

RS 2012/3 15 May 2013

THE TAKEOVER PANEL

COMPANIES SUBJECT TO THE TAKEOVER CODE

**RESPONSE STATEMENT BY THE
CODE COMMITTEE OF THE PANEL FOLLOWING
THE CONSULTATION ON PCP 2012/3**

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1. Introduction and summary

(a) Background

1.1 On 5 July 2012, the Code Committee of the Takeover Panel (the “**Code Committee**”) published a public consultation paper (“**PCP 2012/3**” or the “**PCP**”) in relation to “Companies subject to the Takeover Code”. PCP 2012/3 set out proposed amendments to the Takeover Code (the “**Code**”) with regard to the jurisdiction of the Takeover Panel (the “**Panel**”).

1.2 The principal proposal was the removal from section 3(a) of the Introduction to the Code of the “**residency test**”, i.e. the provision by virtue of which the Code applies to offers for certain companies only if they:

“are considered by the Panel to have their place of central management and control in the United Kingdom, the Channel Islands or the Isle of Man”.

1.3 At present, the residency test does not apply to an offer for a company which has its registered office in the UK, the Channel Islands or the Isle of Man if any of its securities are admitted to trading on:

- (a) a **regulated market** (as defined in the Markets in Financial Instruments Directive (“**MiFID**”)) in the UK, such as the Main Market of the London Stock Exchange or the Main Board of the ICAP Securities & Derivatives Exchange (“**ISDX**”); or
- (b) any stock exchange in the Channel Islands or the Isle of Man, such as the Channel Islands Stock Exchange (the “**CISX**”).

In other words, the Code currently applies (and will continue to apply) to an offer for such a company regardless of its place of central management and control.

- 1.4 In addition, the residency test does not apply to an offer for a company which has its registered office in the UK if its securities are admitted to trading on a regulated market in one or more member states of the European Economic Area (the “**EEA**”) but not on a regulated market in the UK. An offer for such a company will be subject to the “**shared jurisdiction**” regime provided under Article 4(2)(e) of the Directive on Takeover Bids (the “**Directive**”).
- 1.5 However, the residency test does currently apply to offers for **other public companies** which have their registered offices in the UK, the Channel Islands or the Isle of Man. This includes companies whose securities:
- (a) are admitted to trading on a **multilateral trading facility** (as defined in MiFID) (an “**MTF**”) in the UK, such as the London Stock Exchange’s AIM market or the ISDX Growth Market;
 - (b) are admitted to trading outside the UK, the Channel Islands and the Isle of Man, other than on a regulated market in an EEA member state other than the UK, for example, on the New York Stock Exchange (the “**NYSE**”); or
 - (c) are not admitted to trading on any public market.
- 1.6 The PCP also proposed amendments to the “**ten year rule**”, i.e. the provision by virtue of which the Code applies to an offer for a **private company** which has its registered office in the UK, the Channel Islands or the Isle of Man and which satisfies the residency test, but only if, broadly, in the previous 10 years:
- (a) any of its securities were at any time admitted to the Official List; or
 - (b) dealings and/or prices at which persons were willing to deal in any of its securities were published on a regular basis for a continuous period of at least six months; or

- (c) any of its securities were at any time subject to a marketing arrangement as described in section 693(3)(b) of the Companies Act 2006; or
- (d) it was at any time required to file a prospectus for the issue of securities with the registrar of companies or any other relevant authority in the UK, the Channel Islands or the Isle of Man, or to have a prospectus approved by the UKLA.

1.7 In summary, it was proposed that the ten year rule should be amended so that:

- (a) the requirement for a company's securities to have been "admitted to the Official List" would be replaced with a requirement for the securities to have been "admitted to trading on a regulated market or a multilateral trading facility in the United Kingdom or on any stock exchange in the Channel Islands or the Isle of Man"; and
- (b) the requirement for a company to have been "required to file" a prospectus would be replaced with a requirement for the company actually to have filed a prospectus.

1.8 In addition, the PCP proposed certain minor, clarificatory and consequential amendments to the Code.

(b) *Responses to the consultation*

1.9 The consultation period in relation to PCP 2012/3 ended on 28 September 2012. The Code Committee received comments on the consultation questions from 17 respondents, including from companies, financial advisers, trade associations, professional bodies and representatives of the legal professions in England and Wales, Jersey and Guernsey. The 13 respondents who submitted comments on a non-confidential basis are listed in Appendix A to this Response Statement and copies of their responses have today been published on the Panel's website at www.thetakeoverpanel.org.uk. The remaining four

respondents submitted their comments on a confidential basis. The Code Committee thanks all of the respondents for their comments.

- 1.10 There was unanimous support for the proposed removal of the residency test insofar as it applies to companies which have their registered offices in the UK, the Channel Islands or the Isle of Man and which have securities admitted to trading on an MTF in the UK.
- 1.11 However, a number of respondents queried whether it would be appropriate for the residency test to be removed with respect to a company which has its registered office in the UK, the Channel Islands or the Isle of Man if its securities were admitted to trading solely on an “**overseas market**” (i.e. a market outside the UK, the Channel Islands and the Isle of Man, except* for a regulated market in an EEA member state other than the UK). In particular, a number of respondents considered that:
- (a) shareholders in a UK, Channel Islands or Isle of Man company with **securities admitted to trading on an MTF in the UK** would expect to be protected by the Code, regardless of its place of central management and control; but
 - (b) shareholders in a UK, Channel Islands or Isle of Man company with **securities admitted to trading solely on an overseas market** would be likely to expect to be protected by the regulatory requirements (if any) applicable in the overseas market and, correspondingly, might not expect to be protected by the Code.

In addition, certain respondents considered that, in the case of the companies described in paragraph (b) above, it would be possible that the provisions of the Code and the regulatory requirements applicable to the overseas market could conflict or overlap, potentially causing confusion

* in the case of a UK company only

among shareholders and prospective offerors and consequently increasing compliance costs.

(c) *The Code Committee's conclusions*

1.12 The Code Committee has concluded that the residency test should no longer apply to offers for companies which have their registered offices in the UK, the Channel Islands or the Isle of Man and which have securities admitted to trading on an MTF in the UK. This means that, regardless of the company's place of central management and control, the Code will apply to offers for all companies which have their registered offices in the UK, the Channel Islands or the Isle of Man if any of their securities are admitted to trading on:

- (a) a regulated market in the UK (e.g. the Main Market of the London Stock Exchange or the ISDX Main Board) or any stock exchange in the Channel Islands or the Isle of Man (e.g. the CISX);
- (b) an MTF in the UK (e.g. AIM or the ISDX Growth Market); or
- (c) a regulated market in one or more member states of the EEA but not on a regulated market in the UK (but only with respect to the "employee information and company law matters" described in the "shared jurisdiction" provisions of paragraph (iii) of section 3(a) of the Introduction to the Code)*.

1.13 However, in the light of comments received, the Code Committee has concluded that the residency test should continue to apply to a company which has its registered office in the UK, the Channel Islands or the Isle of Man if it is:

- (a) a public company whose securities are admitted to trading solely on a public market which is not a regulated market (either in the UK or* in

* UK companies only

another EEA member state), an MTF in the UK, or a stock exchange in the Channel Islands or the Isle of Man;

- (b) a public company whose securities are not traded on any public market; or
- (c) a private company.

In other words, it will continue to be the case that the Code will apply to an offer for such a company only if it is considered by the Panel to have its place of central management and control in the UK, the Channel Islands or the Isle of Man and, in the case of a private company, if it also satisfies the ten year rule (as amended).

- 1.14 A table summarising the application of the Code to companies which are registered in the UK, the Channel Islands and the Isle of Man, both before and after the implementation of the amendments set out in this Response Statement, is set out in Appendix B.

(d) Code amendments

- 1.15 The amendments to the Code which the Code Committee has adopted are set out in Appendix C to this Response Statement. In Appendix C, underlining indicates new text and striking-through indicates deleted text, as compared with the current provisions of the Code.

(e) Implementation

- 1.16 The amendments to the Code introduced as a result of this Response Statement will take effect on Monday, 30 September 2013. The implementation of the amendments is further discussed in section 5 below.
- 1.17 Amended pages of the Code will be published prior to the implementation date.

2. The residency test

Q1	Do you agree that the residency test should be removed from the Code?
Q2	Do you agree that the residency test should not be retained in relation to offers for certain categories of company?
Q3	Do you have any comments on the proposed amendments to sections 3(a)(i) and (ii) of the Introduction to the Code?

(a) *Introduction*

2.1 As explained in section 2 of PCP 2012/3, at present, the Code will apply to an offer for a company if it falls within any of paragraphs (i), (ii) or (iii) of section 3(a) of the Introduction to the Code. In summary, section 3(a) provides as follows:

- (a) *companies admitted to trading on a regulated market in the UK or a stock exchange in the Channel Islands or the Isle of Man:* under paragraph (i) of section 3(a) of the Introduction, the Code applies to an offer (not being a “shared jurisdiction” offer falling within paragraph (iii) of section 3(a)) for a company which has its registered office in the UK, the Channel Islands or the Isle of Man if any of its securities (see the definition of “**shares or securities**” in the Definitions Section of the Code) are admitted to trading on a regulated market in the UK or on any stock exchange in the Channel Islands or the Isle of Man;
- (b) *other companies which satisfy the residency test:* under paragraph (ii) of section 3(a) of the Introduction, the Code applies to an offer (not being an offer falling within paragraph (i) or paragraph (iii) of section 3(a)) for a public or private company which has its registered office in the UK, the Channel Islands or the Isle of Man and which has its place of central management and control in the UK, the Channel Islands or the Isle of Man, but, in relation to a private company, only when it satisfies the ten year rule (as described in paragraph 1.6 of this Response Statement); and

- (c) “*shared jurisdiction*”: under paragraph (iii) of section 3(a) of the Introduction, certain provisions only of the Code apply to an offer (as defined in the second paragraph of section 3(b) of the Introduction to the Code) for, broadly:
- (i) a company which has its registered office in the UK and whose securities are admitted to trading on a regulated market in one or more EEA member states but not on a regulated market in the UK;
 - (ii) a company which has its registered office in an EEA member state other than the UK and whose securities are admitted to trading on a regulated market in the UK and not on a regulated market in any other EEA member state; and
 - (iii) in certain circumstances, a company which has its registered office in an EEA member state other than the UK and whose securities are admitted to trading on regulated markets in more than one EEA member state, including the UK, but not on a regulated market in the EEA member state in which it has its registered office.

In such cases, jurisdiction over the offer will be shared between the Panel and the supervisory authority for takeovers in the relevant EEA member state on the basis set out in Article 4(2)(e) of the Directive.

- 2.2 In section 2 of the PCP, the Code Committee proposed that the requirement for companies which fall within paragraph (ii) of section 3(a) of the Introduction to the Code to have their place of central management and control in the UK, the Channel Islands or the Isle of Man should be removed from the Code. The Code Committee proposed that the “residency test” should be removed for all categories of company referred to in paragraph (ii) of section 3(a) of the Introduction. In other words, it was proposed that the

residency test should be removed with respect to the following companies which have their registered offices in the UK, the Channel Islands or the Isle of Man:

- (a) public companies whose securities are admitted to trading on an MTF in the UK;
- (b) public companies whose securities are admitted to trading solely on an overseas market (see paragraph 1.11);
- (c) public companies whose securities are not admitted to trading on a public market; and
- (d) private companies which satisfy the ten year rule.

Proposed amendments to the current paragraphs (i) and (ii) of section 3(a) of the Introduction to the Code were set out in paragraph 2.17 of the PCP.

(b) *Summary of responses*

2.3 All of the respondents who commented on the issue agreed (or did not disagree) with the proposal that the residency test should be removed with respect to public companies which have their registered offices in the UK, the Channel Islands or the Isle of Man and whose securities are admitted to trading on an MTF in the UK.

2.4 A number of respondents considered that the current uncertainty for market participants about the application of the Code to such companies was unhelpful and they welcomed the clarity that the proposed amendments would provide. Certain respondents also welcomed the fact that the proposed amendments would resolve the current situation whereby the applicability of the Code to such a company could change as a result of changes to the composition of its board or to the residency of certain of its directors.

2.5 However, two thirds of the respondents considered that the residency test should be retained for certain categories of company (or that the Code should not apply to those certain categories of company). In particular, respondents queried whether it was appropriate for the Code to apply to an offer for a company which has its registered office in the UK, the Channel Islands or the Isle of Man but whose securities are admitted to trading solely on an overseas market. A number of respondents considered that:

- (a) shareholders in a UK, Channel Islands or Isle of Man company with securities admitted to trading on an MTF in the UK would expect to be protected by the Code, regardless of its place of central management and control; but
- (b) shareholders in a UK, Channel Islands or Isle of Man company with securities admitted to trading solely on an overseas market would be likely to expect to be protected by the regulatory requirements (if any) applicable in the overseas market and, correspondingly, might not expect to be protected by the Code.

In addition, certain respondents considered that, in the case of the companies described in paragraph (b) above, it would be possible that the provisions of the Code and the regulatory requirements applicable to the overseas market could conflict or overlap, potentially causing confusion among shareholders and prospective offerors and consequently increasing compliance costs.

2.6 Some respondents considered that, if the residency test were to be removed for all categories of company, shareholders in companies which are not currently subject to the Code should be given the opportunity to decide whether the Code should apply to the company by means of a shareholder resolution whereby they could elect for the company either to “opt in” or to “opt out” of the Code’s application (depending on how the relevant provisions of the Code were framed).

- 2.7 One respondent queried whether it was appropriate for the Code to apply at all to public companies whose securities are not admitted to trading on a public market and suggested that the removal of such companies from the scope of the Code's jurisdiction could relieve such companies of a significant regulatory burden.
- 2.8 Few respondents commented on Question 3, which related to the drafting of the proposed amendments to paragraphs (i) and (ii) of section 3(a) of the Introduction to the Code.

(c) *Conclusions*

- 2.9 Given that respondents unanimously agreed with the proposal that a company which has:

- (a) its registered office in the UK, the Channel Islands or the Isle of Man;
and
- (b) its securities admitted to trading on an MTF in the UK

should not be required to have its place of central management and control in the UK, the Channel Islands or the Isle of Man in order for an offer for the company to be subject to the Code, the Code Committee has decided to proceed with the adoption of that element of the proposed amendments.

- 2.10 However, given that a significant majority of respondents disagreed with the proposal to remove the residency test from the Code insofar as it applies to public companies which have their registered offices in the UK, the Channel Islands or the Isle of Man and whose securities are admitted to trading solely on an overseas market, and in the light of the concerns expressed by those respondents, the Code Committee has decided not to proceed with that element of the proposed amendments.

- 2.11 In addition, the Code Committee has concluded that the residency test should also be retained insofar as it applies to public and private companies whose securities are not admitted to trading on a public market.
- 2.12 Accordingly, the Code Committee has not adopted the amendments to paragraphs (i) and (ii) of section 3(a) of the Introduction to the Code proposed in the PCP (other than the proposed amendments to the ten year rule – see section 3 of this Response Statement). Instead, the Code Committee has made the following amendment to paragraph (i) of section 3(a) of the Introduction:

**“3 COMPANIES, TRANSACTIONS AND PERSONS
SUBJECT TO THE CODE**

...

(a) Companies

- (i) UK, Channel Islands and Isle of Man registered and traded companies

The Code applies to all offers (not falling within paragraph (iii) below) for companies and Societas Europaea (and, where appropriate, statutory and chartered companies) which have their registered offices* in the United Kingdom, the Channel Islands or the Isle of Man if any of their securities are admitted to trading on a regulated market or a multilateral trading facility in the United Kingdom or on any stock exchange in the Channel Islands or the Isle of Man.”.

3. The ten year rule

Q4	Do you have any comments on the proposed amendments to the ten year rule and the introduction of a new definition of “multilateral trading facility”?
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(a) Introduction

- 3.1 As described in paragraph 1.6 of this Response Statement, under paragraph (ii) of section 3(a) of the Introduction, the Code currently applies to offers for private companies which have their registered offices in the UK, the Channel

Islands or the Isle of Man and which have their place of central management and control in the UK, the Channel Islands or the Isle of Man, but only if:

- “(A) any of their securities have been admitted to the Official List at any time during the 10 years prior to the relevant date; or
- (B) dealings and/or prices at which persons were willing to deal in any of their securities have been published on a regular basis for a continuous period of at least six months in the 10 years prior to the relevant date, whether via a newspaper, electronic price quotation system or otherwise; or
- (C) any of their securities have been subject to a marketing arrangement as described in section 693(3)(b) of the Act at any time during the 10 years prior to the relevant date; or
- (D) they were required to file a prospectus for the issue of securities with the registrar of companies or any other relevant authority in the United Kingdom, the Channel Islands or the Isle of Man or to have a prospectus approved by the UKLA at any time during the 10 years prior to the relevant date.”.

3.2 In section 3 of the PCP, the Code Committee proposed certain amendments to the “ten year rule”, as follows:

- (a) replacing the reference in paragraph (ii)(A) of section 3(a) of the Introduction to the Code to a company’s securities having been “admitted to the Official List” during the previous 10 years with a reference to its securities having been “admitted to trading on a regulated market or a multilateral trading facility in the United Kingdom or on any stock exchange in the Channel Islands or the Isle of Man”; and
- (b) replacing the reference in paragraph (ii)(D) of section 3(a) of the Introduction to the Code to a company having been “required to file a prospectus” in the previous 10 years with a reference to its having “filed a prospectus”.

3.3 In section 3 of the PCP, the Code Committee also proposed the introduction into the Definitions Section of the Code of a new definition of “**multilateral**

trading facility". That new definition was adopted in Instrument 2013/1, which was published by the Code Committee on 28 March 2013, and was introduced into the Definitions Section of the Code with effect from 1 April 2013.

(b) Summary of responses

- 3.4 There were few comments on the proposed amendments to the ten year rule.
- 3.5 Two respondents suggested that consideration might be given to reducing the period of time for which paragraphs (ii)(A) to (D) of section 3(a) of the Introduction to the Code applies to private companies from ten years to, say, five, or even three, years. The Code Committee considers that the question of reducing the period of time for which paragraphs (ii)(A) to (D) of section 3(a) of the Introduction applies to private companies falls outside the scope of the consultation in the PCP.
- 3.6 Two respondents made the suggestion, which the Code Committee has accepted, that paragraph (ii)(D) of section 3(a) of the Introduction to the Code should require the prospectus to have been filed on a publicly available record. One of those respondents noted that, under financial services legislation in Jersey, there was, in certain circumstances, a requirement for a "prospectus" to be "filed" on a private record. The respondent considered that paragraph (ii)(D) of section 3(a) of the Introduction should apply only where there was a requirement for a prospectus to be filed on a public record. The other respondent considered that a requirement for a prospectus to have been publicly filed would be consistent with the aim of ensuring that the application of the Code was clear from publicly available sources.

(c) Conclusions

- 3.7 In the light of the above, the Code Committee has adopted the amendments to paragraphs (ii)(A) and (D) of section 3(a) of the Introduction to the Code proposed in the PCP, subject to certain minor revisions.

3.8 In addition to the introduction into paragraph (ii)(D) of the Introduction of a requirement for a prospectus to have been filed on a public record (as mentioned above), the Code Committee has:

- (a) deleted the reference in paragraph (ii)(D) to a private company having had a prospectus approved by the UKLA; and
- (b) amended the reference in paragraph (ii)(D) to the filing of a prospectus for the “issue” of securities” so as to refer to the filing of a prospectus for the “offer, admission to trading or issue” of securities.

The Code Committee considers that it is preferable for the test in paragraph (ii)(D) to have one limb, rather than two, and the amendment of paragraph (ii)(D) in this way is not intended to alter the effect of that aspect of the provision.

3.9 Paragraphs (ii)(A) and (D) of section 3(a) of the Introduction to the Code will therefore be as follows:

“(ii) Other companies

The Code also applies ... in relation to private companies only when:

- (A) any of their securities have been admitted to ~~the Official List trading on a regulated market or a multilateral trading facility in the United Kingdom or on any stock exchange in the Channel Islands or the Isle of Man~~ at any time during the 10 years prior to the relevant date; or

...

- (D) they have filed ~~were required to file~~ a prospectus for the offer, admission to trading or issue of securities with the registrar of companies or any other relevant authority in the United Kingdom, the Channel Islands or the Isle of Man (but in the case of any other such authority only if the filing is on a public record) ~~or to have a prospectus approved by the UKLA~~ at any time during the 10 years prior to the relevant date.”.

(d) Jersey companies

3.10 One respondent, whose response included the comments of a number of Jersey law firms, noted that the Companies (Jersey) Law 1991 (as amended) (the “**Jersey Companies Law**”) provided that, in certain situations, a Jersey private company may be subject to the Jersey Companies Law “as though it were a public company” and, as a result, may be required to file certain types of documents on public records. The respondent noted that one situation in which a Jersey private company may be treated as though it were a Jersey public company under the Jersey Companies Law is where the company enters the name of a person in its register of members so as to increase the number of its members beyond 30 and their number for the time being remains above 30 (the “**30 shareholder rule**”). The respondent noted that if a Jersey private company which satisfied the 30 shareholder rule were to be treated as a Jersey public company for the purposes of paragraph (ii) of section 3(a) of the Introduction to the Code, the ten year rule would not be relevant for the purposes of determining whether the Code would apply to an offer for the company.

3.11 However, the respondent considered that the correct interpretation of paragraph (ii) of section 3(a) of the Introduction to the Code was that a company should be treated as a Jersey public company only if a certificate of incorporation had been issued showing the company to be a Jersey public company, i.e. that:

- (a) a Jersey private company which satisfies the 30 shareholder rule should not be regarded as a Jersey public company for the purposes of paragraph (ii) of section 3(a) of the Introduction; and
- (b) the Code would, therefore, not apply to a Jersey private company which satisfied the 30 shareholder rule if it did not satisfy the ten year rule.

- 3.12 The Code Committee understands that the Panel Executive’s application of paragraph (ii) section 3(a) of the Introduction to the Code to Jersey private companies accords with the respondent’s interpretation, as described above.

4. Minor amendments

Q5 Do you have any comments on the proposed consequential amendments to the Code set out in Appendix B?

(a) Amendments proposed in PCP 2012/3

- 4.1 In section 4 of the PCP, the Code Committee proposed certain minor amendments to the Code, consequential on those proposals in the PCP which would have had the effect of merging the current paragraphs (i) and (ii) of section 3(a) of the Introduction to the Code. Since those proposals have not been adopted, the consequential amendments proposed in the PCP are now not necessary.

(b) Shared jurisdiction

- 4.2 As mentioned in section 2 above, the “shared jurisdiction” regime described in paragraph (iii) of section 3(a) of the Introduction to the Code will apply to an offer (as defined in the second paragraph of section 3(b) of the Introduction) for a company which has its registered office in an EEA member state other than the UK whose securities (as defined in paragraph (2) of the definition of “**shares or securities**”) are admitted to trading on a regulated market in the UK and not on a regulated market in any other EEA member state. This is by virtue of paragraph (iii)(B) of section 3(a) of the Introduction, which implements the first paragraph of Article 4(2)(b) of the Directive.
- 4.3 Having reviewed paragraph (iii)(B) of section 3(a) of the Introduction to the Code and the first paragraph of Article 4(2)(b) of the Directive, the Code Committee believes that paragraph (iii)(B) could be made clearer. The Code

Committee has therefore made the following amendments to paragraph (iii)(B), as also set out in Appendix C:

“(iii) Shared jurisdiction — UK and other EEA registered and traded companies

The Code also applies (to the extent described below) to offers for the following companies:

...

(B) a company which has its registered office in another member state of the European Economic Area whose securities are admitted to trading ~~only~~ on a regulated market in the United Kingdom and not on a regulated market in any other member state of the European Economic Area;”.

(c) Other minor amendments

4.4 In addition, the Code Committee has taken this opportunity to make a number of other minor amendments to the Code, as set out in Appendix C. The amendments do not, in the opinion of the Code Committee, materially alter the effect of the provisions in question and have therefore been made without consultation. In summary, the amendments include:

- (a) the introduction into the Definitions Section of the Code of a new definition of “**recognised investment exchange**”, which term will be defined by reference to section 285(1)(a) of the Financial Services and Markets Act 2000;
- (b) the deletion from the Definitions Section of the Code of the definition of “**Stock Exchange**”;
- (c) the replacement of certain references in the Code to “Stock Exchange”, “Official List” and “AIM” with references to “recognised investment exchange” and, in the case of Note 1 on Rule 14.1, with a reference to the “Daily Official List”; and

- (d) moving the definition of “**business day**” from the current definition of “**dates, business days, periods of time and London time**” in the Definitions Section of the Code so as to become a separate definition.

5. Implementation

(a) Introduction

- 5.1 In section 6 of the PCP, the Code Committee stated that its intention was that the amendments to the Code proposed in the PCP should take effect approximately one month after the date on which it published its Response Statement.

(b) Summary of responses

- 5.2 Certain respondents suggested that the introduction of the amendments to the Code should be subject to transitional arrangements and/or a “grandfathering” regime. One respondent suggested that a transition period of 12 months might be appropriate.
- 5.3 A number of respondents noted that the articles of association of certain companies to which the Code does not currently apply include provisions similar to certain rules of the Code. It was noted that such provisions may or may not give the directors discretion as to how they are to be applied. The respondents were concerned that, if the Code were to apply to such companies, those provisions would need to be removed in order to avoid a conflict between the Code and the articles of association and that any shareholder approval which might be required could take some time to arrange (or that shareholders might not give any such approval).
- 5.4 Two respondents queried the position of a shareholder in a company which would become subject to the Code as a result of the amendments proposed in the PCP where the shareholder held convertible securities, warrants or options to subscribe for new shares. The respondents were concerned to understand

whether the exercise by the shareholder of such conversion rights or rights to subscribe might result in the shareholder triggering an obligation to make a mandatory offer under Rule 9.1(a) or (b) where the exercise would result either in the shareholder being interested in shares carrying 30% or more of the voting rights of the company or in an increase in the interests of the shareholder in the “30-50% band”.

- 5.5 One respondent was concerned to understand what the situation would be if a company were not to be within the jurisdiction of the Code when an offer was initially made but were then to come within the Code’s jurisdiction during the course of the offer.

(c) *Conclusions*

- 5.6 The Code Committee has concluded that the amendments to the Code adopted in this Response Statement should come into effect on Monday, 30 September 2013.
- 5.7 The Code Committee is not convinced that there is a need for the amendments to the Code which have been adopted in this Response Statement to be subject to detailed transitional arrangements or a lengthy transition period. This is particularly the case given that the residency test will be removed only with respect to companies whose securities are admitted to trading on an MTF in the UK and not (as had been proposed in the PCP) with respect to companies whose securities are admitted to trading solely on an overseas market or which are not admitted to trading on a public market.
- 5.8 The Code Committee recognises that companies which will come to fall within the Panel’s jurisdiction as a result of the amendments adopted in this Response Statement are likely to wish to remove from their articles of association any provisions which seek to replicate provisions of the Code. However, the Code Committee understands that the application of such provisions will usually be subject to the discretion of the company’s directors. Where this is the case, the Code Committee does not believe that their removal

would be an urgent matter. Where the application of the provisions is not subject to the directors' discretion, the Code Committee acknowledges that a company whose articles of association created a conflict with the provisions of the Code might wish to expedite their removal. The Code Committee has not been informed of any specific examples where this would be the case and therefore considers that it is unlikely to arise. If it does, an implementation date of 30 September 2013 should provide sufficient opportunity for the required shareholder approvals to be obtained so as to avoid any risk of overlapping regimes arising.

- 5.9 The Code Committee also recognises that shareholders in companies which will come to fall within the jurisdiction of the Code as a result of the amendments adopted in this Response Statement may hold convertible securities, warrants or options to subscribe for new shares, the exercise of which might trigger an obligation to make a mandatory offer under Rule 9.1(a) or (b). The exercise of convertible securities, subscription rights or options is addressed in Note 10 on Rule 9.1, an extract from which is set out below:

“10. Convertible securities, warrants and options

...

The Panel will not normally require an offer to be made following the exercise of conversion or subscription rights provided that the issue of convertible securities, or rights to subscribe for new shares carrying voting rights, to the person exercising the rights is approved by a vote of independent shareholders in general meeting in the manner described in Note 1 of the Notes on Dispensations from Rule 9. ...

Where securities with conversion or subscription rights were issued at a time when no offer obligation on exercise of such rights would arise and no independent shareholders' approval was obtained, the Panel will consider the case on its merits and will have regard, inter alia, to the votes cast on any relevant resolution, the number of shares concerned and the attitude of the board of the company. It is always open to the holder of such rights to dispose of sufficient rights so that, on exercise, the shares in which he would be interested would together carry less than 30% of the voting rights in the company. In circumstances where such rights could not be transferred prior to exercise, the Panel would consider waiving the offer obligation arising upon an exercise of rights provided there was an undertaking to

reduce the number of shares carrying voting rights in which he would be interested to below 30% within a reasonable time. (See also Rule 9.7.)”.

5.10 Although the Panel will be required to consider each case on its merits, the Code Committee understands that where:

- (a) a shareholder holds convertible securities, subscription rights or options to subscribe for securities in a company which becomes subject to the Code as a result of the amendments adopted in this Response Statement; and
- (b) the exercise of the conversion or subscription rights would otherwise trigger an obligation to make a mandatory offer under Rule 9.1,

the Panel would be likely to consent to:

- (i) the exercise of the rights without a mandatory offer being triggered, if shareholder approval had been obtained at the time of the issue of the securities, rights or options (albeit that the requirements of Note 1 of the Notes on Dispensations from Rule 9 would not have been met);
- (ii) the company seeking the approval of its shareholders (in accordance with Note 1 of the Notes on Dispensations from Rule 9) at some point after 30 September 2013 for the exercise of the rights without a mandatory offer being triggered (albeit that, under Note 10 on Rule 9.1, such approval must normally be obtained upon the issue of conversion or subscription rights); or
- (iii) the exercise of the rights without a mandatory offer being triggered, provided that the shareholder undertakes to reduce the number of shares carrying voting rights in which it is interested to below 30% within a reasonable time (and subject to the imposition of voting restrictions under Rule 9.7).

- 5.11 The Code Committee confirms that the revised Code will be applied from the implementation date of 30 September 2013 to all companies and transactions to which it then relates, including those on-going transactions which straddle that date. The Code Committee notes that this approach is the same as that adopted in relation to the amendments to the Code which were implemented on 20 May 2006, including the removal of the then residency test with regard to the companies which currently fall within paragraph (i) of section 3(a) of the Introduction to the Code.
- 5.12 If any party has any concerns in relation to the impact of the amendments set out in this Response Statement on an existing or contemplated transaction involving a company to which the Code does not currently apply but to which it will apply on the implementation date it should consult the Panel prior to that date.

APPENDIX A

Respondents to PCP 2012/3 (excluding those who submitted comments on a confidential basis)

- 1.** Association of British Insurers
- 2.** Bedell Cristin, Carey Olsen, Maurant Ozannes, Ogier and Voisin
- 3.** Grant Thornton UK LLP
- 4.** Guernsey Commercial Bar
- 5.** IFG International Limited
- 6.** Institute of Chartered Accountants in England and Wales
- 7.** Institute of Chartered Accountants of Scotland
- 8.** Lawrence Graham LLP
- 9.** London Stock Exchange plc
- 10.** Memery Crystal LLP
- 11.** mhlaw (Michael Hudson)
- 12.** Quoted Companies Alliance
- 13.** Takeovers Joint Working Party of the City of London Law Society Company Law Sub-Committee and the Law Society of England and Wales' Standing Committee on Company Law

APPENDIX B

Summary of the application of the Code to companies registered in the UK, the Channel Islands and the Isle of Man

	Securities admitted to trading on a UK regulated market (e.g. LSE Main Market or ISDX Main Board) or a CI/IoM stock exchange (e.g. CISX)	Securities admitted to trading on a UK MTF (e.g. AIM/ISDX Growth Market) and not subject to shared jurisdiction	Securities admitted to trading on an EEA regulated market (but not on a UK regulated market)*	Securities admitted to trading on a public market other than a UK regulated market/MTF, a CI/IoM stock exchange or* an EEA regulated market (e.g. NYSE)	Public company; securities not admitted to trading on a public market	Private company
Current status	Paragraph 3(a)(i) Subject to Code (no residency test)	Paragraph 3(a)(ii) Subject to Code only if residency test satisfied	Paragraph 3(a)(iii) Shared jurisdiction (no residency test)	Paragraph 3(a)(ii) Subject to Code only if residency test satisfied	Paragraph 3(a)(ii) Subject to Code only if residency test satisfied	Paragraph 3(a)(ii) Subject to Code only if residency test and ten year rule satisfied
Status as proposed in PCP 2012/3	Subject to Code (no residency test)	Subject to Code (no residency test)	Shared jurisdiction (no residency test)	Subject to Code (no residency test)	Subject to Code (no residency test)	Subject to Code only if ten year rule satisfied (no residency test)
Status as from 30/9/13	Paragraph 3(a)(i) Subject to Code (no residency test)	Paragraph 3(a)(i) Subject to Code (no residency test)	Paragraph 3(a)(iii) Shared jurisdiction (no residency test)	Paragraph 3(a)(ii) Subject to Code only if residency test satisfied	Paragraph 3(a)(ii) Subject to Code only if residency test satisfied	Paragraph 3(a)(ii) Subject to Code only if residency test and ten year rule satisfied
Current status v. status as from 30/9/13	No change (no residency test)	Residency test will no longer apply	No change (no residency test)	No change (residency test retained)	No change (residency test retained)	No change (residency test and ten year rule retained)

* UK companies only

APPENDIX C

Amendments to the Code

INTRODUCTION

3 COMPANIES, TRANSACTIONS AND PERSONS SUBJECT TO THE CODE

...

(a) Companies

- (i) UK, Channel Islands and Isle of Man registered and traded companies

The Code applies to all offers (not falling within paragraph (iii) below) for companies and Societas Europaea (and, where appropriate, statutory and chartered companies) which have their registered offices* in the United Kingdom, the Channel Islands or the Isle of Man if any of their securities are admitted to trading on a regulated market or a multilateral trading facility in the United Kingdom or on any stock exchange in the Channel Islands or the Isle of Man.

- (ii) Other companies

The Code also applies to all offers (not falling within paragraph (i) above or paragraph (iii) below) for public and private companies† and Societas Europaea (and, where appropriate, statutory and chartered companies) which have their registered offices* in the United Kingdom, the Channel Islands or the Isle of Man and which are considered by the Panel to have their place of central management and control in the United Kingdom, the Channel Islands or the Isle of Man, but in relation to private companies only when:

- (A) any of their securities have been admitted to ~~the Official List~~ trading on a regulated market or a multilateral trading facility in the United Kingdom or on any stock exchange in the Channel Islands or the Isle of Man at any time during the 10 years prior to the relevant date; or

...

- (D) they have filed ~~were required to file~~ a prospectus for the offer, admission to trading or issue of securities with the registrar of companies or any other relevant authority in the United Kingdom, the Channel Islands or the Isle of Man (but in the case of any other such authority only if the filing is on a public record) ~~or to have a prospectus approved by the UKLA~~ at any time during the 10 years prior to the relevant date.

...

- (iii) Shared jurisdiction — UK and other EEA registered and traded companies

The Code also applies (to the extent described below) to offers for the following companies:

...

- (B) a company which has its registered office in another member state of the European Economic Area whose securities are admitted to trading only on a regulated market in the United Kingdom and not on a regulated market in any other member state of the European Economic Area; and

DEFINITIONS

Business day

A business day is a day on which the London Stock Exchange is open for the transaction of business.

...

Dates, ~~business days~~, periods of time and London time

Unless otherwise stated in the Code:

...

~~(2) — a business day is a day on which the Stock Exchange is open for the transaction of business;~~

~~(32) ...~~

~~(43) ...~~

...

Principal trader

A principal trader is a person who:

(1) is registered as a market-maker with a recognised investment exchange ~~the Stock Exchange~~, or is accepted by the Panel as a market-maker; or

(2) is a ~~Stock Exchange~~ member firm of a recognised investment exchange dealing as principal in order book securities.

...

Recognised investment exchange

Recognised investment exchange has the same meaning as in section 285(1)(a) of the FSMA.

...

Stock Exchange

London Stock Exchange plc

Rule 14.1

14.1 COMPARABLE OFFERS

...

NOTES ON RULE 14.1

1. Comparability

A comparable offer need not necessarily be an identical offer.

In the case of offers involving two or more classes of equity share capital, prices for all of which are published in the Daily Official List, which are admitted to the Official List or to trading on AIM, the ratio of the offer values should normally be equal to the average of the ratios of the middle market quotations taken from the ~~Stock Exchange~~ Daily Official List over the course of the six months preceding the commencement of the offer period. The Panel will not normally permit the use of any other ratio unless the advisers to the offeror and offeree company are jointly able to justify it.

~~In the any other case of offers involving two or more classes of equity share capital, one or more of which is not admitted to the Official List or to trading on AIM~~, the ratio of the offer values must be justified to the Panel in advance.

Rule 24.10

24.10 ADMISSION TO LISTING AND ADMISSION TO TRADING CONDITIONS*

Where securities are offered as consideration and it is intended that they should be admitted to listing on the Official List and/or to trading on a recognised investment exchange AIM, the relevant admission to listing and/or admission to trading condition should, except with the consent of the Panel, be in terms which ensure that it is capable of being satisfied only when the decision to admit the securities to listing or trading has

been announced by the UKLA and/or the relevant recognised investment exchange ~~Stock Exchange~~, as applicable. Where securities are offered as consideration and it is intended that they should be admitted to listing or to trading on any other investment exchange or market, the Panel should be consulted.

Appendix 7

APPENDIX 7

SCHEMES OF ARRANGEMENT

...

15 ADMISSION TO LISTING AND ADMISSION TO TRADING CONDITIONS

Where securities are offered as consideration and it is intended that they should be admitted to listing on the Official List and/or to trading on a recognised investment exchange ~~AIM~~, the relevant admission to listing and/or admission to trading condition should, except with the consent of the Panel, be in terms which ensure that it is capable of being satisfied only when all steps required for the admission to listing or trading have been completed other than the UKLA and/or the relevant recognised investment exchange ~~Stock Exchange~~, as applicable, having announced their respective decisions to admit the securities to listing or trading. Where securities are offered as consideration and it is intended that they should be admitted to listing or to trading on any other investment exchange or market, the Panel should be consulted.