

# THE TAKEOVER PANEL

## CODE COMMITTEE

### REVIEW OF THE 2011 AMENDMENTS TO THE TAKEOVER CODE

#### 1. Introduction

1.1 On 19 September 2011, the Takeover Panel (the “**Panel**”) implemented the amendments to the Takeover Code (the “**Code**”) adopted by the Code Committee following its review in 2010 of certain aspects of the regulation of takeover bids (the “**2011 Amendments**”). Proposed amendments had been set out in a public consultation paper (“**PCP 2011/1**”) on 21 March 2011. The final form of the 2011 Amendments was confirmed in Response Statement 2011/1 (“**RS 2011/1**”) on 21 July 2011.

1.2 The objectives of the 2011 Amendments were to:

- (a) increase the protection for offeree companies (i.e. “targets”) against protracted “virtual bid” periods by requiring potential offerors (i.e. “bidders”):
  - (i) to be identified in the announcement which commences an offer period; and
  - (ii) to announce either a firm intention to make an offer or that they do not intend to make an offer by the 28th day following the date on which they are first identified (or by any extended deadline);
- (b) strengthen the position of the offeree company by:

- (i) prohibiting deal protection measures and inducement fees, other than in certain limited cases; and
  - (ii) clarifying that offeree company boards are not limited in the factors that they may take into account in giving their opinion on an offer;
- (c) increase transparency and improve the quality of disclosure by:
- (i) requiring the disclosure of offer-related fees; and
  - (ii) requiring the disclosure of the same financial information in relation to an offeror and the financing of an offer irrespective of the nature of the offer; and
- (d) provide greater recognition of the interests of offeree company employees by:
- (i) improving the quality of disclosure by offerors and offeree companies in relation to the offeror's intentions regarding the offeree company and its employees; and
  - (ii) improving the ability of employee representatives to make their views known.

1.3 Paragraph 1.13 of RS 2011/1 stated that:

“Given the significance of the changes, the Code Committee intends to undertake a review of the operation of the amendments to the Code set out in this Response Statement by reference to a period of not less than 12 months following their implementation, subject to the level of bid activity during that period.”.

1.4 Summary statistics for bid activity in the year ended 18 September 2012 are as follows (comparable statistics for the year ended 18 September 2011 are given in brackets):

- There were 81 (79) “firm” offer proposals (i.e. proposals announced under Rule 2.7) which succeeded, lapsed or were withdrawn during the year. These proposals were in respect of 77 (77) offeree companies.
- 80 (79) of those proposals reached the stage where formal offer documentation was sent to offeree company shareholders and 1 (0) was withdrawn.
- 65 (66) of those offers resulted in the offeror obtaining control of the offeree company. Of the balance of 15 (13): 4 (3) were offers which would have resulted in the offeror obtaining control of the offeree company, but which lapsed; 10 (10) were “minority offers”, where the offeror already held majority control of the offeree company; and 1 (0) was an unsuccessful partial offer for less than 30% of the shares in the offeree company.
- 12 (9) offers were not recommended by the board of the offeree company at the time of the announcement under Rule 2.7 of a firm offer and 10 (7) were not recommended by the offeree company board when the offer documentation was published. 8 (6) offers continued not to be recommended at the end of the offer period, of which 7 (6) were successful and 1 (0) lapsed.
- 7 further firm offers had not been resolved as at 18 September 2012 and have not therefore been included in the above figures.
- There were 102 (109) offeree companies which went into an “offer period” during the year.

1.5 This Statement sets out the Code Committee's conclusions following its review of the operation of the 2011 Amendments in the year ended 18 September 2012.

## **2. Protection for offeree companies against protracted "virtual bid" periods**

### **(a) Summary**

2.1 The 2011 Amendments included rule changes designed to increase the protection for offeree companies against protracted "virtual bid" periods, i.e. situations where a potential offeror announces that it is considering making an offer but without committing itself to doing so.

2.2 Overall, the Code Committee considers that those rule changes have worked well and there is no evidence of offeree companies having been put under siege for protracted periods. In addition, in the year ended 18 September 2012, there was a significant reduction in the proportion of offer periods which commenced with the announcement of a "possible offer" following rumour and speculation and/or an untoward movement in the offeree company's share price and a significant increase in the proportion of offer periods which commenced with the announcement of a firm offer (see paragraph 2.8 below).

### **(b) Requirement for potential offerors to be identified**

2.3 The new Rule 2.4(a) requires that the announcement of a possible offer by an offeree company which commences an offer period must identify any potential offerors with which the offeree company is in talks or from which it has received (and not unequivocally rejected) an approach with regard to a possible offer. The introduction of this requirement was intended to remove the advantage of anonymity previously enjoyed by certain potential offerors.

2.4 There were 102 announcements which led to the commencement of an offer period in the year ended 18 September 2012, of which 40 were announcements of a possible offer. Of these possible offer announcements:

- 37 announcements identified one potential offeror; and
- 3 announcements identified more than one potential offeror.

The remaining 62 announcements comprised:

- 15 announcements in which the offeree company initiated a “formal sale process”;
- 6 “strategic review” announcements in which the offeree company specifically referred to an offer (or a merger or the search for a buyer for the company) as one of the options to be considered as part of the strategic review; and
- 41 announcements by an offeror of a firm offer for the offeree company.

2.5 During the consultation on PCP 2011/1, opponents of the requirement for offerors to be identified expressed concern that a significant number of potential offerors would, as a result, be deterred from approaching offeree companies. It is difficult for the Code Committee to assess whether potential offerors have been so deterred. However, the Code Committee notes that there was no significant reduction in the level of bid activity in the year ended 18 September 2012, as compared with the year ended 18 September 2011 (see paragraph 1.4 above).

2.6 In addition, it was argued by some respondents to PCP 2011/1 that a requirement for offerors to be identified might result in well-prepared potential offerors leaking details of their possible offer in order to force the offeree company to make an announcement. This would be because such an announcement would have to identify not only that potential offeror but also any (possibly less well-prepared) potential competitors who might have made an approach to the offeree company. The potential offeror’s intention would

therefore be that the requirement for any such competitor to be identified would, in fact, cause the competitor to withdraw. This concern does not appear to have been realised.

2.7 In PCP 2011/1, the Code Committee said that it considered that the knowledge that any potential offeror would be identified upon the commencement of an offer period could act as an incentive for potential offerors to ensure that the secrecy of possible offers was maintained and that appropriate steps were taken to minimise the chances of a leak of information. The Code Committee welcomes the fact that, in the year ended 18 September 2012, there was a significant increase in the proportion of offer periods which commenced following the announcement of a firm offer and a significant reduction in the proportion of offer periods which commenced following an untoward share price movement or rumour and speculation with regard to a possible offer.

2.8 Of the 102 offer periods which commenced in the year ended 18 September 2012 (year ended 18 September 2011 – 109):

- 41 (27) commenced following an announcement of a firm offer under Rule 2.7;
- 24 (46) commenced following announcements required under Rule 2.2(c) or (d) as a result of rumour and speculation and/or an untoward movement in the offeree company's share price; and
- 37 (36) commenced following announcements made for other reasons.

Whilst it is difficult to establish a direct link between the rule changes and the proportionate increase in the number of offer periods which commenced with the announcement of a firm offer, these figures appear to suggest that the 2011 Amendments have contributed positively towards the Code Committee's aim of reducing the leakage of information in relation to takeover bids. The Code Committee reiterates the vital importance of absolute secrecy before an

announcement of an offer or possible offer and of the requirement for all persons who are privy to confidential information concerning an offer or possible offer to conduct themselves so as to minimise the chances of any leak of that information.

(c) *Requirement for a potential offeror to “put up or shut up” or obtain a deadline extension*

2.9 The new Rule 2.6 requires that, by not later than 5.00 pm on the 28th day following the date on which it is first identified, a potential offeror must either:

- (a) announce a firm intention to make an offer; or
- (b) announce that it does not intend to make an offer,

unless the Panel has consented to an extension of the deadline at the request of the board of the offeree company.

2.10 The Code Committee considers that the requirement for a potential offeror to “put up or shut up” within 28 days of its identification (unless the Panel extends the deadline) has successfully provided the offeree company with the ability to control the duration of the period of uncertainty and disruption following the announcement of a possible offer.

2.11 As is made clear in Rule 2.6(c), the Panel will normally consent to an extension to a “put up or shut up” deadline only at the request of the board of the offeree company. In the year ended 18 September 2012, the Panel Executive (the “**Executive**”), at the request of the offeree company board, extended “put up or shut up” deadlines with respect to 15 potential offerors identified following the implementation of the 2011 Amendments (with extensions being granted to deadlines which expired after 18 September 2012 with respect to a further 3 potential offerors). A further 27 potential offerors were identified following the implementation of the 2011 Amendments and were subject to an initial 28 day deadline which the offeree company board did

not seek to extend (and 1 potential offeror was subject to an initial 28 day deadline that fell after 18 September 2012 which was not extended). There were no cases in which the Executive refused a request by an offeree company board for a deadline extension.

2.12 Of the 39 offer periods which commenced in the year ended 18 September 2012 and in relation to which a “put up or shut up” deadline was set, there were 21 in relation to which at least one offeror announced a firm offer for the offeree company under Rule 2.7 and 13 in relation to which all of the potential offerors announced, under Rule 2.8, that they did not intend to make an offer. As at 18 September 2012, there were 5 offer periods with an unexpired “put up or shut up” deadline.

*(d) Formal sale process*

2.13 The new Note 2 on Rule 2.6 introduced the ability for the Panel to grant a dispensation from the requirements for potential offerors to be identified and to be subject to a “put up or shut up” deadline where, prior to an offeror having announced a firm offer, the offeree company announces that it is seeking one or more potential offerors by means of a formal sale process. In the year ended 18 September 2012, there were 15 offer periods which commenced with the announcement by the offeree company of a formal sale process and 1 further offer period which commenced with the announcement of a possible offer but where the offeree company subsequently announced that it was initiating a formal sale process. Where relevant, the Executive granted a dispensation from the requirement for any potential offerors to be identified and from the requirement for a “put up or shut up” deadline to be imposed.

2.14 Under Note 2 on Rule 21.2, by way of dispensation from the restrictions in Rule 21.2(a), where an offeree company has initiated a formal sale process, it will normally be permitted to enter into an inducement fee arrangement with one of the offerors which had participated in that process at the time of the

announcement of its firm offer. The operation of this dispensation is considered in section 3 below.

2.15 The ability for an offeree company to announce that it is initiating a formal sale process has existed under the Code only since the introduction of the 2011 Amendments. The Code Committee considers that the significant number of formal sale processes initiated in the year ended 18 September 2012 indicates that the mechanism is a valuable addition to the options available to offeree companies. However, the Code Committee believes that it is too early for it to make a full assessment of the operation of formal sale processes. The Code Committee does not therefore propose to introduce any further amendments to the Code in relation to formal sale processes at present but has asked the Executive to keep practice under review. In due course, this may result in the Executive publishing a Practice Statement and/or in the Code Committee bringing forward proposals for additional provisions with regard to formal sale processes, including, for example, in relation to the circumstances in which a formal sale process may be initiated.

*(e) Where a potential offeror ceases to consider the possibility of an offer*

2.16 The new Note 4 on Rule 2.2 introduced the ability for the Panel to grant a dispensation from the requirement to make an announcement of a possible offer where it is satisfied that the potential offeror has ceased actively to consider making an offer for the offeree company. Where such a dispensation is granted, Note 4(a) on Rule 2.2 provides that the former potential offeror will be restricted from actively considering the making of an offer for the offeree company for a period of six months and, in addition, will be subject to the restrictions in Rule 2.8 that apply to persons who announce that they do not intend to make an offer. In addition, Note 4(b) on Rule 2.2 provides that, even where the Panel grants a dispensation from the requirement to make an announcement of a possible offer, an announcement may subsequently have to be made if either:

(a) any rumour and speculation continues or is repeated; or

(b) the Panel considers that an announcement is necessary in order to prevent the creation of a false market.

2.17 In the year ended 18 September 2012, there were 5 cases in which the Executive granted a dispensation under Note 4(a) on Rule 2.2 and 1 case in which an announcement was subsequently required under Note 4(b) on Rule 2.2.

2.18 The Code Committee has asked the Executive to continue to monitor the operation of Note 4 on Rule 2.2 and intends to keep this provision under review.

### **3. Prohibition of deal protection measures and inducement fees**

#### **(a) Summary**

3.1 The 2011 Amendments included the adoption of a new Rule 21.2. Rule 21.2(a) prohibits inducement fee arrangements, implementation agreements and other “offer-related arrangements” between the offeree company (or any person acting in concert with it) and the offeror (or any person acting in concert with it) during an offer period or when an offer is reasonably in contemplation.

3.2 Subject to the comments made in paragraphs 3.4 to 3.6 below, the Code Committee believes that the general prohibition on “deal protection measures” and inducement fees has achieved its objectives of:

(a) reducing the tactical advantages which offerors were able to obtain over offeree companies; and

(b) redressing the balance in favour of the offeree company.

(b) *Exclusions from the prohibition on deal protection measures*

3.3 Rule 21.2(b) provides that the following are excluded from the general prohibition on offer-related arrangements in Rule 21.2(a) and are therefore permitted to be entered into:

- “(i) a commitment to maintain the confidentiality of information provided that it does not include any other provisions prohibited by Rules 21.2(a) or 2.3(d) or otherwise under the Code;**
- (ii) a commitment not to solicit employees, customers or suppliers;**
- (iii) a commitment to provide information or assistance for the purposes of obtaining any official authorisation or regulatory clearance;**
- (iv) irrevocable commitments and letters of intent;**
- (v) any agreement, arrangement or commitment which imposes obligations only on an offeror or any person acting in concert with it, other than in the context of a reverse takeover; and**
- (vi) any agreement relating to any existing employee incentive arrangement.”.**

3.4 The Code Committee understands from the Executive that, in certain cases, parties to an offer and their advisers have failed to observe the general prohibition on deal protection measures. On occasion, parties and advisers have included, or sought to include, in so-called “cooperation agreements”, or similar documents, certain provisions which go beyond those which the Executive considers to be permissible under the narrowly defined exclusions provided in Rule 21.2(b). These have included:

- (a) an obligation to cooperate to “implement” the acquisition of the offeree company by the offeror;
- (b) an agreement by the offeree company to extend the long-stop date of a scheme of arrangement, if so requested by the offeror;
- (c) warranties in relation to information, due diligence, share capital etc.;

- (d) commitments by the offeree company to produce scheme documentation within a particular time period and not to publish documents without the offeror's approval; and
- (e) restrictions on the offeree company's ability to make announcements and to communicate with shareholders and others in relation to the offer.

3.5 In addition, there have been a number of cases in which offeree company shareholders who are also offeree company directors have entered into irrevocable commitments with an offeror under which they have not only agreed to accept the offer (or, in the case of a scheme of arrangement, vote in favour of the relevant resolutions) but also agreed to other provisions which, except with the consent of the Panel, are prohibited by Rule 21.2(a). On occasion, irrevocable commitments given by offeree company directors have included:

- (a) agreements not to solicit a competing offer from other potential offerors;
- (b) commitments to recommend the offeror's offer to offeree company shareholders; and
- (c) undertakings to notify the offeror if the director becomes aware of a possible offer by a potential competing offeror.

3.6 The Code Committee continues to believe that it should be permissible for offeree company shareholders who are also offeree company directors to enter into irrevocable commitments to accept an offer (or vote in favour of a scheme of arrangement) with an offeror. However, the Code Committee understands that the Executive interprets Rule 21.2(b)(iv) as meaning that it is not permissible for offeree company directors to enter into agreements, commitments and undertakings of the type described in paragraph 3.5 above.

This is because such agreements, commitments and undertakings relate to matters undertaken not solely in their capacity as offeree company shareholders but also in their capacity as offeree company directors (and therefore as persons acting in concert with the offeree company). The Code Committee confirms that this was its intention.

3.7 As a separate matter, the Code Committee understands that it has been put to the Executive that the exception from the prohibition on offer-related arrangements provided by Rule 21.2(b)(vi) covers a broader range of agreements than the Code Committee intended. As indicated above, Rule 21.2(b)(vi) provides that “any agreement relating to any existing employee incentive arrangement” will fall outside the definition of an offer-related arrangement (and therefore outside the general prohibition in Rule 21.2(a)). The Code Committee is aware that the exception in Rule 21.2(b)(vi) could be construed widely but understands that the Executive interprets Rule 21.2(b)(vi) as meaning that an agreement between an offeror and the offeree company that the offeree company will not grant any new options to employees under its established share option schemes is not permissible under this exception. The Code Committee confirms that this was its intention.

3.8 The Code Committee has asked the Executive to continue to monitor the operation of Rule 21.2 and understands that the Executive will take appropriate remedial and disciplinary action in the event of it becoming aware of any further breaches of the rule. In addition, the Code Committee may, in due course, wish to give further consideration to the continuing appropriateness of the list of agreements, arrangements and commitments which, by virtue of Rule 21.2(b), are excluded from the general prohibition in Rule 21.2(a).

(c) *Dispensations from the prohibition on deal protection measures*

3.9 Notes 1 and 2 on the new Rule 21.2 provide the Panel with the ability to grant dispensations from the general prohibition on offer-related arrangements, as follows:

- (a) under Note 1 on Rule 21.2, the Panel will normally consent to an offeree company, which is the subject of a firm offer that has not been recommended by its board, agreeing to pay an inducement fee to a competing offeror, provided that the value of the fee is no more than 1% of the value of the offer and that the fee will only become payable if another offer succeeds; and
- (b) under Note 2 on Rule 21.2, where the board of the offeree company has undertaken a formal sale process, the Panel will normally consent to the offeree company entering into an inducement fee arrangement (on the basis described in paragraph (a) above) with one offeror, who had participated in the formal sale process, at the time of the announcement of its firm offer.

3.10 In the year ended 18 September 2012, there were no instances of the Executive's consent having been sought for the entering into of an inducement fee arrangement pursuant to Note 1 on Rule 21.2.

3.11 As indicated in paragraph 2.13 above, in the year ended 18 September 2012, there were 16 cases in which the offeree company initiated a formal sale process. Of those 16 cases, there was only 1 in which the Executive was requested to consent to the entering into of an inducement fee arrangement pursuant to Note 2 on Rule 21.2.

**4. No limitation on the factors which the offeree company board may take into account in giving its opinion on an offer**

4.1 The 2011 Amendments included the adoption of a new Note 1 on Rule 25.2, which makes clear that the Code does not limit the factors which the board of the offeree company may take into account in giving its opinion on an offer and that, in particular, the offeree company board is not required to consider the offer price as the determining factor.

- 4.2 The Code Committee is not aware of any issues having arisen with regard to Note 1 on Rule 25.2.

## **5. Disclosure of offer-related fees and expenses**

- 5.1 The 2011 Amendments included the adoption of new Rules 24.16 and 25.8, which require offerors and offeree companies to disclose in the offer document and the offeree board circular details of the fees and expenses expected to be incurred in relation to the offer. Rules 24.16 and 25.8 require separate disclosure to be made of fees and expenses in relation to: financial and corporate broking advice; legal advice; accounting advice; public relations advice; other professional services; other costs and expenses; and, in the case of an offeror, financing arrangements.

- 5.2 The Code Committee believes that Rules 24.16 and 25.8 have improved transparency with regard to offer-related fees and expenses, as was desired by shareholders and other respondents to PCP 2011/1, and is not aware of any major issues having arisen with regard to the new provisions.

## **6. Disclosure of financial and other information**

- 6.1 The 2011 Amendments included the adoption of rule changes in relation to the financial and other information required to be disclosed by an offeror, including in relation to the financing of the offer. Amongst other things, the amendments included the adoption of:

- (a) a revised Rule 24.3(f), requiring offer documents to contain, in all cases, a description of how the offer is to be financed, including details of the debt facilities or other instruments entered into in order to finance the offer; and
- (b) a new Rule 26.1, so as to require certain offer-related documents to be published on a website from the time of the announcement of a firm

offer, including, under Rule 26.1(b), documents relating to the financing of the offer.

- 6.2 Overall, the Code Committee considers that the amendments with regard to the disclosure of financial information have worked well and continues to believe that it is important that shareholders and other readers of offer documentation are provided with information as to how an offer is to be financed. The Code Committee understands that the Executive has granted certain dispensations from the requirements of Rules 24.3(f) and 26.1(b) in the case of “market flex” provisions in debt facilities, as described below.
- 6.3 In certain cases, debt facility agreements entered into in order to finance offers include market flex provisions under which the arrangers of the debt may, in specified circumstances, vary certain terms of the financing within defined limits in order to facilitate its successful syndication. In a number of cases, it has been put to the Executive that the requirements of Rules 24.3(f) and 26.1(b), under which an offeror would normally be obliged to disclose the limits set out in such market flex provisions, could have the effect of increasing the offeror’s financing costs. This is because, it is contended, potential syndicatees might negotiate their participation in the syndicate on more favourable terms if they know the maximum extent to which the lead arrangers have the ability to flex the relevant terms.
- 6.4 The Code Committee understands that, in a small number of cases, the Executive has granted a limited dispensation from Rule 26.1(b) and has consented to the market flex arrangements not being published on a website by no later than 12 noon on the business day following the announcement of a firm offer, thereby providing the lead arranger with an opportunity to syndicate the debt in the period of up to 28 days before the offeror is required to publish its offer document in accordance with Rule 24.1(a). In such cases, if the debt is syndicated by that time, the terms upon which the debt is being provided must be described in the offer document, and the final form of the financing documents must be published on a website, but the Executive will not require the market flex arrangements (which will no longer be relevant) to

be so described or published. However, if the debt is not syndicated by that time, the market flex arrangements will have to be described in the offer document and the full terms then published on a website.

- 6.5 The Code Committee continues to believe that the disclosure of flex terms is a necessary element of the disclosure of offer financing and has asked the Executive to keep practice in this area under review.

**7. Disclosure by offerors and offeree companies in relation to the offeror's intentions regarding the offeree company and its employees**

- 7.1 The 2011 Amendments included the adoption of changes to Rules 24.2 and 25.2 intended to improve the quality of disclosure by offerors and offeree companies in relation to the offeror's intentions regarding the offeree company and its employees. In addition, the new Note 3 on Rule 19.1 provides, in summary, that if an offeror or offeree company makes a statement relating to any particular course of action it intends to take, or not take, after the end of the offer period then it will be regarded as being committed to that course of action for a period of 12 months from the date on which the offer period ends, or such other period of time as is specified in the statement, unless there has been a material change of circumstances.

- 7.2 The Code Committee has been informed by the Executive that there has been an improvement in the quality and detail of disclosures of intention made by offerors under Rule 24.2 (and by the boards of offeree companies under Rule 25.2). However, the Code Committee is disappointed that, in many cases, disclosures have been general, and not specific, and that, for example, a number of offerors (including offerors which have secured a recommendation from the offeree company board) have sought to satisfy the requirements of Rule 24.2 by stating that their intention is to undertake a review of the offeree company's business following completion of the takeover. The Code Committee wishes to reiterate its views in this regard, which were set out in paragraph 7.8 of RS 2011/1, as follows:

“The Code Committee believes that any statement of intention by an offeror should be as detailed as is possible on the basis of the information that is known to the offeror at the time it is made. The Code Committee acknowledges that it might be legitimate for a hostile offeror which has not had an opportunity to undertake full due diligence on the offeree company to state that it will undertake a review of the offeree company’s business once it has obtained control of the company. However, the Code Committee believes that the offeror must have a fundamental business rationale for seeking to acquire the offeree company, which it should disclose as fully as possible. The Code Committee also considers that statements of a general nature are unlikely to be acceptable in the context of a recommended offer where the offeror has had an opportunity to undertake full due diligence.”.

7.3 The Code Committee understands that, in the event that an offeror which had made general, non-specific disclosures under Rule 24.2 of its intentions regarding the offeree company and its employees subsequently took action, such as making a significant number of employees redundant, to which it had not referred in the offer document, the Executive would wish to investigate whether, at the time that the offer document was published, the offeror had in fact formulated an intention to take that action. If the offeror had formulated such an intention but had not disclosed this, and had instead restricted itself to a general statement, the Code Committee understands that the Executive would be likely to consider this to be a serious breach of the Code.

7.4 In addition, as stated in RS 2011/1, if, in the absence of a material change of circumstances, a party to an offer were to take action contrary to its stated intentions within the 12 month period from the date on which the offer period ended (or such other time period as was specified by the relevant party), the Code Committee understands that the Executive would consider whether to instigate disciplinary action in relation to that party’s compliance with Rule 19.1.

## **8. Employee representatives**

8.1 The 2011 Amendments included the adoption of rule changes intended to improve communication between the board of the offeree company and the offeree company’s employee representatives and employees, and to enable

employee representatives to be more effective in providing their opinion on the effects of an offer on employment. The rule changes included:

- (a) amendments to Rule 2.12 so as to require that an offeree company must make an announcement of a possible offer readily available to its employee representatives and, at the same time, must inform the employee representatives of their right to have an opinion on the effects of the offer on employment appended to the offeree board circular; and
- (b) the adoption of a new Rule 25.9, including provisions requiring that:
  - (i) where an employee representatives' opinion is received, but not in good time before the publication of the offeree board circular, the offeree company must publish the employee representatives' opinion on a website and announce via a Regulatory Information Service that it has been so published; and
  - (ii) the offeree company must pay for the publication of the employee representatives' opinion and for the costs reasonably incurred by the employee representatives in obtaining any advice required for the verification of the information contained in that opinion in order to comply with the standards of Rule 19.1.

8.2 In the year ended 18 September 2012, a total of 18 employee representatives' opinions were published in respect of 10 separate offers. Of these:

- 9 employee representatives' opinions were appended to offeree board circulars in respect of 5 offers in accordance with the first sentence of Rule 25.9. This represents a significant increase over the period which followed the introduction, in May 2006, of the right for employee representatives to have their opinions appended to offeree board circulars. As noted in

PCP 2010/2, there were previously very few examples of employee representatives' taking advantage of this right.

- 9 employee representatives' opinions in respect of a further 5 offers were published on a website in accordance with the second sentence of Rule 25.9 after they were received by offeree companies following the publication of the offeree board circular.

8.3 The figures above appear to demonstrate that the 2011 Amendments have gone a considerable way towards achieving their objectives of improving communications between offeree companies and their employee representatives and of enabling employee representatives to be more effective in providing their opinion on the effects of an offer on employment. In addition, the Code Committee does not believe that the enhanced rights of employees and employee representatives have resulted in disproportionate burdens being placed on offeree companies.

## **9. Conclusion**

9.1 This Statement completes the Code Committee's review of the operation of the 2011 Amendments. The Code Committee believes that, to date, the 2011 Amendments have operated satisfactorily.

9.2 As indicated above, the Code Committee has asked the Executive to continue to monitor certain areas of practice and to keep a number of the provisions of the Code under review. However, the Code Committee does not intend to propose any immediate changes to the Code as a result of its review of the 2011 Amendments and any future proposals will be brought forward in accordance with the Code Committee's usual procedures for amending the Code.