The Secretary to the Code Committee
The Takeover Panel
10 Paternoster Square
London EC4M 7DY

27th September 2012

Dear Mr/Madam Secretary

Investor Relations Society response to The Takeover Panel Consultation Paper issued by The Code Committee of the Panel: profit forecasts, quantified financial benefits statements, material changes in information and other amendments to The Takeover Code

I have pleasure in enclosing The Investor Relations Society's response to the above consultation.

The Investor Relations Society's mission is to promote best practice in investor relations; to support the professional development of its members; to represent their views to regulatory bodies, the investment community and government; and to act as a forum for issuers and the investment community.

The Investor Relations Society represents members working for public companies and consultancies to assist them in the development of effective two way communication with the markets and to create a level playing field for all investors. It has over 600 members drawn both from the UK and overseas, including the majority of the FTSE 100 and much of the FTSE 250.

Thank you for giving us the opportunity to respond to this Public Consultation Paper. Overall, we are in agreement with the broad thrust of this paper and we consider that the proposed amendments to the provisions of the code relating to profit forecasts, merger benefits statements and material changes in information previously published during an offer period will - in general - serve to strengthen the existing Code. The role of Rule 28 in conferring credibility to profit forecasts is clear and we support it, as this is a key issue for investor relations professionals. We are strong advocates of companies using an independent consensus to help analysts and investors accurately establish a true and fair understanding of the company's current trading and future prospects; we also understand that the exact form that guidance may take and the combination of narrative and data points provided will depend on the nature of an individual company's business model and its established practice.

However, we do have concerns with aspects of this consultation that, whilst few in number, we feel are of significance and if left uncorrected could have an adverse impact on issuers. We discuss these in our response but they can be surmised as such:

1) **We are concerned in general that the accuracy of some third party consensus compiling does not always meet the expressed requirements of Rule 19.1 and that this is not obviously recognised in the consultation paper;**

2) **The proposed Note 1 on Rule 28.7 for a party to an offer, upon commencement of an offer period, to be required to remove an independent consensus forecast from their website would also remove a vital opportunity for investors to be able to rely on a stable and verifiable number. It would leave only unverifiable and often inaccurate third party figures available for investors, which seems an unsatisfactory outcome.**

3) **We feel the advantages of companies publishing independently (through an accredited provider) or self-collated (verifiable) consensus on their websites should be considered by the Code Committee and Panel.**

Our response is below and we hope it will be of assistance.

Yours faithfully

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Q1) Do you have any comments on the proposed new definitions of “profit forecast”, “profit estimate” and “quantified financial benefits statement” and the proposed amendments of the definitions of “cash offeror” and “offer period”?

We agree it is helpful to introduce updated definitions into the Definitions Section of the Code.

Profit forecast: We agree with what is proposed to clarify the definition of profit forecasts, although recommend an extra line should be included (in **bold**):

A profit forecast is a form of words which expressly states, or by implication indicates, a figure, or a minimum or maximum figure, for the likely level of profits or losses for a particular period, or contains data from which a calculation of such a figure for profits or losses may be made, even if no particular figure is mentioned and the word “profit” is not used, ***and which may affect investment decisions****.”*

Profit estimate: Agree as stated.

Quantified financial benefits statement: Agree, important to factor in cost saving measures as often prime consideration in takeovers.

Amendments of the definitions of “cash offeror”: Agree with inclusion of a non-convertible debt instrument will normally be treated as cash.

Reintroduction of definitions of offer period: Agree.

Q2) Do you agree that the requirements for assumptions to be stated and for third party reports to be obtained should be retained for profit forecasts and quantified financial benefits statements which are first published during an offer period? Do you have any comments on the proposed new Rule 28.1(a)?

We agree that requirements for assumptions should be stated and third party reports to be obtained should be retained on profit forecasts and quantified financial benefits statements first published during an offer period. We consider that this will allow both parties to an offer and their shareholders to gain a clearer understanding of how the profit forecast or quantified financial benefits statements have been derived and consider for themselves the likelihood of these being met. This enhances transparency of process. In particular, this materially significant information is vital for shareholders in offeree companies in making their decisions regarding the attractiveness of the offer, while reducing the possibility of exaggerated or otherwise unrealistic profit forecasts/quantified financial benefits statements. Third party reports (that is a report from reporting accountants and financial advisors) published in the offer period will serve to add further confidence that what is presented is a true and fair representation of the PF/QFBS. It should be noted that by requiring both accountants and financial advisors to report, there is a double cost to bear – although double the security.

We have no further comments on 28.1a) other than we think it is a beneficial clarification.

Q3) Do you agree that the requirements for assumptions to be stated and for third party reports to be obtained should be retained for profit forecasts which have been published following an approach or, in appropriate circumstances, the first active consideration of a possible offer? Do you have any comments on the proposed new Rule 28.1(b) and Note 1 on Rule 28.1?

Yes, we also agree with this for reasons stated above. We have no additional comments.

Q4) Do you agree with the proposed new requirements with regard to an outstanding profit forecast? Do you have any comments on the proposed new Rule 28.1(c)?

Yes, we agree and support the proposed new requirements. We support the premise behind the introduction of Rule 28.1(c) in seeking to minimise incidences whereby companies with no expectation of an offer being made or received are dissuaded from publishing guidance on future expected profits, potentially prejudicing the dissemination and gathering of information which occurs through investor-issuer dialogue. Forward-looking guidance is a transparent mechanism whereby capital markets can ascertain future expectations of financial performance, typically enabling more accurate share price formation and a more precise reflection of a company's prospects to be reflected in its share price. Furthermore, this paradigm enables the company itself to monitor its own internal expectations of performance against the market's view and if necessary take action under its continuing obligations under the Listing Rules, to keep the market informed of any price sensitive information which may cause a dichotomy in expectations. We note that Rule 28.1 (c) i) implies director confirmation of the profit forecast and although we agree with the principle of this we feel that in reality the necessity to confirm the accounting basis means there is likely to be limited cost saving opportunities for offeree companies and paper offerors to the offer from changes to the rules.

Q5) Do you agree with the proposed ability for the Panel to grant a dispensation from the proposed new Rules 28.1(a) and (b) in relation to ordinary course profit forecasts? Do you have any comments on the proposed new Note 2 on Rule 28.1?

The Investor Relations Society believes that transparency is at the heart of best practice investor relations and we support the current disclosure and transparency regime. We are a rigorous upholder of the principles of universal, proactive and prompt dissemination of information to shareholders and we therefore strongly advocate companies producing ordinary course profit forecast indications (in whatever style suits their business) providing a base for analysts and investors. We think allowing a dispensation in relation to ordinary course profit forecasts means this style of reporting is likely to be significantly more widely used by reporting issuers and thereby improving transparency and engagement between company and investors. An area on which we would like to see further clarification refers to the proposed process in which the Panel is required to grant dispensation: i) what is the proposed timetable for this?; ii) to what extent will this be public information?; iii) what will be the measures put in place to manage potential dispute?

Our overall view is that any steps taken to encourage clarification to the market are positive.

Q6) Do you agree with the proposal for the Panel to be able to grant a dispensation from the proposed new Rules 28.1(a) and (b) in relation to profit forecasts for certain future financial periods? Do you have any comments on the proposed new Note 3 on Rule 28.1?

It is important to allow the defending company in a hostile takeover bid the best opportunity possible to present its case, which might include seeking to publish long term profit forecasts. The current requirements of Rule 28 whereby third parties have to submit financial reports for forecasts for any future period do not allow sufficient flexibility – therefore we think it appropriate for this New Note 3 to be incorporated into 28.1. Ensuring long-term forecasts comply with company accounting policy and assumptions should reassure the market of the forecast's viability without the need for further accreditation. It is important to note the obvious difficulties in reporting expectations for periods significantly in the future.

Q7) Do you agree with the proposed requirement to publish corresponding profit forecasts for the current and intervening financial periods where a profit forecast for a future

financial period is published? Do you have any comments on the proposed new Rule 28.2?

Although we support clarity of forecasts the proposal to publish on current or intervening financial periods appears to contradict the proposal in Q6. We would like to see more clarity on how the two proposals interrelate. The requirement to publish corresponding forecasts would seem to negate the dispensation on longer term numbers.

Q8) Do you agree that reports should always be required to be obtained on a profit forecast where the offer is a management buy-out or is made by the existing controller of the offeree company? Do you have any comments on the proposed new Note 4 on Rule 28.1?

We agree – profit forecasts must not be seen to be being manipulated by management to their advantage when the offer is a management buyout in order to make their offer appear more generous to shareholders than the market considers.

Q9) Do you have any comments on the proposed new Note 5 on Rule 28.1 with regard to profit ceilings?

The uncertainty around this proposal lies in ascertaining when making a statement on profit ceilings if it is deemed to be of benefit to the company or not. Further clarification of how this is to be assessed (notwithstanding clear examples of benefit such as management buyout) would be helpful.

Q10) Do you agree that the Code should expressly provide the Panel with the ability to grant a dispensation from the requirements of Rule 28 where the offer would not result in a material increase in the equity share capital of the offeror? Do you have any comments on the proposed new Note 6 on Rule 28.1?

Profit forecasts are an important way for companies to preserve and enhance their valuation given that investors assign a high premium on accurate forecasts when forecasting corporate performance. The role of Rule 28 in conferring credibility to profit forecasts is clear and we are uneasy about unnecessarily eroding this function. We understand the reasoning that a non-material increase in share capital following an offer should therefore result in a dispensation being granted – however, our query would be on the percentage of issued securities constituting material significance. We would like further clarification on how the figure of 10% or more has been reached.

Q11) Do you have any comments on the proposed new Note 7 on Rule 28.1 in relation to the compilation of profit forecasts and quantified financial benefits statements?

Harmonising the definition of the compilation of Profit Forecasts in line with ESMA guidance is sensible. We note that ESMA is becoming increasingly active on a wide variety of issues (for example it's recent study into the proxy advisory industry). One of the challenges our members face in their IR roles is the multiplicity of regulation from different sources and so we welcome attempts at streamlining.

Q12) Do you have any comments on the proposed new Rule 28.3 with regard to assumptions in relation to profit forecasts and quantified financial benefits statements?

We consider this to be the normal course of best practice IR and what our members are already doing. It is core corporate and investor relations procedure to produce figures in this way and we strongly support this.

Q13) Do you agree that the exemption from the requirements of Rule 28 for certain profit estimates should be extended as proposed? Do you have any comments on the proposed new Rule 28.4?

We agree with this proposal. Permitting reported figures in this case will assist smaller companies to minimise their administrative burden.

Q14) Do you have any comments on the proposed new Rule 28.5 in relation to quantified financial benefits statements?

Rule 28.5 relates to basis standards of transparency in corporate reporting - it is standard corporate behaviour to take care in producing accurate financial statements and investor relations officers expect to be able to justify their figures and assumptions to analysts and investors. When factoring in cost saving measures expected from a takeover parties need to ensure that data accuracy is strictly maintained.

Q15) Do you have any comments on the proposed new Rule 28.6 with regard to a profit forecast for part of a business?

We agree with the proposal. A profit forecast for part of a business should mean it is possible to implicitly factor in a forecast for the wider business. Assessing how materiality is defined and what level of importance is assigned to each part of a business will have a significant bearing on this.

Q16) Do you have any comments on the proposed new Rule 28.7(a), the proposed amendments to Note 5 on Rule 19.1, or the proposed Note 1 on Rule 28.7, with regard to references by a party to an offer to third party or average forecasts with respect to its own profits?

We agree with proposed new Rule 28.7 on third party profit forecasts. We understand that if a company discusses future profits in its outlook statements then that is implicitly taken as a forecast. <u>However, we have a major concern relating to the proposed website ruling, Note 1 on Rule 28.7.</u> By removing from its website any consensus analysts' profit forecasts both parties to an offer are potentially negatively impacted. The reason for this is that other published third party provider forecasts cannot be categorically seen to be definitive or wholly accurate. In addition it is extremely difficult, if not impossible, for companies to correct these figures, even if there are substantial factual errors. Indeed the growing trend amongst corporates is to publish consensus forecasts collated using a consistent set of data points with the resulting output being both verifiable and stable. Investors have increasingly come to rely upon these independent consensus figures as being both consistent and accurate.

If Note 1 was implemented we believe the companies would have serious concerns over whether a true and fair assessment of their consensus forecasts was being reflected by third party compilers. This concern is also relevant in the context of Rule 19.1 as a whole. Rule 19.1 calls for the highest standards of care and accuracy. Of course, we agree with this sentiment and our members adhere to it. Our concern lies in the fact that we cannot confidently say that third party providers consensus figures always do so and we have had multiple and consistent reports from our members and the investment community as a whole that incorrect data is used and wrong assumptions made skewing some third party consensus figures to a large degree.

On behalf of our members we need to ensure that a level playing field is maintained and our express concern is that this particular note would potentially prejudice this by removing accurate and reliable numbers, but leaving in place those consensus figures which are viewed as less meaningful.

Q17) Do you have any comments on the proposed new Rules 28.7(b) and (c), and the proposed new Notes 2 to 4 on Rule 28.7, with regard to a party to an offer referring to consensus profit forecasts with respect to the profits of another party to the offer?

We are concerned with the naming of specific third party agencies in paragraph 15.12: *"The Code Committee considers that, for the purposes of the proposed new Rule 28.7(b), there should be an objective means by which a consensus profit forecast should be determined. On balance, the Code Committee considers that an appropriate means of determining a consensus profit forecast would normally be to calculate the arithmetical mean of the consensus figures published by independent providers of third party data services, such as Bloomberg and Thomson Reuters".* We do not consider that Bloomberg and Thomson Reuters should be specifically mentioned by the panel as providers of consensus figures. Indeed, we are of the wider view that third party providers should be accredited in order to engender confidence within corporates that their consensus figures are accurately reflected. We also feel that guidance standards would assist third parties in this field. We would be pleased to assist the Code Committee/Panel with this if required, as we welcome high quality consensus forecasts as a goal for all to aim for. We also strongly support companies publishing consensus forecasts collated using a consistent set of data points with the resulting output both verifiable and stable, as stated throughout this response.

With respect to Note 2 on Rule 28.7, we would support accreditation measures being set up for third parties producing consensus profit forecasts. Without transparency and accountability of these parties in their calculations there is the danger of lack of confidence developing and of Rule 19.1 not being adhered to. On Note 3, we ask for some clarity on how this relates to ordinary course forecasts. On Note 4, we believe it is questionable to distinguish between average forecasts and consensus. We consider this distinguishing to be subject to debate. We refer to our comments above on the issues around accurate consensus forecasts.
Relating to Rule 28.7 (c), our view is that if an offeree company is not permitted to refer to consensus without this being deemed a profit forecast but an offeror company can, this puts the offeree company at a disadvantage – therefore the oferee company must be able to respond without triggering a reporting requirement if an offeror company references an oferee company's consensus profit forecast.

We agree with the underlying principles on Rule 28.7 but consider the notes to be somewhat impractical. We also feel that it is worth exploring the possibility of simply removing individual analysts once brought inside (on a particular offer) from the overall consensus estimates, thus reducing the necessity to rely on third parties and without prejudicing the accuracy of the overall consensus figures.

Q18) Do you have any comments on the proposed new Rules 27.1 and 27.2(a)(i) with regard to material changes in information?

We agree with this proposal. Companies would be detailing material changes in information promptly as a matter of protocol.

Q19) Do you have any comments on the proposed new Rules 27.2(a)(ii), 27.2(b) and 27.2(c) in relation to the requirement to update certain matters in any subsequent document?

We agree with this proposal and have no further comments

Q20) Do you have any further comments on the proposed new Rule 27 and the related Code amendments?

We have no further comments

Q21) Do you have any comments on the proposed amendments relating to the current Rule 28.4?

We have no further comments

Q22) Do you have any comments on the proposed amendments to Rule 26 in relation to documents on display?

We have no further comments