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The Secretary to the Code Committee
The Takeover Panel
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supportgroup@thetakeoverpanel.org.uk

5 November 2014

Dear Sirs,

The Takeover Panel - PCP 2014/2 Post-Offer Undertakings and Intention Statements

Introduction

We are the Quoted Companies Alliance, the independent membership organisation that champions the interests of small to mid-size quoted companies. Their individual market capitalisations tend to be below £500m.

The Quoted Companies Alliance is a founder member of European**Issuers**, which represents over 9,000 quoted companies in fourteen European countries.

The Quoted Companies Alliance Legal and Corporate Finance Expert Groups have examined your proposals and advised on this response. A list of members of the Expert Groups is at Appendix A.

Response

We welcome the opportunity to respond to this consultation.

As a general observation, we are not, in this response, intending, except where indicated below, to comment on the detailed amendments proposed to be made to the Code. We have focussed more on the overall principles underlying the PCP:

1. The City Code does not currently distinguish between a "statement of commitment" and a "statement of intention" in relation to post offer period matters.

2. Most of the Code requirements for the content of Offer/Defence Documents focus on "statements of intention" rather than "commitments" – see, for example, Rule 24.2. Most commitment statements made by Offerors are therefore likely to be made on a "voluntary" basis (see Pfizer/AstraZeneca) and are rare in practice.

3. In broad terms, under the current regime, voluntary statements of commitment and statements of intention are treated the same – they must be complied with for a period of 12 months after an offer period (or such other period as is specified in the statement) unless there has been a "material change in circumstances": Note 3 to Rule 19.1. In view of the broad constituency of persons involved in, affected by, and/or having views on, takeovers of companies subject to the Code, we would suggest

that the interpretation of this exception could prove to be problematic and not without (potentially lengthy) argument, particularly, in the context of statements of intention.

4. As the PCP states, statements of intention are, in effect, treated as statements of commitment and, in terms of sanctions, are subject to the regime broadly described in paragraph 5 below.

5. An actual or likely failure to comply with either a statement of intention or a statement of commitment can lead to Panel disciplinary proceedings and/or court enforcement proceedings. Criminal sanctions could apply if an Offeror knowingly or recklessly makes a statement which does not comply with the Code rules on the content of Offer/Defence Documents. We suspect that many practitioners would be surprised that statements of intention could potentially attract such serious consequences particularly if they have been verified as being true and accurate and are based on reasonable grounds at the time they were made.

6. Most practitioners would not interpret a statement of intention as a commitment. In testing the veracity of statements of intention, the practice has been, through the normal verification exercise, to establish whether the statement of intent, at the time it is made, has been made honestly, is true and accurate and has been based on reasonable grounds.

7. In practice, most Offerors, in relation to those matters in Rule 24, prefer to make statements which are as brief, generic and as flexible as possible. This is particularly the case in contested situations where the Offeror is unlikely to have carried out the degree of due diligence to be clear, in its own mind, what specific steps or measures it might wish to take in relation to the target company if its offer is successful. Even in a recommended situation, Offerors do not necessarily have the degree of insight on such matters, even from much more detailed due diligence, comfortably to give statements which will give clarity and certainty on such matters, particularly where they will, in effect, be required to comply with whatever statement they do make for a minimum period of time. Moreover, as is recognised under the Code, businesses are dynamic and open to extraneous or different circumstances.

8. That said, making categorical statements on matters such as those in Rule 24.2 at the time of an offer document in such circumstances is an uncomfortable one for Offerors. Relying on subsequently convincing the Takeover Panel that there has been "a material change of circumstances", against the background of the sanctions regime described in paragraph 5, does not really alleviate that discomfort. In such circumstances, there will be a natural inclination for Offerors to be reticent and for such statements to be vague and ambiguous so that, ultimately, an Offeror cannot be shown to "have said anything wrong". Offerors are well advised therefore to couch their observations on the matters listed in Rule 24.2 as statements of intention, which so long as they are accurately and honestly made and based on reasonable grounds should not, in our view, attract any regulatory sanctions.

9. The Panel's proposals contemplate a distinction between, and a different regulatory enforcement regime for, "commitment statements" (which must be complied with to avoid the possible sanctions set out in paragraph 5 above as well as a new monitoring regime through written reports and independent supervisors) and "statements of intention", which so long as they are accurately made and on reasonable grounds will not attract any of the sanctions set out in paragraph 5 above (save for the disciplinary powers under Section 11 of the Introduction to the Code); there would be no monitoring regime for statements of intention. The 12 month rule would no longer be applicable as would the "material change in circumstances" exception.

10. Overall, we consider The Takeover Panel's approach to be balanced and is to be welcomed for the following reasons:

    (a) it should encourage Offerors to be less reluctant about making meaningful statements of intention in relation to the matters in Rule 24.2 as there is now greater clarity over the regulatory consequences. Such statements will be subject to a clearer regulatory regime so long as the statements are true and based on reasonable grounds (a test which (we would suggest) applies currently). Removing the "12 month rule" and the uncertain and nebulous "material change of circumstances" exception will also, we believe, be helpful in fostering greater clarity; and

    (b) under the Takeover Panel's proposals commitment statements will need (quite rightly) to be specific, precise and capable of objective assessment (as would any exceptions to them) and, in practice, are now less likely to be made by Offerors (or, if made, will be made only after serious consideration and advice). As a result, these statements are less likely to give rise to costly, and unwelcome, monitoring regimes such as written reports and supervisors and to possible court enforcement proceedings.

11. In the spirit of these changes, we would however recommend that the text of Rule 24.2 (a) (ii) of the Code be amended so that an Offeror is required to state:

    > "its intended strategy for the offeree company and the likely repercussions of this strategy on the employees of the offeree company and the locations of the offeree company's places of business"

12. We believe that the Takeover Panel should clarify that it retains discretion to permit a party to an offer to renege on a post-offer undertaking if an objectively material, unanticipated event occurs (for example a fire or terrorist attack at a factory that an Offeror undertakes to keep open). Otherwise, an Offeror may be put off from making what would be a helpful undertaking because it cannot, with confidence, list out every potential carve out circumstance (and indeed doing so could lead to unhelpfully long lists not dissimilar to the practice that has evolved in respect of offer conditions).

13. It would be useful to clarify the role of financial (and other) advisers in relation to a post-offer undertaking, especially whether they are or will be responsible for ensuring their client complies. Presumably the intention is that they should only have responsibility at the time the undertaking is given, with no ongoing responsibility after the offer has completed.

If you would like to discuss any of our response in more detail, we would be happy to attend a meeting.

Yours faithfully,

Tim Ward
Chief Executive

APPENDIX A

Quoted Companies Alliance Legal Expert Group Members

Gary Thorpe (Chairman)	**Clyde & Co LLP**
Maegen Morrison (Deputy Chairman)	Hogan Lovells International LLP
David Davies	Bates Wells & Braithwaite LLP
Martin Kay	Blake Morgan
Richard Beavan	Boodle Hatfield LLP
Paul Arathoon David Hicks Tom Shaw	Charles Russell Speechlys LLP
David Fuller	CLS Holdings PLC
Mark Taylor	Dorsey & Whitney
Nick Jennings	Faegre Baker Daniels LLP
Anthony Turner	Farrer & Co
June Paddock	Fasken Martineau LLP
Ian Binnie	Hamlins LLP
Danette Antao	Hogan Lovells International LLP
Nicola Green Eleanor Kelly Jane Mayfield	LexisNexis
Mebs Dossa Gabriella Olson-Welsh	McguireWoods
Stephen Hamilton	Mills & Reeve LLP
Ross Bryson	Mishcon De Reya
Rizwan Rahman	Nabarro LLP
Jo Chattle Simon Cox Julie Keefe	Norton Rose Fulbright LLP
Naomi Bellingham Sarah Hassan Hilary Owens	Practical Law Company Limited
Ben Warth	PricewaterhouseCoopers LLP
Donald Stewart	Progility plc

Quoted Companies Alliance Corporate Finance Expert Group Members

Samantha Harrison (Chairman)	**RFC Ambrian Limited**
Richard Evans (Deputy Chairman)	Strand Hanson Limited
Frederico Gago	Accola Capital LLP
Nick Naylor	Allenby Capital Ltd
Chris Hardie	Arden Partners PLC
Chris Searle	BDO LLP
David Foreman Mark Percy Amerjit Kalirai	Cantor Fitzgerald Europe
Martin Finnegan	Causeway Law
Stephen Keys	Cenkos Securities PLC
Sean Geraghty	Dechert
Stuart Andrews	finnCap
Simon McLeod	Goodman Derrick LLP
Colin Aaronson	Grant Thornton UK LLP
Robert Darwin Maegen Morrison	Hogan Lovells International LLP
James Green	K&L Gates LLP
Richard Crawley	Liberum Capital Ltd
Simon Charles David Bennett	Marriott Harrison
Richard Metcalfe	Mazars LLP
Lesley Gregory	Memery Crystal LLP
Nicholas Narraway	Moorhead James
Kristy Duane	Nabarro LLP
Dalia Joseph	Oriel Securities Limited
Jonathan King	Osborne Clarke
Daniel Harris	Peel Hunt LLP
Leighton Thomas	PricewaterhouseCoopers LLP
Charles Simpson	Saffery Champness
Azhic Basirov	Smith & Williamson LLP
Neil Baldwin Mark Brady	SPARK Advisory Partners
Laurence Sacker	UHY Hacker Young
Tim Metcalfe	Zeus Capital Limited