."

IV Rule 4

(1) Add new Note 5 on Rules 4.1 and 4.2 as follows:-

"5 Discretionary clients

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

(2) Add new Note 6 on Rules 4.1 and 4.2 as follows:-

"6. Dealings between offeror and connected exempt market-maker.

See Rule 38.2"

V Rule 5

Note 6 on Rule 5.1 will read as follows:-

"6 Discretionary clients

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

VI Rule 6

Note 9 will read as follows:-

"9 Discretionary clients

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

VII Rule 7.2

(1) This Rule will read as follows:-

"7.2 Dealings for discretionary clients during an offer period

After the identity of an offeror or possible offeror is publicly known, fund managers who manage investment accounts on a discretionary basis and who are connected with the offeror will, unless they are exempt fund managers, be presumed to be acting in concert with the offeror in respect of those investment accounts. Rules 5, 6, 9, 11 and 36 would then be relevant to purchases of offeree company securities, Rule 4.2 to sales of offeree company securities and Rule 7.3 to purchases of offeror company securities by the relevant fund managers on behalf of discretionary clients.

Similarly, fund managers who manage investment accounts on a discretionary basis and who are connected with the offeree company will, unless they are exempt fund managers, be presumed to be acting in concert with, for example, directors of the offeree company, who are also shareholders, in respect of those investment accounts and Rules 5 and 9 may be relevant.

Where obligations under or infringements of the above-mentioned Rules could arise, the relevant fund managers should consult with the Panel before dealing in securities of an offeror or the offeree company as appropriate."

(2) Add new Notes on Rule 7.2 as follows:-

"1. Qualifications

- (a) The presumption in Rule 7.2 may be capable of rebuttal in appropriate circumstances and the Panel should be consulted in advance.
- (b) The exception in Rule 7.2 in relation to exempt fund managers will not apply to an exempt fund manager which is in the same group as the offeror itself (as opposed to the same group as, for example, the financial advisers to the offeror) or as the offeree company in relation to the relevant offer. In addition, if an exempt fund manager is in fact acting in concert with an offeror the usual concert party consequences will follow.
- (c) If an offeror or potential offeror, or any company in its group, has funds managed on a discretionary basis by an exempt fund manager, the Panel should be consulted. If, for example, any securities of the offeree company are owned by the offeror through such

exempt fund manager the exception in Rule 7.2 in relation to exempt fund managers may not apply in respect of those securities.

2. Dealings before an offer is publicly known

Dealings for discretionary clients by fund managers connected with an offeror, before the identity of an offeror or possible offeror is publicly known, will not normally be relevant for the purposes of Rule 7.2. However, if, once that identity is publicly known, it becomes apparent that the shares in the offeree company held by the offeror and persons acting in concert with it, including such fund managers, unless they are exempt fund managers, on behalf of discretionary clients, carry 30% or more of the voting rights of the offeree company, the Panel should be consulted."

VIII Rule 8

- (1) In Rule 8.1 number existing paragraph as (a) and amend it by adding in line 2 after 'or' the following words:-

"(unless the associate is an exempt fund manager to which paragraph (6) of the definition of Associate does not apply)"

- (2) Add a new paragraph (b) to Rule 8.1 as follows:-

"(b) All dealings in relevant securities of an offeror or the offeree company made for the account of discretionary investment clients by an associate which is an exempt fund manager must be similarly reported to the Panel but not to The Stock Exchange or the press."

- (3) Add a note on Rule 8.1 as follows:-

"Separate disclosure

Disclosures by an exempt fund manager which is an associate by virtue of paragraph (6) of the definition of "Associate" must be made separately to both The Stock Exchange and the Panel, notwithstanding Note 1 on Rules 8.1, 8.2 and 8.3."

- (4) Delete Note 2 on Rules 8.1 and 8.2 and renumber accordingly.

- (5) Add a new Note 5 on Rules 8.1 and 8.2 as follows:-

"5. Exempt market-makers

Dealings in relevant securities by exempt market-makers connected with an offeror or the offeree company should be disclosed in the manner set out in Rule 38.5."

IX Rule 9

- (1) Amend Note 6 on page F5 where the words after "common link" will read as follows:-

"such as the discretionary clients of a fund manager connected with a bank or stockbroker, where that bank or stockbroker is acting in concert with the purchaser, unless the fund manager is an exempt fund manager."

- (2) Note 14 on page F8 will read as follows:-

"14 Discretionary clients

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

X Rule 11.1

Note 7 on page G5 will read as follows:-

"7 Discretionary clients

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

XI Rule 19

Add a new paragraph to Note 7 on Rule 19 as follows:-

"Attention is drawn to paragraph (2) of the definition of "Associate", as a result of which, for example, this note will be relevant to stockbrokers who, although not directly involved with the offer, are associates of the offeror or offeree company because the stockbroker and the financial adviser to the offeror or the offeree company are in the same group."

XII Rule 24.3

Add a new Note 6 on page J7 as follows:-

"6 Discretionary clients

Shareholdings of the discretionary clients of fund managers connected with the offeror, unless they are exempt fund managers, and their dealings since the commencement of the offer period, may be relevant and the Panel should be consulted."

XIII Rule 25.3

Paragraph (a) (iii) will read as follows:-

"the shareholdings in the offeree company owned or controlled by the independent advisers (including stockbrokers) to the offeree company, or by fund managers connected with the offeree company (other than exempt fund managers) on behalf of discretionary investment clients, if these shareholdings amount to 10% or more of the offeree company's equity share capital (the persons need not be named);"

XIV Rule 36

Note 1 on Rule 36.3 will read as follows:-

"1 Discretionary clients

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

XV Rule 38 (new)

Add new Rule 38 as follows:-

"DEALINGS BY CONNECTED EXEMPT MARKET-MAKERS

38.1 Prohibited dealings

An exempt market-maker connected with an offeror or the offeree company must not carry out any dealings with the purpose of assisting the offeror or the offeree company as the case may be.

Note on Rule 38.1

Suspension of exempt status

Any dealings by an exempt market-maker connected with an offeror or the offeree company with the purpose of assisting an offeror or the offeree company as the case may be will constitute a serious breach of the Code. Accordingly, if the Panel determines that a market-maker has carried out such dealings, it will be prepared to rule that such market-maker should cease to enjoy exempt status for such period of time as the Panel may consider necessary in the circumstances.

38.2 Dealings between offeror and connected exempt market-maker

The offeror, and persons acting in concert with it, must not deal as a principal with an exempt market-maker connected with the offeror in relevant securities of the offeree company during the offer period. It will generally be for the advisers to the offeror to ensure compliance with this Rule rather than the market-maker.

38.3 Assenting securities

Securities owned by an exempt market-maker connected with the offeror must not be assented to the offer until the offer has become or been declared unconditional as to acceptances.

38.4 Voting

Securities owned by an exempt market-maker connected with an offeror or the offeree company must not be voted in the context of a take-over or possible take-over.

38.5 Disclosure of dealings

Dealings in relevant securities (as defined in Rule 8) by an exempt market-maker connected with an offeror or the offeree company, whether in or outside the United Kingdom, should be aggregated and disclosed to The Stock Exchange, the Panel and the press not later than 12 noon on the business day following the date of the transactions, stating the following details:

- (i) total purchases and sales;
- (ii) the highest and lowest prices paid and received;
- (iii) whether the connection is with an offeror or the offeree company; and
- (iv) in respect of dealings which take place outside the United Kingdom, the relevant overseas location.

Note on Rule 38.5

Method of disclosure

Announcements of dealings by or on behalf of an exempt market-maker under Rule 38.5 which are disclosed in writing (or by telex) to The Stock Exchange are published on the floor of The Stock Exchange and arrangements have been made for copies of such announcements to be sent to the Panel and the press. Separate disclosure to the Panel and the press is, therefore, unnecessary."

APPENDIX 2**OTHER AMENDMENTS TO THE CODE
and AMENDMENTS TO THE RULES GOVERNING SUBSTANTIAL ACQUISITIONS
OF SHARES****I The Code****(1) Rule 6**

Note 2 on Rules 6.1 and 6.2 will read as follows:-

"For the purpose of this Rule, the price at which shares are purchased is the price at which the bargain between the purchaser (or, where applicable, his broker acting in an agency capacity) and the vendor (or market-maker) is struck. Stamp duty and brokers' commission payable by the purchaser are not regarded as part of the purchase price."

Note 5 on Rules 6.1 and 6.2 is amended as follows:-

In line 5 delete "jobbers" and insert "market-makers".

(2) Rule 9

Note 2(a) on Rule 9.5 will read as follows:-

"In calculating the price paid, stamp duty and commission should be excluded."

(3) Rule 11

Note 1 on Rule 11.1 will read as follows:-

"In calculating the price paid, stamp duty and commission should be excluded."

II The Rules Governing Substantial Acquisitions of Shares

(1) Rule 2

The note on Rule 2 will be retitled "Market-makers" and will read as follows:-

"Except with the consent of the Panel, a market-maker will not be considered to be a single shareholder for the purposes of this Rule."

(2) Rule 5

Note 2 on Rule 5 will read as follows:-

"2 - Investment Managers

Investments managed by a fund manager on a discretionary basis, and, unless the fund manager is an exempt fund manager for the purposes of the Code, shares owned by the fund manager or by any company (other than an exempt market-maker) controlled* by, controlling or under the same control as the fund manager, are normally regarded as being the holding of one person for the purposes of this Rule.

Investments managed on a discretionary basis by one fund manager and those managed on a discretionary basis by another fund manager, which controls*, is controlled by or under the same control as the first fund manager, are normally regarded as being the holding of one person for the purposes of the Rule if the relevant fund managers participate in any material exchange of specific investment advice within the group and such advice is generally followed.

In cases of doubt the Panel should be consulted.

* For "control" see new note in "Definitions" of the Code."