THE TAKEOVER PANEL

1999 ANNUAL REPORT

The Panel's 1999 Annual Report was published today. Attached are extracts from the Report by the Director General contained in the Annual Report, in which the following topics are addressed.

- Pre-conditional offer announcements
- Equality of information to competing offerors
- Invoking conditions to an offer
- Rule 37: purchase of own shares
- Rule 9: aggregation of group holdings
- Loan note alternatives and General Principle 1

20 July 1999

PRE-CONDITIONAL OFFER ANNOUNCEMENTS

Under Rule 2.5 the announcement of a firm intention to make an offer should only be made when the offeror has every reason to believe that it can and will be able to implement the offer. Following such an announcement the offeror must proceed with the offer unless the posting of the offer document is subject to a pre-condition which is not fulfilled or Panel consent to the contrary is obtained. In certain circumstances a potential offeror may make an announcement that it is considering a possible offer at a time when it does not want to be committed to making that offer (a "possible offer announcement").

The Executive has reviewed the practice of possible offer announcements under Rule 2.4 which refer to certain pre-conditions to the making of an offer; and announcements made under Rule 2.5 which set out a number of pre-conditions which must be satisfied (or waived) before a potential offeror is committed to posting an offer document.

There have been a number of cases where potential offerors have made possible offer announcements under Rule 2.4 which have stated that they are considering making an offer subject to the satisfaction of certain pre-conditions. Such announcements may create a misleading or confusing impression about the intentions of the potential offeror, because shareholders may be unable to assess in what circumstances an offer may be forthcoming. Accordingly, it must be clear from the wording of any possible offer announcement referring to pre-conditions whether or not the pre-conditions must be satisfied before an offer can be made, or whether they are effectively waivable. It must also be made clear that, even if the specified pre-conditions are satisfied (or waived), an offer will not necessarily be made. The Executive must be consulted in advance if it is proposed to make a pre-conditional possible offer announcement.

Although there is no obligation to specify all the pre-conditions to the making of an offer, if a potential offeror does so and states that it will proceed with its offer if they are all satisfied or waived, then any announcement must be structured as a pre-

conditional Rule 2.5 announcement. It must, however, be made clear in such an announcement whether or not the pre-conditions are waivable. Such pre-conditions may, depending on the specific circumstances of the case, be subjective in form, in contrast to conditions to an offer which should, under Rule 13, normally be objective.

EQUALITY OF INFORMATION TO COMPETING OFFERORS

Under Rule 20.2 any information given to one offeror or potential offeror must, on request, be given equally and promptly to another offeror or bona fide potential offeror. This requirement usually only applies once there has been a public announcement of the existence of the offeror or potential offeror, whether named or unnamed. For example, an announcement that a company is in talks about a possible offer would constitute the public announcement of the existence of an offeror or potential offeror.

It would not be acceptable for an offeree to provide information covered by Rule 20.2 to one existing or potential offeror when it might be unable to provide this information to another existing or potential offeror on an equal basis. For example, if an offeree wishes to release information to one offeror or potential offeror that is subject to a confidentiality agreement with a third party, the offeree must ensure that it has authority to pass that information to any other offeror or bona fide potential offeror.

INVOKING CONDITIONS TO AN OFFER

Rule 13 normally prohibits offers being made subject to conditions which give discretion to the board of the offeror to decide whether or not a condition has been satisfied or which give the offeror board the power to choose whether or not to fulfil a condition. If such conditions were permitted it would create great uncertainty for the offeree, its shareholders and the market generally in circumstances where an offer would be open for acceptance.

However, even where a condition to an offer has been drafted in a form to satisfy Rule 13, offerors and their advisers should be aware that, as provided in Note 2 on Rule 13, it will not be possible to invoke such a condition so as to cause a bid to lapse unless the circumstances which give rise to the right to invoke the condition are of material significance to the offeror in the context of the offer. This is to prevent offerors from using widely drafted, albeit objective, conditions as a means of circumventing Rule 13. The Executive would expect to be consulted before any condition was invoked by an offeror.

RULE 37: PURCHASE OF OWN SHARES

Directors of a company are not normally presumed by the Code to be acting in concert unless their company is subject to an offer or they have reason to believe a bona fide offer for their company may be imminent. Under Rule 37, however, directors of a company will be presumed to be acting in concert from the time they resolve to seek shareholders' authority for a redemption or purchase of the company's own shares until the later of the date of the general meeting at which the resolution to grant such authority is considered, the expiry of the authority in question or the utilisation in full of that authority.

In practice many companies seek an annual authority from their shareholders to purchase or redeem their own shares. Directors of companies seeking such authorities will, together with shareholders who are acting in concert with them, be treated as acting in concert on an on-going basis irrespective of whether any offer or potential offer for their company has been received. Any shareholder which has appointed a representative to the board of the company in question will normally be treated as a director.

In the event that the combined holding of any such concert party could increase to 30% or more of the voting rights of the company in question (or, if already 30% or more but not more than 50%, might increase further) as a result of an exercise of the authority to purchase or redeem shares, the Executive should be consulted with regard

to a waiver of the obligation to make a general offer. Subject to prior consultation, the Panel will normally waive any resulting obligation to make a general offer if there is a vote of independent shareholders and a whitewash procedure on the lines of that set out in Appendix 1 to the Code is followed.

RULE 9: AGGREGATION OF GROUP HOLDINGS

The Executive has a standard approach under Rule 9 to the treatment of holdings within different parts of multi-service financial organisations.

The Executive will aggregate all positions held by the group either as principal or on behalf of discretionary clients. Holdings of exempt market-makers and exempt fund managers will be included in the total aggregate holdings of the group. This is because exempt status is only relevant to rebut the presumption, which would otherwise arise under the Code, that market-making and fund management operations of a particular securities group will be acting in concert with a client advised by the corporate finance department of that group.

Compliance officers of securities groups should therefore monitor closely the total aggregate holdings of the group. Control of the relevant positions, whether they be held as principal or on behalf of discretionary clients, will effectively be in the hands of the overall group and it is, therefore, incumbent on that group to monitor the holdings so as to ensure that Rule 9 is not breached.

Following a merger of securities groups, a combined aggregate holding of the enlarged group in excess of 30% of the voting rights of a particular company might result. Where such circumstances arise, the Executive should be consulted although its general approach is to treat such events as the coming together of shareholders to act in concert and would therefore, in accordance with Note 1 on Rule 9.1, not require a general offer to be made under Rule 9. In such circumstances, however, the combined group will be subject to the prohibition which applies under Rule 9 on the acquisition of further voting rights in the company in question.

This approach on aggregation in respect of Rule 9 could operate onerously to restrict the market-making functions within securities groups. Therefore, in cases where the aggregate group holding approaches or exceeds 30%, the Executive may be prepared to permit market-making to continue subject to the relevant company not being in an offer period and the position of the market-maker not exceeding 3%.

LOAN NOTE ALTERNATIVES AND GENERAL PRINCIPLE 1

General Principle 1 requires all shareholders of the same class of an offeree to be treated similarly.

If it is proposed to make a loan note alternative available to accepting shareholders, all such shareholders (whatever the size of their shareholding in the offeree and, accordingly, the amount of loan notes to which they would be entitled) must be able to elect for loan notes. It would constitute a breach of General Principle 1 to disregard, or treat as invalid, a loan note alternative election from a shareholder on the grounds that it would result in such shareholder receiving less than a specified nominal value of loan notes (unless the resulting holding for such shareholder was de minimis).

Similar concerns under General Principle 1 will apply to any other form of consideration where the effect of the terms of the offer is to prevent the shareholder receiving that consideration because of the size of that shareholder's holding in the offeree.