

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

By email to supportgroup@thetakeoverpanel.org.uk

26 September 2012

Dear Sirs

Consultation Paper PCP 2012/1: Profit forecasts, quantified financial benefit statements, material changes in information and other amendments to the Takeover Code

We are pleased to respond to your request for comments on the proposals set out in PCP 2012/1.

We are supportive of the proposals in PCP 2012/1 which take account of our response to PCP2010/1 (Profit forecasts, asset valuations and merger benefit statements).

We have included our detailed response in an attachment addressing the specific questions raised and a couple of other drafting matters.

In summary, our views on the main proposed changes are as set out below.

Profit forecasts

We agree with the aims of the Code Committee's proposals to:

- i. apply more proportionate requirements than at present to certain profit forecasts, including, in particular, profit forecasts which have been published before an approach with regard to a possible offer has been made;
- ii. adopt a more logical framework for the regulation of profit forecasts than the current Rule 28; and
- iii. achieve a greater consistency with other legislation, standards and guidance than is currently the case.

We also agree with the principle that exemptions from Rule 28 requirements should ultimately be at the Panel's discretion and therefore subject to the requirement to consult the Panel.

Quantified financial benefits statements

We agree with the Code Committee's proposals to incorporate into Rule 28 the current requirements of Note 9 on Rule 19.1 in relation to merger benefits statements (which would be renamed as "quantified financial benefits statements") and, at the same time, to:

- i. extend the application of those provisions to statements made by the offeree company with regard to measures providing cost saving or other financial benefits that it proposes to implement if the offer does not succeed (in addition to the current application of those provisions to statements made by the parties to an offer with regard to the financial benefits expected to arise if the offer is successful); and
- ii. adopt more detailed requirements than at present.

Material changes in information

We are supportive of the proposals to amend Rule 27 in relation to the disclosure of material changes in information published in an offer document or an offeree board circular, so as to require an offeror and the offeree company to disclose any such material changes promptly after their occurrence, and not only in the event that a subsequent document is published.

Please contact Yvette Allen (Partner, Corporate Finance Quality and Risk Management, on 020 7303 0996) should you wish to discuss any of the points raised in the attached response.

Yours faithfully



Deloitte LLP

DELOITTE RESPONSES TO QUESTIONS IN CONSULTATION PAPER PCP 2012/1

Question 1 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”?

- (a) We believe the inclusion of the new definitions are a significant improvement. In the longer term, consideration should also be given to using capitalised, italicised and/or hyperlinked terms (as is the case in the FSA Handbook including the Listing Rules and Prospectus Rules). This will make it easier for users to recognise which words are defined terms, and may also make it easier to draft more concise rules (as there will be less of a need for a full explanation of what is meant within the body of the text).
- (b) Consideration should be given to deleting ‘yet’ from the definition of profit estimate. We believe it may cause some confusion in relation to interim results which are rarely audited and we do not believe that the addition of the word ‘yet’ is necessary. .
- (c) We do not believe that the note regarding ‘target for profits (or losses)’ is appropriate within Definitions. It is not within the definition in the PD Regulation and could be deemed to come within the standard definition when appropriate. Paragraph 2.7 of Part A of the consultation paper acknowledges that targets set as part of long-term incentive plans should not fall to be treated as profit forecasts. As such, the note could cause confusion rather than clarification. If the Code Committee considers that this matter needs to be addressed, we would recommend that it is dealt with as an additional note to Rule 28.1.

Question 2 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)?

- (a) We agree
- (b) Insert ‘its’ before ‘reporting accountants’ in (ii).

Question 3 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 the making of 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?

- (a) We agree
- (b) No comments

Question 4 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)?

- (a) We agree although this may have the unintended consequence of companies who consider themselves to be a potential offeree issuing profit forecasts as a matter of course (ie as part of its defence strategy) knowing that it will not be subject to independent review. The Code Committee may want to consider re-positioning this as part of the dispensation set out in Note 2. to Rule 28.1.
- (b) It is unclear why Rule 28.1(c) is ‘subject to Rule 28.2’.
- (c) In (i), delete ‘s’ from ‘confirmations’.

Question 5 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?

- (a) We agree
- (b) We believe that the definition of 'ordinary course profit forecast' should encompass statements such as profit warnings made in accordance with relevant regulations.
- (c) It is unclear why the third line refers to 'other parties' rather than 'other party'.
- (d) Cross-reference to Rule 28.2 does not seem necessary.
- (e) Overall, the wording seems overly complex and we suggest the following alternative is considered:

An "ordinary course profit forecast" is a profit forecast ~~published by a party to an offer in a forward-looking statement made by that party~~ in the ordinary course of its a party's communication with its shareholders and the market and in accordance with an established practice or required by the rules of the relevant recognised investment exchange or securities regulator.

~~Where a party to the offer (other than a cash offeror) publishes, or has published, an ordinary course profit forecast, the Panel may consent to the disapplication of the reporting requirements of Rule 28.1(a) or (b), provided that the other parties to the offer consent to the that disapplication of these requirements. Where a dispensation is granted, a confirmation by the directors that the basis of accounting used is consistent with the company's accounting policies and in addition to the assumptions on which the profit forecast is based must nevertheless be included in the document or announcement must also include a confirmation by the directors that the basis of accounting used is consistent with the company's accounting policies in which the ordinary course profit forecast is first published (in the case of a dispensation from Rule 28.1(a)) or, as appropriate, in the offer document or offeror board circular (in the case of a dispensation from Rule 28.1(b)). See also Rule 28.2.~~

Question 6 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?

- (a) We agree
- (b) The wording seems overly complex and the second sentence could be simplified as set out in (e) to Question 5 above. Reference to Rule 28.2 is relevant to this note but see response to question 7 below.

Question 7 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?

- (a) We agree although consistent with our response to Question 4 we do have a concern that in certain cases this may be used as a tool for frustrating action and therefore the interaction with Rule 21 should be considered.

- (b) The drafting seems somewhat complicated and we would question whether this needs to be a specific rule rather than being an addition to note 3 to Rule 28.1. Could be something like:

Where a party to the offer publishes a profit forecast for a future financial year, it must also publish a corresponding profit forecast for the current financial year* and any intervening financial year* and the requirements of Rule 21 apply to each such profit forecast. (* or period)*

Question 8 *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?*

- (a) We agree, subject to Panel's ability to grant dispensation.
- (b) It might be helpful to indicate when the Panel might use its discretion – e.g. ordinary course profit forecasts?

Question 9 *Do you have any comments on the proposed new Note 5 on Rule 28.1 with regard to profit ceilings?*

- (a) Did the Code Committee intend to refer to the whole of Rule 28 rather than just Rule 28.1?
- (b) Second paragraph could simply be made into a general requirement to consult the Panel where a party has published or intends to publish a profit forecast which states a maximum figure for the likely level of profits for a particular period. If so, would more logically be placed before the first paragraph.

Question 10 *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?*

- (a) We agree with the concept of making provision for the Panel to grant a dispensation in appropriate cases, but do not quite follow the logic of linking materiality to the size of the increase in the offeror's share capital. We would instead suggest linking materiality to the percentage of non-cash consideration payable to offeree shareholders (as a percentage of total consideration payable).
- (b) Did the Code Committee intend to refer to the whole of Rule 28 rather than just Rule 28.1?

Question 11 *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?*

- (a) This might be better as note 1.
- (b) Add "and must be compiled and presented with due care and consideration" to the end of (a).
- (c) Wording of (c) could be reduced (to be more consistent with (b) and exclude 'other than a cash offeror' which does not seem correct here and is already covered in 28.1) as follows:

Any profit forecast ~~published by a party to an offer (other than a cash offeror)~~ must be compiled and presented on a basis comparable with ~~the party's~~ the party's historical financial information.

Question 12 *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?*

- (a) Consider including a preamble containing the first sentence from note 1(a) to existing Rule 28.2 as follows: *It is important that by listing the assumptions on which the forecast is based useful information should be given to shareholders to help them in forming a view as to the reasonableness and reliability of the forecast.*
- (b) Consider including note 1(b) to existing Rule 28.2 as follows: *There are inevitable limitations on the accuracy of some forecasts and these should be indicated to assist shareholders in their review. A description of any major hazards in forecasting in the particular business or businesses should normally be included.*
- (c) Consider including note 2(c) to existing Rule 28.2 as follows: *There may be occasions, particularly when the estimate forecast relates to a period already ended, when no assumptions are required.*
- (d) Would be better for (b) to come before (a)

Question 13 *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?*

- (a) We agree
- (b) For companies that are not admitted to trading on one of the markets named, we understand that the Panel has agreed with the Auditing Practices Board that a report under International Standard for Review Engagements (UK and Ireland) (“ISRE”) 2410 would provide at least as much assurance as a report under SIR 3000. We would suggest that a further note be added to Rule 28.4 indicating that the Panel will take into account whether the financial information is subject to an ISRE2410 review opinion as one factor in deciding whether to grant such a dispensation.

Question 14 *Do you have any comments on the proposed new Rule 28.5 in relation to quantified financial benefits statements?*

- (a) Sub-heading could be expanded to include “Additional requirements for”
- (b) Might be better as final rule as currently positioned in the middle of rules relating to profit forecasts
- (c) Wording of (d) to be reconsidered/consider deletion of ‘or other measures’ and ‘or other selected effects’/ possibly needs a note to clarify – e.g. cutting back R&D or marketing expenditure may benefit short term profitability but have adverse longer term consequences
- (d) Delete ‘or other measures’ from (e). Unclear what that relates to and might cause confusion.
- (e) Title of note 2 should be “Quantified financial”
- (f) In note 2, consider changing ‘result from an offer’ to ‘result from the proposed transaction’.

Question 15 *Do you have any comments on the proposed new Rule 28.6 with regard to a profit forecast for part of a business?*

- (a) This could potentially be included as a note to Rule 28.1 rather than a separate rule.

Question 16 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?

and

Question 17 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?

- (a) Heading for Rule 28.7 might be better expanded to that proposed in PCP2010/1 as follows: "Quotations from or references to forecasts by analysts and other third parties".
- (b) The need for the level of detail in new Rule 28.7 is not clear. Paragraph 15.3 of the consultation paper states that "*the Code Committee notes that the application of Rule 28 to such profit forecasts is not as a result of Rule 28 itself but as a result of the Executive's application of Note 5 on Rule 19.1*". A factor in that previous position was the lack of a definition in the Rules of 'profit forecast'. The new definition including "*a form of words which expressly states a figure for the likely level of profits or losses for a particular period ..*" would seem to capture references to forecasts made by third parties and it may therefore be possible to simply add a "for the avoidance of doubt this includes references to quotations from or references to forecasts by analysts and other third parties." note to Rule 28.1.
- (c) The drafting of new Rule 28.7 seems overly complicated.
- (d) Rule 28.7(b): Could be clearer that Rule 28.1 does not apply to such forecasts and they are only subject to the disclosure required under Note 4 (see comment below).
- (e) Rule 28.7(c) might be better as a continuation of Rule 28.7(b) as follows: "*Where the other party makes any subsequent reference to that consensus profit forecast, Rule 28.7(a) will not apply.*"
- (f) Note 1: To ask a company to withdraw from its website previously published references to analysts' profit forecasts seems unhelpful as those forecasts still exist albeit shareholders would find it more difficult to find them. We suggest instead the Code Committee gives consideration to requiring a statement to be added to the website indicating when reference to those forecasts was first included and that they were not prepared for the purposes of the offer and have not been examined or reported on in accordance with Rule 28.1. Previously published could be defined to be prior to approach/contemplation of an offer (cf Rule 28.1).
- (g) The definitions and distinctions between average forecasts (used in Rule 28.7(a)) and consensus profit forecasts (used in Rule 28.7(b)) including arithmetical mean of consensus figures (per Note 2) are somewhat unclear. Presumably a party could publish under Rule 28.7(a) a consensus profit forecast in respect of its own profits and not just an average.
- (h) Note 4: The introduction could be included as a new Rule (e.g. first rule within this section) requiring that where reference is made to a third party forecast during an offer period (or after approach/contemplation of offer) the source and basis of compilation must be stated. Note 4 would then explain what needs to be included in respect of the 'source and basis of compilation'.
- (i) Note 4(a)(ii) – 'consensus figure' should be 'average figure'.
- (j) Note 4(a) and (b) – not clear why the distinction between these given that consensus profit forecast may also be an arithmetical mean per Note 2. Might there be analysts' forecasts which are unknown to the party referring to an average profit forecast? Perhaps a rider should be added that the analysts forecasts listed represent all those known to the party.

Question 18 Do you have any comments on the proposed new Rules 27.1 and 27.2(a)(i) with regard to material changes in information?

- (a) No comments

Question 19 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?

- (a) (ix) within Rule 27.2(b) and (c) should also make reference to quantified financial benefits statements. Also, consider adding cross-reference to Rule 27.2(d).

Question 20 Do you have any further comments on the proposed new Rule 27 and the related Code amendments?

- (a) No further comments

Question 21 Do you have any comments on the proposed amendments relating to the current Rule 28.4?

- (a) Proposed new Rules 24.3(d)(xviii) and 25.7(d) could be more simply worded as follows: “*the information required by Rule 28 in respect of any profit forecast or quantified financial benefits statement*”. This has the advantage of avoiding any potential inconsistency in the words used – it is not clear whether the current drafting imposes any additional or different requirements to Rule 28.
- (b) See comments under question 19 above on Rules 27.2(b)(ix) and 27.2(c)(ix).

Question 22 Do you have any comments on the proposed amendments to Rule 26 in relation to documents on display?

- (a) No comments

OTHER COMMENTS

The proposed amendments are not consistent in use of reporting accountant/reporting accountants and financial adviser/financial advisers. This inconsistency may also apply to existing Rules.

Consideration should be given to including a simple cross-reference from Rule 28 (possibly a new Rule 28.8) to Rule 27.2(d).