

PCP 2009/2 Issued on 16 July 2009

THE TAKEOVER PANEL

**CONSULTATION PAPER ISSUED BY
THE CODE COMMITTEE OF THE PANEL**

MISCELLANEOUS CODE AMENDMENTS

**REVISION PROPOSALS RELATING TO
VARIOUS RULES OF THE TAKEOVER CODE**

Before it introduces or amends any Rules of the Takeover Code (the “Code”), the Code Committee of the Takeover Panel (the “Code Committee”) is normally required under its procedures for amending the Code 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 Public Consultation Paper (“PCP”). Comments should reach the Code Committee by 25 September 2009.

Comments may be sent by e-mail to:

supportgroup@thetakeoverpanel.org.uk

Alternatively, please send comments in writing to:

The Secretary to the Code Committee
The Takeover Panel
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London
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All responses to formal consultation will be made available for public inspection unless the respondent requests otherwise. A standard confidentiality statement in an e-mail message will not be regarded as a request for non-disclosure.

Unless the context otherwise requires, words and expressions defined in the Code have the same meanings when used in this PCP.

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1. Summary and introduction

1.1 The Code Committee considers that it is desirable to make a number of amendments to the Code. The purpose of most of the proposed amendments is either to clarify the application of existing provisions within the Code or to codify existing practice in relation to matters which are not currently covered by the Code. However, several of the proposed amendments are more substantive.

1.2 The specific proposals are summarised below:

- (a) **Section 2** sets out proposals relating to mandatory bids and the “chain principle” to strengthen the presumptions in favour of requiring a chain principle bid which, if adopted, will amend Note 8 on Rule 9.1;
- (b) **Section 3** sets out proposals that are aimed at increasing the consistency with which the Code is applied to management incentivisation arrangements, regardless of their nature which, if adopted, will delete Note 4 on Rule 16 and create a new Rule 16.2;
- (c) **Section 4** sets out proposals for documents that are required to be available for inspection in connection with an offer to be published on a website and to amend the list of documents that are required to be put on public display which, if adopted, will amend Rule 26;
- (d) **Section 5** codifies current practice whereby, if an offeror does not wish to proceed with making an offer it has previously announced because a higher offer has been announced subsequently, the Panel is consulted which, if adopted, will amend the Note on Rule 2.7;
- (e) **Section 6** proposes amendments to Rule 12.2 which it is intended will clarify the period of time for which an offeror who decides not to pursue a competition clearance or who is prohibited from making an

offer following a competition reference will be prevented from making a new offer; and

(f) **Sections 7 to 11** propose minor amendments to Note 6 on Rule 9.1, Rule 25.3, Rule 27.1, Rule 31.3 and Rule 36.

1.3 **Section 12** gives the Code Committee's view on the impact of the proposed amendments.

1.4 The full text of the proposed amendments is set out in Appendix A to this PCP. All references to the Code in this PCP are based on the Code as currently published.

1.5 For ease of reference, a list of the questions that are put for consultation is set out in Appendix B to this PCP.

2. Mandatory bids and the “chain principle” – Note 8 on Rule 9.1

(a) Introduction

2.1 Note 8 on Rule 9.1, headed “The chain principle”, states as follows:

“Occasionally, a person or group of persons acting in concert acquiring shares resulting in a holding of over 50% of the voting rights of a company (which need not be a company to which the Code applies) will thereby acquire or consolidate control, as defined in the Code, of a second company because the first company itself is interested, either directly or indirectly through intermediate companies, in a controlling block of shares in the second company, or is interested in shares which, when aggregated with those which the person or group is already interested in, secure or consolidate control of the second company. The Panel will not normally require an offer to be made under this Rule in these circumstances unless either:-

(a) the interest in shares which the first company has in the second company is significant in relation to the first company. In assessing this, the Panel will take into account a number of factors including, as appropriate, the assets and profits of the respective companies.

Relative values of 50% or more will normally be regarded as significant; or

(b) one of the main purposes of acquiring control of the first company was to secure control of the second company.

The Panel should be consulted in all cases which may come within the scope of this Note to establish whether, in the circumstances, any obligation arises under this Rule.”.

2.2 For ease of description, this section refers to the parties involved in transactions to which Note 8 applies as follows:

- (a) the company in respect of which a chain principle mandatory bid obligation may be triggered (i.e. the company referred to in Note 8 as the “second company”) is “Company C”;
- (b) the company which is interested, either directly or indirectly through intermediate companies, in a controlling block of shares in Company C (i.e. the company referred to in Note 8 as the “first company”) is Company B; and
- (c) the person or concert party which may incur a mandatory bid obligation in relation to Company C as a result of acquiring over 50% of the voting rights of Company B is Acquirer A.

2.3 Although cases involving the chain principle are relatively rare, the Code Committee considers that the chain principle as currently framed is not wholly consistent with the philosophy underlying the mandatory bid rule. Moreover, the Panel Executive (the “Executive”) has informed the Code Committee that difficulties have arisen from time to time in applying Note 8 in practice.

(b) *Philosophy underlying the mandatory bid rule*

2.4 The philosophy underlying the mandatory bid rule is that a general offer should be made to shareholders when a person acquires control (as defined by the Code) of a company for two reasons:

(a) first, the company now has a new controller where before it was controlled by another person or was not controlled at all and shareholders should be given an opportunity to dispose of their shares as, for a variety of reasons, they may not wish to remain interested in the company under a new controller; and

(b) secondly, the new controller is likely to have paid a premium price to the shareholders from whom he has acquired shares and a general offer at the highest price paid by the new controller is required so that all shareholders have the opportunity to share the premium.

2.5 This reasoning is relevant in a chain principle case. Even where the value of Company B's shareholding in Company C is low relative to the overall value of Company B, Acquirer A may have ascribed a premium value to the Company C shareholding in calculating the value of Company B shares to it. Acquirer A may therefore have implicitly paid a premium for Company C shares as part of the price paid to selling Company B shareholders.

2.6 In addition, under a chain principle transaction, Acquirer A will acquire control indirectly of Company C and, whilst Company C will, in some cases, already have been controlled by Company B, the identity and strategy of Acquirer A may well have a material effect on the value of, and the attractiveness of remaining as a shareholder in, a controlled Company C. Therefore, the considerations referred to in paragraph 2.4(a) may well be relevant.

2.7 Strict application of the principles set out in paragraph 2.4 might require a chain principle bid to be made (or at least an alternative remedy, such as on-

sale, or reduction of Company B's shareholding to below 30%) in almost every case where Company B held a controlling interest in Company C. However, whilst the Code Committee believes that the range of circumstances in which a chain principle bid is required to be made should be extended, it recognises that to do so in every case might be unduly harsh and could result in Acquirer A being required to make a bid for a company in which it had little or no interest. The Code Committee therefore believes that the principle should be retained that, in order for a chain principle bid to be required, Company C should be of significance to Acquirer A.

(c) *Practical difficulties in applying the chain principle*

- 2.8 The Executive has informed the Code Committee that difficulties have arisen in applying the chain principle in practice because, in particular, it is difficult to make objective judgements about whether the securing of control of Company C is one of Acquirer A's "main purposes" in acquiring over 50% of the voting rights in Company B. For example, the biggest single element of Company B's business and assets may comprise its holding in Company C, but Acquirer A may argue that the holding in Company C is merely an incidental benefit to it and its "main purposes" in acquiring Company B are quite different. The Code Committee considers that it is unsatisfactory for such a material matter to turn on a judgement, which will, almost inevitably, contain a significant element of subjectivity, as to a person's purposes or intent.
- 2.9 In addition, where the Executive rules that a mandatory bid does not have to be made, the ruling may well be exposed to challenge. In many cases, it will be possible for a shareholder of Company C to argue that one of Acquirer A's "main purposes" in acquiring over 50% of the voting rights of Company B was, notwithstanding any protestations to the contrary by Acquirer A, to secure effective control of Company C.
- 2.10 For these reasons, the "one of the main purposes" test in Note 8 can lead to considerable uncertainties for Acquirer A, even where it has obtained a

conditional ruling (on an *ex parte* basis) from the Executive that a general offer for Company C is not required.

- 2.11 The Code Committee therefore believes that Note 8 should be amended so that it operates in a more straightforward and predictable manner.

(d) Proposed amendments

- 2.12 In order to help address practical difficulties which may arise in applying Note 8, the Code Committee proposes to amend the tests in Note 8 as set out below to strengthen the presumptions in favour of requiring a chain principle bid to be made and so to increase the level of protection available to shareholders in Company C by:

- (a) lowering the quantitative threshold at which Company B's shareholding in Company C is considered to be "significant" in the context of Company B to 30%. The Code Committee also considers that the relative market values of such companies ought to be a relevant criterion; and
- (b) providing that a chain principle bid would normally be required if Company B's holding in Company C might reasonably be considered to be significant to the decision of Acquirer A in making an offer for Company B. The Code Committee recognises that, in applying this revised test, elements of judgement will remain and the Panel will generally need to take into account the views of all relevant parties to determine whether or not it is appropriate, in all the circumstances, to require a Rule 9 offer to be made. Nonetheless, because the test threshold would be both lower and framed in more objective terms (so that Acquirer A's subjective view would be less determinative), the Code Committee considers that it would be easier to apply in practice.

- 2.13 The Code Committee therefore proposes to amend Note 8 on Rule 9.1, as follows:

“... The Panel will not normally require an offer to be made under this Rule in these circumstances unless either:-

(a) the interest in shares which the first company has in the second company is significant in relation to the first company. In assessing this, the Panel will take into account a number of factors including, as appropriate, the assets, ~~and~~ profits and market values of the respective companies. Relative values of ~~50%~~ 30% or more will normally be regarded as significant; or

(b) ~~one of the main purposes securing control of the second company might reasonably be considered to be a significant purpose of acquiring control of the first company was to secure control of the second company.~~”.

Q.1 Do you agree with the proposed amendments to Note 8 on Rule 9.1?

3. Management incentivisation - Note 4 on Rule 16

(a) Introduction and background

3.1 Rule 16 provides that, except with the consent of the Panel, an offeror may not make arrangements with shareholders in relation to an offer if there are favourable conditions attached which are not being extended to all shareholders.

3.2 Note 4 on Rule 16 provides certain exceptions to the restrictions in Rule 16, as follows:

“4. Management retaining an interest and other management incentivisation

Sometimes an offeror may wish to arrange for the management of the offeree company to remain financially involved in the business. The methods by which this may be achieved vary but the principle which the Panel is concerned to safeguard is that the risks as well as the rewards associated with an equity shareholding should apply to the management’s retained interest. For example, the Panel would not normally find acceptable an option arrangement which guaranteed the original offer price as a minimum. The Panel will require, as a condition of its consent, that the independent adviser to the offeree company publicly states that in its opinion the arrangements with the

management of the offeree company are fair and reasonable. In addition, the Panel will also require such arrangements to be approved at a general meeting of the offeree company's shareholders. At this meeting the vote must be a vote of independent shareholders and must be taken on a poll. Holdings of convertible securities, options and other subscription rights may also be relevant in determining whether a general meeting is required, particularly where such rights are exercisable during an offer.

Where the offeror wishes to arrange other incentivisation for management to ensure their continued involvement in the business, the Panel will require, as a condition of its consent, that the independent adviser to the offeree company publicly states that in its opinion the arrangements are fair and reasonable.

The Panel must be consulted in all circumstances where this Note may be relevant.”.

- 3.3 Note 4 on Rule 16 was introduced into the Code principally to provide a method by which, subject to certain procedural safeguards (including the consent of the Panel), offers which included arrangements to enable management to participate in the ongoing business could proceed without contravening the main provisions of Rule 16 and offeree company managers who were also shareholders in the offeree company could be offered equity interests in the offeror that were not being made available to other offeree company shareholders.
- 3.4 Under Note 4 on Rule 16, if the Panel consents to the proposed incentivisation arrangements:
- (a) where “financial” incentivisation arrangements are being offered (for example, where management has a shareholding in the offeree company and is being offered shares in the offeror other than on the same terms as all other shareholders), the following must be obtained:
 - (i) an opinion from the independent adviser to the offeree company that the arrangements are fair and reasonable; and
 - (ii) a vote of independent offeree company shareholders; and

- (b) in all other cases where incentivisation proposals, of whatever nature, are being offered to management of the offeree company, an opinion from its independent adviser is required but no provision is made for the Panel to require a vote of independent shareholders. As written, the Code requires the opinion from the independent adviser irrespective of whether management has a shareholding in the offeree company. However, the Code Committee understands that, in practice, an opinion from the independent adviser is usually only sought in circumstances where management does in fact hold shares in the offeree company, reflecting the underlying philosophy that Rule 16 derives from General Principle 1 and is concerned with the equivalent treatment of shareholders.

3.5 The Code Committee considers, however, that the application of the Note may lead to inconsistencies and anomalies and that, given that management incentivisation arrangements often are (or may be) relevant to shareholders' consideration of an offer, a more consistent approach would be desirable.

(b) *Relevance of management incentivisation arrangements to shareholders*

3.6 The Code Committee considers that, in addition to concerns relating to General Principle 1, management incentivisation arrangements may be relevant to shareholders for two principal reasons:

- (a) first, there is a risk that an incentivisation arrangement could have the intention, and/or the effect, of encouraging a director or other senior employee who may be able to influence the outcome of the board's consideration of a proposed offer to use that influence in support of the proposed offer. The larger or more unusual the incentivisation arrangement, the greater the corresponding risk; and
- (b) secondly, offerors may set a limit on the total value they are prepared to pay to acquire a company and, to the extent that incentivisation

arrangements are negotiated in respect of management, the amount available for non-management shareholders may be reduced. Consequently, incentivisation arrangements may directly or indirectly affect the amount of consideration available to shareholders under the offer.

(c) *Relevance of shareholdings*

3.7 Whilst in the majority of cases members of the offeree company's management who are offered incentivisation arrangements will be shareholders in the offeree company, this is not always the case.

3.8 The Code Committee considers that the factors referred to in paragraph 3.6 may be relevant regardless of whether management holds shares in the offeree company and, consequently, that the protection available to offeree company shareholders should not differ depending on whether they in fact do so.

(d) *Nature of incentivisation*

3.9 The Code Committee also considers that incentivisation arrangements may take many different forms and that, in considering the relevance of incentivisation arrangements in the context of an offer, the critical factors will be the overall quantum and structure, particularly bearing in mind the objectives which management is to be incentivised to achieve. The Code Committee considers that obtaining an interest in securities in the offeror is not, in this context, of itself a critical element. For example, a wide range of arrangements may have the effect of incentivising management by reference to underlying profitability and/or share price performance, even where management does not acquire any interest in offeror securities.

3.10 The Code Committee therefore believes that the Code should regulate any management incentivisation arrangements that are made in connection with an offer, regardless of whether the person to be incentivised is to acquire an interest in offeror securities.

(e) ***Relevance of “management”***

3.11 Note 4 on Rule 16 applies to a wider group than the board of directors of the offeree company. One of the main objectives of offerors proposing incentivisation arrangements is to try to ensure that employees and directors of the offeree company whose contribution to the business is significant remain involved in, and committed to, the business under its new ownership.

3.12 Given that the potential concerns referred to in paragraph 3.6 above may be relevant in respect of a wider group than simply the directors of the offeree company, the Code Committee considers that it is appropriate for the provision to continue to extend further than the board of the offeree company and that, whilst the scope of the term can be debated, it is appropriate to continue to refer to “management”.

(f) ***The opinion of the offeree company’s independent adviser***

3.13 Note 4 on Rule 16 currently requires the Panel’s consent to any incentivisation arrangement be obtained and states that the Panel will require, as a condition of its consent, that the independent adviser to the offeree company publicly states that, in its opinion, the arrangements with the management of the offeree company are fair and reasonable.

3.14 With its knowledge of the offeree company, its expertise in its own field and having access to all relevant documentation, an independent adviser is well placed to give an opinion on the arrangements being proposed. The Code Committee considers that the independent adviser’s statement as to whether the arrangements being proposed are, in its opinion, fair and reasonable is important in providing guidance to shareholders and that such statements should be required in relation to every incentivisation arrangement proposed. The Code Committee also considers that, because this requirement is included in the Code for the benefit of shareholders, it would be appropriate for the opinion to be expressed in that context. The Code Committee is, therefore,

proposing to require the advisers to state that the arrangements proposed are fair and reasonable so far as shareholders are concerned. In considering their opinion as to whether any particular arrangements are fair and reasonable so far as shareholders are concerned, the Code Committee considers that advisers should, in particular, bear in mind the concerns referred to in paragraph 3.6 above.

(g) *Where no incentivisation arrangements are proposed or the terms of any incentivisation arrangements have not been finalised*

3.15 In some offers either no incentivisation arrangements are proposed or the terms of any incentivisation arrangements have not been finalised. This can be for a variety of reasons and the Code Committee considers that it would be appropriate for shareholders to be informed of the relevant facts relating to the stage that discussions have reached or the fact that no such discussions have taken place. The Code Committee is, therefore, proposing to include the following requirements in the new provisions:

(i) where no incentivisation arrangements are proposed, this fact should be stated publicly;

(ii) where it is intended to put incentivisation arrangements in place, but either no discussions or only limited discussions have taken place, this fact should be stated publicly and full details of the discussions should be disclosed; and

(iii) where the discussions are at a more advanced stage, but have yet to be finalised, the Code Committee considers that full details of the nature and extent of the proposed arrangements should be disclosed and the offeree company's independent adviser should be required to state publicly whether, in its opinion, the terms proposed (whether specific or within parameters) are fair and reasonable so far as shareholders are concerned. If appropriate, the Panel's consent and the approval of independent shareholders may also be required (see sections (h) and (i) below).

(h) The requirement to consult the Panel

3.16 The Code Committee considers that the requirement for the offeree company's independent adviser to state publicly its opinion on the arrangements with management should, in future, be applied in relation to any incentivisation arrangements that are being proposed (including arrangements that have yet to be finalised as referred to in paragraph 3.15(iii) above). In view of this, the Code Committee considers that requiring the Panel to be consulted in every case is unnecessary and is therefore proposing that consultation should be required only where the value of any arrangement to be entered into (or proposed to be entered into) is significant and/or the nature of the arrangement is unusual, either in the context of the relevant industry or best practice.

3.17 In proposing this change, the Code Committee recognises that, if implemented, it will impose an onus on the offeree company's independent advisers to decide when to consult the Panel and that, in certain cases, it may not be clear whether the terms of the incentivisation being proposed are sufficiently significant or unusual to merit consultation. The Code Committee considers, however, that advisers should, if they are in any doubt, consult the Panel. The Code Committee is aware that elsewhere in the Code there are many examples where companies and their advisers have to exercise their judgement and common sense in deciding whether to consult the Panel. It also considers that it is preferable for the proposals to be adopted on the basis set out above rather than to retain a blanket requirement for consultation with the Panel in every case.

(i) The Panel's consent and the requirement to seek the approval of independent shareholders

3.18 If the proposals set out in section 3(h) above (for the Panel to be consulted only when the incentivisation arrangements being proposed are significant or unusual) are adopted, it will be appropriate and necessary for the Panel to consider any proposed arrangements on which it is consulted in detail.

However, on the basis that any such arrangements will already have been considered by the offeree company's independent adviser, who will have opined that the arrangements are fair and reasonable so far as shareholders are concerned, the Executive has indicated to the Code Committee that it does not expect that it should be necessary to withhold its consent other than rarely.

3.19 In certain circumstances, however, the Panel may decide that it would be appropriate for the proposed arrangements to be considered by offeree shareholders themselves and for their approval to be sought by way of a vote of independent shareholders at a general meeting. The Code Committee understands that the Executive will be mindful of the expenses that may be incurred in convening and holding a general meeting and will take that into consideration in deciding whether to require the arrangements to be approved by shareholders of the offeree company at a general meeting. However, it should be noted that the Panel's discretion not to require a vote is limited in relation to the circumstances referred to in section 3(j) below.

3.20 In certain circumstances, the incentivisation arrangements proposed may have a significant value to the party being incentivised or may be of such an unusual nature that, as noted above, the Code Committee considers makes it appropriate for the arrangements to be subject to the approval of independent shareholders at a general meeting of the offeree company. These arrangements will not necessarily fall into the description of "financial", in which case the second paragraph of Note 4 on Rule 16, which covers the Panel's approach to incentivisation arrangements which are not regarded as financial, makes no provision for the Panel to require a vote of independent shareholders to be held. As stated in section 3(d) above, the Code Committee does not consider it appropriate for the Code to maintain a distinction between financial and other forms of management incentivisation. The Code Committee is, therefore, proposing that the amendments will give the Panel the ability to make its consent to any incentivisation arrangements conditional on the approval of independent offeree company shareholders, regardless of the nature of the incentivisation arrangement.

(j) Article 3.1(a) of the European Directive on Takeover Bids

3.21 In PCP 2005/5, which related to the implementation of the European Directive on Takeover Bids (Directive 2004/25/EC, the “Directive”), the Code Committee proposed amendments to Note 4 on Rule 16 so as to ensure compliance with the provisions of Article 3.1(a) of the Directive. One of the effects of these amendments is that, in all situations where management incentivisation arrangements are offered to managers who are also shareholders in the offeree company and the incentivisation arrangements result in those persons receiving equity interests in the offeror, a vote of independent shareholders of the offeree company must be held in order to approve the arrangements. Accordingly, the Code Committee proposes that the revised provisions will retain this requirement.

(k) The form of any resolution required

3.22 Where Note 4 on Rule 16 currently refers to a resolution to be put to offeree company shareholders it is not specific about the form of the resolution. The Code Committee believes that any resolution proposed in relation to the matters referred to above should be voted on separately by the relevant independent shareholders in the offeree company. The Code Committee does not believe that it would be appropriate for a resolution required by Note 4 on Rule 16 to be passed by virtue of its forming part of a composite resolution, for example, a resolution to approve a scheme of arrangement put to an EGM of the offeree company. Accordingly, the Code Committee has reflected the need for a separate resolution in the amendments it is proposing. The Code Committee is also proposing to make the same amendment to Note 2 on Rule 16, which addresses the possible requirement for a vote to be held in relation to the sale of assets.

3.23 Whilst, as stated above, the Code Committee believes that resolutions required by either Note 2 or Note 4 on Rule 16 should be voted on separately by the relevant independent shareholders in the offeree company, it is aware that it is

the Executive's practice to permit (in both cases) such resolutions to be inter-conditional with any other resolutions relating to the offer, such that the offer itself may be permitted to lapse if the separate resolution on, for example, the management incentivisation arrangements is not approved. The Code Committee agrees with this practice.

(l) Note 4 on Rule 11.2

3.24 Note 4 on Rule 11.2 was introduced into the Code in 2002 in RS 6 at the same time as the introduction of Rule 11.2 itself. Rule 11.2 sets out the circumstances in which securities in the offeror are required to be made available to all offeree company shareholders. Note 4 on Rule 11.2 makes it clear that, if Note 4 on Rule 16 has been complied with, there is no requirement for all shareholders to be offered equity in the offeror, even if offeree company management shareholders receive equity in the offeror in respect of their holdings in the offeree company amounting to 10% or more, such that Rule 11.2 might be triggered and offeror securities be made available to all shareholders.

3.25 The Code Committee considers that it is more appropriate to include this provision in the Code in the same place as the other provisions relating to management incentivisation and is, therefore, proposing an amendment to that effect.

(m) Whitewashes and incentivisation arrangements

3.26 The Code Committee is of the opinion that incentivisation arrangements will only be proposed infrequently in connection with a whitewash transaction (when the Panel waives the obligation to make a general offer pursuant to Rule 9), but it considers that in situations where any incentivisation arrangements for the management of the "offeree" company (i.e. the management of the Code company seeking the whitewash) are proposed in connection with such a transaction it would be appropriate for the same procedures as are required in relation to an offer to be followed.

3.27 Accordingly, the Code Committee is proposing to include in paragraph 4 of Appendix 1 of the Code (“Whitewash Guidance Note”) a reference to what is expected to be adopted as new Rule 16.2 which will have the effect of making the same safeguards as are referred to above apply in relation to whitewash transactions. The proposed amendment is set out in Appendix A.

(n) Consequential amendments

3.28 The main proposals are included in a new rule, Rule 16.2 (together with its Notes thereon) and Note 4 on Rule 16 will be deleted in its entirety. Rule 16 will become Rule 16.1.

3.29 As referred to in section 3(l) above, the Code Committee considers that the substance of what is currently Note 4 on Rule 11.2 should be included as a Note on the new Rule 16.2. It is, however, proposed to retain Note 4 on Rule 11.2, but to amend it so that it merely cross refers to the new Rule 16.2. The proposed amendment is set out in Appendix A.

3.30 In addition both section 10 of the Introduction to the Code and Rule 35.3 make reference to Rule 16 and the Code Committee proposes that those references should both now become references to Rule 16.1, as set out at Appendix A.

(o) Proposed amendments

3.31 Set out below are the amendments to Rule 16 and its Notes which the Code Committee is proposing to reflect the points made above:

**“RULE 16. SPECIAL DEALS AND MANAGEMENT
INCENTIVISATION”**

16.1 SPECIAL DEALS WITH FAVOURABLE CONDITIONS

...

NOTES ON RULE 16.1

...

2. *Offeree company shareholders' approval of certain transactions — eg disposal of offeree company assets*

... At this meeting the vote must be a separate vote of independent shareholders and must be taken on a poll. Where a sale of assets takes place after the offer has become unconditional, the Panel will be concerned to see that there was no element of pre-arrangement in the transaction.

...

[Note 4 to be deleted in its entirety]

16.2 MANAGEMENT INCENTIVISATION

(a) Except with the consent of the Panel, where an offeror has entered into or proposes to enter into any form of incentivisation arrangements with members of the offeree company's management, the independent adviser to the offeree company must state publicly that in its opinion the arrangements are fair and reasonable so far as shareholders are concerned. If it is intended to put incentivisation arrangements in place following completion of the offer, but either no discussions or only limited discussions have taken place, this fact must be stated publicly and full details of the discussions disclosed. Where no incentivisation arrangements are proposed, this must be stated publicly.

(b) Where the value of the arrangements entered into or proposed to be entered into is significant and/or the nature of the arrangements is unusual either in the context of the relevant industry or best practice, the Panel must be consulted and its consent to the arrangements obtained. The Panel may also require, as a condition of its consent, that the arrangements be approved at a general meeting of the offeree company's shareholders.

(c) Any approval as required by paragraph (b) above, must be by a separate vote of independent shareholders, taken on a poll.

NOTES ON RULE 16.2

1. Requirement for general meeting approval

Where the relevant members of management are interested in any securities of the offeree company and, as a result of the incentivisation arrangements, they will become interested in securities of the offeror on a basis that is not being made available to all shareholders, such

arrangements must be approved at a general meeting of the offeree company's shareholders.

2. Management retaining an interest

If the only shareholders in the offeree company who receive offeror securities are members of the management of the offeree company, the Panel will not, so long as the requirements of this Rule are complied with, require all offeree shareholders to be offered offeror securities pursuant to Rule 11.2, even though such members of the management of the offeree company propose to sell, in exchange for offeror securities, more than 10% of the offeree company's shares.

Q.2 Do you agree with the proposed amendment to Note 2 on Rule 16, the proposed deletion of Note 4 on Rule 16, the proposed adoption of the new Rule 16.2 and the Notes thereon, the amendment to paragraph 4 of Appendix 1 and the related amendments referred to above?

4. Requirement for display documents to be published on a website and other amendments to Rule 26

(a) Current position under the Code

4.1 Rule 26 currently requires that, except with the consent of the Panel, copies of the documents referred to in that Rule (referred to in this PCP as “display documents”) must be made available for inspection from the time that the offer document or offeree board circular, as appropriate, is published until the end of the offer period. The offer document or offeree board circular must state which documents are being made available for inspection and the location at which they are displayed (which must be in the City of London or such other place as the Panel may agree).

4.2 The Note on Rule 26 provides that, on request, copies of all display documents must be made available by an offeror or the offeree company to the other party and to any competing offeror or potential offeror.

(b) *PCP 2008/3 (“Electronic communications, websites and information rights”)*

4.3 PCP 2008/3 was published by the Code Committee on 18 July 2008 and proposed, among other things, amendments to the Code to:

(a) enable electronic forms of communication to be used to send documents and information to shareholders and certain other relevant persons; and

(b) facilitate and require a wider use of websites by parties to offers.

4.4 Paragraphs 10.1 to 10.8 of PCP 2008/3 described proposals to amend the Code to require that copies of all documents put on public display by an offeror or the offeree company under Rule 26 should be published on a website in addition to being made available for physical inspection. This was on the basis that the Code Committee believed that hard copy display documents were sometimes put on display in circumstances that were not conducive to enabling shareholders and other interested persons to carry out a detailed review of the documents.

4.5 In view of this, the Code Committee proposed to amend Rule 26, and to introduce new Notes 2, 3, 4 and 5 on Rule 26 as follows:

“RULE 26. DOCUMENTS TO BE ON DISPLAY

Except with the consent of the Panel, copies of the following documents must be made available for inspection and published on a website from the time the offer document or offeree board circular, as appropriate, is published until the end of the offer period (and any related competition reference period). The offer document or offeree board circular must state which documents are so available ~~and~~, the place (being a place in the City of London or such other place as the Panel may agree) where inspection can be made and the address of the website on which the documents are published:—

...

NOTES ON RULE 26

1. _____ Copies of documents

...

2. _____ Website to be used for publication

A party to an offer should normally use its own website for publishing documents to be on display. If a party to an offer does not have its own website, or intends to use a website maintained by a third party for this purpose, the Panel should be consulted.

3. _____ “Read-only” format

Documents on display on a website must be published in a “read-only” format so that they may not be amended or altered in any way.

4. _____ Shareholders, persons with information rights and other persons in non-EEA jurisdictions

See Note 3 on Rule 19.11 and the Note on Rule 30.3.

5. _____ Amendment, variation or updating of documents on display

If a document on display is amended, varied or updated during the period in which it is required to be on display under Rule 26, then the amended, varied or updated document should also be put on display.”.

(c) **RS 2008/3 (“Electronic communications, websites and information rights”)**

4.6 The proposals in PCP 2008/3 relating to display documents raised a number of comments from respondents. The responses were described in paragraphs 10.1 to 10.16 of RS 2008/3, which was published by the Code Committee on 19 December 2008. In summary, the principal arguments raised against the implementation of the proposals were:

- (a) the proposals would fundamentally change the means by which display documents may be reviewed;
- (b) commercially sensitive information would become more widely available;

- (c) extending the time period in which documents must be on display would compound the problems referred to in paragraphs (a) and (b) above;
- (d) the proposed amendments were unnecessary; and
- (e) the Code would be inconsistent with the equivalent provisions of the Financial Services Authority's Prospectus Rules (the "Prospectus Rules").

4.7 After considering these arguments, the Code Committee concluded that it would be consistent with the objectives of PCP 2008/3 for display documents to be published on a website in addition to being made available for inspection in hard copy form. This was on the basis that the Code Committee believed that a party to an offer should have a website that would form a single point of reference for documents, announcements and information published in connection with an offer (including display documents). However, the Code Committee proposed deferring the proposed amendments to Rule 26 and the related Notes until a review had been undertaken of whether the list of documents to be put on display under Rule 26 remained appropriate. It was noted that the Code Committee thought it likely that the amendments to Rule 26 proposed in PCP 2008/3 would be adopted substantially in the form proposed following the review. Sections 4(d) to (i) below of this PCP constitute the conclusions of that review.

(d) *Purpose of requiring documents to be put on public display*

4.8 The Code Committee believes that information in relation to the offeree company and offerors should be provided to shareholders, persons with information rights and other interested persons in the form of the offer document and/or offeree board circular, and in the form of documents put on public display, for the following reasons:

(i) *Offeree company*

4.9 Information in relation to the offeree company should be provided to enable offeree company shareholders to evaluate the offer for their shares in the offeree company and to assist them in deciding whether or not to assent their shares to the offer. The display documents provide some general background information in relation to the relevant company (for example, its memorandum and articles of association) and also provide a means whereby an interested person can obtain further details in relation to the matters summarised or referred to in the offer document and/or offeree board circular, thus ensuring full disclosure and transparency in relation to this information (for example, in respect of the detail of irrevocable commitments and inducement fee agreements).

(ii) *Offerors*

4.10 In the context of a securities exchange offer, the Code Committee believes that information in relation to the offeror enables offeree company shareholders to evaluate the offer for their shares in the offeree company, and to assist them in deciding whether or not to assent their shares to the offer, on the same basis as described above.

4.11 However, irrespective of the form of the offer consideration, the Code Committee also believes that information in relation to an offeror is required because offeree company shareholders have the right to know about the potential controller of their company in order to decide whether to assent their shares to the offer or to retain their shares and possibly remain as minority shareholders in a company controlled by the offeror (subject to a sufficient number of other shareholders in the offeree company electing to do the same).

4.12 In the context of an offer where the consideration is solely in cash and there is no possibility of offeree company shareholders remaining as a minority in the offeree company, or the possibility of them doing so is negligible (for example, where the offer is being implemented by means of a scheme of

arrangement or a contractual offer with a 90% non-waivable acceptance condition), the requirement to provide certain information in relation to the offeror was relaxed in November 2007. A new Note 6 on Rule 24.2 was introduced in RS 2007/1 (“Schemes of arrangement”) which removed the requirement to summarise and put on display material contracts and financing arrangements of the offeror in those circumstances.

(e) ***Origin and development of Rule 26***

4.13 Early editions of the Code did not specify the information to be put on display in connection with an offer although, in later years, a requirement was added that certain documents relating to profit forecasts, asset valuations, irrevocable commitments and a full list of dealings should be put on display.

4.14 In the 1980s, the Code was amended to include a Note on Rule 26 which provided that, regardless of whether an offeror or the offeree company was listed on the London Stock Exchange, the documents referred to in paragraph 6 of Chapter 2 of Section 6 of “Admission of Securities to Listing on the London Stock Exchange” (the “Yellow Book”) should be made available for inspection. This Note was subsequently added as a new paragraph (f) of Rule 26.

4.15 In November 1993, Rule 26 was amended to refer specifically to the documents described in the Yellow Book as currently set out in paragraphs (a) to (f) of Rule 26. These documents were (and remain):

- (a) the memorandum and articles of association or equivalent documents;
- (b) the accounts for the preceding two years;
- (c) offeree company directors’ service contracts;
- (d) any other reports, letters, valuations or other documents that are exhibited to, or referred to in, offer-related documents;

- (e) written consents of financial advisers; and
- (f) material contracts described in the offer document or offeree board circular.

4.16 The Code Committee considered whether the requirement to put these documents on display and the other requirements of Rule 26 remain appropriate and concluded that, save as described below, the documents required to be put on display under Rule 26 have continued relevance to shareholders' investment decisions and that the Rule therefore continues to impose a proportionate regulatory burden on parties to offers.

4.17 However, following changes in applicable regulatory regimes, the Code Committee has identified the requirements of Rule 26(c) ("offeree company directors' service contracts") and Rule 26(f) ("material contracts described in the offer document or offeree board circular") as areas in which amendments to the Code should now be considered.

(f) Offeree company directors' service contracts and material contracts

4.18 In July 2005, the Financial Services Authority ("FSA") introduced changes to the listing regime that, among other things, implemented the provisions of the Prospectus Directive. One of these changes was the removal of the requirement to put a copy of the following documents on display in connection with the publication of a prospectus:

- (a) material contracts of the issuer; and
- (b) the service contracts of its directors.

4.19 The Code Committee understands that, notwithstanding that material contracts and directors' service contracts are no longer required to be put on display in connection with the publication of a prospectus, a summary of each material

contract entered into by the issuer or a member of its group in the preceding two years (other than those entered into in the ordinary course of business) is still required to be included in the prospectus. Similarly, summary details of directors' service contracts must be set out in a prospectus including, in particular, details of the expiration of the term of office and benefits on termination of employment.

4.20 The Code Committee understands that the position in relation to the documents required to be put on display in connection with shareholder circulars issued in connection with the FSA's Listing Rules (the "Listing Rules") was at the same time amended to reflect the position under the Prospectus Rules, such that copies of material contracts generally and directors' service contracts are not required to be put on display. The Code Committee understands that there is an exception to this general rule in that a copy of the relevant sale and purchase agreement would be required to be put on display in the case of a circular related to a Class 1 acquisition or disposal, and a copy of the relevant contract would be required to be put on display in the case of a circular in respect of a related party transaction, together with any other material contracts that are referred to in the circular which are necessary to enable shareholders to make a properly informed decision in relation to the proposed transaction (for example, an underwriting agreement where an acquisition was being financed by the issue of new shares).

4.21 Given the close nexus in the origin of Rules 26(a) to (f) and the corresponding provisions of the Yellow Book, the Code Committee has considered the arguments set out below in relation to whether equivalent changes to those introduced in the Prospectus Rules and Listing Rules should be made in respect of Rules 26(c) and (f) of the Code.

(g) *Arguments in favour of amending Rules 26(c) and (f)*

4.22 The Code Committee believes that there are good arguments in favour of amending the Code to:

- (a) remove the requirement to put on display copies of the service contracts of the offeree company directors (Rule 26(c)); and
- (b) remove the requirement to put on display copies of material contracts (or at least those material contracts that are not entered into in connection with an offer) that are described in the offer document or offeree board circular in compliance with Rules 24.2(a), 24.2(c) or 25.6(a).

4.23 An investor in a company incorporated in the United Kingdom may acquire new shares issued by the company in reliance on the information set out in a prospectus. Under the Prospectus Rules, a prospectus is required to include summary material contract details, but the issuer would not be required to put a copy of the relevant documents on display. As such, a potential investor would not have the benefit of being able to review a copy of each material contract in full in making an investment decision in relation to acquiring the shares.

4.24 Similarly, if a company which has its shares admitted to the Official List of the UK Listing Authority proposed to undertake a transaction that is classified as a Class 1 transaction for the purposes of the Listing Rules (for example, the disposal of a significant part of its business), it would be required to obtain shareholder approval in general meeting and produce a shareholder circular containing, among other things, a summary of the issuer's material contracts. However, the issuer would not be required to put a copy of the relevant documents on public display in full.

4.25 If either of the companies referred to above were subsequently to become the subject of a takeover offer, in deciding whether to assent shares to the offer or remain a minority shareholder in the offeree company (provided a sufficient number of other shareholders elected to do the same and/or the offeror was not able, or chose not, to implement the statutory squeeze-out procedure), offeree company shareholders would, in effect, be provided with more information in relation to material contracts of the offeree company and the offeree company

directors' service contracts than when the shares were first acquired or when deciding whether to consent to the disposal of a significant part of the company's business. Whilst it may be possible to justify a higher standard of disclosure in relation to matters that have a direct bearing on an offer (for example, it may be important for a shareholder to be able to review in full a copy of an implementation agreement or irrevocable commitments to accept the offer obtained by an offeror), it is more difficult to justify requiring copies of material contracts that are not related to the offer and directors' service contracts to be put on display in full in view of the similarity of the investment decisions which would be taken by a shareholder in these circumstances.

(h) Argument against amending Rules 26(c) and (f)

4.26 The Code Committee believes that the principal argument against amending Rule 26 as described above to remove the requirement to put copies of offeree company directors' service contracts and material contracts (other than those entered into in connection with the offer and summarised in the relevant documents) on display, in addition to providing summaries in offer documents and offeree board circulars, is that the Code regime serves a different purpose from the Prospectus Rules and Listing Rules. As such, it could be argued that it should not necessarily follow that a change in the provisions of the Prospectus Rules and/or Listing Rules in relation to display documents should be mirrored in the equivalent provisions of the Code.

4.27 Whilst the requirement to put certain documents on display under Rule 26 has its origins in the Yellow Book, the subsequent development and interpretation of the Rule have been on a stand-alone basis and it does not therefore follow that there should be direct equivalence between the Code and the Prospectus Rules and Listing Rules. There are a number of areas in which similar provisions of the regulatory systems of the FSA and the Panel operate differently (including, for example, the disclosure regimes, the payment of inducement fees and the approach to permitting the use of electronic forms of communication). It could be argued that these overlapping (but different)

regimes appear to be well understood in the market and do not appear to cause undue confusion in practice.

(i) *Code Committee's conclusions and proposed amendments to the Code*

(i) *Requirement for display documents to be published on a website*

4.28 The Code Committee has concluded that the Code should now be amended to require that copies of all documents put on public display by an offeror or offeree company under Rule 26 should be published on a website in addition to being available for physical inspection. This is on the basis that the Code Committee remains of the view that a party to an offer should have a website that would form a single point of reference for documents, announcements and information published in connection with an offer (including display documents).

4.29 The Code Committee also now proposes to amend Rule 26 to extend the period during which documents on display should be made available so that the documents would be displayed until the end of the offer (including any competition reference period) rather than until the end of the offer period (i.e. the first closing date of the offer or, if later, the date when the offer becomes or is declared unconditional as to acceptances). The Code Committee believes that this information may be of interest to shareholders seeking to reach a properly informed decision on the offer and others, for example, holders of convertible securities, options or subscription rights to which Rule 15 applies, seeking to make investment decisions. The Code Committee believes that, in certain circumstances, these decisions may be taken after the end of the offer period. The full text of these proposed amendments is set out in paragraph 4.5 above and also in Appendix A.

Q.3 Should the Code be amended to require display documents to be made available for inspection on a website in addition to hard copy form until the end of the offer (and any related competition reference period)? Do you have any comments on the proposed amendments to Rule 26 or the new Notes 2, 3, 4 and 5?

(ii) *Directors' service contracts*

4.30 In view of the argument described in paragraphs 4.23 to 4.25 above, the Code Committee has concluded that the Code should be amended to delete Rule 26(c) in its entirety and to renumber the remaining provisions of Rule 26 accordingly.

(iii) *Material contracts*

4.31 In view of the argument described in paragraphs 4.23 to 4.25 above, the Code Committee believes that the Code should also now be amended to delete the general requirement in Rule 26(f) for copies of material contracts that are described in the offer document in compliance with Rules 24.2(a) or Rule 24.2(c), or in the offeree board circular in compliance with Rule 25.6(a), to be put on display.

4.32 Certain material contracts and other arrangements entered into by parties to offers in connection with an offer are already specifically required to be put on display under Rule 26 (for example, documents relating to the payment of inducement fees or similar arrangements and documents evidencing irrevocable commitments or letters of intent in relation to the acceptance of an offer). However, the Code Committee believes that the Code should also require certain other material contracts entered into in connection with an offer (for example, implementation agreements and joint bidding agreements) to be put on display. The Code Committee therefore believes that the Code should be amended to include a new specific requirement for copies of material contracts entered into by an offeror or the offeree company, or any of their respective subsidiaries, in connection with the offer to be put on display if they are summarised or referred to in the offer document or offeree board circular (as the case may be) pursuant to Rule 24.2(a), Rule 24.2(c) or Rule 25.6(a).

4.33 The Code Committee therefore proposes to amend Rule 26(f) as follows:

“(ef) any material contract entered into by an offeror or the offeree company, or any of their respective subsidiaries, in connection with the offer that is described in the offer document or offeree board circular (as appropriate) in compliance with Rule 24.2(a), Rule 24.2(c) or Rule 25.6(a);”.

(iv) Consequential amendment

4.34 In view of the proposed amendment to Rule 26(f) described above, the Code Committee believes that a consequential amendment would also be required to be made to Rule 26(d) to make it clear that the service contracts of offeree company directors, and material contracts that are not entered into in connection with the offer, would not be required to be put on display if they are described or referred to in the offer document or offeree board circular or any other document published by or on behalf of the offeror or the offeree company.

4.35 The Code Committee therefore proposes to amend Rule 26(d) as follows:

“(cd) any report, letter, valuation or other document any part of which is exhibited or referred to in any document issued by or on behalf of the offeror or the offeree company (other than the service contracts of offeree company directors and any material contracts that are not entered into in connection with the offer);”.

Q.4 Do you agree that the Code should be amended to delete Rule 26(c) as suggested above? Do you agree that Rules 26(d) and (f) should be amended as suggested above?

5. When there is no need to make an offer – the Note on Rule 2.7

(a) Introduction

5.1 Rule 2.7 provides as follows:

“2.7 CONSEQUENCES OF A “FIRM ANNOUNCEMENT”

When there has been an announcement of a firm intention to make an offer, the offeror must normally make an offer unless, in accordance with the provisions of Rule 13, the offeror is permitted

to invoke a pre-condition to the making of an offer or would be permitted to invoke a condition to the offer if the offer were made.”.

5.2 Rule 13.4(a) provides that an offeror should not invoke any condition or pre-condition so as to cause the offer not to proceed, to lapse or to be withdrawn unless the circumstances which give rise to the right to invoke the condition or pre-condition are of material significance to the offeror in the context of the offer.

5.3 The Note on Rule 2.7 sets out certain circumstances in which an offeror will not be required to make an offer, and provides as follows:

“When there is no need to make an offer

An announced offeror need not make an offer if a competitor has already made a higher offer or, with the consent of the Panel, in the circumstances set out in Note 5 on Rule 21.1.”.

(b) The first limb of the Note on Rule 2.7 – where a competitor has made a higher offer

5.4 The effect of the first limb of the Note on Rule 2.7 is that where:

- (a) an offeror (“Offeror 1”) has announced a firm intention to make an offer under Rule 2.5 but has not published its offer document; and
- (b) a competing offeror (“Offeror 2”) has subsequently announced a firm intention to make a higher offer under Rule 2.5 and has published its offer document,

Offeror 1 is not required to publish its offer document. This is on the basis that there would be little purpose in Offeror 1 doing so in such circumstances, because it is assumed that shareholders would accept Offeror 2’s higher offer (when made) in preference to Offeror 1’s offer.

- 5.5 The first limb of the Note on Rule 2.7 currently involves an objective test to determine whether Offeror 1's obligation to proceed with its offer falls away once Offeror 2's offer has been made. The Note on Rule 2.7 does not currently refer to Offeror 1 being required to obtain the consent of the Panel not to proceed with its offer in those circumstances, albeit that the Code Committee understands that, as a matter of course, an offeror proposing not to proceed with its offer and its advisers would typically discuss the position with the Executive.
- 5.6 The Code Committee understands that, from time to time, Offeror 1 might seek to invoke the first limb of the Note on Rule 2.7 in circumstances where, for example, although Offeror 2 has made a higher offer, either:
- (a) Offeror 2's offer is not materially higher than Offeror 1's; or
 - (b) either or both offers are securities exchange offers, the value(s) of which may fluctuate as a result of changes in an offeror's share price.
- 5.7 In such circumstances, the Code Committee understands that, if consulted, the Executive would consider a number of factors in deciding whether Offeror 1 should be released from its obligation to make an offer. Depending on the circumstances of the case, these factors would normally include:
- (a) the views of the offeree board and its advisers;
 - (b) the specie of consideration pursuant to the offers;
 - (c) the extent to which there is a material difference in value between the two offers; and
 - (d) the structure of, and the conditions attached to, each of the offers.
- 5.8 Although the first limb of the Note on Rule 2.7 does not explicitly refer to the consent of the Panel, or the factors that the Panel might take into account in

deciding whether Offeror 1 should be released from the obligation to proceed with its offer, the Code Committee agrees with the approach described above.

5.9 In the light of the above, the Code Committee considers that it is important that a lower offeror and its advisers should consult the Panel in circumstances where a higher competing offer has been made before a decision is taken as to whether or not to make an offer and, therefore, that the Note on Rule 2.7 should be amended to make clear that the ability of an offeror to choose not to proceed with an offer where a higher competing offer has been made should be subject to the consent of the Panel in all circumstances.

Q.5 Do you agree that the Note on Rule 2.7 should be amended to make clear that the ability of an offeror to choose not to proceed with an offer where a higher competing offer has been made should be subject to the consent of the Panel?

(c) The second limb of the Note on Rule 2.7 – Note 5 on Rule 21.1

5.10 The Code Committee has also considered the second limb of the Note on Rule 2.7, which relates to Note 5 on Rule 21.1.

5.11 Under Rule 21.1, the board of an offeree company, once it has reason to believe that a bona fide offer might be imminent, is restricted from taking certain action which might have the effect of frustrating the offer without obtaining the prior approval of shareholders in general meeting. Such action includes issuing new shares or options, acquiring or disposing of assets of a material amount or entering into a contract otherwise than in the ordinary course of business.

5.12 Note 5 on Rule 21.1 provides as follows:

“5. When there is no need to make an offer

The Panel may allow an offeror not to make an offer if, at any time during the offer period prior to the publication of the offer document:-

(a) *the offeree company passes a resolution in general meeting as envisaged by this Rule; or*

(b) *the Panel has given consent for the offeree company to proceed with an action or transaction to which Rule 21.1 applies without a shareholders' meeting."*

5.13 On the basis that:

(a) any matter which is caught by Rule 21.1 would normally be the subject of a condition to an offer; and

(b) Rule 2.7 provides that an offeror which has announced a firm intention to make an offer will normally be required to make an offer unless it is permitted to invoke a pre-condition or a condition to its offer, and taking into account the materiality test set out in Rule 13.4(a) as referred to in paragraph 5.2 above,

the Code Committee considers that Note 5 on Rule 21.1 is inconsistent with Rule 2.7 and Rule 13.4(a) and should therefore be deleted.

Q.6 Do you agree that Note 5 on Rule 21.1 should be deleted?

(d) *Proposed amendments*

5.14 In the light of the above, the Code Committee proposes to amend the Note on Rule 2.7 as follows:

"When there is no need to make an offer

With the consent of the Panel, An announced offeror need not make an offer if a competitor has already made a higher offer ~~or, with the consent of the Panel, in the circumstances set out in Note 5 on Rule 21.1.~~"

5.15 In addition, the Code Committee proposes that the cross-reference to Note 5 on Rule 21.1 in Rule 37.3(a) should be deleted and that Notes 6 to 10 on Rule

21.1, and the cross-reference in Rule 37.3(a) to Note 10 on Rule 21.1, should be renumbered.

Q.7 Do you agree with the proposed amendment to the Note on Rule 2.7 as set out above and to the proposed consequential amendments?

6. Offerors who decide not to pursue a UK or EU competition clearance or who are prohibited from making an offer by the Competition Commission or the European Commission – Rule 12.2

(a) Introduction

6.1 Rule 35.1 places restrictions for 12 months on an offeror and any person acting in concert with that offeror in circumstances where an offer has been announced or made but has not become or been declared wholly unconditional and has been withdrawn or has lapsed.

6.2 However, Rule 35.1 provides that such restrictions will only apply if the offer has been withdrawn or has lapsed “otherwise than pursuant to Rule 12.1” (i.e. where the offer lapses otherwise than as a result of a UK or EU competition reference). Rule 12.2 provides that, where an offer is referred to the Competition Commission or the European Commission initiates proceedings (a “competition referral”), the offer period will end (save in certain circumstances), but that during the competition reference period certain restrictions will apply. Rule 12.2 also provides, at Rule 12.2(b)(ii)(A), that, if the offer or possible offer is allowed to proceed, the offeror or potential offeror must, normally within 21 days, announce a firm intention to make an offer in accordance with Rule 2.5 or announce that it does not wish to make an offer. In this latter case, the announcement will be treated as one to which Rule 2.8 applies and the offeror or potential offeror will, subject to limited exceptions, be prohibited from making an offer for the offeree company for six months from the date of the announcement.

6.3 The reference in Rule 35.1 to “otherwise than pursuant to Rule 12.1” and the provisions in Rule 12.2 relating to the procedure to be followed when the

competition reference period ends, either on clearance from the competition authorities of an offer or possible offer or as a result of their issuing a prohibition decision, were introduced as part of the changes proposed in PCP 2008/1 (“Competition reference periods”). As explained below, these provisions do not apply to pre-conditional offers.

6.4 As a result of the changes introduced following PCP 2008/1 and RS 2008/1, in addition to providing that, where an offer or possible offer is the subject of a competition referral, the offer period will end (save in certain circumstances), Rule 12.2 also sets out the obligations and restrictions that apply to the offeror or potential offeror if the offer is allowed to proceed. However, the Code Committee has noted that Rule 12.2 does not make it clear what obligations and restrictions apply to an offeror or potential offeror which: (i) decides that it does not wish to continue to seek clearance from the Competition Commission or European Commission (as appropriate); or (ii) is not allowed to proceed with the offer.

(b) Where the offeror or potential offeror decides not to pursue the clearance

6.5 The Code Committee believes that, if an offer has lapsed pursuant to Rule 12.1 as a result of a reference to the competition authorities, and the referred offeror or potential offeror subsequently decides that it does not wish to pursue the relevant UK or EU competition clearance, then that offeror or potential offeror should be required to announce its decision. The Code Committee believes that such an announcement should be treated as a statement to which Rule 2.8 applies in the same way as if the offeror or potential offeror had received the necessary clearance but had decided not to proceed with an offer in accordance with Rule 12.2(b)(ii)(A).

(c) Where the offeror or potential offeror is not allowed to proceed

6.6 If, at the end of a competition reference period, a prohibition decision is issued by the relevant authority in relation to the referred offer or possible offer, Rule 12.2(b)(iii) applies and no new offer period begins. That the relevant offeror

or potential offeror may not proceed with the prohibited offer is clear but it is not clear under the Code at present what would happen if, owing to a change in circumstances or willingness to propose anti-trust remedies to the appropriate competition authorities, that offeror or potential offeror wanted subsequently to make another offer.

6.7 As explained above, Rule 35.1 places restrictions on an offeror whose offer has lapsed or been withdrawn for a period of 12 months from the date of lapsing or withdrawal. However, these restrictions do not apply if the offer has lapsed pursuant to Rule 12.1, as would be the case in the scenario described above. The Code Committee considers that, in these circumstances, in order to prevent the offeree company from being placed under extended siege, the “prohibited” offeror or potential offeror should be made subject to the same restrictions under Rule 2.8 as are imposed on an offeror or potential offeror who makes a statement that it does not intend to make an offer for a company.

(d) Duration of restrictions

6.8 The Code Committee has considered whether, in these two scenarios, the offeror or potential offeror should be restricted from making another offer:

- (a) for six months (as provided for in Rule 2.8 and consistent with the period set out in Rule 12.2 for offerors or potential offerors who receive clearance but decide not to make an offer); or
- (b) for 12 months (consistent with the period set out in Rule 35.1 for offers that lapse or are withdrawn other than as a result of competition referrals).

As regards the first scenario, the Code Committee believes that it would be inconsistent to restrict offerors and potential offerors who decide not to pursue clearance for a longer period than those who decide not to make a new offer once clearance is received in accordance with Rule 12.2(b)(ii)(A). Similarly,

as regards the second scenario, the Code Committee believes that it would be inconsistent to restrict offerors and potential offerors for a longer period when clearance is not received than when it is received. Consequently, the Code Committee believes that, in both scenarios, six months would be the appropriate time period for the restrictions to apply.

- 6.9 In the light of the above, the Code Committee considers that Rule 12.2 should be amended to clarify the position in both these situations. It is therefore proposing to amend Rule 12.2(b)(iii) and to introduce a new Note 4 on Rule 12.2, as follows:

“12.2 COMPETITION REFERENCE PERIODS

...

- (b) If the offer period ends in accordance with Rule 12.2(a):-**

...

(iii) where the competition reference period ends when either the Competition Commission or the Secretary of State has issued a prohibition decision or when the European Commission has issued a decision under Article 8(3) of Council Regulation 139/2004/EC, no new offer period will begin. The offeror or potential offeror whose offer is prohibited, together with any person acting in concert with it, will, except with the consent of the Panel, be subject to the restrictions in Rule 2.8 for six months from the date on which the relevant decision is issued.

NOTES ON RULE 12.2

...

4. Offerors and potential offerors who decide not to pursue clearance or a decision from the relevant authority

Following the commencement of a competition reference period, if an offeror or potential offeror decides not to pursue clearance or a decision from the relevant authority, it must announce its decision and that it does not intend to make an offer for the offeree company. Such an announcement will be treated as a statement to which Rule 2.8 applies; the competition reference period will end on the date of the announcement and no new offer period will begin.”.

(e) *Pre-conditional offers*

6.10 The changes introduced following PCP 2008/1 and RS 2008/1 made it clear that, if an offer is announced subject to a pre-condition of clearance from the competition authorities, the offer period will continue throughout the competition reference period. The offeree company may, therefore, be subjected to a prolonged period of siege for the duration of the competition referral. At the end of the competition reference period, if the offer is cleared, as explained in PCP 2008/1, the offeror has 28 days within which to publish its offer document. If, however, the offer is prohibited, the pre-condition will not have been satisfied and the offer will lapse. In those circumstances, the offer will not have lapsed, or been withdrawn, pursuant to Rule 12.1 and the offeror will therefore be subject to the 12 month restrictions set out in Rule 35.1.

Q.8 Do you agree that Rule 12.2 should be amended as proposed?

7. No obligation to extend - Rule 31.3

7.1 Rule 31.3 provides that:

“There is no obligation to extend an offer the conditions of which are not met by the first or any subsequent closing date.”.

This principle was first included in the Code in 1972. At that time, although subjective conditions to an offer were not permitted, the Code did not include any specific provision about the invocation of conditions.

7.2 However, as noted above, Rule 13.4(a) now provides that:

“An offeror should not invoke any condition or pre-condition so as to cause the offer not to proceed, to lapse or to be withdrawn unless the circumstances which give rise to the right to invoke the condition or pre-condition are of material significance to the offeror in the context of the offer. The acceptance condition is not subject to this provision.”.

- 7.3 Therefore, although Rule 31.3 ostensibly provides that an offer may be withdrawn on the first or any subsequent closing date if any of the conditions have not at that time been met, in practice, if an offeror reached the first closing date having satisfied the acceptance condition, but had other conditions outstanding, it would not be permitted automatically to withdraw the offer. This is because Rule 13.4(a) would apply to the invocation of any of those outstanding conditions, and only if the circumstances giving rise to potential invocation were ruled to be material in the context of the offer would the offeror be allowed to withdraw.
- 7.4 However, if, on the first or any subsequent closing date, the acceptance condition had not been satisfied, the offeror would be able to elect not to extend its offer, which would then lapse, even if there were other conditions outstanding. This is because the acceptance condition is not subject to Rule 13.4(a).
- 7.5 As they stand, therefore, Rules 13.4(a) and 31.3 are not consistent. The automatic right of withdrawal under Rule 31.3 can apply only when it is the acceptance condition alone that is being invoked.
- 7.6 The Code Committee considers it would be desirable to remove this inconsistency by amending Rule 31.3 as follows:

“There is no obligation to extend an offer if the acceptance conditions of which are not met has not been satisfied by the first or any subsequent closing date.”.

Q.9 Do you agree with the proposed amendment to Rule 31.3?

8. Intentions of the directors of the offeree company with regard to alternative offers – Rule 25.3(a)(v)

- 8.1 Rule 25.1(a) provides that the board of the offeree company “must send its opinion on the offer (including any alternative offers) to the offeree company’s shareholders and persons with information rights”. In addition, Rule 25.3(a) provides that the first major circular published by the offeree

board in connection with the offer (whether recommending acceptance or rejection of the offer) must state various details including, by virtue of subparagraph (v), “whether the directors of the offeree company intend, in respect of their own beneficial shareholdings, to accept or reject the offer”.

8.2 The Code Committee believes that, where the offeror has made alternative offers, the offeree board’s circular should make clear which, if any, of the offers the directors of the offeree company intend to elect for.

8.3 The Code Committee therefore proposes to amend Rule 25.3(a)(v) as follows:

“25.3 INTERESTS AND DEALINGS

(a) The first major circular published by the offeree board in connection with the offer (whether recommending acceptance or rejection of the offer) must state:—

...

(v) whether the directors of the offeree company intend, in respect of their own beneficial shareholdings, to accept the offer (and, if there are alternative offers, which alternative they intend to elect for) or to reject the offer.”.

Q.10 Do you agree that Rule 25.3(a)(v) should be amended as proposed?

9. Material changes - Rule 27.1

(a) Background

9.1 Under Rule 27.1, documents sent by an offeror or the board of the offeree company to shareholders of the offeree company and persons with information rights subsequent to the publication of the offer document and the first major offeree board circular respectively must contain details of any material changes in information previously published by or on behalf of the relevant party during the offer period and, if there have been no such changes, must state that this is the case. In addition, Rule 27.1 specifically identifies certain matters which must be updated including, for example, changes to material contracts, irrevocable commitments or letters of intent and details of interests

and dealings in relevant securities of the offeree company and, where appropriate, the offeror.

(b) Proposed amendment

9.2 The Code Committee believes that an additional item should be added to the list of matters which must specifically be updated, namely any known material changes in the financial or trading position of the company in question. Accordingly, the Code Committee proposes that Rule 27.1 should be amended as follows:

“27.1 MATERIAL CHANGES

Documents subsequently sent to shareholders of the offeree company and persons with information rights by either party must contain details of any material changes in information previously published by or on behalf of the relevant party during the offer period; if there have been no such changes, this must be stated. In particular, the following matters must be updated:-

...

(b) any known material changes in the financial or trading position (Rules 24.2(a)(iv) and 25.2);”.

Q.11 Do you agree that Rule 27.1 should be amended as proposed?

10. Vendor of part only of an interest in shares – Note 6 on Rule 9.1

10.1 Rule 9.1(a) provides that a person is required to make a general offer when he acquires an interest in shares which, taken together with shares in which persons acting in concert with him are interested, carry 30% or more of the voting rights of a company.

10.2 The definition of “interests in securities”, which applies equally to references in the Code to “interests in shares”, provides, amongst other things, as follows:

“... a person will be treated as having an interest in securities if:-

...

(2) he has the right (whether conditional or absolute) to exercise or direct the exercise of the voting rights attaching to them or has general control of them”.

10.3 Note 6 on Rule 9.1 addresses the situation where it is intended that a vendor of shares will sell part only of his shareholding in a company to a purchaser and will retain the remainder. For example, this may occur where the purchaser wishes to avoid acquiring interests in shares representing 30% or more of a company’s voting rights as he does not wish to trigger a requirement to make a mandatory offer. The third sentence of Note 6 states that:

“The Panel will be concerned to see whether in such circumstances the vendor is acting in concert with the purchaser in such a way as effectively to allow the purchaser to exercise a significant degree of control over the retained shares, in which case a general offer would normally be required.”.

10.4 The Code Committee considers that it is correct that a mandatory offer should be required in circumstances where a purchaser has, in effect, acquired a significant degree of control over the shares retained by the vendor. However, the Code Committee does not believe that this will necessarily mean that the vendor should be considered to be acting in concert with the purchaser as regards the company in question. For example, there may be nothing to suggest that the vendor and the purchaser are co-operating so as to control the company. The Code Committee believes that, in such circumstances, the better analysis is that the purchaser of the shares should be treated as having acquired an interest in the shares retained by the vendor by virtue of paragraph (2) of the definition of “interests in securities”.

10.5 The Code Committee is therefore proposing to amend Note 6 on Rule 9.1, as follows:

“6. Vendor of part only of an interest in shares

Shareholders sometimes wish to sell part only of their shareholdings or a purchaser may be prepared to purchase part only of a shareholding.

This arises particularly where a purchaser wishes to acquire shares carrying just under 30% of the voting rights in a company, thereby avoiding an obligation under this Rule to make a general offer. The Panel will be concerned to see whether in such circumstances the vendor ~~is acting in concert with the purchaser in such a way as has~~ effectively ~~to~~ allowed the purchaser to ~~exercise~~ acquire a significant degree of control over the shares retained ~~shares~~ by the vendor such that the purchaser should be treated as having acquired an interest in them by virtue of paragraph (2) of the definition of interests in securities, in which case a general offer would normally be required. ...”.

Q.12 Do you agree that Note 6 on Rule 9.1 should be amended as proposed?

11. Partial offers by means of a scheme of arrangement – Rule 36

(a) Background

- 11.1 In PCP 2007/1 (“Schemes of arrangement”), the Code Committee proposed a number of amendments to the Code in relation to offers implemented by means of schemes of arrangement. The amendments to the Code adopted as a result of the public consultation were set out in RS 2007/1 and took effect on 14 January 2008.
- 11.2 Section 16 of PCP 2007/1 proposed that certain provisions of the Code should be disapplied in the context of a scheme of arrangement. Those provisions included certain provisions of Rule 36 regarding partial offers, namely: (i) Rule 36.4 (“Offer for between 30% and 50%”); (ii) Rule 36.5 (“Offer for 30% or more requires 50% approval”); and (iii) Rule 36.7 (“Scaling down”). The proposed disapplication of these provisions was adopted in paragraph 16.1 of RS 2007/1 and Rules 36.4, 36.5 and 36.7 were included in the list of provisions which are disapplied in a scheme, which comprises Section 14 of Appendix 7 of the Code. In addition, a footnote was introduced into Rule 36, indicating that Rules 36.4, 36.5 and 36.7 were to be disapplied in a scheme.
- 11.3 The Code Committee is not aware of any case in which a partial offer has been implemented by means of a scheme of arrangement. However, on reflection, the Code Committee believes that, for the reasons given below, it is not

necessary for Rules 36.4, 36.5 and 36.7 to be disapplied in the context of a partial offer implemented by means of a scheme of arrangement.

(b) *Rule 36.7 – scaling down*

11.4 The Code Committee believes that any partial offer implemented by way of a scheme of arrangement would be likely to incorporate a procedure to deal with shareholders who wished to elect to participate in the partial offer in excess of their proportionate shareholdings (i.e. to “over-elect”) and that such a procedure would (and should) closely resemble the “scaling down” procedure envisaged by Rule 36.7. Indeed, the Code Committee understands that similar procedures have been included in schemes involving partial cash alternative consideration coupled with “mix and match” elections, which allow shareholders to “over-elect” for cash. The Code Committee therefore believes that there is no need for Rule 36.7 to be disapplied in the context of a partial offer implemented by means of scheme of arrangement

(c) *Rule 36.5 – 50% approval*

11.5 In summary, Rule 36.5 provides that, if a partial offer could result in the offeror and persons acting in concert with it being interested in shares carrying 30% or more of the voting rights of the offeree company, the partial offer must be conditional not only on the specified number of acceptances being received but also on the approval of the offer being given in respect of over 50% of the voting rights held by shareholders who are independent of the offeror and persons acting in concert with it.

11.6 Whilst the Code Committee understands that a scheme of arrangement must be approved by the requisite majorities of shareholders of the offeree company prescribed by the Companies Act 2006, the Code Committee does not believe that it would be appropriate to rely on these majorities as addressing any concerns that might arise under Rule 36.5. For example, the test of voting eligibility applied by the Court in the context of a scheme is not necessarily

the same as the test of independence applied by the Panel in the context of Rule 36.5.

11.7 In addition, a scheme to implement a partial offer will be approved if shareholders representing a majority in number representing 75% in value of those present and voting in person or by proxy vote in favour of it. However, the requisite majorities for the purposes of the Companies Act 2006 would not necessarily represent more than 50% of the total “independent” voting rights in the offeree company.

(d) Rule 36.4 – offer for between 30% and 50%

11.8 Rule 36.4 provides that, when an offer is made which could result in the offeror and persons acting in concert with it being interested in shares carrying not less than 30% but not holding shares carrying more than 50% of the voting rights of a company, the precise number of shares offered for must be stated and the offer may not be declared unconditional as to acceptances unless acceptances are received for not less than that number.

11.9 Where a scheme of arrangement could result in the offeror and persons acting in concert with it being interested in shares carrying not less than 30% but not holding shares carrying more than 50% of the voting rights of a company, the Code Committee believes that the Panel should be consulted as to the application of the Code in such circumstances.

(e) Proposals

11.10 In the light of the above, the Code Committee proposes to:

- (a) delete the asterisks and footnote to Rules 36.4, 36.5 and 36.7, which provide that those Rules are disapplied in an offer that is implemented by means of a scheme;

- (b) delete the references to Rules 36.4, 36.5 and 36.7 in Section 14(m) of Appendix 7, as set out in Appendix A to this PCP; and
- (c) introduce a new Note 4 on Rule 36, as follows:

“4. Schemes of arrangement

The Panel should be consulted where it is proposed to implement a partial offer by means of a scheme of arrangement.”.

Q.13 Do you agree that Rule 36 should be amended as proposed?

12. Assessment of the impact of the proposals

- 12.1 The amendments proposed relate to various different areas covered by the Code but are principally designed either to codify existing practice or to remove possible ambiguity in the application of the Rules. In the interests of maintaining an orderly framework for the conduct of takeover bids, the Code Committee considers that it is advantageous both to practitioners and to the Executive for existing practice to be reflected in the Code and for ambiguity in the Rules to be removed.
- 12.2 Certain of the proposed amendments reflect developments in the Code Committee’s thinking in relation to “chain principle” bids, management incentivisation and the display of documents on websites. The Code Committee considers that the proposed amendments will, if adopted, be of benefit to both parties to offers and to other market participants and practitioners.
- 12.3 To the extent that the amendments reflect existing practice, the Code Committee does not believe that they will place any new burdens on parties to offers, other market participants or practitioners. To the extent that certain of the proposed amendments will, if adopted, require changes in the way in which offers are conducted the Code Committee believes that any additional costs that will be incurred will be justified on the basis of the benefits that will

arise to the market as a whole. Certain of the proposed amendments may result in a reduction of costs. Taking all these considerations together, the Code Committee considers that the proposed amendments are proportionate.

APPENDIX A
Proposed amendments to the Code

Introduction

10 ENFORCING THE CODE

...

(c) Compensation rulings

Where a person has breached the requirements of any of Rules 6, 9, 11, 14, 15, 16.1 or 35.3 of the Code, the Panel may make a ruling requiring the person concerned to pay, within such period as is specified, to the holders, or former holders, of securities of the offeree company such amount as it thinks just and reasonable so as to ensure that such holders receive what they would have been entitled to receive if the relevant Rule had been complied with. ...

Rule 2.7

2.7 CONSEQUENCES OF A “FIRM ANNOUNCEMENT”

...

NOTE ON RULE 2.7

When there is no need to make an offer

With the consent of the Panel, ~~Aan announced offeror need not make an offer if a competitor has already made a higher offer or, with the consent of the Panel, in the circumstances set out in Note 5 on Rule 21.1.~~

Rule 9.1

9.1 WHEN A MANDATORY OFFER IS REQUIRED AND WHO IS PRIMARILY RESPONSIBLE FOR MAKING IT

...

NOTES ON RULE 9.1

...

6. Vendor of part only of an interest in shares

Shareholders sometimes wish to sell part only of their shareholdings or a purchaser may be prepared to purchase part only of a shareholding. This

arises particularly where a purchaser wishes to acquire shares carrying just under 30% of the voting rights in a company, thereby avoiding an obligation under this Rule to make a general offer. The Panel will be concerned to see whether in such circumstances the vendor ~~is acting in concert with the purchaser in such a way as~~ has effectively allowed the purchaser to ~~exercise~~ acquire a significant degree of control over the shares retained ~~shares~~ by the vendor such that the purchaser should be treated as having acquired an interest in them by virtue of paragraph (2) of the definition of interests in securities, in which case a general offer would normally be required. ...

...

8. *The chain principle*

... The Panel will not normally require an offer to be made under this Rule in these circumstances unless either:-

(a) the interest in shares which the first company has in the second company is significant in relation to the first company. In assessing this, the Panel will take into account a number of factors including, as appropriate, the assets, ~~and~~ profits and market values of the respective companies. Relative values of 50% 30% or more will normally be regarded as significant; or

(b) ~~one of the main purposes~~ securing control of the second company ~~might reasonably be considered to be a significant purpose of acquiring control of the first company~~ was to secure control of the second company.

Rule 11.2

11.2 WHEN A SECURITIES OFFER IS REQUIRED

...

NOTES ON RULE 11.2

...

4. *Management retaining an interest*

In a management buyout or similar transaction, if the only offeree shareholders who receive offeror securities are members of the management of the offeree company, the Panel will not, so long as the requirements of Note 4 on Rule 16 are complied with, require all offeree shareholders to be offered offeror securities pursuant to Rule 11.2, even though such members of the management of the offeree propose to sell, in exchange for offeror securities, more than 10% of the offeree's shares.

~~If, however, offeror securities are made available to any non-management shareholders (regardless of the size of their holding of offeree shares), the Panel will normally require such securities to be made available to all shareholders on the same terms.~~

See Note 2 on Rule 16.2.

Rule 12.2

12.2 COMPETITION REFERENCE PERIODS

...

(b) If the offer period ends in accordance with Rule 12.2(a):-

...

(iii) where the competition reference period ends when either the Competition Commission or the Secretary of State has issued a prohibition decision or when the European Commission has issued a decision under Article 8(3) of Council Regulation 139/2004/EC, no new offer period will begin. The offeror or potential offeror whose offer is prohibited, together with any person acting in concert with it, will, except with the consent of the Panel, be subject to the restrictions in Rule 2.8 for six months from the date on which the relevant decision is issued.

NOTES ON RULE 12.2

...

4. Offerors and potential offerors who decide not to pursue clearance or a decision from the relevant authority

Following the commencement of a competition reference period, if an offeror or potential offeror decides not to pursue clearance or a decision from the relevant authority, it must announce its decision and that it does not intend to make an offer for the offeree company. Such an announcement will be treated as a statement to which Rule 2.8 applies; the competition reference period will end on the date of the announcement and no new offer period will begin.

Rule 16

RULE 16. SPECIAL DEALS AND MANAGEMENT INCENTIVISATION

16.1 SPECIAL DEALS WITH FAVOURABLE CONDITIONS

...

NOTES ON RULE 16.1

...

2. *Offeree company shareholders' approval of certain transactions — eg disposal of offeree company assets*

... At this meeting the vote must be a separate vote of independent shareholders and must be taken on a poll. Where a sale of assets takes place after the offer has become unconditional, the Panel will be concerned to see that there was no element of pre-arrangement in the transaction.

...

- ~~4. — Management retaining an interest and other management incentivisation~~

~~Sometimes an offeror may wish to arrange for the management of the offeree company to remain financially involved in the business. The methods by which this may be achieved vary but the principle which the Panel is concerned to safeguard is that the risks as well as the rewards associated with an equity shareholding should apply to the management's retained interest. For example, the Panel would not normally find acceptable an option arrangement which guaranteed the original offer price as a minimum. The Panel will require, as a condition of its consent, that the independent adviser to the offeree company publicly states that in its opinion the arrangements with the management of the offeree company are fair and reasonable. In addition, the Panel will also require such arrangements to be approved at a general meeting of the offeree company's shareholders. At this meeting the vote must be a vote of independent shareholders and must be taken on a poll. Holdings of convertible securities, options and other subscription rights may also be relevant in determining whether a general meeting is required, particularly where such rights are exercisable during an offer.~~

~~Where the offeror wishes to arrange other incentivisation for management to ensure their continued involvement in the business, the Panel will require, as a condition of its consent, that the independent adviser to the offeree company publicly states that in its opinion the arrangements are fair and reasonable.~~

~~The Panel must be consulted in all circumstances where this Note may be relevant.~~

16.2 MANAGEMENT INCENTIVISATION

a) Except with the consent of the Panel, where an offeror has entered into or proposes to enter into any form of incentivisation arrangements with members of the offeree company's management, the independent adviser to the offeree company must state publicly that in its opinion the

arrangements are fair and reasonable so far as shareholders are concerned. If it is intended to put incentivisation arrangements in place following completion of the offer, but either no discussions or only limited discussions have taken place, this fact must be stated publicly and full details of the discussions disclosed. Where no incentivisation arrangements are proposed, this must be stated publicly.

(b) Where the value of the arrangements entered into or proposed to be entered into is significant and/or the nature of the arrangements is unusual either in the context of the relevant industry or best practice, the Panel must be consulted and its consent to the arrangements obtained. The Panel may also require, as a condition of its consent, that the arrangements be approved at a general meeting of the offeree company's shareholders.

(c) Any approval as required by paragraph (b) above, must be by a separate vote of independent shareholders, taken on a poll.

NOTES ON RULE 16.2

1. Requirement for general meeting approval

Where the relevant members of management are interested in any securities of the offeree company and, as a result of the incentivisation arrangements, they will become interested in securities of the offeror on a basis that is not being made available to all shareholders, such arrangements must be approved at a general meeting of the offeree company's shareholders.

2. Management retaining an interest

If the only shareholders in the offeree company who receive offeror securities are members of the management of the offeree company, the Panel will not, so long as the requirements of this Rule are complied with, require all offeree shareholders to be offered offeror securities pursuant to Rule 11.2, even though such members of the management of the offeree company propose to sell, in exchange for offeror securities, more than 10% of the offeree company's shares.

Rule 19.10

19.10 DISTRIBUTION OF DOCUMENTS, ANNOUNCEMENTS AND INFORMATION TO THE PANEL AND OTHER PARTIES TO AN OFFER

(b) ...

Documents must also be sent in hard copy form to the Panel and the advisers to all other parties to the offer at the time of publication. Such

documents, announcements or information must not be released to the media under an embargo (see also ~~the~~ Note 1 on Rule 26).

Rule 21.1

21.1 WHEN SHAREHOLDERS' CONSENT IS REQUIRED

...

NOTES ON RULE 21.1

...

~~5. When there is no need to make an offer~~

~~The Panel may allow an offeror not to make an offer if, at any time during the offer period prior to the publication of the offer document:-~~

~~(a) the offeree company passes a resolution in general meeting as envisaged by this Rule; or~~

~~(b) the Panel has given consent for the offeree company to proceed with an action or transaction to which Rule 21.1 applies without a shareholders' meeting.~~

65. Service contracts

...

76. Established share option schemes

...

87. Pension schemes

...

98. Redemption or purchase by an offeree company of its own securities

...

~~109.~~ Shares carrying more than 50% of the voting rights

...

Rule 25.3

25.3 INTERESTS AND DEALINGS

(a) The first major circular published by the offeree board in connection with the offer (whether recommending acceptance or rejection of the offer) must state:—

...

(v) whether the directors of the offeree company intend, in respect of their own beneficial shareholdings, to accept the offer (and, if there are alternative offers, which alternative they intend to elect for) or to reject the offer.

Rule 26

RULE 26. DOCUMENTS TO BE ON DISPLAY

Except with the consent of the Panel, copies of the following documents must be made available for inspection and published on a website from the time the offer document or offeree board circular, as appropriate, is published until the end of the offer ~~period~~ (and any related competition reference period). The offer document or offeree board circular must state which documents are so available ~~and~~, the place (being a place in the City of London or such other place as the Panel may agree) where inspection can be made and the address of the website on which the documents are published:—

...

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

~~(cd)~~ any report, letter, valuation or other document any part of which is exhibited or referred to in any document issued by or on behalf of the offeror or the offeree company (other than the service contracts of offeree company directors and any material contracts that are not entered into in connection with the offer);

~~(de)~~ ... ;

~~(ef)~~ any material contract entered into by an offeror or the offeree company, or any of their respective subsidiaries, in connection with the offer that is described in the offer document or offeree board circular (as appropriate) in compliance with Rule 24.2(a), Rule 24.2(c) or Rule 25.6(a);

~~(fg)~~ ... ;

(gh) ... ;

(hi) ... ;

(ij) ... ;

(jk) ... ;

(kl) ... ;

(lm) ... ;

(mn) ... ;

(no) ... ;

(op) ... ; **and**

(pq)

NOTES ON RULE 26

1. Copies of documents

...

2. Website to be used for publication

A party to an offer should normally use its own website for publishing documents to be on display. If a party to an offer does not have its own website, or intends to use a website maintained by a third party for this purpose, the Panel should be consulted.

3. “Read-only” format

Documents on display on a website must be published in a “read-only” format so that they may not be amended or altered in any way.

4. Shareholders, persons with information rights and other persons in non-EEA jurisdictions

See Note 3 on Rule 19.11 and the Note on Rule 30.3.

5. Amendment, variation or updating of documents on display

If a document on display is amended, varied or updated during the period in which it is required to be on display under Rule 26, then the amended, varied or updated document should also be put on display.

Rule 27.1**27.1 MATERIAL CHANGES**

Documents subsequently sent to shareholders of the offeree company and persons with information rights by either party must contain details of any material changes in information previously published by or on behalf of the relevant party during the offer period; if there have been no such changes, this must be stated. In particular, the following matters must be updated:-

...

(b) any known material changes in the financial or trading position (Rules 24.2(a)(iv) and 25.2);

(bc) ... ;

(ed) ... ;

(de) ... ;

(ef) ... ;

(fg) ... ; and

(gh)

Rule 31.3**31.3 NO OBLIGATION TO EXTEND**

There is no obligation to extend an offer if the acceptance conditions of which are not met has not been satisfied by the first or any subsequent closing date.

Rule 35.3**35.3 DELAY OF 6 MONTHS BEFORE ACQUISITIONS ABOVE THE OFFER VALUE**

... In addition, special deals with favourable conditions attached may not be entered into during this 6 months period (see also Rule 16.1).

Rule 36**36.4 OFFER FOR BETWEEN 30% AND 50%***

...

36.5 OFFER FOR 30% OR MORE REQUIRES 50% APPROVAL*

...

36.7 SCALING DOWN*

...

**This Rule is disapplied in a scheme.*

NOTES ON RULE 36

...

4. Schemes of arrangement

The Panel should be consulted where it is proposed to implement a partial offer by means of a scheme of arrangement.

Rule 37.3

37.3 REDEMPTION OR PURCHASE OF SECURITIES BY THE OFFEREE COMPANY

(a) Shareholders' approval

... Where it is felt that the redemption or purchase is in pursuance of a contract entered into earlier or another pre-existing obligation, the Panel must be consulted and its consent to proceed without a shareholders' meeting obtained (Notes 1, 5 and 109 on Rule 21.1 may be relevant).

Appendix 1

APPENDIX 1

WHITEWASH GUIDANCE NOTE

...

4 WHITEWASH CIRCULAR

...

(f) Rule 16.2 (management incentivisation);

(fg) ... ;

- (gh) ... ;
- (hi) ... ;
- (ij) ... ;
- (jk) ... ;
- (kl) ... ;
- (lm) ... ;
- (mn) ... ; and
- (no)

Appendix 7

APPENDIX 7

SCHEMES OF ARRANGEMENT

...

14 PROVISIONS DISAPPLIED IN A SCHEME

...

(k) ... ; and

(l) ... ; and.

~~(m) — Rules 36.4, 36.5 and 36.7 (partial offers).~~

APPENDIX B**List of questions**

- Q.1 Do you agree with the proposed amendments to Note 8 on Rule 9.1?**
- Q.2 Do you agree with the proposed amendment to Note 2 on Rule 16, the proposed deletion of Note 4 on Rule 16, the proposed adoption of new Rule 16.2 and the Notes thereon, the amendment to paragraph 4 of Appendix 1 and the related amendments referred to above?**
- Q.3 Should the Code be amended to require display documents to be made available for inspection on a website in addition to hard copy form until the end of the offer (and any related competition reference period)? Do you have any comments on the proposed amendments to Rule 26 or the new Notes 2, 3, 4 and 5?**
- Q.4 Do you agree that the Code should be amended to delete Rule 26(c) as suggested above? Do you agree that Rules 26(d) and (f) should be amended as suggested above?**
- Q.5 Do you agree that the Note on Rule 2.7 should be amended to make clear that the ability of an offeror to choose not to proceed with an offer where a higher competing offer has been made should be subject to the consent of the Panel?**
- Q.6 Do you agree that Note 5 on Rule 21.1 should be deleted?**
- Q.7 Do you agree with the proposed amendment to the Note on Rule 2.7 as set out above and to the proposed consequential amendments?**
- Q.8 Do you agree that Rule 12.2 should be amended as proposed?**
- Q.9 Do you agree with the proposed amendment to Rule 31.3?**
- Q.10 Do you agree that Rule 25.3(a)(v) should be amended as proposed?**
- Q.11 Do you agree that Rule 27.1 should be amended as proposed?**
- Q.12 Do you agree that Note 6 on Rule 9.1 should be amended as proposed?**
- Q.13 Do you agree that Rule 36 should be amended as proposed?**