

THE TAKEOVER PANEL

CODE COMMITTEE

RESPONSE STATEMENT 13, CODE AMENDMENTS AND PUBLIC CONSULTATION PAPER 15

On 30 April, the Code Committee published Public Consultation Paper 13 relating to treasury shares ("PCP13"). The consultation period in respect of PCP13 ended on 11 June and on 24 July the Code Committee announced that it had deferred publication of Response Statement 13. This was because the Department of Trade and Industry ("DTI") was considering further whether, in order for the compulsory purchase provisions contained in Sections 428-430F of the Companies Act 1985 to be applied, the law as currently drafted would require an offer to be made in respect of all the shares in issue (including those held in treasury) and, if so, whether appropriate amendments should be made to those provisions. The DTI has now considered this issue and The Companies (Acquisition of Own Shares) (Treasury Shares) No. 2 Regulations 2003, regulations 5 to 7 of which relate to Sections 428-430F of the Companies Act 1985, were laid before Parliament on 27 November and will come into force on 18 December. In the light of this, the Code Committee has today issued Response Statement 13 which sets out the results of the public consultation process in respect of PCP13 and the final text of the proposed amendments to the Code and the SARs as approved by the Code Committee in respect of that consultation paper. Copies of Response Statement 13 may be obtained from the Panel's website at www.thetakeoverpanel.org.uk or by telephoning the Panel on 020 7382 9026.

The changes to the Code and the SARs set out in Response Statement 13 are contained in the Appendix to this statement.

Also contained in the Appendix to this statement are a number of minor amendments approved by the Code Committee in order to bring the Code into line with : (i) the requirements of the Companies Act 1985 and the Listing Rules relating to disclosure

of information about and display of directors' service contracts; and (ii) the revised 'Appraisal and Valuation Standards' of the Institute of Chartered Surveyors.

All the changes will take effect on 1 December. Amended pages of the Code and the SARs will be published on 3 December.

The consultation period for PCP15 on offeree protection conditions ended on 1 September. Except where a respondent has requested otherwise, responses received by the Code Committee are available for public inspection and may be obtained by telephoning the Panel on 020 7382 9026. The consultation exercise has raised a number of important issues. The Code Committee is considering these and will make a further announcement in due course.

28 November 2003

APPENDIX

AMENDMENTS RELATING TO TREASURY SHARES

THE TAKEOVER CODE

1. DEFINITIONS

After the definition of 'Securities exchange offer' add the following:

"Treasury shares

All percentage holdings of voting rights, share capital and relevant securities are to be calculated by reference to the relevant percentage held and in issue outside treasury. A transfer or sale of shares by a company from treasury will normally be treated in the same way as an issue of new shares."

2. Rule 2.10

The existing *NOTE* becomes *Note 1* and a new *Note 2* is added as follows:

"2. Treasury shares

Only relevant securities which are held and in issue outside treasury should be included in the announcement. "

3. Add a new **Rule 4.5** as follows:

"4.5 RESTRICTION ON THE OFFEREE COMPANY ACCEPTING AN OFFER IN RESPECT OF TREASURY SHARES

An offeree company may not accept an offer in respect of treasury shares until after the offer is unconditional as to acceptances."

4. Rule 8

In *Note 2* on Rule 8, add a new final paragraph to read:

"All percentage holdings of relevant securities are to be calculated by reference to the percentage of the class of relevant security held and in issue outside treasury - see the reference to treasury shares in the Definitions. "

5. FORM 8.1/8.3

Add a new *Note 7* as follows:

"Note 7. The resultant total percentage holding of the class of relevant security is to be calculated by reference to the percentage held and in issue outside treasury."

6. Rule 9.1

Add a new *Note 16* to read:

"16. Treasury shares

When an obligation to make an offer is incurred under this Rule, it is not necessary for the offer to extend to shares in the offeree company held in treasury."

7. Rule 10

Amend the first sentence of *Note 3* to read:

"Following the announcement of a firm intention to make an offer, the offeree company must, on request, provide the offeror as soon as possible with all relevant details of the issued shares (including the extent to which any such shares are held in treasury and details of any agreements to transfer or sell such shares out of treasury) and, to the extent not issued, the allotted shares

and details of any conversion or subscription rights or any other rights pursuant to the exercise of which shares may be unconditionally allotted or issued during the offer period. "

8. Rule 21.1

Amend **Rule 21.1 (a)** to read:

"(a) issue any authorised but unissued shares or transfer or sell, or agree to transfer or sell, any shares out of treasury;"

In the *NOTES on Rule 21.1*, amend *Note 7* to read:

"7. Established share option schemes

Where the offeree company proposes to grant options over shares, the timing and level of which are in accordance with its normal practice under an established share option scheme, the Panel will normally give its consent. Likewise, the Panel will normally give its consent to the issue of new shares or to the transfer of shares from treasury to satisfy the exercise of options under an established share option scheme. "

9. Rule 37.3

Amend **Rule 37.3(c)** to read:

"(c) Disclosure in the offeree board circular.

The offeree board circular advising shareholders on an offer must state the amount of relevant securities of the offeree company which the offeree company has redeemed or purchased during the period commencing 12 months prior to the offer period and ending with the latest practicable date prior to the posting of the document, and the details of any such redemptions and purchases, including dates and prices and the extent to

which the shares redeemed or purchased were cancelled or held in treasury."

10. Rule 37.4

Amend **Rule 37.4(b)** to read:

"(b) Disclosure in offer document

The offer document must state (in the case of a securities exchange offer only) the amount of relevant securities of the offeror which the offeror has redeemed or purchased during the period commencing 12 months prior to the offer period and ending with the latest practicable date prior to the posting of the offer document and the details of any such redemptions and purchases, including dates and prices and the extent to which the shares redeemed or purchased were cancelled or held in treasury."

THE SARS

11. DEFINITIONS

After the definition of "**Single shareholder**" add the following:

"Treasury shares

All percentage holdings of voting rights and share capital are to be calculated by reference to the relevant percentage held and in issue outside treasury. A transfer or sale of shares from treasury will normally be treated in the same way as an issue of new shares."

12. FORM SAR3

The existing *Note* becomes *Note 1* and a new *Note 2* is added as follows:

"Note 2. The resultant total percentage holding of voting shares and rights over shares is to be calculated by reference to the percentage held and in issue outside treasury."

13. FORM SAR5

Add a *Note* to read:

"Note. The resultant total percentage holding of voting shares and rights over shares is to be calculated by reference to the percentage held and in issue outside treasury."

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OTHER AMENDMENTS TO THE TAKEOVER CODE

14. Introduction

After the penultimate sub-paragraph insert a new paragraph as follows:

"Any public company with more than one beneficial owner that proposes to re-register as a private company to which the Code will not apply should consult the Executive."

15. Rule 25.4

Amend **Rule 25.4 (a)** to read:

"(a) The first major circular from the offeree board advising shareholders on an offer (whether recommending acceptance or rejection of the offer) must contain particulars of all service contracts of any director or proposed director of the offeree company with the company or any of its subsidiaries. If there are none, this should be stated."

Amend the *NOTES ON RULE 25.4* to read:

1. Particulars to be disclosed

Particulars in respect of existing service contracts and, where appropriate under Rule 25.4 (b), earlier contracts or an appropriate negative statement must be provided as follows:—

- (a) the name of the director under contract;*
- (b) date of the contract, the unexpired term and details of any notice periods;*
- (c) full particulars of the director's remuneration including salary and other benefits;*
- (d) any commission or profit sharing arrangements;*
- (e) any provision for compensation payable upon early termination of the contract; and*
- (f) details of any other arrangements which are necessary to enable investors to estimate the possible liability of the company on early termination of the contract.*

Where there is more than one contract, a statement of the aggregate remuneration payable is normally regarded as fulfilling the requirements under (c) above, except to the extent that this method would conceal material anomalies which ought to be disclosed (eg because one director is remunerated at a very much higher rate than the others). In cases where contracts have been replaced or amended, however, the particulars of remuneration payable under both the existing and the earlier contracts must relate to each individual separately.

It is not acceptable to refer to the latest annual report, indicating that information regarding service contracts may be found there, or to state that the contracts are open for inspection at a specified place.

2. Recent increases in remuneration

The Panel will regard as the amendment of a service contract under this Rule any case where the remuneration of an offeree company director is increased within 6 months of the date of the document. Therefore, any such increase must be disclosed in the document and the current and previous levels of remuneration stated.

16. Rule 26

Amend **Rule 26(c)** to read:

"(c) all service contracts of offeree company directors;"

17. Rule 29

Amend the *NB* introducing **Rule 29** to read:

"NB All references in the Rule to "The Standards " are to the Royal Institution of Chartered Surveyors' Appraisal and Valuation Standards. "

Amend the first sentence of **Rule 29.1 (b)** as follows:

"In relation to land, buildings and plant and machinery, a valuer should be a corporate member of The Royal Institution of Chartered Surveyors or The Institute of Revenues Rating and Valuation or some other person approved by the Panel."

In **Rule 29.1(d)** in line 6 delete "**The Manual**" and insert "**The Standards**".

Amend **Rule 29.2(a) to (c)** to read:

"29.2 BASIS OF VALUATION

(a) The basis of valuation must be clearly stated. Only in exceptional circumstances should it be qualified and in that event the valuer must explain the meaning of the words used. Similarly, special assumptions (see PS 2.3 of the Standards) should not normally be made in a valuation but, if assumptions are permitted by the Panel, they should be fully explained. (See Chapter 5 of The Standards.)

(b) In relation to valuations of land, buildings and plant and machinery, attention is drawn to The Standards.

(c) For non-specialised properties, the basis of valuation will normally be market value as defined in The Standards. Property which is occupied for the purposes of the business will be valued at existing use value. Where a property has been adapted or fitted out to meet the requirements of a particular business, the market value should relate to the property after the works have been completed. Alternatively, the market value may relate to the state of the property before the works had been commenced and the works of adaptation may be valued separately on a depreciated replacement cost basis, subject to adequate potential profitability. Specialised properties occupied by the business should be valued on a depreciated replacement cost basis, subject to adequate potential profitability. Properties held as investments or which are surplus to requirements and are held pending disposal should be valued at market value."

Amend the first sentence of **Rule 29.2(d)** to read:

"(d) In the case of land currently being developed or with immediate

development potential, in addition to giving the market value in the state existing at the date of valuation, the valuation should include:"