

RS 12 Issued on 16 April 2003

THE PANEL ON TAKEOVERS AND MERGERS

**QUESTIONS AS TO THE POSSIBLE AMENDMENT
OF RULE 31.9 AND RELATED RULES**

**STATEMENT BY THE CODE COMMITTEE OF
THE PANEL FOLLOWING THE EXTERNAL
CONSULTATION PROCESS ON PCP 12**

1. Introduction

1.1 On 7 January 2003, the Code Committee of the Takeover Panel (the “Code Committee”) published a Public Consultation Paper (“PCP12”) entitled “Questions as to the possible amendment of Rule 31.9 and related Rules”.

1.2 The purpose of this paper is to provide details of the Code Committee’s response to the external consultation process on PCP12.

2. Number of responses received

A total of five responses were received, including two from professional bodies representing practitioners.

3. The Code Committee’s conclusions

3.1 General

3.1.1 There was general support from respondents for the proposals set out in PCP12, and no significant reservations about the proposed amendments were expressed. The Code Committee has, therefore, decided to proceed with the amendments to the Code as set out in PCP12.

3.1.2 Paragraphs 3.2 to 3.5 below set out a summary of the responses to the individual questions posed in PCP12.

3.2 Q1: Do you agree with the conclusions set out in paragraph 3.2.3 of PCP12?

There was general support for the proposal that Rule 31.9 should apply to a wider range of matters than the list of specific announcements currently set out in the Rule and, in particular, that major asset acquisitions and disposals should be caught by the operation of the Rule.

3.3 Q2: Do you agree that the first sentence of Rule 31.9 should be amended as proposed in paragraph 3.3.2 of PCP12?

There was general support for the proposed amendments.

3.4 Q3: Do you agree with the proposed amendments to the second sentence of Rule 31.9 set out in paragraph 4.3 of PCP12?

3.4.1 As it is proposed to be amended, Rule 31.9 will prohibit an offeree company from announcing “any material new information” after the 39th day following the posting of an offer document. The second sentence of Rule 31.9, as amended, will provide as follows:

“Where a matter which might give rise to such an announcement being made after the 39th day is known to the offeree company, every effort should be made to bring forward the date of the announcement, but, where this is not practicable or where the matter arises after that date, the Panel will normally give its consent to a later announcement.”

3.4.2 There was general support for this proposed amendment. One respondent questioned whether it would mean that if, for example, an offeree company was in the process of negotiating a major asset disposal as part of its defence against a hostile offer, but had not entered into a definitive agreement in relation to that disposal by Day 39, the offeree company would need to make some form of holding announcement on Day 39 alerting the market and shareholders to the possibility of the disposal.

3.4.3 The Code Committee takes the view that the obligation in the amended Rule to use “every effort to bring forward” the date of announcement of a matter that might otherwise be made after Day 39 would not, of itself, require the issue of a holding

announcement in these circumstances. However, the offeree company should endeavour to accelerate the transaction in question so that a definitive announcement in relation to the disposal can be made by Day 39. If this is not practicable, the Panel would normally be prepared to grant its consent to the announcement of the transaction after Day 39 if definitive agreements are only entered into after that date.

3.4.4 The Code Committee notes, however, that in preparing any defence document to be published on Day 39, an offeree company would need to comply with the Code's provisions generally regarding the dissemination of information, including the requirement in Rule 19.1 that any document or advertisement issued, or statement made, during the course of an offer must satisfy the highest standards of accuracy and the information given must be adequately and fairly presented. There may, therefore, be situations, for example because on Day 39 the offeree company is very close to signing the definitive agreement in relation to a disposal, when it would not be possible for the offeree company to comply with these general disclosure requirements without disclosing the status of the proposed transaction, even if the amended Rule 31.9 itself does not require a holding announcement to be made.

3.5 Q4: Do you agree with the proposed amendments to the last sentence of Rule 31.9 set out in paragraph 5.5 of PCP12?

Q5: Do you agree with the proposed amendments to Rules 31.5 and 32.2 referred to in paragraph 6.1.7 of PCP12?

Q6: Do you agree with the proposed amendments to Rule 32.1, Note 1 set out in paragraph 6.2.6 of PCP12?

There was general support for these proposed amendments.

4. Amendments to the Code

The Appendix to this statement sets out in full the text of the revised Rules 31.9, 31.5, 32.1 and 32.2. The amendments will take immediate effect.

APPENDIX

31.9 OFFEREE COMPANY ANNOUNCEMENTS AFTER DAY 39

The board of the offeree company should not, except with the consent of the Panel (which should be consulted in good time), announce any material new information (including trading results, profit or dividend forecasts, asset valuations and proposals for dividend payments or for any material acquisition or disposal) after the 39th day following the posting of the initial offer document. Where a matter which might give rise to such an announcement being made after the 39th day is known to the offeree company, every effort should be made to bring forward the date of the announcement, but, where this is not practicable or where the matter arises after that date, the Panel will normally give its consent to a later announcement. If an announcement of the kind referred to in this Rule is made after the 39th day, the Panel will normally be prepared to grant an extension to “Day 46” (see Rule 32.1) and/or “Day 60” (see Rule 31.6) as appropriate.

(See also Note 3 on Rule 31.6.)

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31.5 NO EXTENSION STATEMENTS

If statements in relation to the duration of an offer such as “the offer will not be extended beyond a specified date unless it is unconditional as to acceptances” (“no extension statements”) are included in documents sent to offeree company shareholders, or are made by or on behalf of an offeror, its directors, officials or advisers, and not withdrawn immediately if incorrect, only in wholly exceptional circumstances will the offeror be allowed subsequently to extend its offer beyond the

stated date except where the right to do so has been specifically reserved. The provisions of Rule 31.4 will apply in any event.

NOTES ON RULE 31.5

(See also Rule 31.6)

1. Firm statements

In general, an offeror will be bound by any firm statement as to the duration of its offer. Any statement of intention will be regarded for this purpose as a firm statement; the expression “present intention” should not be used as it may be misleading to shareholders.

2. Reservation of right to set statements aside

A no extension statement may be set aside only if the offeror specifically reserved the right at the time the statement was made to set it aside in the circumstances which subsequently arise; this applies whether or not the offer was recommended at the outset. The first document sent to shareholders in which mention is made of the no extension statement must contain prominent reference to this reservation (precise details of which must also be included in the document). Any subsequent mention by the offeror of the no extension statement must be accompanied by a reference to the reservation or, at the least, to the relevant sections in the document containing the details. If the right to set aside the no extension statement has not been specifically reserved as set out above, only in wholly exceptional circumstances will the offeror be allowed to extend its offer (except as required by Rule 31.4), even if a recommendation from the board of the offeree company is forthcoming.

3. Competitive situations

Subject to Note 2 above, if a competitive situation arises after a no extension statement has been made, the offeror can choose not to be bound by it and to be free to extend its offer provided that:—

(a) notice to this effect is given as soon as possible (and in any event within 4 business days after the day of the firm announcement of the competing offer) and shareholders are informed in writing at the earliest opportunity; and

(b) any offeree shareholders who accepted the offer after the date of the no extension statement are given a right of withdrawal for a period of 8 days following the date on which the notice is posted.

(For the purpose of this Note a competitive situation will normally arise following a public announcement of the existence of a new offeror or potential offeror whether named or not. Other circumstances, however, may also constitute a competitive situation.)

4. Recommendations

Subject to Note 2 above, the offeror can choose not to be bound by a no extension statement which would otherwise prevent the posting of an increased or improved offer recommended for acceptance by the board of the offeree company.

5. Rule 31.9 announcements

Subject to Note 2 above, if the offeree company makes an announcement of the kind referred to in Rule 31.9 after the 39th day and after a no extension statement has been made, the offeror can choose not to be bound by that statement and to be free to extend its offer if permitted by the Panel under Rule 31.9, provided that notice to this effect is given as soon as possible (and in any event within 4 business days after the date of the offeree company announcement) and shareholders are informed in writing at the earliest opportunity.

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RULE 32. REVISION

32.1 OFFER OPEN FOR 14 DAYS AFTER REVISION

If revised, an offer must be kept open for at least 14 days following the date on which the revised offer document is posted. Therefore, no revised offer document may be posted in the 14 days ending on the last day the offer is able to become unconditional as to acceptances.

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 statements and proposals for dividend payments or for any material acquisition or disposal) may have the effect of increasing the value of the offer. An offeror will not, therefore, normally be permitted to make such announcements after it is precluded from revising its offer. If an announcement of a kind referred to in this Note might fall to be made during the offer period, the Panel must be consulted at the earliest opportunity and an offeror will not be permitted to make a no increase statement as defined in Rule 32.2 prior to the release of the announcement.

2. When revision is required

An offeror will normally be required to revise its offer if it, or any person acting in concert with it, purchases shares at above the offer price (see Rule 6) or it becomes obliged to make

an offer in accordance with Rule 11 or to make a cash offer, or to increase an existing cash offer, under Rule 9.

3. When revision is not permissible

Since an offer must remain open for acceptance for 14 days following the date on which the revised offer document is posted, an offeror will generally not be able to revise its offer, and must not place itself in a position where it would be required to revise its offer, in the 14 days ending on the last day its offer is able to become unconditional as to acceptances. Nor must an offeror place itself in a position where it would be required to revise its offer if it has made a no increase statement as defined in Rule 32.2.

4. Triggering Rule 9

When an offeror, which is making a voluntary offer either in cash or with a cash alternative, makes an acquisition which causes it to have to extend a mandatory offer under Rule 9 at no higher price than the existing cash offer, the change in the nature of the offer will not be viewed as a revision (and will thus not be precluded by an earlier no increase statement), even if the offeror is obliged to waive any outstanding condition, but such an acquisition can only be made if the offer can remain open for acceptance for a further 14 days following the date on which the amended offer document is posted.

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32.2 NO INCREASE STATEMENTS

If statements in relation to the value or type of consideration such as “the offer will not be further increased” or “our offer remains at xp per share and it will not be raised” (“no increase statements”) are included in documents sent to offeree company shareholders, or are made by or on behalf of an offeror, its directors, officials or advisers, and not withdrawn immediately if incorrect, only in wholly exceptional circumstances will the offeror be allowed subsequently to amend the terms of its offer in any way even if the amendment would not result in an increase of the value of the offer (eg the introduction of a lower paper alternative) except where the right to do so has been specifically reserved.

NOTES ON RULE 32.2

1. Firm statements

In general, an offeror will be bound by any firm statement as to the finality of its offer. In this respect, the Panel will treat any indication of finality as absolute, unless the offeror clearly states the circumstances in which the statement will not apply, and will not distinguish between the precise words chosen, ie the offer is “final” or will not be “increased”, “amended”, “revised”, “improved”, “changed”, and similar expressions will

all be treated in the same way. Any statement of intention will be regarded for this purpose as a firm statement; the expression “present intention” should not be used as it may be misleading to shareholders.

2. Reservation of right to set statements aside

A no increase statement may be set aside only if the offeror has specifically reserved the right at the time the statement was made to set it aside in the circumstances which subsequently arise; this applies whether or not the offer was recommended at the outset. The first document sent to shareholders in which mention is made of the no increase statement must contain prominent reference to this reservation (precise details of which must also be included in the document). Any subsequent mention by the offeror of the no increase statement must be accompanied by a reference to the reservation or, at the least, to the relevant sections in the document containing the details. If the right to set aside the no increase statement has not been specifically reserved as set out above, only in wholly exceptional circumstances will the offeror be allowed to increase its offer after a no increase statement, even if a recommendation from the board of the offeree company is forthcoming or if the offer is unconditional in all respects.

3. Competitive situations

Subject to Note 2 above, if a competitive situation arises after a no increase statement has been made, the offeror can choose not to be bound by it and to be free to revise its offer provided that:—

(a) notice to this effect is given as soon as possible (and in any event within 4 business days after the day of the firm announcement of the competing offer) and shareholders are informed in writing at the earliest opportunity; and

(b) any shareholders who accepted the offer after the date of the no increase statement are given a right of withdrawal for a period of 8 days following the date on which the notice is posted.

(For the purpose of this Note a competitive situation will normally arise following a public announcement of the existence of a new offeror or potential offeror whether named or not. Other circumstances, however, may also constitute a competitive situation.)

4. Recommendations

Subject to Note 2 above, the offeror can choose not to be bound by a no increase statement which would otherwise prevent the posting of an increased or improved offer recommended for acceptance by the board of the offeree company.

5. Rule 31.9 announcements

Subject to Note 2 above, if the offeree company makes an announcement of the kind referred to in Rule 31.9 after the 39th day and after a no increase statement has been made, the offeror can choose not to be bound by that statement and to be free to revise its offer if permitted by the Panel under Rule 31.9, provided that notice to this effect is given as soon as possible (and in any event within 4 business days after the date of the offeree company announcement) and shareholders are informed in writing at the earliest opportunity.