

THE TAKEOVER PANEL

CODE COMMITTEE

REVIEW OF CERTAIN ASPECTS OF THE REGULATION OF TAKEOVER BIDS

1. Introduction

- 1.1 On 1 June 2010, the Code Committee of the Takeover Panel (the “**Code Committee**”) published a public consultation paper (the “**Consultation Paper**”) which set out suggestions for possible amendments to the Takeover Code (the “**Code**”). The consultation period ended on 27 July 2010.
- 1.2 The consultation gave rise to an unprecedented number of responses, with 97 formal responses being received from a broad range of respondents representing industry, investors, academics, practitioners, trades unions and individuals. It also occasioned a great deal of discussion among market participants and other interested constituencies. The Code Committee is grateful to all of those who expressed an opinion in relation to the consultation and has considered their views carefully. A list of respondents who submitted responses on a non-confidential basis can be found in the Appendix to this Statement.
- 1.3 This Statement is the Code Committee’s response to the Consultation Paper and sets out the Code Committee’s conclusions in relation to the principal issues consulted upon. To the extent that the Code Committee has concluded that there is a case for proposing amendments to the Code, the Code Committee will publish one or more public consultation papers in due course setting out the proposed amendments in full in accordance with its usual procedures for amending the Code.

2. Background and overview

- 2.1 A number of the suggestions discussed in the Consultation Paper, and certain of the suggestions in the responses, would, if adopted, extend significantly the scope of the Code.
- 2.2 Since the Code was adopted in 1968, the Panel has been focused on the protection of offeree company shareholders and the maintenance of an orderly framework within which takeovers may be conducted. Section 2(a) of the Introduction to the Code recognises this explicitly and provides that:

“The Code is designed principally to ensure that shareholders are treated fairly and are not denied an opportunity to decide on the merits of a takeover and that shareholders of the same class are afforded equivalent treatment by an offeror. The Code also provides an orderly framework within which takeovers are conducted. In addition, it is designed to promote, in conjunction with other regulatory regimes, the integrity of the financial markets.

The Code is not concerned with the financial or commercial advantages or disadvantages of a takeover. These are matters for the company and its shareholders. Nor is the Code concerned with those issues, such as competition policy, which are the responsibility of government and other bodies.”.

- 2.3 The Code Committee considers that the Code has served its constituencies and the markets well for more than 40 years and the views expressed by respondents and others during the course of the consultation confirmed this. This has been achieved by the Panel having regard to a clear set of simple and well defined principles that have changed little during that time, notwithstanding the substantial and radical changes that have taken place in market practice and the wider corporate and economic environment.
- 2.4 Questions of wider public interest have always been and, in the Code Committee’s view, rightfully remain, the responsibility of government and other bodies which are better placed than the Panel to consider those matters. Nevertheless, as was the case earlier this year, where interested constituencies express views indicating that market practice has evolved such that one party

to a transaction to which the Code applies has an unfair advantage in the offer process, the Code Committee will take account of those views and, if it considers it appropriate, propose amendments to the Code as a result.

2.5 The Code Committee has considered carefully the concerns expressed in relation to the conduct of takeovers generally and, more particularly, the views expressed by certain commentators that:

- (i) it has become too easy for 'hostile' offerors (i.e. offerors whose offers are not from the outset recommended by the board of the offeree company) to succeed; and
- (ii) the outcome of offers, and particularly hostile offers, may be influenced unduly by the actions of so-called 'short-term' investors (for example, persons who become interested in the shares of an offeree company only after the possibility of an offer has been publicly announced).

2.6 After considering these concerns, and the views of respondents, the Code Committee has concluded that hostile offerors have, in recent times, been able to obtain a tactical advantage over the offeree company to the detriment of the offeree company and its shareholders.

2.7 In view of this conclusion, the Code Committee intends to bring forward proposals to amend the Code with a view to reducing this tactical advantage and redressing the balance in favour of the offeree company. In addition, the Code Committee has concluded that a number of changes should be proposed to the Code to improve the offer process and to take more account of the position of persons who are affected by takeovers in addition to offeree company shareholders.

2.8 Further details in relation to the factors which led the Code Committee to conclude that offerors have a tactical advantage over the offeree company, and the Code amendments to be proposed as a result, are set out below.

3. Factors which have enabled offerors to obtain a tactical advantage

3.1 The Code Committee believes that the following factors have, in recent times, enabled offerors to obtain a tactical advantage over the offeree company:

- (i) the announcement of a possible offer can have a destabilising effect on the offeree company and often leads to significant changes in the composition of the shareholder register, with certain shareholders selling some or all of their shares and merger arbitrageurs acquiring interests in shares in the offeree company;
- (ii) the ‘virtual bid’ period (i.e. the period between the commencement of an offer period and the announcement of a firm offer) can be long and drawn-out and this can adversely affect the conduct of the offeree company’s business and the offeree company board’s negotiating position with an offeror;
- (iii) after the commencement of an offer period, an offeror is able, in effect, to bypass the offeree company board and engage directly with offeree company shareholders generally in discussions regarding the merits of a possible offer and the price at which any such offer might be made without having to commit to making a formal offer;
- (iv) the cost to a potential offeror of making an approach to an offeree company or publishing a possible offer announcement is not significant (for example, the offeror does not need to have incurred financing costs or undertaken any preparatory due diligence work) and, in making such an approach or announcement, an offeror receives the benefit of the protections afforded by Rule 21.1 in restraining the offeree company from taking any action that might frustrate an offer;
- (v) offeree company boards are often reluctant to request that the Panel should impose a ‘put up or shut up’ deadline under Rule 2.4(b) in respect of a potential offeror whose identity has been publicly

announced since such action might be perceived to be self-serving or defensive, particularly at an early stage in an offer period; and

- (vi) there has been an increasing trend for offerors and their advisers to persuade the offeree company board to enter into a comprehensive package of deal protection measures (including agreeing an inducement fee at the maximum permitted level) that is designed to deter competing offerors and, in practice, restricts the ability of the offeree company board to engage with potential competing offerors in a way that is detrimental to the interests of offeree company shareholders.

3.2 The Code Committee believes that it is important that the framework within which takeovers are conducted does not operate in a way that unduly favours the interests of a particular party (or parties) to a takeover and has therefore considered a number of different means of reducing the tactical advantage which the Code Committee considers that offerors have obtained over the offeree company.

4. Proposals which would extend significantly the scope of the Code

4.1 A number of commentators have put forward specific suggestions for amending the Code with a view to making it more difficult for hostile offerors to succeed. A number of these suggestions would extend significantly the scope of the Code by, for example:

- (i) amending rules which were designed to reflect the provisions of company law (in the case of raising the minimum acceptance condition threshold for offers above the current level of '50% plus one' of the voting rights of the offeree company);
- (ii) overriding basic economic rights (in the case of 'disenfranchising' shares acquired during the offer period); and

- (iii) extending the Code to apply to matters that are currently the responsibility of other regulatory bodies (in the case of providing protection to shareholders in offeror companies).

4.2 Each of these suggestions is considered further below.

(a) ***Raising the acceptance condition threshold above '50% plus one'***

4.3 Respondents were almost unanimously opposed to raising the minimum acceptance condition threshold of '50% plus one' for both voluntary offers under Rule 10 and mandatory offers under Rule 9. This was on the basis that this threshold is founded upon, and is inextricably linked with, the threshold for the passing of an ordinary resolution under UK company law (the passing of which enables, among other things, changes to be made to a company's board of directors). Without an equivalent change in company law so as to raise the threshold for the passing of ordinary resolutions, the Code Committee believes that the efficacy of any Code change to the acceptance condition threshold would be significantly undermined. For example:

- (i) if an offer lapsed in circumstances where the offeror had obtained acceptances of more than 50% but less than the increased acceptance condition threshold, the position of the offeree company board would, in practice, be unsustainable;
- (ii) an offeror might be able to obtain statutory control of the offeree company by purchasing shares through the 50% threshold but might nevertheless fail to satisfy the increased acceptance condition threshold, with the result that the offer would lapse and shareholders who had accepted the bid would be denied an exit even though statutory control of the company would have passed to the offeror; and
- (iii) offerors might be encouraged to seek to obtain control of offeree companies by means of making changes to the board of directors ahead of, or instead of, making an offer for the company's shares.

4.4 The Code Committee considers that, if company law were to be amended so as to raise the threshold for the passing of ordinary resolutions, it would be logically consistent for the acceptance condition threshold for offers that are subject to the Code to be conformed with the new ordinary resolution threshold. In the absence of such changes in company law, the Code Committee does not believe that the Code should be so amended.

(b) *Disenfranchising shares acquired during the offer period*

4.5 The respondents were almost unanimously opposed to disenfranchising shares acquired during the offer period and also to the introduction of a qualifying period prior to shares carrying votes (or weighted voting rights for shareholders who have held their shares for a particular period). The majority of respondents were of the view that each of these proposals would compromise the principle of ‘one share, one vote’ and significantly impair the economic rights attaching to the shares acquired by offeree company shareholders. The disenfranchisement of shares acquired during offer periods would also run contrary to the concept of ‘equivalent treatment’ for all shareholders in the same class as enshrined in General Principle 1.

4.6 However, the Code Committee understands that qualifying periods (or weighted voting rights) could be introduced through changes in company law. If such changes were to be made, the Code Committee considers that it would be logically consistent for the Code to be amended accordingly. In the absence of such changes, the Code Committee does not believe that the Code should be so amended.

(c) *Providing protection to offeror shareholders*

4.7 The majority of respondents were not in favour of affording shareholders in offeror companies similar protections to those extended under the Code to offeree company shareholders and, in particular, a requirement for an offeror company shareholder vote, other than in the case of reverse takeovers as is currently provided in Rule 3.2.

- 4.8 Protecting offeror shareholders generally would be a new area of regulation for the Panel and would constitute a significant expansion of the Panel's role. While the Code Committee believes that the merits of the arguments are more finely balanced than those in respect of the suggestions considered in sections 4(a) and (b) above, the Code Committee accepts the view of the majority of respondents and is therefore not proposing any amendments to the Code in this regard.
- 4.9 The principal arguments raised by respondents against amending the Code to protect offeror shareholders generally were that this could be regarded as:
- (i) unnecessary given the protections afforded to offeror company shareholders by company law, the fiduciary duties of the offeror directors and the rules of other regulatory authorities (most obviously those of the UK Listing Authority);
 - (ii) involving an inappropriate (and possibly unlawful) extraterritorial application of the Code in the case of offerors incorporated in other jurisdictions;
 - (iii) creating an 'uneven playing field' between competing offerors unless applied equally to all offerors (some of which may not even have shareholders);
 - (iv) raising issues of proportionality unless those protections were to be applied only to offers involving offeree companies of a particular size (relative or absolute); and
 - (v) in the case of a requirement for an offeror company shareholder vote, reducing the certainty of delivery of an offer since it would give offerors in all cases (and not only in cases where a shareholder vote is required for other regulatory reasons) a means of lapsing an offer without having to satisfy the materiality test that applies under Rule 13.4(a) to the invocation of offer conditions.

4.10 On balance, the Code Committee has concluded that the Code should not be amended to provide protection under the Code for offeror company shareholders similar to that afforded to offeree company shareholders. However, the Code Committee proposes that the Code should be amended to require further disclosures to be made in offer documentation in relation to:

- (i) the financial position of the offeror and its group and the financing of its offer; and
- (ii) the offeror's future intentions as regards the offeree company and its employees.

4.11 The Code Committee believes that this information will be of interest to the offeror company's shareholders as well as other interested parties, notably the offeree company board, shareholders and employees. Further information in this regard is set out in sections 5(c) and (d) below.

5. Code amendments to be proposed as a result of changes in market practice

5.1 After concluding that certain of the specific suggestions for amendments to the Code raised by commentators would be impractical without associated changes in company law, the Code Committee considered other options for reducing the tactical advantage which offerors have obtained over the offeree company and redressing the balance in favour of the offeree company. In addition, the Code Committee considered a number of other changes to the Code to take more account of the position of persons who are affected by takeovers in addition to the shareholders in the offeree company.

5.2 In summary, the Code Committee has concluded that amendments to the Code should be proposed with the objective of:

- (i) increasing the protection for offeree companies against protracted 'virtual bid' periods;

- (ii) strengthening the position of the offeree company;
- (iii) increasing transparency and improving the quality of disclosure; and
- (iv) providing greater recognition of the interests of offeree company employees.

5.3 The Code Committee proposes to achieve this by amending the Code to:

- (i) require potential offerors to clarify their position within a short period of time;
- (ii) prohibit deal protection measures and inducement fees other than in certain limited cases;
- (iii) clarify that offeree company boards are not limited in the factors that they may take into account in giving their opinion and recommendation on the offer;
- (iv) require the disclosure of offer-related fees;
- (v) require the disclosure of the same financial information regarding an offeror and the financing of an offer irrespective of the nature of the offer;
- (vi) improve the quality of disclosure by offerors and offeree companies in relation to the offeror's intentions regarding the offeree company and its employees; and
- (vii) improve the ability of employee representatives to make their views known.

5.4 Further details in relation to these proposed Code amendments are set out below.

(a) ***Increasing the protection for offeree companies against protracted ‘virtual bid’ periods***

(i) *Requiring potential offerors to clarify their position within a short period of time*

5.5 The majority of respondents considered that the Panel’s application of the ‘put up or shut up’ regime generally works well but widespread concerns were voiced regarding the increased trend for offerors to make a ‘virtual bid’ whereby a potential offeror announces that it is considering making an offer but without committing itself to doing so. The Code Committee shares those concerns and believes that offeree companies should be provided with greater protection against protracted ‘virtual bids’. The Code Committee considers that making amendments to the ‘put up or shut up’ regime will be central in achieving this.

5.6 In the light of the above, the Code Committee proposes to introduce amendments to the Code as follows:

- (i) to require that, following an approach, the potential offeror is named in the announcement which commences an offer period regardless of which party publishes the announcement;
- (ii) to require that, except with the consent of the Panel, any publicly named potential offeror must, within a fixed period of four weeks following the date on which the potential offeror is publicly named:
 - (a) announce a firm intention to make an offer under Rule 2.5; or
 - (b) announce that it will not make an offer, whereupon it will then be subject to the restrictions referred to in Rule 2.8; or
 - (c) make an application jointly with the offeree company for an extension to the deadline and explain the expected timetable to

the announcement of a firm intention to make an offer under Rule 2.5, following which an announcement would normally be required to be published updating the market on the status of the discussions and the revised deadline.

5.7 The Code Committee believes that amending the Code in this manner would have a number of advantages, including that:

- (i) offeree companies would have more certainty over how long the offer process would last and long periods in which the offeree company is effectively under 'siege' from an unsolicited or unwelcome potential offeror would be avoided;
- (ii) an offeror would have a strong incentive to avoid its potential interest in making an offer being leaked to the market on the basis that this would reduce the time available to the offeror for it to formulate its offer with a view to meeting the required deadline to announce a formal offer under Rule 2.5; and
- (iii) in practice, offers would be more likely to be conducted either through confidential discussions with the offeree company board which lead to a recommended offer or through a formal hostile offer conducted in accordance with the established Code timetable.

5.8 The Code Committee does not propose to extend the proposed amendments to the 'put up or shut up' regime described above to a situation where the board of an offeree company has initiated a formal process to sell the company by means of a public auction.

5.9 The Code Committee also considered introducing private 'put up or shut up' deadlines as a means of permitting an offeree company board to apply for a 'put up or shut up' deadline after it has received an approach from a potential offeror but before any offer period has commenced, in which case neither the fact of the approach nor the setting of the deadline would be publicly

announced. This was on the basis that, in such circumstances, it could be argued that an offeree company might be subjected to a level of ‘siege’ as a result of:

- (i) the restrictions placed on the operation of the offeree company’s business by the application of Rule 21.1;
- (ii) the amount of management time that may be taken up with dealing with the potential offeror; and
- (iii) the potential offeror having spoken to a number of shareholders who then seek to put pressure on the offeree company board.

5.10 On balance, the Code Committee does not believe that, in a private context, an offeree company would normally be considered to be subject to an unacceptable level of ‘siege’. However, the Code Committee believes that, if an offeree company were able to make a convincing case that it was subject to an unacceptable level of siege in the circumstances of a particular case, the Panel could, exceptionally, consider setting a private ‘put up or shut up’ deadline by reference to General Principle 6 which provides that “[a]n offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.”.

5.11 The Code Committee has therefore concluded that the Code should not be amended to provide for private ‘put up or shut up’ deadlines.

(b) *Strengthening the position of the offeree company*

(i) Prohibiting deal protection measures and inducement fees other than in certain limited cases

5.12 A majority of the responses to the question of whether the Panel should prohibit or otherwise restrict deal protection measures were in favour of intervention by the Panel in this area. However, the majority of respondents

agreed with the Panel's current approach of permitting inducement fees provided that, among other things, the inducement fee is *de minimis* (which will normally mean no more than 1% of the value of the offeree company calculated by reference to the offer price). After considering the responses, and notwithstanding the support expressed for the Panel's current approach to inducement fees, the Code Committee intends to propose that the Code should be amended to prohibit deal protection measures and inducement fees (other than in certain limited cases) for the reasons described below.

- 5.13 The Code Committee, informed by the Panel Executive's experience of current market practice and the views of many respondents, believes that it has now become standard market practice in the context of recommended offers for offerors to have the benefit of a number of deal protection measures including an inducement fee at the maximum permissible level. The Code Committee further understands that such measures are often presented to offeree company boards by offerors and their advisers as standard 'packages' which the offeree company board is under considerable pressure to accept, with little, if any, room for negotiation.
- 5.14 The Code Committee shares the concerns of respondents that such packages of contractual protections have detrimental effects for offeree company shareholders in that they might:
- (i) deter competing offerors from making an offer, thereby denying offeree company shareholders the possibility of deciding on the merits of a competing offer; and
 - (ii) lead to competing offerors making an offer on less favourable terms than they would otherwise have done.
- 5.15 The Code Committee has come to the view that, in many cases, it is difficult either to regard the deal protection measures included in implementation and other agreements as the result of an arm's length negotiation or to believe that

inducement fee agreements, in practice, actually induce offerors to make an offer.

5.16 Accordingly, the Code Committee proposes that the Code should be amended to introduce a general prohibition (save in certain limited circumstances) on:

- (i) undertakings given to an offeror by an offeree company board to take any action to implement a transaction to which the Code applies, or to refrain from taking any action which might facilitate a competing transaction to which the Code applies; and
- (ii) inducement fee agreements.

5.17 The Code Committee recognises that an offeror could legitimately request certain specific undertakings from the offeree company board, for example, in relation to:

- (i) the confidentiality of information provided to the offeree company during the course of the offer;
- (ii) the non-solicitation of an offeror's employees or customers; and
- (iii) the provision of information that is required in order to satisfy the conditions to the offer or obtain regulatory approvals.

5.18 However, the Code Committee considers that allowing offerors to obtain any further undertakings from the offeree company board would run the risk that market practice would, through incremental extension, return to where it is today.

5.19 The Code Committee has no desire to restrict parties to an offer from using schemes of arrangement to implement recommended offers. The Code Committee recognises that schemes involve a court process to which the offeror is not party and that implementation agreements contain provisions to

provide the offeror with a degree of control over the court process to ensure schemes are implemented in an orderly and timely manner. In view of this, the Code Committee intends to propose amendments to the Code to provide that, where the board of an offeree company agrees to the inclusion of its recommendation in the offeror's announcement of its firm intention to make an offer by means of a scheme, it will be required to implement the scheme in accordance with a timetable to be agreed with the Panel in advance and published in the scheme circular, subject to the withdrawal of its recommendation.

5.20 The Code Committee does not propose to extend the prohibition on deal protection measures and inducement fees to a situation where an offeree company board has initiated a formal process to sell the company by means of a public auction.

(ii) *Clarifying that offeree company boards are not limited in the factors that they may take into account in giving their opinion and recommendation on the offer*

5.21 The majority of respondents were not in favour of amending the Code to be prescriptive in relation to the factors that the offeree company board should take into account in considering whether to recommend an offer. However, the Code Committee notes that there appears to be a perception among certain market participants that the offeree company board is bound by its obligations under the Code to consider the offer price as the determining factor in giving its opinion and deciding whether to recommend an offer.

5.22 The Code Committee therefore proposes to make amendments to clarify that the Code does not limit the factors that the offeree company board is able to take into account in giving its opinion on an offer, and reaching a conclusion as to whether it should recommend a bid, and is not bound to consider the offer price as the determining factor.

(c) ***Increasing transparency and improving the quality of disclosure***

(i) *Requiring the disclosure of offer-related fees*

5.23 The majority of respondents were in favour of greater disclosure being required in relation to the fees of the advisers to offeree companies and offerors, with a wide range of views as to when, and in what degree of detail, such disclosure should be provided.

5.24 The Consultation Paper invited responses on whether success fees should be prohibited, on the basis that they might (or might be seen to) compromise the objectivity of an adviser's advice. A substantial majority of respondents considered that success fees should not be prohibited, since they could serve to align the interests of clients and advisers and it was thought that reputational concerns and disclosure would provide sufficient safeguards.

5.25 On balance, the Code Committee has concluded that fees involving an incentive or success-based component should not be prohibited (save to the extent currently provided in the Code) but that the minimum and maximum amounts payable as a result of any success, incentive or ratchet mechanism should be disclosed (albeit in a manner that does not reveal commercially sensitive information regarding the offer).

5.26 The Code Committee considered several options for amending the Code to require the disclosure of offer-related fees and concluded that the Code should be amended to require that:

- (i) the estimated aggregate fees should be set out by each party in the offer document or the initial offeree board circular (as appropriate);
- (ii) the estimated fees of the advisers to each of the parties to an offer (including, financial advisers, corporate brokers, accountants, lawyers and public relations advisers) should be disclosed separately by category of adviser (including the maximum and minimum amounts

payable as a result of any success, incentive or ratchet mechanism, but without revealing commercially sensitive information regarding the offer);

(iii) fees in respect of the financing provided to a party should be disclosed separately from advisory fees; and

(iv) any material changes to the disclosed estimated fees of the advisers to each of the parties to an offer should be announced promptly.

(ii) *Requiring the disclosure of the same financial information in relation to an offeror and the financing of an offer irrespective of the nature of the offer*

5.27 Opinion was evenly split as to whether further disclosure should be required of financial information in relation to an offeror and the financing of an offer.

5.28 The principal focus of the Code is on the protection of offeree company shareholders. The traditional view taken by the Panel has therefore been that, during the course of an offer, information in relation to the financial condition of the offeror and the financing of the offer is likely to be relevant only where the offer is a securities exchange offer (i.e. in circumstances where shareholders in the offeree company might become shareholders in the offeror) or where they could become minority shareholders in a company controlled by the offeror.

5.29 However, arguments have been put forward, which the Code Committee supports, that constituencies other than offeree company shareholders have an interest in information regarding the financial position of the offeror and its group. These include:

(i) the offeree company directors (having regard to their obligations under Rule 25.1 and duties under section 172 of the Companies Act 2006);

- (ii) the employees, customers, creditors and suppliers of both the offeree company and the offeror; and
- (iii) the shareholders in the offeror.

5.30 In view of the fact that information can now be incorporated into documents published under the Code by reference to other sources, including the website on which parties to offers are required to display offer-related documents, announcements and other information, the Code Committee believes that offerors would be able to incorporate financial information into Code documents, and make that information publicly available, quickly, easily and with little incremental cost.

5.31 A significant minority of respondents also supported the idea of requiring further disclosure to be provided by all offerors in relation to the financing of an offer, including the implications that the offer financing might have on the offeror, the offeree company and their respective businesses in the future. This would be with a view to enabling the offeree company board and all other interested constituencies to consider the long term effects of an offer on the merged business in all circumstances.

5.32 The Code Committee agrees with these respondents and therefore intends to propose amendments to the Code to:

- (i) provide that detailed financial information on an offeror must be disclosed in all offers and not only in securities exchange offers (including the deletion of Rule 24.2(b) and Note 6 on Rule 24.2);
- (ii) introduce new provisions into Rule 24.2 so as to require, where the offer is material, the inclusion in offer documents of a *pro forma* balance sheet of the combined group and details of the ratings attributed to the offeror by ratings agencies (and any changes that arise as a result of the offer);

- (iii) require the disclosure in greater detail than at present of the debt facilities or other instruments entered into by an offeror in order to finance the offer, irrespective of whether the payment of interest, repayment or security is dependent to any significant extent on the business of the offeree company; and
 - (iv) require all documents relating to the financing arrangements for the offer to be put on public display.
- (d) ***Providing greater recognition of the interests of offeree company employees***
- (i) *Improving the quality of disclosure by offerors and offeree companies in relation to the offeror's intentions regarding the offeree company and its employees*

5.33 The majority of respondents who addressed the issue believed that there was scope for further or better quality disclosure of the offeror's intentions regarding the offeree company, the offeror and their employees and of the offeree company board's opinions on those intentions. The view of the majority of respondents was that the current provisions of Rules 24.1 and 25.1 made adequate provision for disclosure but that offerors and offeree companies tended to disclose the minimum information required to comply with their obligations.

5.34 While the Code Committee agrees with the majority view that wholesale changes to the relevant provisions of the Code are not required, the Code Committee believes that the Code should be amended to require further disclosures to be made. This is on the basis that the Code Committee considers that the ability of the offeree company board and other interested constituencies to comply with their own obligations, and to provide meaningful information to offeree company shareholders and employees, depends on the accuracy and adequacy of the information published by the offeror in accordance with its own obligations.

5.35 The Code Committee has therefore concluded that offerors should continue to disclose details of any plans regarding the offeree company's employees, locations of business and fixed assets (as currently required under Rule 24.1) and proposes to amend the Code to add a new requirement for offerors to make negative statements if there are no such plans.

5.36 In addition, the Code Committee believes that the Code should be amended to make clear that, except with the consent of the Panel, statements in offer documents regarding an offeror's intentions in relation to the offeree company and, in particular, the offeree company's employees, locations of business and fixed assets (or the absence of any such plans), will be expected to hold true for a period of at least one year following the offer becoming or being declared wholly unconditional (save where another period is stated).

(ii) *Improving the ability of employee representatives to make their views known*

5.37 Some respondents believed that better communication between the offeree company board and the offeree company employees (and employee representatives) would enable the employee representatives to be more effective in providing their opinion on the effects of the offer on employment and, in so doing, would facilitate a wider understanding of the implications that the offer may have for the interests of the offeree company employees.

5.38 In the light of this, the Code Committee proposes to amend the Code to:

- (i) make it clear that the Code does not prevent the passing of information in confidence during the offer period to employee representatives acting in their capacity as such;
- (ii) require offeree company boards to inform employee representatives at the earliest opportunity of their right under the Code to circulate an opinion on the effects of the offer on employment; and

- (iii) make it clear that it is the offeree company board's responsibility to publish the employee representatives' opinion at the offeree company's expense.

5.39 In addition, the Code Committee proposes to amend the Code to require the offeree company to pay the costs incurred by the employee representatives in obtaining such advice as may reasonably be required for the verification of the information contained in the employee representatives' opinion.

6. Other suggestions for amendments to the Code which the Code Committee does not currently intend to implement

6.1 The Consultation Paper also discussed a number of suggestions for amendments to the Code which the Code Committee has concluded should not be implemented at the current time. In particular:

(a) Reducing the disclosure threshold from 1% to 0.5%

6.2 The majority of respondents did not think that the disclosure threshold for Rule 8.3 disclosures should be reduced from 1% to 0.5% at the present time. In view of the changes that were made recently to the Code's disclosure regime to provide greater transparency, the Code Committee believes that it should continue to monitor the appropriateness of the Rule 8.3 disclosure threshold since it is currently unclear whether reducing the disclosure threshold would improve transparency or result in a large number of disclosures which are not materially helpful.

6.3 The Code Committee is therefore of the view that the 1% disclosure threshold should not be reduced at the present time.

(b) Substantial acquisitions of shares

6.4 A significant majority of respondents were not in favour of reintroducing safeguards similar to those previously provided by the Rules Governing

Substantial Acquisitions of Shares (the “SARs”). The SARs, which were abolished in 2006, limited the speed at which persons could increase a holding of shares and rights over shares to an aggregate of between 15% and 30% of the voting rights of a company and required accelerated disclosure of such acquisitions within that band.

6.5 Whilst noting the opinion of those who maintain their opposition to the abolition of the SARs, the Code Committee agrees with the view of the majority of respondents that the arguments put forward for their abolition in 2005 remain valid and have been supported by subsequent events.

6.6 The Code Committee therefore considers that reintroducing equivalent rules to the SARs would place an unnecessary restriction on dealings in shares in circumstances where control of a company was not passing or being consolidated.

(c) *Shortening the offer timetable*

6.7 Although the majority of respondents were not in favour of reducing the maximum time period for the publication of offer documents from 28 days, a significant minority were in favour of reducing this period. The Code Committee considered that the arguments for and against shortening the offer timetable in this manner were finely balanced.

6.8 In the case of securities exchange offers which involve the publication of a prospectus, the Code Committee understands that offerors often need to utilise the full 28 day period. Therefore, reducing this period by, say, seven days would be likely to result in a significant number of requests for dispensations by offerors in securities exchange offers. However, a cash offeror would not normally need 28 days in which to produce an offer document that meets the required standards of care and accuracy.

6.9 On balance, the Code Committee concluded that, since:

- (i) offer periods are likely to become significantly shorter as a result of the proposed changes to the 'put up or shut up' regime; and
- (ii) it is not normally in an offeror's interests to delay the publication of its offer document,

the maximum time period for the publication of offer documents should remain as 28 days.

(d) Separate advice for offeree company shareholders

6.10 The overwhelming majority of respondents were not in favour of amending the Code to require that separate advice should be made available to offeree company shareholders in addition to that provided to the offeree company board by the independent financial adviser appointed under Rule 3.

6.11 In summary, the view of respondents was that the advice given to the offeree company board by the Rule 3 adviser, the substance of which is then made known to the offeree company shareholders, could be relied upon as being genuinely independent and that a requirement for separate advice to be obtained would give rise to additional cost without providing any material benefit.

6.12 The Code Committee agrees with the views of the majority of respondents in this regard and does not propose to amend the Code to require that separate advice should be made available to offeree company shareholders.

(e) Splitting up of dealing, voting and offer acceptance decisions

6.13 A number of respondents who addressed the issue considered that further thought should be given to clarifying the way in which the Code's disclosure regime applies to circumstances where the rights attaching to shares have been split up.

6.14 In view of the importance of disclosing to the market where the discretion lies in respect of all decisions relating to any disclosed shareholding, the Code Committee believes that further consideration should be given to whether proportionate measures could be introduced into the Code to enhance transparency in circumstances where the dealing, voting and offer acceptance decisions attached to a discloseable shareholding have been split between two or more persons. The Code Committee intends to return to this subject in due course.

(f) Disclosure of offer acceptance/scheme voting decisions

6.15 The majority of respondents who addressed the issue were not in favour of the suggestion that the Code should be amended to provide additional transparency in respect of offer acceptance and scheme voting decisions. This was on the basis that, in summary, they did not consider that increased transparency in relation to these decisions would provide significant benefits in practice.

6.16 The Code Committee agrees with the views of the majority of respondents in this regard and does not propose to amend the Code to require increased transparency in relation to offer acceptance and scheme voting decisions by offeree company shareholders. However, the Code Committee considers that all parties involved in offers, including offeree company shareholders, should continue to ensure that statements made during the course of an offer regarding, among other things, offer acceptance or scheme voting decisions, meet the highest standards of care and accuracy.

21 October 2010

APPENDIX**Respondents who submitted responses on a non-confidential basis**

Allen, Mr J.

Alternative Investment Management Association Limited

Association for Financial Markets in Europe

Association of British Insurers

Baker & McKenzie LLP

Berwin Leighton Paisner LLP

Bryant, Ms C.

Carr, Mr R.

Cass Business School

Citigroup Global Markets Limited

Clifford Chance LLP

Commission on Ownership

Cone, Mr J.

Confederation of British Industry

Cutler, Mr J. E.

Davies QC, Prof. P.

Deutsche Bank AG

Dignam, Prof. A.

Equiniti Limited/Equiniti Financial Services Limited

Ernst & Young LLP

Europa Partners Limited

Eversheds LLP

Financial Reporting Council

Franklin Mutual Advisers, LLC

Gazelle Corporate Finance Limited

GC100 Group

GlaxoSmithKline plc

Gleacher Shacklock LLP

Grant Thornton UK LLP

Hann, Mr J.
Hawkpoint Partners Limited
Hermes Equity Ownership Services Ltd
Hogan Lovells International LLP
Hundred Group of Finance Directors
Institute of Chartered Accountants in England and Wales
Institute of Chartered Accountants of Scotland
Institute of Chartered Secretaries and Administrators
Institute of Chartered Secretaries and Administrators Registrars Group
Institute of Directors
International Corporate Governance Network
Investment Management Association
Investor Relations Society
J.P. Morgan Cazenove
Kershaw, Prof. D.
KPMG LLP
Local Authority Pension Fund Forum
London Stock Exchange Group PLC
Macaulay, Mr A.
Mauldon, Mr D.
Mayer Brown International LLP
Mills, Mr D.
Moore QC, Mr M.
Nabarro LLP
Nomura International plc, Investment Banking Division
Northern Ireland Local Government Officers' Superannuation Committee
Norton Rose LLP
Olswang LLP
Pinsent Masons LLP
PricewaterhouseCoopers LLP
Quoted Companies Alliance
Richardson, Mr D.
Schroder Investment Management Limited

Seymour Pierce Limited

Shearman & Sterling LLP

Simmons & Simmons

Standard Life Investments Limited

Takeovers Joint Working Party of the City of London Law Society Company Law

Sub-Committee and the Law Society of England and Wales' Standing Committee on
Company Law

Thompson, Prof. S.

TUC

UBS Global Asset Management

Unite the Union

White & Case

Wright, Mr R.H.