PCP 10 Issued on 14 March 2002

THE PANEL ON TAKEOVERS AND MERGERS

CONSULTATION PAPER ISSUED BY

THE CODE COMMITTEE OF THE PANEL

SHAREHOLDER ACTIVISM AND ACTING IN CONCERT

REVISION PROPOSALS RELATING TO

NOTE 2 ON RULE 9.1 OF THE TAKEOVER CODE

Before it introduces or amends any Rules of the Takeover Code ("the Code") or the Rules Governing the Substantial Acquisitions of Shares ("the SARs"), the Code Committee of the Takeover Panel is required under its consultation procedures to publish the proposed Rules and amendments for public consultation and to consider responses arising from the public consultation process.

The Code Committee is therefore inviting comments on this Consultation Paper. Comments should reach the Code Committee by 9 May 2002.

Comments may be sent by email to:

consultation@disclosure.org.uk

Alternatively, please send comments in writing to:

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The Panel on Takeovers and Mergers
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It is the Code Committee's policy to make all responses to formal consultation available for public inspection unless the respondent requests otherwise.

1. Introduction

1.1 Levels of shareholder activism have increased in recent years. The Code Committee believes that this trend is likely to continue, particularly amongst institutional shareholders, following recent Government initiatives and also as a result of pressure from the institutional shareholders' underlying clients. Whilst it is not for the Code Committee to express a view one way or the other on the merits of shareholder activism or on the Government's initiatives, the Code Committee believes that it is extremely important that the implications of such action under the Code and the SARs are clearly understood by both practitioners and by the market generally.

1.2 Shareholder activism often takes the form of a group of shareholders collectively seeking, either through private meetings or through requisitioning an Extraordinary General Meeting ("EGM"), to make changes to the board of a company or to direct the board to pursue a particular course of action. At first sight, it may be thought that such action does not fall under the jurisdiction of the Code as, even if the activist shareholders' proposal is successful, control of the company does not pass

in the same way as it does when an offer becomes or is declared wholly unconditional. However, the Code Committee firmly believes that the Code is relevant in this context as, by taking such action, the activist shareholders may acquire management control of a company. As a result, the Code Committee believes that there are circumstances when such shareholders and their supporters should be considered to be acting in concert for the purposes of the Code.

1.3 If the activist shareholders and their supporters are considered to be acting in concert, the position under the Code will be the same as for any other "coming together" – i.e. the act of coming together to act in concert will not of itself have any Code consequences; if, however, any member of the concert party acquires shares carrying voting rights in the company in question thereafter, then the normal consequences under the Code and the SARs will apply, taking into account the aggregate shareholding of the concert party members.

1.4 For example, if the combined shareholdings of the concert party members total 29.9 per cent. of the voting rights of the company in question and if one of the members then acquires further shares carrying 0.1 per cent. or more of the voting rights, the mandatory bid obligation contained in Rule 9.1(a) of the Code will be triggered as a result. Likewise, if, following the coming together, the aggregate concert party holding is between 30 per cent. and 50 per cent. of the company in question and if any of the members of the concert party acquires any further shares carrying voting rights, the mandatory bid obligation contained in Rule 9.1(b) of the Code will be triggered as a result. The SARs, and particularly the requirement to disclose any dealings under SAR 3, will also be relevant where the aggregate holding of the concert party members after the proposed dealing is more than 15 per cent. but less than 30 per cent. of the voting rights of the company. This is on the basis that such parties will be considered to be acting by agreement or understanding for the purpose of SAR 5. If, however, no member of the concert party acquires any shares in the company in question during the period for which such persons are deemed to be acting in concert, there will be no consequences under the Code or the SARs.

1.5 In establishing the aggregate concert party holding (and the parameters of the concert party), normal Code principles will apply. Accordingly, where, for example, a fund management organisation is considered to be part of a concert party, then the entire group of companies of which it is a member will be presumed to be included in that concert party and any shareholdings

and/or dealings by any member of that group will be relevant for the purposes of the Code and the SARs. The Panel will, however, normally be willing to grant dispensations for certain activities, such as market-making and index tracking, subject to certain safeguards being observed. Similarly, the Panel will not generally regard the acquisition by the fund manager of a new portfolio which contains shares in the company in question as an acquisition of shares for the purposes of the Code and the SARs but rather as a coming together (such that no Code/SAR consequences will result from such an event).

1.6 This paper begins by explaining the Panel's current practice in this area. This practice has recently been the subject of extensive discussions between the Panel and certain institutional fund management representative groups and also representatives of industry. The amendments to the Code and the SARs proposed by the Code Committee, which are set out in full in Appendix 1 to this paper, take account of the issues raised in these discussions. As explained in paragraph 4.12 below, the Code Committee believes that, if implemented, these proposed amendments will mean that the Panel will be less likely than it has been in the past to rule that activist shareholders are acting in concert.

2. Current Position

2.1 The only place in which shareholder activism is specifically addressed in the Code is in Note 2 on Rule 9.1 which provides that:

"The Panel does not normally regard the action of shareholders voting together on particular resolutions as action which of itself should lead to an offer obligation but it might, in certain circumstances, hold that such joint action indicates that there is a group acting in concert with the result that subsequent purchases by any member of the group could give rise to such an obligation."

Type of joint action which will lead to a conclusion that parties are acting in concert

2.2 In applying Note 2 on Rule 9.1, the Panel's position is that where the joint voting action relates to a proposal aimed at achieving control of a company's board (a "board control-seeking" proposal), active co-operation

between shareholders may well lead to a presumption that they and any proposed directors are acting in concert. It is always a difficult judgement as to whether a particular proposal is board control-seeking. To take two examples, the Panel considers a proposal to change the entire board to be board control-seeking whereas a proposal to change just one director is not generally so regarded. However, many cases are much more marginal, particularly where it is contended that the proposed appointments will be for the benefit of all shareholders in the company and not just the activist shareholders. This may arise, for example, where there is no prior relationship between the proposed appointee(s) and the activist shareholders and where the proposed appointee(s) is/are ostensibly non-partisan towards the activist shareholders.

2.3 It should also be noted that this issue arises not only in the context of board changes, but also where other major changes to the company's policy are proposed.

Who is considered to be acting in concert?

2.4 To date, the Panel has always considered the shareholders who requisition an EGM and the proposed directors to be acting in concert where the proposal the subject of the resolution is deemed to be board control-seeking. In addition, shareholders who indicate their support for the requisitionists' proposal prior to the date of the requisition would generally be included in the concert party. However, the position is less clear-cut where, for example, shareholders have been approached by the requisitionists but no positive support has been forthcoming. In these cases, it is generally necessary to examine in detail the correspondence and co-operation between the parties to see whether this supports a conclusion of concertedness.

2.5 Once the requisition of an EGM has been announced, both the board of the company in question and the requisitionists will generally hold meetings with key shareholders with a view to soliciting support. The Panel's position is that an expression of support for one side or the other, including the granting of a proxy, would not of itself result in the shareholders approached being deemed to be acting in concert with that side. There may, however, be other factors evidencing concertedness.

2.6 It has frequently been put to the Panel that it should be prepared to draw a

distinction depending on the types of shareholders involved. For example, institutional shareholders often contend that it is not their business to acquire control of public companies, either on their own or in conjunction with other parties. Institutional shareholders also argue that proposals which they support are generally for the common good such that the Panel should treat their activities with less scepticism than, for example, those of private individuals. The Panel has considered this to be a relevant but not persuasive factor.

2.7 It has also been put to the Panel that because institutional shareholders are subject to a fiduciary duty to act in the best interests of their clients, it is incorrect to regard them as acting in concert when they are collectively taking activist measures. This is not an argument which has been accepted by the Panel. The Panel does not consider the concept of acting in concert to be incompatible with the concept of acting in accordance with one's fiduciary duties.

Time at which the parties are considered to have come into concert and the period for which they are considered to remain in concert

2.8 The shareholders who requisition an EGM, their supporters and the proposed directors may be deemed to have come into concert long before the date of the requisition itself. Applying the introduction to the definition of acting in concert, the Panel takes the position that such parties will come into concert once an agreement or understanding is reached between them in respect of a board control-seeking proposal. So, for example, shareholders who collectively approach the chairman of a company seeking to change the entire board and who threaten to requisition an EGM if their demands are not met have generally been considered to have been acting in concert from the time when they reached an agreement or understanding on their common objective. Accordingly, a concert party may be formed without an EGM ever having been requisitioned.

2.9 The question then arises as to when the activist shareholders and their supporters should be considered to be no longer acting in concert. Such shareholders often contend that, if they are successful in their objective, the concert party should be disbanded immediately following the successful outcome on the basis that their common purpose has then been achieved. On this analysis, the parties would come out of concert immediately following the EGM at which the relevant resolution is passed or, if the proposed changes are implemented without the need for an EGM,

at that time.

2.10 The Panel has, however, generally resisted this argument on the basis that, if the proposals were considered to be board control-seeking and they have been achieved, then by definition the concert party has obtained management control of the company. Given this, the Panel is reluctant to rule that the concert party should then fall away. As a result, the Panel has tended to rule in favour of the concert party continuing to exist until such time as it is satisfied that the parties are no longer acting in concert. The Panel has also normally considered the concert party to remain in existence if the activist shareholders are unsuccessful in their objective but it is likely that they may seek to pursue the matter at a future date. Again, institutional shareholders have argued that a more relaxed approach should be adopted where they are involved.

2.11 This is a difficult subject and the Code Committee believes that practitioners are not generally aware of the potential Code issues arising in this area. Accordingly, the Code Committee considers that it is extremely important for the Code to be amended to clarify the position. Furthermore, the Code Committee considers that the SARs should also be amended to make the SARs consistent with the Code in this area.

Q1 Do you agree that the Code and the SARs need to be amended to address the implications of collective shareholder activism?

3. Possible Approaches Rejected by the Code Committee

3.1 Before considering the proposed amendments in detail, the Code Committee believes that it would be helpful to set out certain approaches which it considered on this subject but subsequently rejected. These are as follows: (1) the Code should include a presumption that certain types of proposal will be deemed to be board control-seeking, and (2) the Panel should create a new form of exempt status for accredited fund managers.

Presumption that certain types of proposal should be deemed to be board control-seeking

3.2 As mentioned in paragraph 2.2 above, it can be difficult for the Panel to

determine categorically whether a particular proposal is board control-seeking. One option considered by the Code Committee was for the Code to provide that (a) certain proposals should be presumed to be board control-seeking – for example, any proposal to appoint or replace all or a majority of the board of directors of a company, and (b) other proposals may be considered to be board control-seeking depending on the application of various factors, including the positions to be held by the proposed directors and the relationship between them and the activist shareholders.

3.3 The Code Committee rejected this approach on the basis that it was very likely to result in a large number of proposals being deemed to be board control-seeking albeit that (a) there was in fact no desire by the activist shareholders to exercise on-going control over the company the subject of the proposal, and (b) the proposal was ostensibly in the interests of all shareholders in that company – for example, a proposal to replace a management team which has clearly failed the company. The Code Committee was concerned that this approach might have the detrimental effect of discouraging institutional shareholders from taking collective action on the ground that such intervention might frequently result in the institutions being deemed to be members of a concert party. Although, as explained above, there is nothing wrongful in acting in concert, the Code Committee recognises that institutional shareholders may be reluctant to put themselves in a position where they are exposed to the risk of being required to make a mandatory bid.

3.4 Whilst the Code Committee accepts that there are ways in which this risk can be addressed, each of the possible ways of doing so has potentially undesirable consequences. For example:

(a) although the shares in the company in question can be added to the activist shareholders' stop lists, this is undesirable for fund managers as it restricts their freedom of action (e.g. with regard to purchasing shares for new client portfolios);

(b) although the activist shareholders (and the market generally) may be of the opinion that the board as a whole has failed the company and should be replaced, the activist shareholders may decide to replace only one director in order to avoid any Code consequences. This might not be in the interests of the company or its shareholders generally; and

(c) the activist shareholders could ensure that their aggregate shareholding, when added to that of the parties approached, was well below 30 per cent. This could, however, render their collective action ineffective.

3.5 The Code Committee also believes that this issue needs to be considered in the light of the notion that, as mentioned in paragraph 2.6 above, institutional shareholders have no desire to control companies on an on-going basis. Indeed, the Code Committee understands that fund management organisations have been at pains to stress to the Panel that the sole agenda for institutional shareholders in taking collective action is to seek to maximise their investment return and that this operates not only to the benefit of the activist shareholders, but also to the benefit of all shareholders in the companies concerned.

3.6 It should be noted that the Government has recently been encouraging institutional shareholders to take a more active role in the companies in which they invest. This has culminated in the announcement in October 2001 that the Government intends to introduce legislation to make intervention in investee companies, when in shareholders' and beneficiaries' interests, a duty for trustees and fund managers. A consultation paper entitled "Encouraging Shareholder Activism" was also published by the Department for Work and Pensions and HM Treasury on 4 February 2002.

Creation of a new form of exempt status

3.7 One other proposition considered by the Code Committee was to introduce a new form of exempt status for accredited fund managers which should then be permitted to pursue activist measures free from the constraints of the Code. The Code Committee rejected this suggestion on the basis that it does not consider it appropriate for it to prescribe that certain fund management organisations can carry out such activities without constraint whereas others cannot, as the Code Committee believes that each case needs to be examined on its own facts to determine whether the particular proposal is board control-seeking. Although unusual, there may inevitably be cases from time to time where the collective actions of a group of fund management organisations which one would expect to pass the accredited test are in fact board control-seeking such that they should be considered

to be acting in concert.

4. Proposed Amendments to the Code and the SARs

4.1 The Code Committee believes that the purpose of any amendments to the Code and the SARs must be to catch those proposals where the activist shareholders may be seeking on-going control of a particular company but not to interfere with legitimate collective action designed to maximise overall shareholder value. The Code Committee believes that this objective can be achieved by the Code providing that the determination as to whether a particular proposal is board control-seeking is to be carried out by reference to a list of factors (which should be set out in the Code). Furthermore, the Code Committee believes that the key factor should be the relationship between the activist shareholders and the proposed directors – only if this gives rise to concern will it be necessary to go on to consider the other factors.

4.2 The full text of the proposed amendments to the Code, which the Code Committee proposes should replace the existing Note 2 on Rule 9.1, is set out in Part A of Appendix 1 to this paper. The Code Committee also proposes to introduce a new Note 5 on SAR 5 to make clear that where parties are considered to be acting in concert pursuant to Note 2 on Rule 9.1 (as amended), they will also be considered to be acting by agreement or understanding for the purpose of SAR 5. This new Note is set out in Part B of Appendix 1 to this paper. As explained in paragraph 9.1 of PCP 9 on Employee Benefit Trusts, which is being issued at the same time as this paper, the Code Committee proposes to include a similar Note on SAR 5 in respect of the proposed new Note 5 on Rule 9.1. If, following the consultation exercises, both Notes are considered appropriate, the Code Committee will amalgamate both these provisions into a single Note on SAR 5.

4.3 There are three key areas in which the Code Committee believes that clarification is required: (1) the types of proposal which are considered to be board control-seeking, (2) the point at which the concert party will be deemed to be formed, and (3) the point at which the parties will be deemed to be no longer acting in concert.

What proposals will be considered to be board control-seeking?

4.4 In determining whether a proposal is board control-seeking, the Panel will have regard to a number of factors, including the following:

(a) the relationship between any of the proposed directors and any of the activist shareholders or their supporters. Relevant factors in this regard will include:

(i) whether there is or has been any prior relationship between any of the activist shareholders and any of the proposed directors. For example, are any of the proposed directors employees, directors, officers or consultants of any of the activist shareholders or of any of their group companies or of any other company in which any of the activist shareholders or any of their group companies has invested?

(ii) whether there are any agreements, arrangements or understandings between any of the activist shareholders and any of the proposed directors with regard to their proposed appointment. For example, are any of the proposed directors required to report to any of the activist shareholders?

(iii) whether any of the proposed directors will be remunerated in any way by any of the activist shareholders as a result of or following their appointment.

If, on this analysis, there is no relationship between any of the proposed directors and any of the activist shareholders or their supporters, or if any such relationship is insignificant, then the proposal will not be considered to be board control-seeking (even if the activist shareholders propose to replace the entire board) such that the parties will not be deemed to be acting in concert and it will not be necessary for the factors set out at paragraphs (b) to (f) below to be considered.

If, however, such a relationship does exist which is not insignificant, then the proposal may be deemed to be board control-seeking, depending on the application of the factors set out at paragraph (b) below or, if appropriate, paragraphs (b) to (f) below.

The question as to whether a particular relationship is insignificant will need to be examined on the facts of each case. However, as an example, a proposal by certain institutional shareholders to make changes to the board of a company, including the appointment of X and Y as non-executive directors, will not be considered to be board control-seeking if the only relationship between the activist shareholders and the proposed directors is the fact that X and Y are also non-executive directors of separate FTSE100 companies in which the activist shareholders hold shares in similar proportions to their peers;

(b) the number of directors to be appointed or replaced compared with the total size of the board.

If it is proposed to replace the entire board, or if the implementation of the proposal would result in the proposed directors representing a majority of the directors on the board, then the proposal will normally be deemed to be board control-seeking.

If the implementation of the proposal would not result in the proposed directors representing a majority of the directors on the board, then the proposal will not normally be deemed to be board control-seeking (even where one or more of the proposed directors is connected to one or more of the activist shareholders) unless an analysis of the factors set out at paragraphs (c) to (f) below would indicate otherwise. In particular, if it is proposed to appoint or replace only one director, the proposal will not normally be considered to be board control-seeking, even if, for example, the director to be appointed or replaced is the chief executive and the new appointee is connected to one or more of the activist shareholders;

(c) the board positions held by the directors being replaced and to be held by the proposed directors.

Accordingly, a proposal to replace two or more of the chairman, chief executive and finance director would normally be more likely to be considered to be board control-seeking than a proposal to appoint or replace two or more non-executive directors;

(d) the nature of the mandate, if any, for the proposed directors.

For example, where it is proposed that the new directors be mandated to effect fundamental changes to the business sought by the activist shareholders, this would suggest a move to seek control over the direction of the company. If, however, the rationale for appointing the new directors is solely to tighten up on the company's corporate governance, that would be of less concern;

(e) whether any of the activist shareholders will benefit, either directly or indirectly, as a result of the implementation of the proposal other than through its holding of shares in the company.

For example, a proposal which would result in the company entering into a major contractual arrangement with one of the activist shareholders would render the proposal more likely to be considered to be board control-seeking; and

(f) the relationship between the proposed directors and the existing directors and/or the relationship between the existing directors and the activist shareholders.

This may be relevant where, for example, the proposed directors will not themselves represent a majority of the directors on the board of the company but, because of an existing relationship between them and the existing directors or because of an existing relationship between the existing directors and the activist shareholders, a control position on the company's board will nonetheless be created.

4.5 The approach outlined above will also be relevant in an analysis of whether a proposal is board control-seeking albeit that on its face it does not require a change to the company's board. This is on the basis that activist shareholders rarely put a proposal to a company's board in the absence of an explicit or implicit threat to seek to make changes to the board in the event that the proposal is not implemented. Accordingly, an analysis as to whether such a proposal should be considered to be board

control-seeking will be carried out by reference to an application of the factors set out at (a) to (f) above to the threat made to the board in the event that the activist shareholders' proposal is not implemented – i.e. if the activist shareholders inform the board that unless their proposal is implemented, they will requisition an EGM to replace the three executive directors on a board of five directors with A, B and C, all of whom are appointees of the activist shareholders, then a concert party will arise; if, however, A, B and C are entirely independent of the activist shareholders, or if they are not independent of the activist shareholders but it is intended that they will be three non-executives on a board of seven, then in either case there will be no concert party. If no threat, either explicit or implicit, is made to make changes to the board, then the proposal will not normally be considered to be board control-seeking unless there are other factors which suggest that the parties are in fact acting in concert.

4.6 The Code Committee proposes that, in accordance with current practice, the requisitionists of an EGM convened to consider a board control-seeking proposal, together with their supporters as at the date of the requisition, will be considered to be acting in concert with each other and with the proposed directors. However, once the requisition of an EGM has been announced, the soliciting of support (including proxies) by either the activist shareholders or the incumbent directors will not normally result in the shareholders approached being deemed to be acting in concert with either side, subject to there being no other factors evidencing concertedness.

Q2 Do you agree that the determination as to whether a proposal is board control-seeking should be carried out by reference to the list of factors suggested?

Investment trusts

4.7 The Code Committee proposes that a similar approach should also be adopted with regard to a proposal to change some or all of the directors of and/or the investment manager of an investment trust company. Accordingly, the initial question will be whether there is any relationship between the proposed directors and/or the proposed new investment manager on the one hand and any of the activist shareholders on the other.

4.8 If there is no such relationship or if any such relationship is insignificant, then the proposal will not be considered to be control-seeking, even if the activist shareholders propose to change the entire board and the investment manager. If, however, there is such a relationship which is not insignificant, then it will be necessary to consider the factors set out at paragraph (b) above or, if appropriate, paragraphs (b) to (f) above.

4.9 As with non-investment trust companies, if it is proposed to appoint or replace only one director, then the proposal will not normally be considered to be control-seeking even if the new appointee is connected to the activist shareholders. If it is proposed to replace the entire board, or if the implementation of the proposal would result in the proposed directors representing a majority of the directors on the board, then the proposal will normally be deemed to be control-seeking such that the activist shareholders, the proposed directors and, if appropriate, the proposed new investment manager will be deemed to be acting in concert. If, however, the implementation of the proposal would not result in the proposed directors representing a majority of the directors on the board, then the proposal will not normally be considered to be control-seeking (even where one or more of the proposed directors is connected to one or more of the activist shareholders) unless an analysis of the factors set out at paragraphs (c) to (f) above would indicate otherwise, save that the proposed appointment of a new investment manager will be an additional relevant factor in these circumstances, just as it was for the test in paragraph (a) above. For example, a proposal to replace three out of seven directors and the investment manager is more likely to be considered to be control-seeking than a proposal to replace just three out of seven directors without replacing the investment manager.

Q3 In the light of the approach proposed to be adopted in respect of non-investment trust companies referred to above, do you agree with the approach proposed to be adopted in respect of investment trust companies?

When will the concert party be deemed to be formed?

4.10 The Code Committee proposes that shareholders who back or support a board control-seeking proposal (as determined above), together with the proposed directors, should be deemed to have come into concert once an agreement or understanding is reached between them in respect of a board control-seeking proposal. In terms of timing, this is consistent with the

definition of acting in concert and with the Panel's approach in a normal offer situation to the question of whether parties are acting in concert. This will mean that shareholders who make a joint approach to the board of a company or its chairman to threaten a board control-seeking proposal will be considered to be acting in concert, although it will almost certainly be the case that they will have come into concert some time prior to that date.

Q4 Do you agree that shareholders who back or support a board control-seeking proposal, together with the proposed directors, should be deemed to have come into concert once an agreement or understanding is reached between them in respect of a board control-seeking proposal?

When will the parties be deemed to be no longer acting in concert?

4.11 The Code Committee agrees with the Panel's existing practice that it is not appropriate for parties which have been successful in implementing a board control-seeking proposal to be taken out of concert immediately following the successful conclusion of their proposal (notwithstanding the argument that their purpose in coming into concert has then been achieved). The Code Committee is also of the view that it would be inappropriate for the Code to be unduly prescriptive in this area as each case needs to be considered on its own facts. However, the Code Committee believes that there are a number of factors which will usually be relevant in this context in assessing whether the parties are still acting in concert and that it would be helpful for these to be set out in the Code. These factors include the following:

(a) whether the parties have been successful in achieving their stated objective. If the parties have been successful in implementing a proposal which was considered to be board control-seeking, then they will have achieved management control of the company and so, consistent with Note 1 on the definition of acting in concert, the starting point would be to say that they should remain in concert until the Panel is satisfied that this is no longer the case. This may result in the activist shareholders remaining in concert for some months following, for example, the EGM. Where the activist shareholders' proposal is rejected, in whole or in part and whether at an EGM or otherwise, there would be grounds for keeping the parties in concert if there is any suggestion that the parties may wish to renew the proposal at a future date. If, however, the proposal is abandoned, then, subject to a "cooling off" period, it would normally be appropriate for the

parties to be taken out of concert;

(b) whether there is any evidence of ongoing concertedness between the relevant parties – for example, regular correspondence or meetings;

(c) whether there is any evidence of an ongoing struggle between the activist shareholders and the board. Clearly, the dispute may be prolonged by either party and in these circumstances it would be inappropriate for the parties to be taken out of concert;

(d) the types of activist shareholders involved and the relationship between them; and

(e) the relationship between the activist shareholders and the proposed/new directors.

4.12 The Code Committee anticipates that if the approach outlined in paragraphs 4.4 to 4.9 above is adopted as to the determination of what constitutes a board control-seeking proposal, then it is likely that concert parties will be deemed to exist in this context less frequently than has been the case in the past. The corollary of this is that, once formed, such a concert party should be deemed to continue to exist until the Panel is satisfied that the parties involved are no longer acting in concert.

4.13 The Code Committee does not believe that these proposals will result in any additional costs to either companies or their shareholders.

Q5 Do you agree that an analysis of the above factors is the correct way of determining when such parties should be taken out of concert?

APPENDIX I

Part A: Revised Note 2 on Rule 9.1

"2. Collective shareholder action

The Panel does not normally regard the action of shareholders voting together on a particular resolution as action which of itself indicates that such parties are acting in concert. However, the Panel will normally deem shareholders who requisition or threaten to requisition an extraordinary general meeting of a company to consider a board control-seeking proposal, together with their supporters as at the date of the requisition or threat, to be acting in concert with each other and with the proposed directors. Such parties will be deemed to have come into concert once an agreement or understanding is reached between them in respect of a board control-seeking proposal.

In determining whether a proposal is board control-seeking, the Panel will have regard to a number of factors, including the following:

(a) the relationship between any of the proposed directors and any of the shareholders proposing or supporting them. Relevant factors in this regard will include:

(i) whether there is or has been any prior relationship between any of the activist shareholders and any of the proposed directors;

(ii) whether there are any agreements, arrangements or understandings between any of the activist shareholders and any of the proposed directors with regard to their proposed appointment; and

(iii) whether any of the proposed directors will be remunerated in any way by any of the activist shareholders as a result of or following their appointment.

If, on this analysis, there is no relationship between any of the proposed directors and any of the activist shareholders, or if any such relationship is insignificant, then the proposal will not be considered to be board control-seeking such that the parties will not be deemed to be acting in concert and it will not be necessary for the factors set out at paragraphs (b) to (f) below to be considered. If, however, such a relationship does exist which is not insignificant, then the proposal may be deemed to be board control-seeking, depending on the application of the

factors set out at paragraph (b) below or, if appropriate, paragraphs (b) to (f) below;

(b) *the number of directors to be appointed or replaced compared with the total size of the board.*

If it is proposed to appoint or replace only one director, then the proposal will not normally be considered to be board control-seeking. If it is proposed to replace the entire board, or if the implementation of the proposal would result in the proposed directors representing a majority of the directors on the board, then the proposal will normally be deemed to be board control-seeking.

If, however, the implementation of the proposal would not result in the proposed directors representing a majority of the directors on the board, then the proposal will not normally be considered to be board control-seeking unless an analysis of the factors set out at paragraphs (c) to (f) below would indicate otherwise;

(c) *the board positions held by the directors being replaced and to be held by the proposed directors;*

(d) *the nature of the mandate, if any, for the proposed directors;*

(e) *whether any of the activist shareholders will benefit, either directly or indirectly, as a result of the implementation of the proposal other than through its holding of shares in the company; and*

(f) *the relationship between the proposed directors and the existing directors and/or the relationship between the existing directors and the activist shareholders.*

In respect of a proposal to replace some or all of the directors of and/or the investment manager of an investment trust company, the relationship between the proposed new investment manager and any of the activist shareholders will also be relevant to the analysis of the factors set out at paragraph (a) above and, if appropriate, paragraphs (c) to (f) above.

In determining whether it is appropriate for such parties to be deemed no longer to be acting in concert, the Panel will take account of the following factors:

(a) whether the parties have been successful in achieving their stated objective;

(b) whether there is any evidence to indicate that the parties should continue to be deemed to be acting in concert;

(c) whether there is any evidence of an ongoing struggle between the activist shareholders and the board of the company;

(d) the types of activist shareholders involved and the relationship between them; and

(e) the relationship between the activist shareholders and the proposed/new directors."

Part B: New Note 5 on Rule 5 of the SARs

"5. Collective shareholder action

Persons who are deemed to be acting in concert pursuant to Note 2 on Rule 9.1 of the Code will be deemed to be acting by agreement or understanding for the purpose of this Rule."

APPENDIX II: QUESTIONS FOR CONSULTATION

1. Do you agree that the Code and the SARs need to be amended to address the implications of collective shareholder activism?

2. **Do you agree that the determination as to whether a proposal is board control-seeking should be carried out by reference to the list of factors suggested?**

3. **In the light of the approach proposed to be adopted in respect of non-investment trust companies, do you agree with the approach proposed to be adopted in respect of investment trust companies?**

4. **Do you agree that shareholders who back or support a board control-seeking proposal, together with the proposed directors, should be deemed to have come into concert once an agreement or understanding is reached between them in respect of a board control-seeking proposal?**

5. **Do you agree that an analysis of the factors listed is the correct way of determining when such parties should be taken out of concert?**