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THE TAKEOVER PANEL

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

**PROFIT FORECASTS, ASSET VALUATIONS AND
MERGER BENEFITS STATEMENTS**

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 21 May 2010.

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
10 Paternoster Square
London
EC4M 7DY

Telephone: 020 7382 9026

Fax: 020 7236 7005

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. Introduction and summary

1.1 The purpose of this PCP is to consider a number of amendments which the Code Committee is proposing with a view to improving the coherence and consistency of the approach in the Code towards the requirements for certain financial information, when published in the form of a profit forecast, an asset valuation, a merger benefits statement or any other quantified statement of effects, either before or during the course of an offer, to be accompanied by a report from one or more third parties.

1.2 The proposals comprise:

- (i) the relaxation, normally in the context of a recommended offer, of the reporting requirements in relation to a statement which would be treated as a profit forecast under Rule 28 or regarded as an asset valuation given in connection with an offer under Rule 29 but which is in fact published in the “normal course” of a company’s business and not in connection with the offer and which is neither used in the debate on the offer nor otherwise a material issue (Sections 2 and 3);
- (ii) the extension of the exemptions currently included in Rule 28.6(c) in relation to certain unaudited interim and preliminary results which comply with the UKLA Rules to, in certain circumstances, profits reported in interim management statements and unaudited interim and preliminary results reported by companies traded on the AIM and PLUS markets (Section 4);
- (iii) a requirement for reports to be provided when a profit forecast is made for a part of a business (Section 5); and

- (iv) the extension of the requirements in Note 8 on Rule 19.1, relating to merger benefits statements, to other quantified statements of the potential financial effects of a course of action which is put forward in the course of an offer, such as cost savings published by the offeree company as part of its defence, and an extension of the circumstances in which reports on such statements would be required (Section 6).
- 1.3 The PCP also contains, in Section 7, a number of proposals for technical and drafting changes to Rules 28 and 29 to improve consistency and clarity and to bring the Rules up to date and, in some cases, to codify existing practice.

(b) Background

- 1.4 General Principle 2 states that:

“The holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid; ...”.

- General Principle 4 states that:

“False markets must not be created in the securities of the offeree company, of the offeror company or of any other company concerned by the bid in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted.”.

It is these two principles that underlie the approach in the Code towards the publication of unaudited financial information, in relation to either a “paper offeror” (i.e. one who is not offering solely cash) or the offeree company, which might both influence shareholders’ assessment of the offer and affect the market price of the securities of the party to the offer to which the information relates and thus the attractiveness of the offer. Rule 19.1 requires that all information published in the context of an offer must be prepared to the highest standards of

accuracy but because of (i) the particular reliance that investors may place on such financial information in making a judgement on value and (ii) the possible motivation of the directors of the company concerned to make an optimistic assessment by reference to subjective considerations, the Code requires more comprehensive and authoritative support for such financial information than is generally required by Rule 19.1. In particular, the Code requires a clear exposition of the assumptions made in compiling the financial information and reports from appropriate third parties.

- 1.5 Rule 28.1, relating to profit forecasts, emphasises the need for **“the highest standards of accuracy and fair presentation in all communications published in connection with an offer”** and states both that: **“A profit forecast must be compiled with due care and consideration by the directors, whose sole responsibility it is ...”**; and that: **“the financial advisers must satisfy themselves that the forecast has been prepared in this manner by the directors.”**. Other parts of Rule 28 describe statements which will be treated as profit forecasts and set out the information that must accompany a forecast, both in the form of underlying assumptions and of reports from the relevant advisers. In essence, the Rule as a whole provides that any forecast made by the offeree company or by a paper offeror, that is either presented to shareholders during the course of the offer or that is on the record at the start of the offer period, must be reported on by the relevant party’s accountants and financial advisers. This is intended to reassure shareholders and the market more generally that the forecast has been prepared to Code standards. Some limited exemptions from the requirement to report are set out in the Rule and other dispensations may be granted in certain circumstances by the Panel.
- 1.6 Rule 29.1, relating to asset valuations, requires that: **“When a valuation of assets is given in connection with an offer, it should be supported by the opinion of a named independent valuer.”**. Rule 29 goes on to prescribe the contents of the independent valuer’s opinion but also provides, in Rules 29.1(c) and 29.6, for

exemptions from the requirement for the opinion that may be granted by the Panel in limited circumstances.

- 1.7 Note 8 on Rule 19.1 imposes a requirement on parties to an offer to provide certain information when, in the context of a securities exchange offer which is or becomes hostile or competitive, they make quantified statements about the expected financial benefits of a proposed takeover or merger (“merger benefits statements”) and it requires that reports on the statements must be provided by financial advisers and accountants.

(c) *The Code Committee’s review*

- 1.8 The Code Committee has reviewed Rules 28 and 29 and Note 8 on Rule 19.1 with a view to reflecting developments of both (i) practice in the market and (ii) accounting rules and the UKLA Rules relating to the publication of forward-looking or other unaudited financial information. It has also compared the differing requirements in Rules 28 and 29 and Note 8 on Rule 19.1 for third party reports to be provided on financial information that is published and made available to shareholders both before and during the course of an offer, with a view to proposing a more consistent approach.

- 1.9 In carrying out its review, the Code Committee has had regard to the need for any requirement for reports on financial information to be proportionate and, therefore, for the Rules to strike an appropriate balance between:

- (i) the need for offeree company shareholders and the market to be able to rely on relevant financial information, such as profit forecasts, asset valuations or other significant forward-looking financial statements, which are made available in the course of an offer, whether published during the offer period or before it begins; and

- (ii) the burden that the reporting requirements can sometimes impose on the companies concerned.

1.10 With these considerations in mind, the Code Committee is proposing a relaxation of the requirements for reports on profit forecasts and asset valuations in the circumstances described in sub-paragraphs 1.2(i) and (ii) above. However, the Code Committee has identified certain other situations, described in sub-paragraphs 1.2(iii) and (iv), which are not currently covered by the Code but in which it considers that reports on financial information should be required.

(d) Informal prior consultation

1.11 As part of the Code Committee's consideration of the proposals discussed in this PCP, the Panel Executive (the "Executive") carried out informal consultations on its behalf during which the views of, among others, the bodies and companies listed in Appendix A were sought in relation to the principal substantive issues raised.

1.12 The responses received by the Executive in the course of this informal consultation were supportive of the Code Committee's principal objectives. The Code Committee would like to express its thanks to all those who took part in the informal consultation exercise for their valuable input.

(e) Proposed amendments and questions

1.13 The full text of the proposed amendments to the Code is set out in Appendix B. A list of the questions put in the PCP is set out in Appendix C.

(f) Invitation to comment and proposed implementation

1.14 The Code Committee would welcome comments on the proposals in this PCP; comments should be submitted by 21 May 2010 in the manner indicated at the front of the PCP.

1.15 The Code Committee's current intention is that any amendments made to the Code as a result of this consultation exercise should take effect later in 2010.

2. "Normal course" profit forecasts

(a) Introduction

2.1 The Code Committee has noted that it has become common practice in some jurisdictions, most notably the USA, for companies to provide "earnings guidance" statements or other statements including forward-looking profit information on a regular basis as part of their normal process of communicating with shareholders and the market (hereafter referred to as "normal course" statements or "normal course" forecasts). The likelihood of these companies either having such a normal course statement on the record at the start of an offer period or of their wanting to publish such a normal course statement during an offer period has therefore increased. Such normal course statements would normally fall to be treated under Rule 28.6 as profit forecasts and, under the current requirements of Rule 28.3, reports would have to be made on them.

2.2 The Code Committee understands that in a number of cases the Executive has encountered the situation where an overseas paper offeror has published a normal course earnings guidance statement before the start of an offer period and has sought a dispensation from the reporting requirements in Rule 28 on the grounds that the statement in question was published in the normal course of the company's communication with shareholders and the market and not in

connection with an offer. The Code Committee understands that, on occasion, the Executive has granted dispensations from the reporting requirements in such circumstances, typically with stipulations that the earnings guidance statement must not be repeated, must not be drawn to the attention of offeree shareholders and, wherever the statement continues to be available in the public domain (for example, on the company's website) that it should have added to it a prominent warning that the statement was not prepared to Rule 28 standards and should not be relied upon for Code purposes.

2.3 While there is no obligation on companies admitted to trading on UK markets to provide forward-looking information which would constitute a profit forecast as part of their normal course communication with shareholders and the market, in practice, a significant number of such companies do so. A review conducted by the Executive in the second quarter of 2009 indicated that approximately one quarter of the members of the FTSE 100 Index had, in the previous six months, either published explicit earnings guidance statements or made other public statements which put “**a floor under, or a ceiling on, the likely profits of a particular period or contain[ed] the data necessary to calculate an approximate figure for future profits**” (and which would therefore be treated as profit forecasts under Rule 28.6(a)). In the light of this, the Code Committee considers that UK corporate practice in relation to earnings guidance may increasingly run up against the existing provisions of Rule 28 and that requests for dispensations from the reporting requirements in the Rule are likely to arise. The Code Committee has therefore considered amending Rule 28 in anticipation of this development.

(b) Arguments for providing exemptions from the Rule 28 reporting requirements

2.4 The Code Committee considers that it can be argued that requiring a report by accountants and financial advisers on normal course profit forecasts may be disproportionate in some circumstances for the following reasons:

- (i) when a normal course forecast is produced outside an offer period, at a time when an offer cannot reasonably be regarded as being in contemplation, there is less likely to be an incentive for the party preparing the forecast to take an optimistic view on the figures and, therefore, the cost and burden to that party of having that forecast reported on subsequently by financial advisers and accountants to the standard of Rule 28 may be out of proportion to any benefit accruing to offeree shareholders;

- (ii) a normal course forecast may be produced for a different purpose, in a different context and to a different standard from a profit forecast made in the context of an offer. There is an expectation that a profit forecast made in the context of an offer will set a minimum level of profit which the company has a high level of confidence of achieving or exceeding and, in practice, such a forecast is made with a considerable degree of prudence and to a limited time horizon. By contrast, a normal course earnings guidance statement, albeit made with due care in the light of listing rules and other market obligations, may represent more of a best estimate for a period, or relate to a longer future period; and, moreover, it may be presented as a range of figures and be revised from time to time, with greater market understanding that, for various reasons, the actual profits may be higher or lower than the guidance given. Therefore, even on the basis that guidance has been provided responsibly, there may not be a sufficient degree of confidence in the financial information to enable a report to be prepared to the standard expected under Rule 28;

- (iii) a normal course forecast is often made in accordance with international peer company practice and in the interests of transparency to inform the market, and has to comply with applicable legal and regulatory standards. To discourage companies from providing such guidance outside an offer period or to encourage them to do so on a more conservative basis because of the

risk of having to report under Rule 28 should an offer ensue would be a disservice to shareholders; and

- (iv) if a normal course forecast has little or no bearing on shareholders' assessment of the offer and the market is fully aware of the context in which it has been made, reports would serve little purpose.

(c) *Argument against providing exemptions*

2.5 The counter-argument is that shareholders can be expected to read and, to some extent at least, rely upon forward-looking earnings guidance. It is difficult to believe that, in practice, a profit forecast made by a company subject to the Code, even if made in the normal course and with no thought to a possible offer, will not have some bearing on shareholders' assessment of the value of, and hence their assessment of, any subsequent offer for the company. A profit forecast by an offeror is likely to be of particular relevance to offeree shareholders when deciding whether to accept a securities exchange offer.

(d) *The Code Committee's views*

2.6 The Code Committee believes that, in principle, the Code should not apply so as to discourage companies from publishing normal course statements or forecasts to keep shareholders and the market informed. At the same time, it is important to maintain the quality assurance provided by requiring reports on profit forecasts where these are likely to be of particular relevance in the assessment of an offer. The Code Committee therefore considers that, while the underlying premise in the Code should continue to be that a profit forecast, whether on the record at the start of an offer period or made during the offer period, should be reported on, the Code should provide scope for exemptions to be granted from the requirement to report, subject to the following provisos:

- (i) the forecast was made in the normal course of the company's communication with the market;
 - (ii) the offer has been publicly recommended by the offeree board and, in the context of a forecast made by an offeror that is a paper offeror, no competitive situation has arisen (i.e. there is no announced competing offer or named potential offeror);
 - (iii) an exemption should not generally be available where the forecast was made during an offer period, or shortly before the commencement of an offer period when it might be reasonable to assume that the party making the forecast had the offer in contemplation; and
 - (iv) the forecast has not been used by the parties to the offer in any debate on the merits of the offer nor has it otherwise become a material issue.
- (e) ***Hostile and competitive offers***
- (i) *Reports normally required in hostile/competitive situations*

2.7 The Code Committee believes that, normally, if an offer is hostile or (in respect of a profit forecast made by a paper offeror) if a competitive situation has arisen, any profit forecast (whether pre-existing or new), even if made in the normal course, should be reported on. This is because the Code Committee considers that, in such circumstances, a profit forecast is likely to be used in the debate on the merits of the offer and there may be more incentive for parties to publish optimistic profit forecasts, with the result that the need for third party reports is likely to be greater. Moreover, in a hostile or competitive context, there may well be certain disagreement on the facts, for example, differing views as to whether an apparently normal course earnings guidance statement made by an offeree company or by a paper offeror before the start of an offer period had been made

when an offer could reasonably be regarded as having been in contemplation. The Code Committee also considers that, in the context of a recommended offer, offeree shareholders can take some comfort from the fact that a profit forecast made by a paper offeror is likely to have been considered carefully by the independent adviser appointed under Rule 3 in formulating its advice to the offeree board.

(ii) *Exceptionally, reporting exemption may be available, even if the offer is hostile/competitive*

2.8 However, the Code Committee also considers that, occasionally, circumstances could arise in which it would be disproportionate to require a party, which had made a normal course forecast when it genuinely had no expectation of an offer being made, to obtain a report on that forecast in the course of a hostile or competitive offer. This might especially be so if the forecast was not actually a matter for debate by the parties on the merits of the offer or otherwise considered by the Panel to be a material issue. The Code Committee therefore considers that the Panel should be able to grant an exemption from the reporting requirement in such circumstances.

(iii) *Reporting requirements may be re-imposed if circumstances change*

2.9 It may happen that, during the course of the offer period, there is a change in the circumstances that prevailed when the Panel made a decision to give an exemption. For example, the forecast might become the subject of debate by the parties on the merits of the offer, perhaps because of the announcement of a competing offer or possible offer or because although, when the exemption was given, the parties both expected the offer to be recommended by the offeree board, ultimately it was not. If such a change in circumstances should arise, the Code Committee believes that the Panel should be able to re-examine the case and

consider whether the change in circumstance is such that, at that point, reports on the forecast should be required.

- 2.10 If, following a change in circumstances, reports were to be required, the Code Committee believes that the party making the profit forecast should obtain and publish the reports expeditiously.

(f) Timing of “normal course” statements or forecasts

- 2.11 The Code Committee considers that an important factor in determining whether it would be disproportionate to require a report will be the possible motivation of the party making the forecast. Before an offer period commences, the motivation of each party may be influenced by their knowledge of whether an offer is in contemplation or not. Even if a forecast is published in the normal course, the Code Committee considers that its publication at a time when an offer might reasonably be regarded to be in contemplation is more likely to result in a requirement to report than if the forecast is published at a time either before a potential offeror has begun preparations for a possible offer or before a company has any idea that an offer might be made for it or that it might otherwise enter an offer period, for example by putting itself up for auction.

- 2.12 The Code Committee recognises, though, that determining when an offer could reasonably be regarded as being in contemplation is difficult. Therefore, rather than relying on such a concept, the Code Committee proposes to provide a cut-off point for the availability of an exemption from reporting on a normal course forecast published before the commencement of the offer period at one month before the commencement of the offer period. Reports would normally be required on forecasts made after that point, although the Code Committee believes that the Panel should have discretion, depending upon the facts of any given case, both:

- (i) to give an exemption in respect of a forecast made within the one month prior to the commencement of the offer period, where the Panel is satisfied that it is appropriate to do so (for example, if an offeree company is taken by surprise by an offer); and
 - (ii) to grant an exemption in respect of a forecast made during the offer period, provided the criteria in paragraph 2.6(i), (ii) and (iv) are satisfied, if the Panel is persuaded that there were good reasons why publication of the normal course forecast could not simply be dispensed with and the issue of complying with the reporting requirements under Rule 28 thereby avoided.
- 2.13 The Code Committee also recognises that the Panel would be able to grant an exemption if, taking into account the other considerations set out in paragraph 2.6 above, it was persuaded that requiring reports would be disproportionate on the facts of the case.
- 2.14 However, the Code Committee considers it more likely that the Panel would judge it proportionate to require a report on a normal course profit forecast published in the later stages of an offer timetable. For example, an offeree company earnings guidance statement published on, or shortly before, “Day 39” (the day in the offer timetable after which no material new information may be announced by the offeree board) may well, by virtue of its timing, have more influence on the assessment of an offer than one that is published before the offer document has been posted.
- 2.15 The Code Committee proposes that the Note on Rule 28.1 should continue to apply, so that advisers to the parties to an offer will continue to be required to review at the outset of an offer period whether there are any profit forecasts on record and to consult the Panel at an early stage as to the circumstances in which reports might be required.

2.16 For the avoidance of doubt, the Code Committee considers that the proposals in this PCP should not lead to any derogation from the existing prohibitions, set out in:

- (i) Note 1 on Rule 32.1, on an offeror making announcements which may increase the value of an offer in the 14 days ending on the last day the offer is able to become unconditional as to acceptances or after a no increase statement; and
 - (ii) Rule 31.9, on the board of the offeree company announcing any new material information after “Day 39” of the offer timetable.
- (g) *Normal course forecast used in the debate on the merits of an offer or otherwise being a material issue*

2.17 The Code Committee believes that the extent to which a normal course forecast is used in the debate on the merits of the offer should be relevant to any decision on granting an exemption from the reporting requirement. Thus, even if an offer is recommended, and the forecast in question was made in the normal course more than one month before the commencement of the offer period, a report may still be required if the profit forecast becomes part of the debate on the merits of the offer.

2.18 The Code Committee believes that there can be certain other circumstances, in addition to hostile and competitive situations, in which a normal course forecast may be of particular significance in consideration of the offer or otherwise be a material issue, even if it is not used in the debate on the merits of the offer. For example, in a management buy-out or an offer to minority shareholders, those controlling or managing a company might be seen to have an interest in projecting lower profits ahead of or during an offer period in order to reduce the cost of the offer. Conversely, where management holds a significant interest in the shares of

the offeree company and expects to exit through a recommended offer, or where the offer contains some contingent value rights or management incentives, whose value relates to future profits, there could be an interest for the board of the offeree company in publishing a more optimistic profit forecast. Also, if, for example, a normal course forecast were materially different from existing market expectations, it might be a material issue in shareholders' assessment of the value of the offer, particularly if the forecast had been made during or shortly before the commencement of the offer period. The Code Committee believes that, even if other criteria are satisfied, the Panel should be more cautious in giving an exemption from reporting on a normal course forecast made in such circumstances.

- 2.19 Whenever an exemption is given in respect of a normal course forecast, in order to minimise the chances of that forecast being used in the debate on the merits of the offer, the Code Committee proposes that the party making the forecast should be obliged to desist from repeating it or drawing attention to it in any way in its communication with shareholders on the offer. Where repetition is unavoidable (for example, where the forecast is embedded in an interim results statement reproduced to satisfy the document contents requirements of Rule 24 or Rule 25 or where a normal course trading update simply re-affirms a forecast previously announced or where it has been made available and continues to be available on the company's website), then there should be added a disclaimer to the effect that the forecast was not made in connection with the offer and has not been reviewed or reported on in accordance with Rule 28 and so should not be relied upon for Code purposes. The Executive should be consulted about the terms of such a disclaimer.
- 2.20 If, following an exemption being given in respect of a normal course forecast, it does, in fact, become a matter of debate by the parties to the offer on the merits of the offer or if arguments are made relating the value of the offer to the profit forecast in question, the Code Committee believes that the Panel should be able to

set the exemption aside and require reports to be made. As before, if, following such a change in circumstances, reports were to be required, the Code Committee believes that the party which had made the profit forecast should obtain and publish the reports expeditiously.

(h) *Relative values*

2.21 Finally, the Code Committee considers that a normal course forecast made by a paper offeror is less likely to be significant if securities represent only a small proportion of the offer value or if the value of the securities exchange offer is small relative to the offeror's market capitalisation. There is an analogy here to the "whale vs. minnow" argument which underlies Rule 28.6(c)(iv), the rationale of which is that, even in a hostile context, a large offeror is unlikely to be motivated, in publishing interim results, by the existence of a securities exchange offer which represents only 10% or less of its own market capitalisation. The Code Committee believes that the value of the securities offered in consideration relative to the value of the offeror securities already in issue would be one of the factors to be taken into account in judging whether or not requiring a report on such a normal course forecast could be held to be disproportionate. It does not, however, regard it as necessary in this context to lay down a specific threshold beyond which this relative value would, of itself, exempt a paper offeror from an obligation to report.

(i) *Interim and preliminary figures*

2.22 For the avoidance of doubt, the Code Committee considers that the exemptions proposed in this section would not apply in relation to unaudited profit figures published during an offer period, which are already covered by provisions in Rule 28.6(c).

(j) Proposed amendments to Rule 28.3

2.23 Reflecting the points discussed in paragraphs 2.4 to 2.22 above, the Code Committee proposes that Rule 28.3 should be amended as follows:

“28.3 REPORTS REQUIRED IN CONNECTION WITH PROFIT FORECASTS

(a) A forecast made by an offeror offering solely cash need not be reported on. With the consent of the Panel, this exemption may be extended to an offeror offering a non-convertible debt instrument.

(b) In all other cases, except as provided in this Rule 28.3, the accounting policies and calculations for the forecasts must be examined and reported on by the auditors or consultant accountants. Any financial adviser mentioned in the document must also report on the forecasts.

(c) ...

(d) Except with the consent of the Panel, any profit forecast which has been made before the commencement of the offer period must be examined, repeated and reported on in the document sent to shareholders and persons with information rights. In order for the Panel to give its consent, the following criteria will normally have to be satisfied:

(i) the forecast was made in the normal course of the company’s communication with the market;

(ii) the offer has been publicly recommended by the board of the offeree company and, in respect of a forecast made by an offeror, no competing offer or named potential offeror has been announced;

(iii) the forecast was made more than one month prior to the commencement of the offer period; and

(iv) the forecast has not, during the offer period, been used by the parties to the offer in any debate on the merits of the offer nor has it otherwise become a material issue.

(e) When a forecast made before the commencement of the offer period does not satisfy the criteria set out in (d) above ~~Exceptionally,~~ the Panel may exceptionally accept that, because of the uncertainties involved, it is not possible for that a forecast previously made to be reported on in accordance with the Code as required under (b) above nor for a revised forecast to be made. In such circumstances, the Panel ~~would~~ will insist on a full explanation being given as to why the requirements of this Rule 28.3 ~~the Code were~~ are not capable of being met.

(f) Where the forecast is made during an offer period, the Panel may grant an exemption from the requirement to report on a profit forecast under (b) above, taking into account the criteria set out in (d)(i), (ii) and (iv) above, and provided that the Panel is satisfied that the party making the forecast could not reasonably refrain from doing so.

NOTES ON RULE 28.3

1. Normal course profit forecasts

In order to be regarded as published in the “normal course” of a company’s communication with the market, a forecast must, normally, form part of an established pattern of reporting.

2. Change of circumstances

Where, during an offer period, there is a change in the circumstances which prevailed when the Panel made its decision to give an exemption under Rule 28.3(d), for example, if the profit forecast is subsequently used in the debate on the merits of the offer, or if an expected recommendation of the offer by the board of the offeree company is not obtained, the Panel may require the profit forecast to be examined, repeated and reported on.

3. Repetition of a forecast

The Panel will, when giving an exemption from the requirement to report on a profit forecast under Rule 28.3(d) or (f), require that the forecast must not be repeated or referred to in any document, announcement or information sent to shareholders or persons with information rights. Where repetition of a profit forecast on which reports have not been made is unavoidable, for example because the forecast is included in an interim results statement that is reproduced in order to satisfy the requirements of Rule 24.2 or Rule 25.2, or where such a forecast has been made available on the relevant party’s website and continues to be so available, a statement to the effect that the forecast has not been prepared for the

purposes of the offer and has not been examined or reported on in accordance with the requirements of this Rule 28.3 must be included in the document containing the forecast or added to the party's website, as appropriate. In such circumstances, the Panel should be consulted.

4. Interim and preliminary figures

This Rule 28.3 operates without prejudice to the exemptions from the requirement to report in Rule 28.6(c)."

- 2.24 The Code Committee proposes that as a consequence of these proposals, the following amendments should also be made in Rules 28.4 and 28.5:

“28.4 PUBLICATION OF REPORTS AND CONSENT LETTERS

Whenever a profit forecast is made during an offer period and reports are required, the reports must be included in the document containing the forecast or, ...”; and

“28.5 SUBSEQUENT DOCUMENTS – CONTINUING VALIDITY OF FORECAST

When a company includes a forecast and reports on that forecast in a document, ...”.

- Q1 Do you agree with the Code Committee’s proposals for the provision of exemptions from the obligation to report on a profit forecast published in the normal course of a company’s business in the circumstances described above?**

3. “Normal course” asset valuations

(a) *The requirement to provide an independent opinion*

- 3.1 Whereas Rule 28 provides that, at the commencement of an offer period, advisers should check for any previously published profit forecasts and that reports should be made in the document sent to shareholders if such a forecast exists, there is no

- equivalent requirement for advisers to check for asset valuations on the record and reports are not automatically required on such pre-existing valuations. Instead, under Rule 29.1, the requirement is that an independent opinion should be provided “**When a valuation of assets is given in connection with an offer...**”. The rationale for the difference in approach between the two Rules is that many companies, for example, property, natural resources or investment holding companies, may have asset valuations on the record at the start of an offer period but those valuations, being historical, will not necessarily be significant for the market in valuing those companies for the purposes of the offer; however, forecasts of profits or earnings are, by virtue of the fact that they are forward-looking or are estimates which await confirmation, are almost always significant.
- 3.2 The Code Committee understands that, therefore, where, prior to the commencement of the offer period, such a company has published, in the normal course, a half-yearly, quarterly or monthly asset valuation or a net asset value (“NAV”) figure (a “normal course valuation”), the Executive does not normally regard that asset valuation or NAV figure as having been “given in connection with an offer” and so does not require it to be supported by the opinion of a named independent valuer pursuant to Rule 29.
- 3.3 However, the Code Committee understands that there have been cases, concerning, for example, property companies, in which the last published NAV before the commencement of the offer period was of such importance to the market’s assessment of the company’s value that, even though that NAV was prepared in the normal course and not “**in connection with an offer**”, it was nonetheless considered by the Panel to be information on which offeree shareholders and the market were likely to place particular reliance in considering what action to take. In such cases, therefore, and in cases where the valuation on the record has been used in the argument or debate on the merits of the offer, the Panel has required the valuation to be supported by an independent valuer’s

opinion, or superseded by an updated valuation supported by an independent opinion pursuant to Rule 29.

3.4 When a normal course valuation is published during an offer period, the Code Committee understands that the Executive is likely to regard it as being given in connection with the offer and thus to require it to be supported by an independent valuer's opinion. However, in some cases it has been argued that the publication of a normal course valuation, even during an offer period, was not motivated by the existence of an offer or possible offer and, therefore, that an independent opinion should not have to be provided.

3.5 The Code Committee has reviewed the requirements in Rule 29 and proposes that the Executive's practice in relation to normal course valuations as described above should be reflected in the Code. In addition, the Code Committee proposes that provision should be made in the Rule for exemptions from the requirement to provide an independent valuer's opinion in circumstances similar to those proposed in relation to normal course forecasts and for similar reasons. The proposals in this section are set out in that context.

(b) *"In connection with an offer"*

3.6 The Code Committee proposes that a valuation should normally be regarded as having been published "in connection with an offer", and thus be supported by an independent valuer's opinion, if it is published either during an offer period or at a time when an offer might reasonably be regarded as being in contemplation. The Code Committee proposes to determine the time when an offer might reasonably be regarded as being in contemplation in the same way as it has proposed in relation to profit forecasts, that is, normally, the period of one month prior to the commencement of the offer period.

(c) *Exemptions from the requirement to provide an independent valuer's opinion*

3.7 Rule 29.1(c) currently states as follows:

“(c) In connection with an offer

In certain cases offer documents or defence circulars will include statements of assets reproducing directors' estimates of asset values published with the company's accounts in accordance with Schedule 7 Part 1 of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008. The Panel will not regard such estimates as “given in connection with an offer” unless asset values are a particularly significant factor in assessing the offer and the estimates are, accordingly, given considerably more prominence in the offer documents or circulars than merely being referred to in a note to a statement of assets in an appendix. In these circumstances, such estimates must be supported, subject to Rule 29.2(e), by an independent valuer in accordance with this Rule.”

The Schedule referred to in the Rule requires a directors' report to consider whether the market value of interests in land differs substantially from the amount at which those interests are included in the balance sheet. If so, and the difference is, in the directors' opinion, of such significance as to require the attention of shareholders to be drawn to it, the directors' report must indicate the difference with such degree of precision as is practicable. Rule 29.1(c) was introduced to avoid such directors' asset valuations being inadvertently caught by Rule 29 where they had in fact not been “given in connection with an offer” and were being repeated in the offer document or offeree board circular as a matter of record rather than given prominence or made part of the debate on the merits of the offer. The underlying rationale was that a requirement for an independent opinion on the directors' asset valuations would be disproportionate unless such valuations were a particularly significant factor in assessing the offer.

3.8 Rule 29.6 also provides for a waiver from the requirement to provide an independent valuer's opinion on an asset valuation in the exceptional circumstances where a company, such as a property company, is the subject of an

unexpected offer and has difficulty in obtaining such an opinion in the time available before the offeree board's circular has to be published. The Rule states that:

“... In such cases, the Panel may be prepared exceptionally to waive strict compliance with this requirement. The Panel will only do this where the interests of shareholders seem on balance to be best served by permitting informal valuations to appear coupled with such substantiation as is available. Advisers to offeree companies who wish to make use of this procedure should consult the Panel at the earliest opportunity.”.

3.9 The Code Committee proposes that the exemptions in Rules 29.1(c) and 29.6 should be retained and that further exemptions should be provided for so that, even if a valuation is published in connection with an offer (i.e. during the offer period or within the one month before the start of the offer period), the Panel will be able to waive the requirement for an independent valuer's opinion to be provided under Rule 29 provided that, normally, the following criteria are satisfied:

- (i) the valuation is published in the normal course of the company's communication with the market, on a basis consistent with previous such normal course valuations and in accordance with a generally accepted methodology for the particular asset class in question;
- (ii) the offer has been publicly recommended by the board of the offeree company and, in respect of a valuation by a paper offeror, no competing offer or named potential offeror has been announced;
- (iii) the valuation has not been used by the parties to the offer in the debate on the merits of the offer nor has it otherwise become a material issue; and

- (iv) the party publishing the valuation could not reasonably refrain from doing so.
- 3.10 The Code Committee considers that the Panel should be able to exercise its discretion to give an exemption in respect of a normal course valuation published within the one month prior to the commencement of the offer if the Panel is satisfied that it is appropriate to do so (for example, if an offeree company is taken by surprise by an offer).
- 3.11 On the other hand, the Code Committee proposes that the Panel should be able to require an independent valuer's opinion to be provided even if a normal course valuation is published more than one month before the commencement of the offer period if it is subsequently used by the parties to the offer in the debate on the merits of the offer or if it otherwise becomes a material issue.
- 3.12 While an exemption should not normally be available in a hostile or (in respect of a valuation by a paper offeror) in a competitive situation, the Code Committee believes that there may be occasions when such an exemption might nonetheless be given.
- 3.13 For the purposes of paragraph 3.9(iii) above, the Code Committee considers that, where an offer has been recommended by the board of the offeree company, the Panel would not regard a simple reference relating the offer value to the NAV published in the normal course prior to the commencement of the offer period as being a valuation "used in the debate on the merits of the offer". For example, it considers that the statement "the offer represents a discount of x per cent to [the offeree company's] last published NAV of y pence per share at 30 June..." would not of itself be regarded as using the valuation in the debate on the merits of the offer.

3.14 The Code Committee also considers that the Panel should, in general, be less likely to give an exemption where the persons controlling or managing the company might be thought to have an interest in using a valuation in such a way as to create a pessimistic view of the company's value, for example in the context of a management buy-out or an offer to minority shareholders.

(d) Change of circumstances

3.15 As proposed for profit forecasts, the Code Committee proposes that if the circumstances prevailing when an exemption is given should change, then the Panel should be able to re-impose the requirement for an independent opinion to be provided.

(e) Disclaimer to be provided if an exempted valuation is repeated

3.16 Where an exemption from providing an independent valuer's opinion on a valuation published in connection with an offer is given, the Code Committee believes that the relevant party to the offer should be required to desist from repeating the asset valuation in any offer documentation. However, where for any reason the Panel does permit a valuation to be so repeated, or where it is publicly available, for example, on the website of the party in question, the Code Committee proposes that it should be accompanied by a disclaimer to the effect that the valuation was not prepared for the purposes of the offer, that it was not compiled nor has it been opined on to Rule 29 standards and that it should not be relied upon for Code purposes. The Executive should be consulted about the terms of such a disclaimer.

3.17 The Code Committee also proposes that a disclaimer should be given when a party repeats in any offer documentation a valuation that has been published more than one month before the commencement of the offer period, on which no independent opinion has been required. In such circumstances, the Code

Committee notes that, under Rule 29.4, an updated valuation, accompanied by an independent opinion, may be required.

- 3.18 The Code Committee considers that an application for an exemption need only be made for the most recent valuation on record. The requirement for a disclaimer will also apply only to that most recent valuation. The Code Committee understands that previous valuations that remain publicly accessible are regarded by the Executive as superseded by the most recent one.

(f) The requirement for consultation

- 3.19 The Code Committee proposes that, whenever a valuation is to be included in any announcement, document or other information sent to shareholders, in order to check whether an independent opinion may be required, or an exemption given, the Panel must be consulted in advance.

(g) Investment trusts and investment companies

- 3.20 The proposals in this PCP are not intended to lead to any change in the Executive's approach to the reported valuations of investment trusts and investment companies. The Code Committee understands that the Executive's practice is that Rule 29 is not applied to such companies, provided that 90 per cent or more of the value of the relevant portfolio is represented by quoted securities. Where more than 10 per cent of the value of an investment trust or investment company portfolio is in unquoted securities, or where unquoted assets representing less than 10 per cent have been revalued and the Executive considers that to be a material issue in relation to the offer, a Rule 29 independent valuer's opinion on that unquoted portion may still be required unless the requirements set out in paragraph 3.9 above are met.

(h) Proposed amendments

3.21 To reflect the proposals discussed in paragraphs 3.1 to 3.19 above, the Code Committee proposes that Rule 29.1 should be amended as follows:

“29.1 REPORTS REQUIRED IN CONNECTION WITH ASSET VALUATIONS TO BE REPORTED ON IF GIVEN IN CONNECTION WITH AN OFFER

(a) Requirement for an independent opinion

Except with the consent of the Panel, ~~When~~ when a valuation of assets is ~~given~~ published in connection with an offer, it ~~should~~ must be supported by the opinion of a named independent valuer. The Panel may also require a valuation to be supported by an independent valuer’s opinion, even if it is not published in connection with an offer, if it is used by the parties to the offer in debate on the merits of the offer or is otherwise a material issue. The Panel should be consulted in any case in which an asset valuation is to be included in any document, announcement or information sent to shareholders or persons with information rights. ~~(For the purposes of this Rule, “an independent valuer” means a valuer who meets the requirements of an “external valuer” as defined in The Standards and, in addition, has no connection with other parties to the transaction.)~~

(a1**) Type of asset**

...

(a2**) The valuer**

For the purposes of this Rule, “an independent valuer” means a valuer who meets the requirements of an “external valuer” as defined in The Standards and, in addition, has no connection with the other parties to the offer. In relation to land, buildings ...

(a3**) In connection with an offer**

A valuation of assets will be regarded as being “published in connection with an offer” if it is published within one month prior to the commencement of or during an offer period.

(e) Exemptions from the requirement for an independent valuer's opinion

(i) In order for the Panel to give its consent under (a) above, the following criteria will normally have to be satisfied:

(A) the valuation is published by a party to an offer in the normal course of its communication with the market (such as a quarterly or monthly net asset value figure);

(B) the offer has been publicly recommended by the board of the offeree company and, in respect of a valuation published by an offeror that is not offering solely cash, no competing offer or named potential offeror has been announced;

(C) the valuation has not, during the offer period, been used by the parties to the offer in any debate on the merits of the offer nor has it otherwise become a material issue; and

(D) the Panel is satisfied that the party publishing the valuation could not reasonably refrain from doing so.

(ii) ~~In certain cases offer documents or defence circulars will include~~When a statements of assets reproducing directors' estimates of asset values is published in an offer document or the offeree board circular by virtue of being included in with the company's accounts in accordance with Schedule 7 Part 1 of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008,; ~~The Panel will not require an independent valuer's opinion to be provided regard such estimates as "given in connection with an offer"~~ unless asset values are a particularly significant factor in assessing the offer and the estimates are, accordingly, given considerably more prominence in the offer document or circular than merely being referred to in a note to a statement of assets in an appendix. ~~In these circumstances, such estimates must be supported, subject to Rule 29.2(e), by an independent valuer in accordance with this Rule.~~

(df) Another party's assets

...

NOTES ON RULE 29.1

1. Normal course valuations

In order to be regarded as published in the “normal course” of a company’s communication with the market, a valuation must, normally, have been published by that party regularly and on a consistent basis and prepared in accordance with generally accepted practice for the relevant asset class.

2. Change of circumstances

Where, during an offer period, there is a change in the circumstances which prevailed when the Panel made its decision to give an exemption from the requirement to obtain an independent valuer’s opinion, for example if the valuation is subsequently used in the debate on the merits of the offer, or if an expected recommendation of the offer by the board of the offeree company is not obtained, the Panel may require the valuation to be supported by the opinion of a named independent valuer.

3. Repetition of a valuation

The Panel will, when granting an exemption from the requirement to provide an independent valuer’s opinion under Rule 29.1, require that the valuation must not be repeated or referred to in any document, announcement or information sent to shareholders or persons with information rights. Where repetition of a valuation which is not supported by an independent valuer’s opinion is unavoidable, for example because the valuation is included in an interim results statement that is reproduced in order to satisfy the requirements of Rule 24.2 or Rule 25.2, or where such a valuation has been made available on the relevant party’s website and continues to be so available, a statement to the effect that the valuation has not been prepared for the purposes of the offer and has not been examined or opined on in accordance with the requirements of Rule 29.1 must be included in the document containing the valuation or added to the party’s website, as appropriate. In such circumstances the Panel should be consulted.”.

- Q2 Do you agree that the Code should provide for dispensations from the requirement for an opinion of a named independent valuer to support a normal course asset valuation in the circumstances set out above?**

4. Application of Rule 28.6(c) to estimates included in interim management statements and to interim and preliminary results published by companies not admitted to the Official List

(a) Introduction

4.1 Rule 28.6(b) states that “**An estimate of profit for a period which has already expired should be treated as a profit forecast.**”. Rule 28.6(c) provides that, “**Except with the consent of the Panel, any unaudited profit figures published during an offer period must be reported on.**”. That Rule then provides exemptions in respect of:

“(i) unaudited statements of annual or interim results which have already been published;

(ii) unaudited statements of annual results which comply with the requirements for preliminary statements of annual results as set out in the UKLA Rules;

(iii) unaudited statements of interim results which comply with the requirements for half-yearly reports as set out in the UKLA Rules in cases where the offer has been publicly recommended by the board of the offeree company; or

(iv) unaudited statements of interim results by offerors which comply with the requirements for half-yearly reports as set out in the UKLA Rules, whether or not the offer has been publicly recommended by the board of the offeree company but provided the offer could not result in the issue of securities which would represent 10% or more of the enlarged voting share capital of the offeror.”.

The Rule goes on to provide as follows:

“The Panel should be consulted in advance if the company is not admitted to the Official List but wishes to take advantage of the exemptions under (ii), (iii) or (iv) above.”.

(b) *Profit estimates for completed periods included in interim management statements*

- 4.2 In March 2007, the UKLA amended its guidance on interim reporting and implemented the Disclosure and Transparency Rules (“DTRs”) pursuant to the Transparency Directive. DTR 4.3 introduced a requirement for issuers to publish an interim management statement (“IMS”) in the period between ten weeks after the beginning and six weeks before the end of each six month financial period.
- 4.3 The reporting requirements are set out in broad terms and the Code Committee understands that market practice varies and is still evolving. A small number of companies produce full quarterly results with confirmation of accounting policies and an accountant’s review in accordance with the International Standard on Review Engagements 2410 (published by the International Auditing and Assurance Standards Board). These companies therefore report quarterly results on the same basis as unaudited half yearly interim results, which Rule 28.6(c)(i) exempts from the requirement to be reported on if published before an offer period, and which Rule 28.6(c)(iii) exempts if published during an offer period when the offer has been publicly recommended.
- 4.4 Other companies produce estimates in a form which falls short of the full financial statements that would be produced for half yearly interim results. The Code Committee understands that the majority of IMSs, at present, are simply trading statements and that they avoid giving specific quarterly profit numbers, although in some cases they may come close to giving “**a form of words [which] puts a floor under, or a ceiling on, the likely profits of a particular period or contains the data necessary to calculate an approximate figure for future profits**”, and therefore to being treated as a profit forecast under Rule 28.6(a).

4.5 Having regard to the considerations set out in section 2 above concerning the desire to avoid requirements in the Code for reports on normal course profit forecasts being disproportionate, the Code Committee is of the opinion that:

- (i) the repetition of a profit estimate for a completed period that is included in an IMS published before an offer period should not require a Rule 28 report (i.e. Rule 28.6(c)(i) should apply to a profit estimate included in an IMS);
- (ii) a profit estimate included in an IMS published during an offer period that contains a degree of detail equivalent to that for half-yearly interim results should, where the offer has been publicly recommended, enjoy the same exemption as is available for interim results under Rule 28.6(c)(iii); and
- (iii) a profit estimate included in an IMS published during an offer period that is not equivalent in detail to half-yearly interim results should qualify for an exemption where the offer has been publicly recommended if the Panel is satisfied that the profit estimate was made in the normal course and it has not been used in the debate on the merits of the offer or has not otherwise become a material issue (i.e. essentially applying the same considerations as set out in section 2 above).

(c) ***Interim results published by companies admitted to trading on AIM or PLUS***

4.6 The exemptions set out in Rule 28.6(c)(ii) to (iv) for companies publishing unaudited preliminary or interim results that comply with the UKLA Rules were introduced at a time when the disclosure obligations for the interim results of companies not admitted to the Official List were limited; hence the requirement in the Rule for consultation with the Panel if the company is not admitted to the Official List but wishes to take advantage of the exemptions. The Code Committee understands that, while the disclosure obligations for companies admitted to trading on AIM or PLUS are less detailed than for those admitted to

the Official List, in practice, interim reports published by many of those companies exceed the minimum obligations. However, even where only the minimum obligations are met, the Code Committee considers that if investors in such companies regard interim reports prepared by them to be sufficient for their investment decisions outside an offer period, such interim reports should be sufficient in the context of a recommended offer. The Code Committee is therefore of the view that the exemptions in Rules 28.6(c)(ii) to (iv) should be extended to companies admitted to trading on AIM or PLUS.

4.7 The Code Committee understands that the proposed practice in relation to IMSs would be consistent with that of the UKLA in applying the Prospectus Rules (“PRs”) and the Listing Rules (“LRs”).

(d) Unaudited results published by companies not admitted to the Official List or traded on AIM or PLUS

4.8 The Code Committee recognises that the accounting disclosure requirements for companies admitted to trading only on non-UK markets have also become both more detailed and more consistent. However, the accounting standards applicable to such companies may be unfamiliar to investors in the offeree companies regulated by the Code and disclosure rules for different markets may vary considerably. Therefore, the Code Committee considers that paper offerors and offeree companies whose securities are not admitted to the Official List or admitted to trading on AIM or PLUS, should continue to be required to consult the Panel to discuss whether their disclosures should be regarded as equivalent to those of such companies if they wish to benefit from a dispensation in similar circumstances to the exemptions under Rules 28.6(c)(ii) to (iv).

(e) Proposed amendments

4.9 To reflect these proposals, the Code Committee proposes that Rule 28.6(c) should be amended as follows:

“(c) Interim and preliminary figures

Except with the consent of the Panel, any unaudited profit figures published during an offer period must be reported on. This provision does not, however, apply to:-

(i) unaudited statements of annual or interim results or interim management statements which have already been published;

(ii) unaudited statements of annual results which comply with ~~the any~~ requirements for preliminary statements of annual results as set out in the UKLA Rules, the AIM Rules for Companies or the PLUS Rules for Issuers;

(iii) unaudited statements of interim results or interim management statements which comply with ~~the any~~ requirements for half-yearly reports as set out in the UKLA Rules, the AIM Rules for Companies or the PLUS Rules for Issuers, where the offer has been publicly recommended by the board of the offeree company; or

(iv) unaudited statements of interim results or interim management statements by offerors which comply with ~~the any~~ requirements for half-yearly reports as set out in the UKLA Rules, the AIM Rules for Companies or the PLUS Rules for Issuers, whether or not the offer has been publicly recommended by the board of the offeree company but provided the offer could not result in the issue of securities which would represent 10% or more of the enlarged voting share capital of the offeror.

The Panel should be consulted in advance ~~if~~ the company is ~~not~~ admitted to the Official List, but wishes to take advantage of the exemptions under paragraphs (ii), (iii) or (iv) above but either the company’s interim management statement does not comply with the requirements set out in paragraphs (iii) or (iv) above, or the company is not admitted to the Official List or to trading on AIM or PLUS, the Panel should be consulted in advance.”

Q3 Do you agree that Rule 28.6(c) should be amended as proposed to provide an exemption from reporting for an unaudited profit estimate for a completed period reported in an interim management statement?

Q4 Do you agree that Rule 28.6(c) should be amended as described to provide an exemption from reporting for unaudited statements of interim results reported by companies admitted to trading on AIM or PLUS?

5. Profit forecasts and estimates for part of a business

5.1 Rule 29.1(a) states in relation to asset valuations that:

“This Rule applies not only to land, buildings, plant and equipment but also to ... individual parts of a business.”.

By contrast, Rule 28 requires reports on profit forecasts for an entire company and makes no mention of forecasts for individual parts of a business.

5.2 The Code Committee understands that there have been cases over the years in which an offeree company has provided a profit forecast for a material part of its business in its defence against an unwelcome offer. Since such forecasts have neither been sufficient to put **“a floor under, or a ceiling on, the likely profits of a particular period”** for the whole business nor have they contained **“the data necessary to calculate an approximate figure for future profits”** of the whole business, the requirements to report under Rule 28 have not been applied. Some advisers have asserted that this breaches the spirit of Rule 28 and that where such profit forecasts are a key part of the argument on an offer, reports should be required. The Code Committee shares this view and considers that, where such a forecast is made for the purposes of being used in the debate on the merits of an offer, and so with a view to enhancing the value of the offeree company or of an offeror’s securities, and where it would, if made in respect of the whole company,

- have to be reported on, then there should be an obligation for reports to be provided.
- 5.3 As already mentioned, it is the Code Committee's view that the underlying principle in Rule 28 should be that reports should be required on profit forecasts or estimates unless to do so would be disproportionate, taking into account: whether the forecast was published in the normal course, whether the offer is hostile or there is a competitive situation, the timing of the forecast and whether it has been used in the debate on the merits of the offer or has otherwise become a material issue. The Code Committee believes that it is unusual for a company to include a profit forecast for part of its business in normal course earnings guidance. Consequently, where a forecast for part of a business is made, the Code Committee considers that it is more likely to be out of the normal course, or to have some particular significance which would suggest that it would also be relevant to the debate on the merits of an offer, and that therefore a requirement to report would be proportionate and appropriate.
- 5.4 The Code Committee has considered whether it should propose some guidelines as to the materiality of a part of a business in respect of which a profit forecast should require a report. For example, the "class tests" applied in the LRs to determine the nature of disclosure required in respect of transactions could be a reference point. The Code Committee has concluded that it is difficult to select a single proportion which would be appropriate for the many different permutations of profit forecasts for parts of a business, or to be prescriptive as to the bases (for example, forecast or historical operating profits, or estimates of value) on which the relative size of a part should be judged. The Code Committee is also conscious that, in certain circumstances, if a relative size threshold were to be set, the decision as to whether or not a report was required might enable the market to infer or to speculate on a profit number in respect of the whole business, which would be undesirable.

- 5.5 Accordingly, the Code Committee has concluded that where a profit forecast is made in respect of part of a business, Rules 28.1 to 28.8 should apply as if it were a forecast for the whole of the business. For this reason, under Rule 28.6(b), an estimate of profit for part of a business in respect of a completed period would also be treated as a profit forecast.
- 5.6 The Code Committee understands, however, that a company subject to the Code may have an associate, or a subsidiary with a minority listing, in a jurisdiction that may require or expect such an entity to publish normal course earnings guidance and that it may not be feasible for the company to prevent such guidance being published. The Code Committee considers that, in such circumstances, reports should not normally be required in relation to such a normal course forecast made by the associate or subsidiary unless the offeror or offeree company with which it is associated has chosen to make use of that forecast in the debate on the merits of the offer or the forecast has otherwise become a material issue.
- 5.7 Exceptionally, where a dispensation would not otherwise be available (for example in a hostile or competitive situation or where the forecast was not made in the normal course), but the relative size of the part of the business in question was particularly small in relation to the whole business, the Panel might nonetheless grant a dispensation.
- 5.8 The Code Committee also notes that pursuant to Rule 28.6(f), a profit warranty may be regarded as a profit forecast and that that Rule includes a requirement for the Panel to be consulted in advance if a profit warranty is to be published in connection with an offer. It may be that a profit warranty given in respect of a part of a business that has been recently acquired may be disclosable as part of the material contracts to be put on display under Rule 26(e). The Code Committee therefore proposes that the Panel should also be consulted in advance of such disclosure.

- 5.9 Taking all these points into account, the Code Committee proposes a new Rule 28.9 as follows:

“28.9 PROFIT FORECAST IN RESPECT OF AN INDIVIDUAL PART OF A BUSINESS

Rules 28.1 to 28.8 apply to a profit forecast in respect of an individual part of a business as if it were a profit forecast for the whole business.”.

The Code Committee also proposes that Rule 28.6(f) should be amended as follows:

“(f) Profit warranties

The Panel must be consulted in advance if a profit warranty, whether for the whole business or a part of the business, is to be published in connection with an offer as it may be regarded as a profit forecast.”.

- Q5 Do you agree that the Code should treat profit forecasts, estimates and warranties for part of a business in the same way as forecasts, estimates and warranties for the whole of the business?**

6. Merger benefits statements and other quantified effects statements

(a) Introduction

- 6.1 Note 8 on Rule 19.1 states as follows:

“8. *Merger benefits statements*

In order to satisfy the existing standards of information set out in the Code, certain additional requirements may need to be complied with if a party makes quantified statements about the expected financial benefits of a proposed takeover or merger (for example, a statement by an offeror that it would expect the offeree company to contribute an additional £x

million of profit post acquisition). These requirements will only need to be complied with in securities exchange offers and will not normally apply in the case of a recommended securities exchange offer unless a competing offer is made and the merger benefits statement is subsequently repeated by the party which made it or the statement otherwise becomes a material issue. These additional requirements include publication of:

(a) the bases of the belief (including sources of information) supporting the statement;

(b) reports by financial advisers and accountants that the statement has been made with due care and consideration;

(c) an analysis and explanation of the constituent elements sufficient to enable the relative importance of these elements to be understood; and

(d) a base figure for any comparison drawn.

These requirements may also be applicable to statements to the effect that an acquisition will enhance an offeror's earnings per share where such enhancement depends in whole or in part on material merger benefits.

Parties wishing to make merger benefits statements should consult the Panel in advance. See also Rule 28.6(g)."

(b) Application of Note 8 on Rule 19.1 to other quantified statements

6.2 The Code Committee has noted that, since Note 8 on Rule 19.1 was introduced in 1997, parties to offers have, on occasion, made quantified statements in connection with the potential effects of a particular course of action which, while not strictly relating to the proposed offer in question, nonetheless have had a material bearing upon that offer. For example, an offeree company in receipt of a hostile bid might wish to quantify as part of its defence strategy the cost savings that it plans to deliver if the offer does not succeed, or the financial benefits expected to accrue from an alternative transaction. Such quantified statements may well be of a similar nature to a "merger benefits statement" and be designed to influence shareholders in respect of an offer, but they are not expressly covered by Note 8 on Rule 19.1. The Code Committee is concerned that, as a

consequence, such statements may be made without being subject to the extra level of assurance that would be required if they fell within Note 8 on Rule 19.1.

- 6.3 The Code Committee therefore proposes that, in order to provide that extra level of assurance, it would be proportionate and appropriate to expand the scope of the Note on merger benefits statements to apply to any quantified statement of the expected financial effects of a course of action proposed in the context of an offer. The Code Committee proposes to introduce a definition of a “quantified effects statement”, to include all such statements, as follows:

“Quantified effects statement

A quantified statement made by a party to an offer about the expected financial effect of a proposal made in the context of an offer (for example, a merger benefits statement by an offeror that it would expect the offeree company to contribute an additional £x million of profit post acquisition, or a statement by the offeree company about the cost savings it would expect to make if an offer were rejected or about the potential benefits expected to accrue from an alternative transaction).”.

The provision in Note 8 on Rule 19.1 would then be amended further as discussed below.

- 6.4 The Code Committee considers that a pro forma statement of the financial effects of an offer, for example the expected change in historical earnings per share or net asset value per share derived from previously published information, should not be regarded as a quantified effects statement.

(c) Circumstances in which reports should be required

- 6.5 The Code Committee believes that, as a general proposition, quantified effects statements are, like profit forecasts that are not made in the normal course, usually made with a view to influencing shareholders’ assessment of an offer and it is therefore proposing a similar approach to the reporting requirements in respect of

such statements as has been proposed for profit forecasts. Thus, if the statement is made in a hostile or competitive situation, then it is likely to be of sufficient significance as to require reports to be provided. Further, the Code Committee believes that reports should be required unless the Panel is satisfied that the quantified effects statement is not a material issue. Clearly, since a quantified effects statement is, by definition, made in the context of an offer, the other considerations proposed in respect of profit forecasts, namely whether the statement was made in the normal course, whether it pre-dated the offer period or was made when the offer might reasonably be regarded as having been in contemplation, or whether it was being used in the debate on the merits of the offer, would not apply.

- 6.6 This approach would represent an extension of the circumstances in which reports are currently required under Note 8 on Rule 19.1. The second sentence of the first paragraph of Note 8 on Rule 19.1 provides an exemption from the reporting requirement in the Note in the case of a recommended securities exchange offer. The Code Committee notes that Note 8 is aimed at a merger benefits statement by a paper offeror and does not require reporting in the case of a cash only offer (where synergy benefits for the offeror do not affect value for offeree company shareholders). The definition of “quantified effects statement” proposed above would, however, also capture a quantified statement made by the offeree company and, since any such statement will be relevant whatever the form of consideration offered, the Code Committee proposes that, in these cases, reporting obligations should apply irrespective of whether the offer consideration is securities or cash.
- 6.7 The Code Committee also notes that the exemption from the reporting requirements provided in Note 8 applies “*unless a competing offer is made and the merger benefits statement is subsequently repeated by the party which made it or the statement otherwise becomes a material issue*”. The Code Committee believes that a quantified effects statement by a paper offeror would be likely to become a material issue if a competitive situation were to arise whether or not the

statement is repeated. Thus, the Code Committee considers that the point at which reports should normally be required on a quantified effects statement by a recommended paper offeror should be earlier than the point at which a competing offer is made, as is currently provided for in Note 8. The Code Committee believes that, in effect, reports should be required as soon as is practicable after the announcement of a competing offer or of a named potential competing offeror.

6.8 The Code Committee understands that it may often be the case that a company announces quantified cost reduction or other profit improvement plans before an offer period begins or before any offer is reasonably in contemplation. It is not the Code Committee's intention that the widened scope of reporting requirements on quantified effects statements should automatically create an obligation to report on any such statement that is already on the record. However if such a statement becomes a material issue in the context of the offer, for example as a result of:

- (i) an announcement, after an approach, of a change to pre-announced savings, in quantum or time-frame; or
- (ii) repetition and application of existing statements as part of an argument to refute the merits of an offer,

then the Code Committee considers that it would be appropriate for the Panel to require such pre-existing statements, and any improvement or amplification, to be reported on.

6.9 The Code Committee believes, given the parallels drawn between the proposed requirements to report on profit forecasts and on quantified effects statements, that Note 8 on Rule 19.1, as revised to reflect the points discussed above, lies more naturally within Rule 28 than within Rule 19.1. The Code Committee

therefore proposes that Note 8 on Rule 19.1 be amended and that the amended provision should then become a new Rule 28.10 as follows:

~~“8. Merger benefits statements:~~

28.10 QUANTIFIED EFFECTS STATEMENTS

~~(a) In order to satisfy the existing standards of information set out in the Code, certain additional requirements may need to be complied with if a party to an offer makes a quantified effects statement, about the expected financial benefits of a proposed takeover or merger (for example, a statement by an offeror that it would expect the offeree company to contribute an additional £x million of profit post acquisition). These requirements will only need to be complied with in securities exchange offers and will not normally apply in the case of a recommended securities exchange offer unless a competing offer is made and the merger benefits statement is subsequently repeated by the party which made it or the statement otherwise becomes a material issue. These additional requirements include publication of **it must publish at the same time:**~~

~~(a) the bases of the belief (including sources of information) supporting the statement;~~

~~(b) reports by financial advisers and accountants that the statement has been made with due care and consideration;~~

~~(c) an analysis and explanation of the constituent elements sufficient to enable the relative importance of these elements to be understood; and~~

~~(d) a base figure for any comparison drawn.~~

(b) The requirements in (a) will not apply:

(i) in respect of a quantified effects statement made by an offeror where the consideration is solely cash; or

(ii) normally, in the case of an offer that has been publicly recommended by the board of the offeree company, unless:

(A) in respect of a quantified effects statement by an offeror that is not offering solely cash, a competing offer or a named potential competing offeror has been announced; or

(B) the quantified effects statement otherwise becomes a material issue.

(c) These requirements in (a) may also be applicable apply to a statements to the effect that an acquisition will enhance an offeror's earnings per share where such enhancement depends in whole or in part on material merger benefits.

(d) A party to an offer Parties wishing to make merger benefits a quantified effects statements should consult the Panel in advance.

See also Rule 28.3(g)."

6.10 The Code Committee notes that it has become the usual practice for offerors making merger benefits statements to give, under the current paragraph (c) in Note 8 on Rule 19.1 (to be replaced by Rule 28.10(a)(iii) above), not only the annual quantum of synergies or other benefits expected, but also the year by which such benefits are expected to be fully realised and the costs expected to be incurred in achieving those synergies. Furthermore, some breakdown of the merger benefits is frequently provided as between, for example, "cost" and "revenue" benefits, major areas of cost savings and major, distinct operating divisions. The Code Committee considers that this is an appropriate interpretation of the current Note which would also apply, in respect of all other quantified effects statements, to the interpretation of the proposed Rule 28.10(a)(iii).

Q6 Do you agree with the proposals to expand the application of the rules on merger benefits statements to cover other statements as described above and to introduce a new definition of a "quantified effects statement"?

Q7 Do you agree with the proposals relating to the circumstances in which reports may be required on "quantified effects statements"?

7. Other miscellaneous amendments

(a) *Proposed deletion of Rule 28.3(c)*

7.1 Rule 28.3(c) states:

“When income from land and buildings is a material element in a forecast, that part of the forecast should normally be examined and reported on by an independent valuer: this requirement does not apply where the income is virtually certain, eg known rents receivable under existing leases.”.

This Rule was inserted following discussions with the Royal Institution of Chartered Surveyors (“RICS”) at a time when Rule 29 dealt only with land and buildings. In the view of the Code Committee, it is a matter that falls more appropriately under Rule 29 than Rule 28. The Code Committee considers it anomalous that this one specific element of a profit forecast, and particularly one (income from land and buildings) which might be expected to be amongst the more predictable of numbers, should require a separate independent valuer’s report. The Code Committee believes that the accountants and financial advisers reporting on a profit forecast should be capable of reporting on income from land and buildings. It is always open to them to consult a chartered surveyor expert should they feel it necessary. Having consulted RICS, the Code Committee therefore proposes to delete Rule 28.3(c).

7.2 The amended Rules 28.3(d), (e) and (f) proposed in paragraph 2.22 would become (c), (d) and (e) respectively.

Q8 Do you agree that Rule 28.3(c) should be deleted?

(b) Amendment of Rule 28.6(a) in respect of profit ceilings

7.3 The Code Committee understands that it is the practice of the Executive to dispense with the requirement in Rule 28.6(a) for a report on a profit ceiling where there is no benefit to the company or the management announcing the profit ceiling. However, in circumstances where making a statement that puts a ceiling on the profits for a period could be seen to be in the interests of management or of controlling shareholders (for example in a management buy-out or an offer for a minority), the Executive will normally require a report. The Code Committee believes that this practice is correct and that Rule 28.6(a) should accommodate these differing circumstances and formalise a framework where there is no obligation to report on the announcement of a profit ceiling where such a report would serve no useful purpose. The Code Committee therefore proposes that the third sentence of Rule 28.6(a) should be amended and a Note added to Rule 28.6 as follows:

“Whenever a form of words puts a floor under, or, in certain circumstances, a ceiling on, the likely profits of a particular period or contains the data necessary to calculate an approximate figure for future profits, it will be treated by the Panel as a profit forecast which must be reported on.

...

NOTE ON RULE 28.6

Profit ceilings

The Panel will normally treat a statement that puts a ceiling on the profits for a period as a profit forecast only in circumstances where that statement could be seen to be in the interests of management or of controlling shareholders (for example in a management buy-out or an offer for a minority).”

Q9 Do you agree with the proposed amendment of Rule 28.6(a) and the addition of the Note on Rule 28.6?

(c) *References to analysts' forecasts and valuations*

7.4 The Code Committee understands that it is the Executive's practice to regard any references in offer documentation to profit forecasts, profit estimates or valuations sourced from analysts, including "consensus" numbers, as being endorsed by the party to the offer making the reference and thus to require a report or an independent valuer's opinion if that would have been required had the party given such forecasts or valuations on its own account.

7.5 However, the Panel's practice in respect of analysts' forecasts and valuations is not provided for in either of Rules 28 or 29, and its authority stems from Note 4 on Rule 19.1, which provides as follows:

"4. Quotations

A quotation (eg from a newspaper or a broker's circular) must not be used out of context and details of the origin must be included.

Since quotations will necessarily carry the implication that the comments quoted are endorsed by the board, such comments must not be quoted unless the board is prepared, where appropriate, to corroborate or substantiate them and the directors' responsibility statement is included."

7.6 The Code Committee agrees with the Executive's approach but believes that it would be desirable for both Rules 28 and 29 to reflect this practice explicitly in addition to its being implicit in the application of Note 4 on Rule 19.1.

7.7 The Code Committee understands that it is becoming increasingly common for certain companies to collate and to publish or circulate to institutional investors a summary of analysts' forecasts ("consensus forecasts") from time to time, for example ahead of quarterly results or trading updates. Such summaries might contain, for example, the median, the high and the low forecasts for a number of key measures such as revenue, operating margin, underlying profit before tax and earnings per share. The Code Committee recognises that the purpose of such

- practice is to assist the market in understanding research analysts' forecasts in a more complete and potentially more consistent way than if investors had to obtain and understand the basis of each individual analyst's forecast for themselves. However, the Code Committee is concerned that the mere fact of publication of consensus forecasts by the company, let alone any processing of the figures that it may have carried out to improve consistency and comparability, carries a risk that the forecasts are seen as to an extent "endorsed" by the company.
- 7.8 The Code Committee therefore considers that the publication by a party to an offer of consensus forecasts during an offer period should be treated as the publication of a profit forecast by the company. However, consistent with the approach taken to normal course forecasts and statements in section 2 of this PCP, the Code Committee proposes that the Panel should be able to give an exemption from the reporting requirement, provided that the conditions discussed in section 2 are met, i.e. that the consensus forecasts were published in the normal course; that the offer is recommended and (in respect of forecasts for a paper offeror) that no competing offer or possible offer has been announced; and that the forecasts are not being used in the debate on the merits of the offer and have not otherwise become a material issue.
- 7.9 Where a party to an offer has published consensus forecasts before the commencement of an offer period and has made them available on its website, the Code Committee proposes that the party should add, on its website, a statement to the effect that the consensus forecasts were not made for the purposes of the offer and have not been reviewed or reported on in accordance with Rule 28 and so should not be relied upon for Code purposes. The Executive would have to be consulted about the terms of such a disclaimer. Should the party wish to update the consensus forecasts to reflect updating by any analyst or other third party, the Code Committee proposes that reports would normally be required but that an exemption might be available if the criteria outlined in paragraph 7.8 were met.

7.10 The Code Committee therefore proposes a new Rule 28.11, as follows:

**“28.11 QUOTATIONS FROM OR REFERENCES TO FORECASTS
BY ANALYSTS AND OTHER THIRD PARTIES”**

(a) Except with the consent of the Panel, if a party to an offer includes in any document, announcement or information sent to shareholders or persons with information rights a quotation from or reference to a forecast of profit relating to that party, which originates from a research analyst or other third party, including average or consensus figures, such quotation or reference must be reported on in accordance with Rule 28.3(b) as if it were a profit forecast made by that party if it is sufficient to enable the calculation of an approximate figure for future profits of that party.

(b) In order for the Panel to give its consent, all the criteria in Rule 28.3(c)(i), (ii) and (iv) will normally have to be satisfied.

(c) If a party to an offer has, before the commencement of the offer period, published on its website a quotation from or reference to a forecast which originates from a research analyst or other third party, including average and consensus figures, such quotation or reference must have added to it a statement to the effect that the forecast was not prepared for the purposes of the offer and has not been examined or reported on in accordance with Rule 28.3. If such a quotation or reference published on a party’s website is updated during the offer period, paragraphs (a) and (b) above will apply. In any of these circumstances, the Panel should be consulted.”

7.11 Following a similar approach in respect of quotations from or references to analysts’ valuations of assets, the Code Committee proposes to add a new Rule 29.7, as follows:

**“29.7 REFERENCES TO OR QUOTATIONS FROM
VALUATIONS BY ANALYSTS AND OTHER THIRD
PARTIES”**

(a) Except with the consent of the Panel, if a party to an offer includes in any document, announcement or information sent to shareholders or persons with information rights a quotation from or reference to a valuation of that party’s assets, which originates from a

research analyst or other third party, including average or consensus figures, such quotation or reference will be regarded as a valuation published in connection with an offer and will have to be supported by the opinion of a named independent valuer. In cases of doubt, the Panel should be consulted.

(b) In order for the Panel to give its consent, all the criteria in Rule 29.1(e)(i)(A), (B) and (C) will normally have to be satisfied.

(c) If a party to an offer has, before the commencement of the offer period, published on its website a quotation from or reference to a valuation which originates from a research analyst or other third party, as described in (a) above, such quotation or reference must have added to it a statement to the effect that the valuation was not prepared for the purposes of the offer and has not been examined or reported on in accordance with Rule 29.1(a). If such a quotation or reference published on a party's website is updated during the offer period, paragraphs (a) and (b) above will apply. In any of these circumstances, the Panel should be consulted."

Q10 Do you agree with the proposed new Rule 28.11 and Rule 29.7?

(d) Amendment to Rule 28.7 to reflect changes in accounting practice

7.12 Since Rule 28.7 was framed, it has become obligatory for the consolidated financial statements of companies admitted to the Official List or to trading on AIM to be prepared in accordance with International Financial Reporting Standards ("IFRS"). Unlike UK GAAP, IFRS accounts prohibit extraordinary items and IFRS 3, "Business combinations", requires that the profit or loss of discontinued operations should be presented as a line item below profit before tax. Therefore, like tax and minority interests, the profit or loss of discontinued operations would have to be forecast in order to forecast profit after tax.

7.13 The Code Committee therefore proposes that Rule 28.7 should be amended to bring it into line with current practice as follows:

“28.7 TAXATION, PROFIT OR LOSS OF DISCONTINUED OPERATIONS ~~EXTRAORDINARY ITEMS~~ AND MINORITY INTERESTS

When a forecast of profit before taxation appears in a document published in connection with an offer, there must be included forecasts of taxation (where the figure is expected to be significantly abnormal); and profit or loss of discontinued operations ~~extraordinary items~~ and minority interests (where either of these amounts is expected to be material).”.

7.14 A corresponding change would be made to Rule 24.2(a)(i), as follows:

“(i) for the last 3 financial years for which the information has been published, turnover, net profit or loss before and after taxation, the charge for tax, profit or loss of discontinued operation~~extraordinary items~~, minority interests, the amount absorbed by dividends and earnings and dividends per share;”.

Q11 Do you agree that Rules 28.7 and 24.2 should be amended as proposed?

(e) Amendment of Rule 29.1(d)

7.15 The current Rule 29.1(d), which deals with a party to an offer addressing the valuation of another party’s assets, states:

“A party to a takeover situation will not normally be permitted to publish a valuation, appraisal or calculation of worth of the assets owned by another party unless it is supported by the unqualified opinion of a named independent valuer and that valuer has had access to sufficient information to carry out a property valuation, appraisal or calculation of worth either in accordance with The Standards or, in respect of assets other than land, buildings, plant and equipment, to appropriate standards approved by the Panel. Comments by one party about another party’s valuation, appraisal or calculation of worth of its own assets may be permitted in exceptional circumstances. In all cases, the Panel must be consulted in advance.”.

7.16 The Code Committee understands that, at least in relation to property companies, a valuer that is advising one party to an offer may be deterred altogether from

commenting on another party's valuation by the reference in the penultimate sentence to such comments being permitted only in "exceptional circumstances". The Code Committee agrees that it will not in general be possible for a party to procure a re-valuation of another party's assets or to procure a competing valuation which has a similar degree of authority and professional robustness where the valuer instructed by the second party has not had the detailed access to the underlying information which the original independent valuer has had. To prevent such "second-guessing" of a formal valuation is therefore appropriate and is provided for in the first sentence of Rule 29.1(d). However, the Code Committee does not believe that all debate about the assumptions and reliability of a valuation should be stifled. Rather, as for profit forecasts, it considers that a robust commercial debate about the merits of a valuation should be permitted with a view to ensuring that shareholders are fully informed.

- 7.17 The Executive has consulted RICS on this topic. The relevant guidance for RICS members is Practice Statement 2.6 in The Standards, which states:

"A member must not undertake a critical review of a valuation prepared by another valuer that is intended for disclosure or publication unless the member is in possession of all the facts and information on which the first valuer relied."

- 7.18 The view of the Code Committee and of RICS is that this does not prevent a member of RICS from commenting on another valuer's generic assumptions such as interest rates or rental inflation. The Code Committee and RICS consider that the words "**in exceptional circumstances**" in Rule 29.1(d) (which will become Rule 29.1(f)) might give rise to an unduly restrictive interpretation of the extent to which a commercial debate could be held on an asset valuation, and that in order to avoid such a reading, those words should be replaced by the words "**with the Panel's consent**".

Q12 Do you agree with the proposed replacement of the words “in exceptional circumstances” in Rule 29.1(d) (the proposed new Rule 29.1(f)) by the words “with the Panel’s consent”?

(f) Consequential amendments

7.19 The Code Committee proposes that the following amendments should also be made as a consequence of the other Code amendments proposed in this PCP.

(i) Rule 28.1

7.20 In order to reflect the proposals to amend Rule 28.3, the Code Committee proposes that the Note on Rule 28.1 should be amended as follows:

“Existing forecasts

At the outset, an adviser should invariably check whether or not his client has a forecast on the record so that the procedures required by Rule 28.3 (~~dc~~) can be set in train with a minimum of delay.”.

(ii) Rule 28.6(g)

7.21 In order to reflect the proposals relating to quantified effects statements under paragraph 6.9 above, the Code Committee proposes that Rule 28.6(g) should be amended as follows:

“(g) Earnings enhancement and ~~merger benefits~~ quantified effects statements

...

Parties should also be aware that the inclusion of earnings enhancement statements, if combined with ~~merger benefits~~ quantified

effects statements and/or other published financial information, may result in the market being provided with information from which the prospective profits for the offeror or the enlarged offeror group or at least a floor or ceiling for such profits can be inferred. Such statements would then be ~~subject to~~ treated as a profit forecast under this Rule. If parties are in any doubt as to the implications of the inclusion of such earnings enhancement statements, they should consult the Panel in advance.

~~See also Note 8 on Rule 19.1.~~

(iii) *Rule 32.1*

7.22 Note 1 on Rule 32.1 includes a reference to merger benefits statements. To reflect the changes proposed in section 6 above, if adopted, the Code Committee proposes that this reference should change to “quantified effects statements”.

Appendix 1.4

7.23 In order to reflect the proposed introduction of Rule 28.10, the Code Committee proposes that Appendix 1.4(o) should be amended as follows:

“(o) Rules 28 and 29 (profit forecasts, quantified effects statements and asset valuations ...”.

Q13 Do you agree with the proposed consequential amendments to Rules 28.1, 28.6(g), 32.1 and Appendix 1.4(o)?

8. Assessment of the impact of the proposals

(a) *Reporting on profit forecasts, asset valuations and quantified effects statements*

8.1 The Code Committee believes that the benefit of its proposals will be to release the parties to an offer from the costs and time involved in obtaining third party reports or opinions on financial information in a number of circumstances where

it considers that the requirement to produce reports is disproportionate to the benefit of having that information reported on. This might be of particular benefit for a larger offeror whose offer is partly in securities, for whom the cost and trouble of obtaining a report in respect of large and international operations may be considerable.

- 8.2 As the proposed exemptions apply only to normal course forecasts and valuations, they will have no impact on those situations where a profit forecast or asset valuation is produced, in the context of an offer but not in the normal course.
- 8.3 Since the majority of the offers regulated by the Code are recommended, uncontested transactions, where it will generally be within the power of the parties to prevent any normal course forecast or valuation from being used as part of the debate on the merits of the offer, the Code Committee considers that in the majority of cases where an exemption is sought in respect of a normal course forecast or valuation, that forecast or valuation is neither likely to be a material issue nor to require any difficult subjective assessments by the Panel.
- 8.4 The Code Committee recognises that, in seeking a dispensation, there may be some additional work for parties and their advisers in, for example:
- (i) demonstrating that a forecast or valuation was made in the “normal course”;
 - (ii) demonstrating that a forecast or valuation was not materially different from existing market expectations;
 - (iii) reviewing announcements and documents to see whether a forecast has been made in respect of a part of a business; or

- (iv) monitoring and controlling statements made during the offer period to ensure that a forecast or valuation for which an exemption has been granted is not used in the debate on the merits of the offer.

The Code Committee considers that the burden of this work will be small as compared with the burden of obtaining third party reports.

- 8.5 The Code Committee recognises that there will be a minority of cases where the Panel will be required to make a judgement involving some element of subjectivity. This might arise both in circumstances where the Panel is asked to arbitrate between parties (for example, where an expectation that an offer will be recommended changes), and in cases where, although all parties to the offer argue for an exemption, the Panel remains concerned that circumstances such as the timing, nature of, or references to the forecast or valuation are such that it is in shareholders' interest that a report should be required. The Code Committee notes that the making of such judgements is already required in the context of Rules 28 and 29, for example, where dispensations are sought by overseas paper offerors or where there is disagreement as to whether a particular statement amounts to a profit forecast as defined in Rule 28.6(a). The Code Committee believes that the making of such judgements will be required in a minority of the cases in which an exemption from a requirement to report is sought, and that this additional burden for the Panel is likely to be outweighed by the benefit of allowing exemptions from a need to report in circumstances where such reporting is disproportionate.

(b) Extension of exemptions in Rule 28.6(c) to IMS and to AIM and PLUS companies

- 8.6 The Code Committee considers that the extension of exemptions to IMS represents a pragmatic acknowledgement of market practice in the wake of the development of the DTRs. The Code Committee considers that the formal

extension of the exemptions in Rule 28.6(c) to AIM and PLUS companies will remove the somewhat unsatisfactory practice under the current Rule, whereby advisers or accountants to parties to an offer are asked to confirm to the Panel that the reporting by an AIM or PLUS client is essentially the same as that required under the DTRs, and, on confirmation that the disclosure is essentially the same except where the AIM or PLUS rules differ from the DTRs, a dispensation from a formal report under Rule 28 is generally granted.

(c) *Quantified effects statements*

- 8.7 The Code Committee recognises that the proposed extension of the current requirements to report on merger benefit statements to all quantified effects statements will lead to an increased burden of reporting. The Code Committee considers that this is justified by arguments of equity and dependability of such information where it is of similar import to the debate on an offer as a current merger benefits statement.
- 8.8 The Code Committee notes that it has already become market practice, in many cases, for a party to report on a merger benefits statement at an earlier stage than would strictly be required under the Code, in order to obtain the benefit in the market which such third party reporting confers, and considers that, to that extent, its proposals in relation to the point at which reports will be required are in line with evolving market practice.

APPENDIX A**Bodies and companies consulted informally by the Executive (on a non-confidential basis)**

1. The AIM team of the London Stock Exchange
2. Citigroup
3. Deutsche Bank
4. Oriel Securities
5. PLUS Markets Group plc
6. PricewaterhouseCoopers
7. The Royal Institution of Chartered Surveyors
8. UBS
9. The UK Listing Authority

APPENDIX B

Proposed amendments to the Code

DEFINITIONS

Quantified effects statement

A quantified statement made by a party to an offer about the expected financial effect of a proposal made in the context of an offer (for example, a merger benefits statement by an offeror that it would expect the offeree company to contribute an additional £x million of profit post acquisition, or a statement by the offeree company about the cost savings it would expect to make if an offer were rejected or about the potential benefits expected to accrue from an alternative transaction).

Rule 19.1

19.1 STANDARDS OF CARE

...

NOTES ON RULE 19.1

...

8. — *Merger benefits statements*

[Whole Note to be deleted.]

Rule 24.2

24.2 FINANCIAL AND OTHER INFORMATION ON THE OFFEROR, THE OFFEREE COMPANY AND THE OFFER

...

(a) ...

(i) for the last 3 financial years for which the information has been published, turnover, net profit or loss before and after taxation, the charge for tax, profit or loss of discontinued

~~operation~~~~extraordinary~~—items, minority interests, the amount absorbed by dividends and earnings and dividends per share; ...

Rule 28

SECTION K. PROFIT FORECASTS AND QUANTIFIED EFFECTS STATEMENTS

28.1 STANDARDS OF CARE

...

NOTE ON RULE 28.1

Existing forecasts

At the outset, an adviser should invariably check whether or not his client has a forecast on the record so that the procedures required by Rule 28.3(~~d~~c) can be set in train with a minimum of delay.

...

28.3 REPORTS REQUIRED IN CONNECTION WITH PROFIT FORECASTS

(a) A forecast made by an offeror offering solely cash need not be reported on. With the consent of the Panel, this exemption may be extended to an offeror offering a non-convertible debt instrument.

(b) In all other cases, except as provided in this Rule 28.3, the accounting policies and calculations for the forecasts must be examined and reported on by the auditors or consultant accountants. Any financial adviser mentioned in the document must also report on the forecasts.

~~(e) When income from land and buildings is a material element in a forecast, that part of the forecast should normally be examined and reported on by an independent valuer; this requirement does not apply where the income is virtually certain, eg known rents receivable under existing leases.~~

~~(d~~c) Except with the consent of the Panel, any profit forecast which has been made before the commencement of the offer period must be examined, repeated and reported on in the document sent to shareholders and persons with information rights. In order for the Panel to give its consent, the following criteria will normally have to be satisfied:

(i) the forecast was made in the normal course of the company's communication with the market;

(ii) the offer has been publicly recommended by the board of the offeree company and, in respect of a forecast made by an offeror, no competing offer or named potential offeror has been announced;

(iii) the forecast was made more than one month prior to the commencement of the offer period; and

(iv) the forecast has not, during the offer period, been used by the parties to the offer in any debate on the merits of the offer nor has it otherwise become a material issue.

(ed) When a forecast made before the commencement of the offer period does not satisfy the criteria set out in (c) above ~~Exceptionally~~, the Panel may exceptionally accept that, because of the uncertainties involved, it is not possible for that a forecast ~~previously made to be reported on in accordance with the Code as required under (b) above~~ nor for a revised forecast to be made. In such circumstances, the Panel ~~would~~ will insist on a full explanation being given as to why the requirements of this Rule 28.3 ~~the Code~~ were are not capable of being met.

(e) Where the forecast is made during an offer period, the Panel may grant an exemption from the requirement to report on a profit forecast under (b) above, taking into account the criteria set out in (c)(i), (ii) and (iv) above, and provided that the Panel is satisfied that the party making the forecast could not reasonably refrain from doing so.

NOTES ON RULE 28.3

1. Normal course profit forecasts

In order to be regarded as published in the “normal course” of a company’s communication with the market, a forecast must, normally, form part of an established pattern of reporting.

2. Change of circumstances

Where, during an offer period, there is a change in the circumstances which prevailed when the Panel made its decision to give an exemption under Rule 28.3(c), for example, if the profit forecast is subsequently used in the debate on the merits of the offer, or if an expected recommendation of the offer by the board of the offeree company is not obtained, the Panel may require the profit forecast to be examined, repeated and reported on.

3. Repetition of a forecast

The Panel will, when giving an exemption from the requirement to report on a profit forecast under Rule 28.3(c) or (e), require that the forecast must not be repeated or referred to in any document, announcement or information sent to shareholders or persons with information rights. Where repetition of a profit forecast on which reports have not been made is unavoidable, for example because the forecast is included in an interim results statement that is reproduced in order to satisfy the requirements of Rule 24.2 or Rule 25.2, or where such a forecast has been made available on the relevant party's website and continues to be so available, a statement to the effect that the forecast has not been prepared for the purposes of the offer and has not been examined or reported on in accordance with the requirements of this Rule 28.3 must be included in the document containing the forecast or added to the party's website, as appropriate. In such circumstances, the Panel should be consulted.

4. Interim and preliminary figures

This Rule 28.3 operates without prejudice to the exemptions from the requirement to report in Rule 28.6(c).

28.4 PUBLICATION OF REPORTS AND CONSENT LETTERS

Whenever a profit forecast is made during an offer period and reports are required, the reports must be included in the document containing the forecast or, ...

28.5 SUBSEQUENT DOCUMENTS – CONTINUING VALIDITY OF FORECAST

When a company includes a forecast and reports on that forecast in a document, ...

28.6 STATEMENTS WHICH WILL BE TREATED AS PROFIT FORECASTS

(a) When no figure is mentioned

... Whenever a form of words puts a floor under, or, in certain circumstances, a ceiling on ...

...

(c) **Interim and preliminary figures**

Except with the consent of the Panel, any unaudited profit figures published during an offer period must be reported on. This provision does not, however, apply to:-

- (i) **unaudited statements of annual or interim results or interim management statements which have already been published;**
- (ii) **unaudited statements of annual results which comply with ~~the~~ any requirements for preliminary statements of annual results as set out in the UKLA Rules, the AIM Rules for Companies or the PLUS Rules for Issuers;**
- (iii) **unaudited statements of interim results or interim management statements which comply with ~~the~~ any requirements for half-yearly reports as set out in the UKLA Rules, the AIM Rules for Companies or the PLUS Rules for Issuers, where the offer has been publicly recommended by the board of the offeree company; or**
- (iv) **unaudited statements of interim results or interim management statements by offerors which comply with ~~the~~ any requirements for half-yearly reports as set out in the UKLA Rules, the AIM Rules for Companies or the PLUS Rules for Issuers, whether or not the offer has been publicly recommended by the board of the offeree company but provided the offer could not result in the issue of securities which would represent 10% or more of the enlarged voting share capital of the offeror.**

~~The Panel should be consulted in advance if~~ **If the company is not admitted to the Official List, but wishes to take advantage of the exemptions under paragraphs (ii), (iii) or (iv) above but either the company's interim management statement does not comply with the requirements set out in paragraphs (iii) or (iv) above, or the company is not admitted to the Official List or to trading on AIM or PLUS, the Panel should be consulted in advance.**

...

(f) **Profit warranties**

The Panel must be consulted in advance if a profit warranty, whether for the whole business or a part of the business, is to be published in connection with an offer as it may be regarded as a profit forecast.

(g) Earnings enhancement and ~~merger benefits~~ quantified effects statements

...

Parties should also be aware that the inclusion of earnings enhancement statements, if combined with ~~merger benefits~~ quantified effects statements and/or other published financial information, may result in the market being provided with information from which the prospective profits for the offeror or the enlarged offeror group or at least a floor or ceiling for such profits can be inferred. Such statements would then be ~~subject to~~ treated as a profit forecast under this Rule. If parties are in any doubt as to the implications of the inclusion of such earnings enhancement statements, they should consult the Panel in advance.

See also ~~Note 8 on Rule 19.1.~~

NOTE ON RULE 28.6

Profit ceilings

The Panel will normally treat a statement that puts a ceiling on the profits for a period as a profit forecast only in circumstances where that statement could be seen to be in the interests of management or of controlling shareholders (for example in a management buy-out or an offer for a minority).

28.7 TAXATION, PROFIT OR LOSS OF DISCONTINUED OPERATIONS EXTRAORDINARY ITEMS AND MINORITY INTERESTS

When a forecast of profit before taxation appears in a document published in connection with an offer, there must be included forecasts of taxation (where the figure is expected to be significantly abnormal), and profit or loss of discontinued operations ~~extraordinary items~~ and minority interests (where either of these amounts is expected to be material).

...

28.9 PROFIT FORECAST IN RESPECT OF AN INDIVIDUAL PART OF A BUSINESS

Rules 28.1 to 28.8 apply to a profit forecast in respect of an individual part of a business as if it were a profit forecast for the whole business.

28.10 QUANTIFIED EFFECTS STATEMENTS

(a) If a party to an offer makes a quantified effects statement, it must publish at the same time:

(i) the bases of the belief (including sources of information) supporting the statement;

(ii) reports by financial advisers and accountants that the statement has been made with due care and consideration;

(iii) an analysis and explanation of the constituent elements sufficient to enable the relative importance of these elements to be understood; and

(iv) a base figure for any comparison drawn.

(b) The requirements in (a) will not apply:

(i) in respect of a quantified effects statement made by an offeror where the consideration is solely cash; or

(ii) normally, in the case of an offer that has been publicly recommended by the board of the offeree company, unless:

(A) in respect of a quantified effects statement by an offeror that is not offering solely cash, a competing offer or a named potential competing offeror has been announced; or

(B) the quantified effects statement otherwise becomes a material issue.

(c) The requirements in (a) may also apply to a statement to the effect that an acquisition will enhance an offeror's earnings per share where such enhancement depends in whole or in part on material merger benefits.

(d) A party to an offer wishing to make a quantified effects statement should consult the Panel in advance.

28.11 QUOTATIONS FROM OR REFERENCES TO FORECASTS BY ANALYSTS AND OTHER THIRD PARTIES

(a) Except with the consent of the Panel, if a party to an offer includes in any document, announcement or information sent to shareholders or persons with information rights a quotation from or reference to a forecast of profit relating to that party, which originates from a research analyst or other third

party, including average or consensus figures, such quotation or reference must be reported on in accordance with Rule 28.3(b) as if it were a profit forecast made by that party if it is sufficient to enable the calculation of an approximate figure for future profits of that party.

(b) In order for the Panel to give its consent, all the criteria in Rule 28.3(c)(i), (ii) and (iv) will normally have to be satisfied.

(c) If a party to an offer has, before the commencement of the offer period, published on its website a quotation from or reference to a forecast which originates from a research analyst or other third party, including average and consensus figures, such quotation or reference must have added to it a statement to the effect that the forecast was not prepared for the purposes of the offer and has not been examined or reported on in accordance with Rule 28.3. If such a quotation or reference published on a party's website is updated during the offer period, paragraphs (a) and (b) above will apply. In any of these circumstances, the Panel should be consulted.

Rule 29

29.1 REPORTS REQUIRED IN CONNECTION WITH ASSET VALUATIONS TO BE REPORTED ON IF GIVEN IN CONNECTION WITH AN OFFER

(a) Requirement for an independent opinion

Except with the consent of the Panel, ~~W~~when a valuation of assets is given published in connection with an offer, it ~~should~~ must be supported by the opinion of a named independent valuer. The Panel may also require a valuation to be supported by an independent valuer's opinion, even if it is not published in connection with an offer, if it is used in debate on the merits of the offer or is otherwise a material issue. The Panel should be consulted in any case in which an asset valuation is to be included in any document, announcement or information sent to shareholders or persons with information rights. ~~(For the purposes of this Rule, "an independent valuer" means a valuer who meets the requirements of an "external valuer" as defined in The Standards and, in addition, has no connection with other parties to the transaction.)~~

(ab) Type of asset

...

(bc) The valuer

For the purposes of this Rule, “an independent valuer” means a valuer who meets the requirements of an “external valuer” as defined in The Standards and, in addition, has no connection with the other parties to the offer. In relation to land, buildings ...

(ed) In connection with an offer

A valuation of assets will be regarded as being “published in connection with an offer” if it is published within one month prior to the commencement of or during an offer period.

(e) Exemptions from the requirement for an independent valuer’s opinion

(i) In order for the Panel to give its consent under (a) above, the following criteria will normally have to be satisfied:

(A) the valuation is published by a party to an offer in the normal course of its communication with the market (such as a quarterly or monthly net asset value figure);

(B) the offer has been publicly recommended by the board of the offeree company and, in respect of a valuation published by an offeror that is not offering solely cash, no competing offer or named potential offeror has been announced;

(C) the valuation has not, during the offer period, been used by the parties to the offer in any debate on the merits of the offer nor has it otherwise become a material issue; and

(D) the Panel is satisfied that the party publishing the valuation could not reasonably refrain from doing so.

(ii) ~~In certain cases offer documents or defence circulars will include~~ When a statements of assets reproducing directors’ estimates of asset values is published in an offer document or the offeree board circular by virtue of being included in with the company’s accounts in accordance with Schedule 7 Part 1 of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008; ~~The Panel will not require an independent valuer’s opinion to be provided regard such estimates as “given in connection with an offer”~~ unless asset values are a particularly significant factor in assessing the offer and the estimates are, accordingly, given considerably more prominence in the offer document or circular than merely being

referred to in a note to a statement of assets in an appendix. ~~In these circumstances, such estimates must be supported, subject to Rule 29.2(e), by an independent valuer in accordance with this Rule.~~

(df) Another party's assets

... Comments by one party about another party's valuation, appraisal or calculation of worth of its own assets may be permitted ~~in exceptional circumstances~~ with the Panel's consent. In all cases, the Panel must be consulted in advance.

NOTES ON RULE 29.1

1. Normal course valuations

In order to be regarded as published in the "normal course" of a company's communication with the market, a valuation must, normally, have been published by that party regularly and on a consistent basis and prepared in accordance with generally accepted practice for the relevant asset class.

2. Change of circumstances

Where, during an offer period, there is a change in the circumstances which prevailed when the Panel made its decision to give an exemption from the requirement to obtain an independent valuer's opinion, for example if the valuation is subsequently used in the debate on the merits of the offer, or if an expected recommendation of the offer by the board of the offeree company is not obtained, the Panel may require the valuation to be supported by the opinion of a named independent valuer.

3. Repetition of a valuation

The Panel will, when granting an exemption from the requirement to provide an independent valuer's opinion under Rule 29.1, require that the valuation must not be repeated or referred to in any document, announcement or information sent to shareholders or persons with information rights. Where repetition of a valuation which is not supported by an independent valuer's opinion is unavoidable, for example because the valuation is included in an interim results statement that is reproduced in order to satisfy the requirements of Rule 24.2 or Rule 25.2, or where such a valuation has been made available on the relevant party's website and continues to be so available, a statement to the effect that the valuation has not been prepared for the purposes of the offer and has not been examined or opined on in accordance with the requirements of Rule 29.1 must be included in the document containing the valuation or added to the party's website, as appropriate. In such circumstances the Panel should be consulted.

29.7 REFERENCES TO OR QUOTATIONS FROM VALUATIONS BY ANALYSTS AND OTHER THIRD PARTIES

(a) Except with the consent of the Panel, if a party to an offer includes in any document, announcement or information sent to shareholders or persons with information rights a quotation from or reference to a valuation of that party's assets, which originates from a research analyst or other third party, including average or consensus figures, such quotation or reference will be regarded as a valuation published in connection with an offer and will have to be supported by the opinion of a named independent valuer. In cases of doubt, the Panel should be consulted.

(b) In order for the Panel to give its consent, all the criteria in Rule 29.1(e)(i)(A), (B) and (C) will normally have to be satisfied.

(c) If a party to an offer has, before the commencement of the offer period, published on its website a quotation from or reference to a valuation which originates from a research analyst or other third party, as described in (a) above, such quotation or reference must have added to it a statement to the effect that the valuation was not prepared for the purposes of the offer and has not been examined or reported on in accordance with Rule 29.1(a). If such a quotation or reference published on a party's website is updated during the offer period, paragraphs (a) and (b) above will apply. In any of these circumstances, the Panel should be consulted.

Rule 32.1

32.1 OFFER OPEN FOR 14 DAYS AFTER PUBLICATION OF REVISED OFFER DOCUMENT

...

NOTES ON RULE 32.1

1. Announcements which may increase the value of an offer

Where an offer involves an exchange of equity or potential equity, the announcement by an offeror of any material new information (including trading results, profit or dividend forecasts, asset valuations, ~~merger benefits quantified effects statements and proposals for dividend payments~~ ...

Appendix 1

...

4. WHITEWASH CIRCULAR

...

(O) Rules 28 and 29 (profit forecasts, quantified effects statements and asset valuations ...

APPENDIX C**List of questions**

- Q1 Do you agree with the Code Committee’s proposals for the provision of exemptions from the obligation to report on a profit forecast published in the normal course of a company’s business in the circumstances described above?**
- Q2 Do you agree that the Code should should provide for dispensations from the requirement for an opinion of a named independent valuer to support a normal course asset valuation in the circumstances set out above?**
- Q3 Do you agree that Rule 28.6(c) should be amended as proposed to provide an exemption from reporting for an unaudited profit estimate for a completed period reported in an interim management statement?**
- Q4 Do you agree that Rule 28.6(c) should be amended as described to provide an exemption from reporting for unaudited statements of interim results reported by companies admitted to trading on AIM or PLUS?**
- Q5 Do you agree that the Code should treat profit forecasts and estimates for part of a business in the same way as forecasts for the whole of the business?**
- Q6 Do you agree with the proposals to expand the application of the rules on merger benefits statements to cover other statements as described above and to introduce a new definition of a “quantified effects statement”?**
- Q7 Do you agree with the proposals relating to the circumstances in which reports may be required on “quantified effects statements”?**
- Q8 Do you agree that Rule 28.3(c) should be deleted?**

- Q9 Do you agree with the proposed amendment of Rule 28.6(a)?**
- Q10 Do you agree with the proposed new Rule 28.11 and Rule 29.7?**
- Q11 Do you agree that Rules 28.7 and 24.2 should be amended as proposed?**
- Q12 Do you agree with the proposed replacement of the words “in exceptional circumstances” in Rule 29.1(d) (the proposed new Rule 29.1(f)) by the words “with the Panel’s consent”?**
- Q13 Do you agree with the proposed consequential amendments to Rules 28.1, 28.6(g), 32.1 and Appendix 1.4(o)?**