14 April 2016

The Secretary to the Code Committee
The Takeover Panel
10 Paternoster Square
London
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By email: supportgroup@thetakeoverpanel.org.uk

CP Issued by the Code Committee of the Panel: The Communication and Distribution of Information during an Offer

Dear Secretary

Please find attached our response to the Panel Consultation Paper: The Communication and Distribution of Information during an Offer.

Thank you for your consideration.

Yours faithfully

Derek Shakespeare

Chair, Corporate Finance Committee

Association for Financial Markets in Europe
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Consultation response

Takeover Panel Code Committee Consultation: The Communication and Distribution of Information during an Offer

April 2016

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on the **Consultation Paper on the Communication and Distribution of Information during an Offer**. AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia.

AFME is listed on the EU Register of Interest Representatives, registration number 65110063986-76.

Our response to certain questions and some additional comments is set out below. Where a question is not referred to, we have no comments.

Responses to Questions

Question 1 – Should the proposed new Rule 20.1(a) apply to information and opinions relating to an offer or a party to an offer?

We suggest that there is an express carve-out in the Rule or the accompanying Notes to make it clear that information that is administrative in nature is not caught by Rule 20.1.

Question 3 – Should documents provided by an offeror or the offeree company to shareholders or other relevant persons, and written communications provided to and published by the media, be required to be published on a website?

(1) - We consider that Rules 20.1(c)(i) and (ii) should be subject to a materiality threshold (although not limited to material *new* information only) and that there should be a carve-out for information that is administrative in nature, otherwise all investor, adviser, analyst and media comms are potentially within scope.

(2) - It is potentially impractical to require publication to a dedicated website of all information caught by Rule 20.1(c), let alone 'prompt'. We would suggest that Rule 20.1(c) should not apply to information about a party to an offer, but instead to information about an offer only, because Rule 20.1(b) already catches material new information about a party, and as currently drafted Rules 20.1(c)(i) and (ii) would catch all investor, adviser, analyst and media comms including ordinary course business or product service announcements (which are carved out of the advertising regime). For example, an overseas offeror which is a bank may issue a press release relating to its domestic saving rates which have no relevance to the offer.

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(3) – We request clarification that the new Rule 20.1(b)(i) would not require information distributed to a banking syndicate on an ongoing basis under the terms of a facility agreement to be made public and that the new Rules 20.1(b)(ii) and 20.1(c)(i) would not require information distributed to holders of debt securities on an ongoing basis under the terms of the relevant instrument to be made public.

(4) – We understand that the aim of Rule 20.1(c)(i) should be to ensure that written presentations and other documents which are provided to holders of "relevant securities" are also made available to all such holders. We note that under new Rule 20.2(a)(ii) only meetings with "persons interested in relevant securities" need to be supervised, and we would be grateful for clarification as to why, under new Rule 20.1(c)(i) a document which is provided to, or used in a meeting with a person which is "interested in securities (including debt securities)" must be made public (unless it relates to the offer).

(5) – The new Rule 20.1(c)(ii) refers to documents 'provided to the media'. However, question 3 in the consultation paper uses the language 'provided to *and published by* the media'. We therefore request confirmation in the Panel response paper that under new Rule 20.1 the information that needs to be published in the context of communications with the media is that which has been provided to the media and not, as Question 3 might suggest, the media coverage that follows.

Question 6 – Should all announcements required to be made under the Code be required to be published via a RIS and, if the relevant RIS is not open for business, be distributed to not less than two national newspapers in the UK and two newswire services operating in the UK?

Non-material announcements should be able to be made via RIS on the following business day if the relevant RIS is not open for business rather than having to be distributed to two national newspapers and newswire services. We would suggest that the Panel reserves the power to consent to a waiver (i.e. 'Except with the consent of the Panel…') and, assuming the Panel accepts that non-material announcements would not be subject to this requirement, we request that the Panel give guidance (either separately or in its response to the consultation) specifying what the Executive consider to be non-material announcements.

Question 7 – Should the Panel have the ability to require a copy of an announcement (or a document which includes the contents of the announcement) to be sent to the offeree company's shareholders, employee representatives and pension scheme trustees?

We request clarification (in the response) of the type of announcement the Panel would envisage would be required to be sent to shareholders and the criteria for making such a determination. The impact of the requirement should be proportionate given the cost implications.

Question 12 – Do you have any comments on the scope of the proposed new Rule 20.2?

We note that unscheduled inbound calls are in scope under new Rule 20.2. This means that if shareholders call the IR team during the relevant periods they will need to be told that the call cannot proceed without a financial adviser or corporate broker being present. We would request that the Panel allow unchaperoned inbound calls to the IR team, permitting the IR team to communicate basic information according to a script pre-agreed with the broker or financial adviser and/or approved by the Panel.

Question 14 – Should a supervisor of a meeting to which the proposed new Rule 20.2 applies be required to confirm the names and functions of the individuals who attended the meeting in addition to the matters required to be confirmed under the current Note 3 on Rule 20.1?

The name and organisation of the attendees should be sufficient and details of the function should not be required. We suggest that "function" be replaced with "organisation" in Rule 20.2(c).

Question 15 – Do you have any comments on the proposed Note to the new Rule 20.2 in relation to meetings which take place prior to the commencement of a firm or revised offer?

(1) See comment above in response to question 14.

(2) We consider that it should not be a requirement to provide "brief details" of any material new information or significant new opinion since we expect this will create an unnecessary level of bureaucracy. Whilst the intention may be to seek only "brief details" there is a risk that the preparation and submission of these letters may now result in disproportionate time being required (including legal input from those not at the meeting) in order to produce a record of information where such information may not still be material at the time of the Rule 2.7 announcement. We would also note that from a logistical standpoint, a deadline of 12 noon on the

following business day for submission of these details might prove problematic. Accordingly, the current confirmation sought from the financial adviser that all material information will be included in the Rule 2.7 announcement, together with the record-keeping requirements of the new Market Abuse Regime (where applicable) and the fact that a full script could be made available on request, should be sufficient.

Question 16 – Do you have any comments on the proposal to give the Panel the ability to grant dispensations from the provisions of the proposed new Rule 20.2in relation to meetings following the announcement of a recommended firm offer?

We note that under new Rule 20.2, Note 2 the Panel states that it will normally, subject to prior consultation, grant a dispensation from the requirements for meetings to be attended by a financial adviser or corporate broker following the announcement of a recommended firm offer and where there is no competitive situation. Please could the Panel, in its response paper, confirm that "no competitive situation" means that a competing bidder has not been publicly identified, or amend this new Note to that effect.

Question 20 – Should the new Rule 20.3 in relation to the use of videos be introduced as proposed?

Is it the intention of the Panel that new Rule 20.3 on videos captures webcasts? For example, a party of an offeror may well broadcast a live webcast of its results presentation and directors typically participate in live Q & As, with the whole webcast then being available as a video on that party's website. We would suggest deletion of "or a party to an offer" in new Rule 20.3(a) in order that the requirement for scripting only captures offer-related information, in respect of which the speakers would have a scripted response.

Question 22 – Should the amendments to Rule 26 in relation to the publication of documents on a website be made as proposed?

We note that new Rule 26.1/26.2 provides that documents must be published on a website "promptly" rather than by 12 noon on the following business day. In order to avoid any confusion which may be caused as to what "promptly" means, we would suggest "promptly and, in any event, no later than 12 noon on the following business day".

Additional Comments

Proposed Changes to Rule 19.4/new Rule 20.5

The publication of corporate image advertisements by offerors or offerees should not require the Panel's prior consent (at least in recommended and uncompetitive situations). It would seem that if the opportunity is being taken to review the rules on advertisements they should reflect current market practice on recommended offers.

Suggested Amendment – insert the words "or (ii)" after the word category in the fifth line of new Rule 20.5 or include an explicit derogation for recommended and uncompetitive situations.

Proposed Change to the Note to Rule 19.4/new Rule 20.5

Comment **–** suggested change to wording in order to avoid confusion with FSMA.

Suggested Amendment – replace the word "approved" with "reviewed".

Transitional provisions

We would be grateful for confirmation in the Panel response paper as to how the new regime is to be applied in the context of information distributed before the effective date of new rules and guidance. For example, how would the new regime apply: (i) where a bidder is actively considering an offer prior to the effective date (but has not yet made an approach), (ii) where a target is in receipt of an approach prior to the effective date but no possible or firm offer has been announced and (iiii) where an offer period has commenced prior to the effective date?

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