PCP 2014/1 Miscellaneous amendments to the Takeover Code

ICAEW welcomes the opportunity to comment on the consultation paper *Miscellaneous amendments to the Takeover Code* published by the Code Committee of the Takeover Panel on 16 July 2014, a copy of which is available from this link.

This response of 12 September 2014 has been prepared on behalf of ICAEW by the Corporate Finance Faculty. Recognised internationally as a source of expertise on corporate finance issues and for its monthly *Corporate Financier* magazine, the Faculty is responsible for ICAEW policy on corporate finance issues including submissions to consultations. The Faculty's membership is drawn from professional services groups, advisory firms, companies, banks, private equity, law firms, consultants, academics and brokers. This response reflects consultation with Faculty members experienced in public company advisory work.

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MAJOR POINTS

1. We support the majority of the proposed changes to the Takeover Code in consultation paper PCP 2014/1.

2. We disagree however with the proposal to require the former potential offeror to be identified where the offeree company is required to make an announcement (Q11). We consider that Note 4(b) on Rule 2.2 currently provides sufficient flexibility to the Panel to prevent the creation of a false market.

RESPONSES TO SPECIFIC QUESTIONS

Q1 Should the latest date for a potential competing offeror to clarify its position be a firm date as opposed to a flexible date which is set by the Panel on a case-by-case basis?

3. Yes, we agree that there should be a firm date.

Q2 Should the deadline by which a potential competing offeror must clarify its position be extended to seven days prior to the final day on which the first offeror's offer is capable of becoming or being declared unconditional as to acceptances, rather than 10 days prior to that time?

4. Yes, we agree. Extending the deadline by which a potential competing offeror must clarify its position will be helpful. It will be important, however, for the asset management industry amongst others, that a sufficient time period is permitted for them to undertake their investment decision-making process for non-discretionary managed assets and submit acceptances/ proxies.

Q3 Should the latest date by which a potential competing offeror must clarify its position be fixed at 5.00pm on the 53rd day following the publication of the first offeror's initial offer document?

5. On balance we think that it is a good idea to fix the date at Day 53 (rather than, say, 7 days before Offeror 1's final closing date). The Panel will obviously want to weigh up, however, not only the tactical positions of the respective competing offerors but also the position of offeree shareholders and the risk that, in the case of a foreshortened first offer (whether a bullet offer or some of form of foreshortening), offeree shareholders may, in effect, be denied an exit from either offeror – e.g. Offeror 1's bid may have lapsed because it has not received sufficient acceptances (because shareholders are waiting for Offeror 2's firm bid to emerge) but, following such lapse but before Day 53, Offeror 2 decides not to announce a firm bid. We would welcome the Panel's views on these considerations.

Q4 Where the first offeror is proceeding by way of a scheme of arrangement, should the latest date by which a potential competing offeror must clarify its position normally be 5.00pm on the seventh day prior to the date of the shareholder meetings?

6. We agree that shareholders should have additional time where the offeror is proceeding by way of a scheme of arrangement. We would observe that there will be some inconsistency compared to a contractual offer since seven days prior to the date of the shareholder meeting is in effect only five days, due to the 48 hour deadline for shareholders to submit proxies. See also our point on Q2 about the asset management industry.

Q5 Should the Panel, in appropriate cases, continue to be able to permit a potential competing offeror to clarify its position after the date of the shareholder meetings and, in such cases, should the deadline be set for a date which is no later than 5.00pm on the seventh day prior to the date of the court sanction hearing?

7. We consider that it is essential that the Panel should continue to have the flexibility of permitting a potential competing offeror to clarify its position after the date of the shareholder meetings.

8. However we consider that the current drafting of Section 4(b) of Appendix 7 is preferable. Why, given that shareholders will have thus already made their decision, should there be a deadline of seven days prior to the sanction hearing? A potential competing offer could firmly commit itself to a bid at any time between the shareholder meetings and the court sanction meeting, even if very late in this period, without resulting in significant disruption to the offeree or to offeree shareholders or creating uncertainty in the market, particularly since the offeree board would always be free to adjourn the sanction hearing.

Q6 Do you have any comments on the proposed amendments to Rules 2.6(d) and (e), Note 3 on Rule 2.6 and Section 4 of Appendix 7?

9. We question why the drafting of the deadline in Note 3 is not placed within Rule 2.6(d) itself.

Q7 Do you have any comments on the proposed new Note 5 on Rule 32.1 with regard to extensions to Day 60?

10. While we agree with the proposed wording for Note 5 on Rule 32.1, we wonder whether, on the surface of Rules 32.1 and 31.6 (and their notes), it is generally clear to parties and their advisers that revisions to offers can be made after Day 46, but with the consequence that Day 60 may be extended.

Q8 What are your views on the proposed amendment to Note 2 on Rule 2.8?

11. We agree with the proposed amendment.

Q9 Should paragraph (a) of Note 4 on Rule 2.2 be amended as proposed so as to restrict a person who is subject to that Note, together with any person who acted, or subsequently acts, in concert with it, from acquiring interests in shares of the offeree company?

12. We agree with the proposed amendment.

Q10 Should paragraph (a) of Note 4 on Rule 2.2 be amended as proposed so as to restrict a person who is subject to that Note, together with any person who acted, or subsequently acts, in concert with it, from making an approach to the board of the offeree company?

13. We agree with the proposed amendment.

Q11 Should paragraph (b) of Note 4 on Rule 2.2 be amended as proposed so as to require that an announcement which the Panel requires to be made by the offeree company under that paragraph (b) should normally identify the former potential offeror?

14. We do not agree with the proposed amendment. We believe that if there is no rumour or speculation etc, a former potential offeror should likely be able to walk away unnamed. The current rule already provides the Panel with the flexibility to require an announcement to be made (or not) and we feel strongly that there should not be a presumption that a former potential offeror will be identified.

Q12 Should paragraph (a) of Note 4 on Rule 2.2 be amended as proposed to as to restrict a person who is granted a dispensation, and any person acting in concert with it, from actively considering an offer, from making an approach and from acquiring an interest in shares of the offeree company for a period of three months following the date on which the dispensation was granted and from doing any of the things set out in Rules 2.8(a) to (e) for the following three month period?

15. We agree with the proposed amendment.

Q13 Should the default auction procedure be based on the Existing Default Procedure? If not, is there an alternative model which would be more appropriate?

16. We agree that the default auction procedure be based on the Existing Default Procedure.

Q14 Should the default auction procedure be incorporated into the Code as a new Appendix 8?

17. We agree. We consider it would be helpful if Rule 32.5 also stated clearly which party (or the Panel) is responsible for announcing the default auction procedures (or alternative auction procedures) that have been agreed between competing offerors and the target board where the Panel has agreed to such procedures applying).

Q15 Should the Proposed Auction Procedure provide for an auction process with a maximum of five rounds over five consecutive business days?

18. We believe that it is helpful for parties to know as early as possible that, generally, the Panel will be operating a system of five rounds as they can prepare for this better when setting price and possible increments.

Q16 Should both of the competing offerors be permitted to announce a revised offer in the first round of the auction?

19. Yes.

Q17 In the second, third and fourth rounds, should a competing offeror be permitted to announce a revised offer only if the other competing offeror has announced a revised offer in the previous round?

20. Yes.

Q18 Should both of the competing offerors be entitled to announce a revised offer in the fifth and final round?

21. Yes.

Q19 Do you agree that the Proposed Auction Procedure should not require revised offers to incorporate minimum incremental increases to previous offers?

22. We agree.

Q20 Should the Proposed Auction Procedure prohibit the announcement of a revised offer where the consideration is calculated by reference to a formula that is determinable by reference to the value of a revised offer by the other competing offeror (in the absence of agreement between the parties that such formula offers should be permitted)?

23. Yes.

24. Q21 Should a competing offeror be permitted to submit a revised offer to the Panel in the fifth and final round subject to the condition that it will be announced only if the other competing offeror also submits a revised offer?

25. Yes.

Q22 Do you agree that the introduction of new forms of consideration during the auction should not be prohibited?

26. Yes.

Q23 Should the terms of the Proposed Auction Procedure prohibit dealings in the relevant securities of the offeree company by the parties to the offer and persons acting in concert with them, and the procuring of irrevocable commitments and letters of intent, during the auction procedure?

27. Yes.

Q24 Should the terms of the Proposed Auction Procedure provide that, between the end of the auction procedure and the end of the offer period, a competing offeror and any person acting in concert with it must not acquire any interest in the shares of the offeree company if it would then be required to revise its offer?

28. Yes.

Q25 Should the terms of the Proposed Auction Procedure prohibit announcements by the competing offerors or the offeree company (or persons acting in concert with them) which relate to, or could reasonably be expected to affect the orderly operation of, the auction procedure or which relate to the terms of either competing offeror's offer?

29. Yes.

Q26 Do you have any comments on the proposed amendments to Rule 32.5 or the proposed new Appendix 8?

30. We have no comments.

Q27 Should the Code be amended so as to require a whitewash transaction circular to state that potential controllers which are granted a Rule 9 waiver are not restricted from making an offer for the company?

31. Yes.

Q28 Do you have any comments on the proposed amendments to Note 1 of the Notes on Dispensations from Rule 9, Section 4 of Appendix 1 and Note 5 on the definition of "acting in concert"?

32. We have no comment.

Q29 Should Rule 2.11(b) be amended so as to require irrevocable commitments and letters of intent procured prior to an offer period to be disclosed following the identification of the offeror as such, and Rule 2.11(c) deleted, as proposed?

33. We are uncertain whether this disclosure would be expected by the market and whether it would be unnecessarily bureaucratic.

Q30 Should Rule 2.7 be amended so as to require details of interests and short positions in relevant securities of the offeree company, and irrevocable commitments and letters of intent, to be included in the announcement of a firm intention to make an offer, and the new Note 3 on Rule 2.7 introduced, as proposed?

34. We agree with the proposal

Q31 Should Note 2(a)(i) on Rule 8 be amended such that the "10 business days" deadline would apply to an offeror's Opening Position Disclosure, regardless of when it announced its firm intention to make an offer?

35. Yes.

Q32 Should Note 1 on Rule 2.11 be amended so as to make clear that no separate disclosure is required when details of irrevocable commitments and letters of intent are disclosed in a firm or possible offer announcement made by no later than 12 noon on the business day following the date on which they are procured?

36. Yes.

Q33 Should paragraph (viii) of Note 5(a) be deleted so as to remove the requirement to disclose details of irrevocable commitments and letters of intent in an Opening Position Disclosure?

37. Yes.

Q34 Should Note 3 on Rule 2.11 be amended so as require the disclosure of any outstanding conditions to which an irrevocable commitment is subject?

38. Yes.

Q35 Should Note 12 on Rule 8 be amended so as to make clear that it applies to any participant in a formal sale process, and should consequential amendments be made to Note 1 on Rule 2.4, Note 2 on Rule 2.6 and the Note on Rule 7.1, as proposed?

39. Yes.

Q36 Should Rule 26.1 be amended so as to make clear that the specified documents are required to be published on a website by no later than 12 noon on the business day following a firm offer announcement (or, if later, the date of the relevant document)?

40. Yes.

Q37 Should Rule 2.10 be amended so as to bring forward the latest deadline for announcements of the numbers of relevant securities in issue from 9.00am to 7.15am?

41. Yes.

Q38 Should Note 5(f) on Rule 8 be amended so as to require that, where the owner or controller of an interest or short position is a trust, details of the trustee(s), the settlor and the beneficiaries of the trust must be disclosed?

42. We refer to the Small Business, Enterprise and Employment Bill which amends Part 21A of the Companies Act 2006 and includes the concept of people with 'significant control'. The Code Committee may wish to consider the new proposed rules in the Bill regarding the disclosure of beneficial interests in shares (Parts 7 and 8 and Schedule 3), how they might apply to Code or non-Code companies and whether the level of disclosure intended to be required by the Code will be or should be at least as rigorous as that set out in the Bill.

Q39 Should Note 5(a) on Rule 8 be amended to provide for aggregated disclosure by a connected principal trader where the sole reason for the connection is that the principal trader is controlled by, controls or is under the same control as a connected adviser to an offeror, the offeree company or any person acting in concert with the offeror or the offeree company?

43. Yes.

Q40 Should the Code be amended as proposed in respect of matters relating to the redemptions and purchases by offeree companies and offerors of their own securities?

44. Yes.

Q41 Should Note 4 on Rule 20.1, Note 5 on Rule 19.1 and Section 6 of Appendix 2 be amended as proposed?

45. Yes.

Q42 Do you have any comments on the proposed amendments to Note 2 on Rule 32.2 and Note 2 on Rule 31.5?

46. We wonder if it would be helpful if the Panel stated that the three specific reservations referred to in Rule 32.2, which the offeror may consider making to a no increase statement, are not exhaustive examples of reservations.

Q43 Do you have any comments on the proposed amendments to Note 5 on Rule 32.2 and Note 5 on Rule 31.5?

47. We have no comment.

Q44 Should Rule 3.1 and Note 3 on Rule 3.1 be amended as proposed so as to make clearer the roles of the board of the offeree company and the independent adviser?

48. On balance, we think that the amendment will help emphasise the board's responsibility to take into account a range of factors when considering an offer.

Q45 Should the second paragraph of Note 16 on Rule 9.1 be amended as proposed so as to make clear that it applies only to shares acquired and held by a principal trader in a client serving capacity?

49. Yes.