



The Communication and Distribution of Information During an Offer

ICAEW welcomes the opportunity to comment on the consultation paper *The Communication and Distribution of Information During an Offer* published by the Takeover Panel on 15 February 2016, a copy of which is available from this [link](#).

This response of 14 April 2016 has been prepared on behalf of ICAEW by the Corporate Finance Faculty. Recognised internationally as a source of expertise on corporate finance issues and for its monthly *Corporate Financier* magazine, the Faculty is responsible for ICAEW policy on corporate finance issues including submissions to consultations. The Faculty's membership is drawn from professional services groups, advisory firms, companies, banks, private equity, law firms, consultants, academics and brokers.

ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 145,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

Copyright © ICAEW 2016
All rights reserved.

This document may be reproduced without specific permission, in whole or part, free of charge and in any format or medium, subject to the conditions that:

- it is appropriately attributed, replicated accurately and is not used in a misleading context;
- the source of the extract or document is acknowledged and the title and ICAEW reference number are quoted.

Where third-party copyright material has been identified application for permission must be made to the copyright holder.

For more information, please contact representations@icaew.com

icaew.com

GENERAL POINTS

1. The Takeover Panel's consultation is a timely opportunity for reviewing the effectiveness and appropriateness of the rules governing the communication and distribution of information and opinions by, or on behalf of, an offeror or the offeree company.
2. Notwithstanding this, we are concerned that some of the proposals are disproportionately cumbersome as currently drafted, and have the potential to create much confusion through numerous RISs and website traffic. Separately, has consideration been given as to the willingness and/or ability of the RIS to accept or manage increased traffic of non-material notification announcements? Some websites do not always pick up all announcements, including some Rule 8 announcements, which means that even if there is a requirement to make an announcement, it may not always become apparent. We would invite the Code Committee to reconsider its approach in this regard.
3. We also find that the Panel's intentions regarding supervision of certain meetings as set out in the PCP, may not be reflected in the drafting of proposed new Rule 20.2 and accompanying Notes, and in the table in Appendix D. We highlight other potential ambiguities in the drafting of the new Rule and accompanying notes in our responses to Qs 9-18.
4. The proposed revision of the rules on policing and supervising meetings has also highlighted points of general philosophical approach in this area. While appreciating some of the attempts to alleviate the weight of the obligations (for example in the new Note 3 on Rule 20.2), we have some concerns about the increasing complexity of the rules and would welcome an opportunity to discuss these points further.
5. We take this opportunity to respectfully suggest that an eight-week consultation period, which straddled various holidays, is unnecessarily short given the nature of the proposed changes. We also feel obliged to comment on the unusually unhelpful format of the consultation, specifically where questions lack clear signposting to the relevant commentary, amendment or clause.

RESPONSES TO SPECIFIC QUESTIONS

Q1 Should the proposed new Rule 20.1(a) apply to information and opinions relating to an offer or a party to an offer?

6. Yes, it should.
7. It would, however, be helpful to understand the extent to which the Panel considers restrictions are necessary on other parties, which are not parties to an offer?

Q2 Should material new information or significant new opinions relating to an offer or a party to an offer which an offeror or the offeree company publishes, or which it provides to shareholders, other relevant persons or the media, be required to be published via a RIS at the same time?

8. Yes, such information should be required to be published via a RIS at the same time.
9. The drafting, however, of proposed new Rule 20.1(b) raises a number of questions
 - Clause (ii) lists potential recipients of material new information or significant new opinions and it is unclear why they form such a narrow selection. For example, are persons who are not 'obviously' shareholders or potential investors intended to be excluded from the scope of the rule?
 - Also, in clause (ii), how might one establish if a person is 'interested in any securities'? Should this be on the basis that the person convening the meeting 'reasonably' considers

that they are (or not) 'interested in any securities'? Is this intended to capture only current interests in securities, or meetings which persons who may (or reasonably might be) interested in securities?

- For clause (iii), how should information provided, but that is not recorded or scripted, be captured?

Q3 Should documents provided by an offeror or the offeree company to shareholders or other relevant persons, and written communications provided to and published by the media, be required to be published on a website?

10. We agree, although we believe measures will also need to be taken to mitigate the potential for confusion arising from an increased volume of website traffic. We strongly believe that information that is not in the category of material new information or significant new opinion, should be clearly labelled on the website as such to help signpost users, but without the need for an accompanying RIS announcement upon posting on the website. This will also help alleviate confusion which can arise when, for example, presentations are updated or replaced by new versions (while no new RIS announcements are required there will be a RIS on record which refers to an older version which has been removed/ replaced).
11. While we do not object to its inclusion on a website, we do not believe that the consultation paper sets out the Panel's reasoning why information that does not contain material new information or significant new opinion should be subject of an announcement. Numerous announcements of information that is not relevant to the offer (eg routine trade press) risks creating confusion for shareholders as to which key documents should receive the focus of their attention. We would suggest that at the commencement of the Offer Period, when shareholders are notified per Rule 2.12, more emphasis is placed on informing shareholders of the location and nature of information that is to be made available throughout the Offer Period and that if material new information or new opinions are expressed this will be notified via RIS.
12. The drafting of proposed new Rule 20.1(c) also raises questions:
 - why is 'relevant material' described differently; ie as 'presentation or other document' in (i) and 'article, letter or other written communication' in (ii)?
 - Should (i) and (ii) include 'by, or on behalf of, a party to an offeror or the offeree company' after 'provided'?

Q4 Do you have any comments on the proposed new Note 7 on Rule 20.1 with regard to employee communications or the proposed new Note 8 on Rule 20.1 with regard to presentations and other documents?

13. We agree with proposed new Note 7.
14. Regarding proposed new Note 8, while additional transparency by way of website updates is helpful, we refer to our reservations in paragraphs 10 and 11 regarding announcements of information that is not material or significant to the offer. If the Panel is minded to revise the proposed approach, we would suggest that the final sentence in proposed new Note 8 could be deleted.

Q5 Do you have any comments on the proposed new Note 6 on Rule 20.1 with regard to the provision of information prior to the commencement of an offer period or prior to the announcement of a firm or revised offer?

15. It is unclear what the Panel's intention is regarding the (separate) announcement of presentations, the publication of which has been delayed but which are eventually referred to in the Rule 2.7. Would the Panel expect them to be announced separately or does their reference within the body of the Rule 2.7 announcement satisfy the requirement to publish an announcement of material new information by RIS?

Q6 Should all announcements required to be made under the Code be required to be published via a RIS and, if the relevant RIS is not open for business, be distributed to not less than two national newspapers in the UK and two newswire services operating in the UK?

16. We agree that announcements should be published via a RIS although, as noted in our responses to Qs 3 and 4, we believe that applying this to information that is not material or significant to the offer is disproportionate.
17. We believe the Panel should consider revisiting the 'out of hours' policy arrangement for announcements' distribution. In particular, we would question the value and practicability of the requirement to publish (or send the announcement) to two UK national newspapers.

Q7 Should the Panel have the ability to require a copy of an announcement (or a document which includes the contents of the announcement) to be sent to the offeree company's shareholders, employee representatives and pension scheme trustees?

18. We would welcome guidance from the Panel on the circumstances in which it envisages this action would be appropriate.

Q8 Do you have any other comments on the amendments to the Code proposed in Section 2 of the PCP?

19. We have no other comments.

Q9 Should a reference in the proposed new Rule 20.2 to a meeting include any telephone call or meeting held by electronic means?

20. Yes, although 'digital means' would be a suggested additional term if the Panel is trying to capture all real-time communications.

Q10 Should the proposed new Rule 20.2 apply to meetings attended by (a) a representative of, or adviser to, an offeror or the offeree company and (b) a shareholder in, or other person interested in relevant securities of, an offeror or the offeree company, or any investment manager, investment adviser or investment analyst?

21. Yes, although we would welcome further explanation of the choice of categories stated in proposed new Rule 20.2(a)(ii).

Q11 Should the proposed new Rule 20.2 apply to (a) all meetings which take place during the offer period and (b) meetings which take place prior to the commencement of the offer period, but only if the meeting relates to a possible offer or if it would not be taking place but for the possible offer?

22. We support the Panel's proposed approach as this is set out in paragraphs 3.17 and 3.18 of the PCP. However, this is not reflected in the drafting of proposed new Rule 20.2 and Appendix D.

23. Specifically, we would have expected to see proposed new Rule 20.2 reflecting the following:

- a. the dispensations available to the financial adviser not to attend certain meetings in the case of a risk of 'tipping off' eg pre-offer period;
- b. 'ordinary course' meetings being carved out.

24. It is unclear whether the Panel envisages that meetings that are not 'ordinary course' and which would be taking place regardless of the possible offer should be supervised by an adviser and an accompanying confirmation sent to the Panel. Should the text of proposed new Rule 20.2(b)(i) include the phrase 'to which Rule 20.2 is stated to apply' after 'paragraph (a)'?

25. We also wonder whether the drafting of new Rule 20.2(b)(i) should include the words 'representative of' after 'an appropriate', consistent with paragraph 3.1(b) of the PCP. See also our response to Q16.

Q12 Do you have any other comments on the scope of the proposed new Rule 20.2?

26. No.

Q13 Should the proposed new Rule 20.2 provide that (a) any meeting to which the Rule applies must be supervised by an appropriate financial adviser or corporate broker to the offeror or offeree company (as appropriate) and (b) no material new information or significant new opinion relating to the offer or a party to the offer may be provided during the meeting?

27. Yes. In addition, as noted in our responses to Qs 11 and 15, the rule should reflect the ability for meetings to be supervised and confirmations given by representatives of the offeror or offeree.

Q14 Should a supervisor of a meeting to which the proposed new Rule 20.2 applies be required to confirm the names and functions of the individuals who attended the meeting in addition to the matters required to be confirmed under the current Note 3 on Rule 20.1?

28. Yes and, for completeness, the confirmation should also include the names of their organisations.

Q15 Do you have any comments on the proposed Note 1 on the new Rule 20.2 in relation to meetings which take place prior to the commencement of an offer period or prior to the announcement of a firm or revised offer?

29. Further to our response on Q11 regarding dispensations available to the financial adviser not to attend certain meetings, we wonder whether proposed Note 1 (or a new Note on Rule 20.2) ought to cater specifically for senior representatives of the offeror or offeree company who supervise meetings and who are required to provide a confirmation to the Panel with relevant names etc and that no new material information/ opinion was provided in such meeting.

Q16 Do you have any comments on the proposal to give the Panel the ability to grant dispensations from the provisions of the proposed new Rule 20.2 in relation to meetings following the announcement of a recommended firm offer?

30. We wonder whether Note 2(a) to proposed new Rule 20.2 should refer to '**an appropriate representative of** a financial adviser or corporate broker...'

Q17 Should the requirement for a confirmation in writing to be provided to the Panel by not later than 12 noon on the business day following a meeting be disapplied in the case of meetings attended only by one or more financial advisers or corporate brokers and one or more relevant third parties?

31. Yes, however in contrast to the commentary in paragraph 3.38 of the PCP, the drafting of Note 3(a)(i) to proposed new Rule 20.2 does not contain a restriction on the provision at such meetings of material new information or significant new opinions.

Q18 Do you have any comments on the proposed treatment of meetings attended only by one or more advisers to an offeror or the offeree company (other than a financial adviser or corporate broker) and one or more "sell-side" investment analysts (as described in paragraph 3.39(b) of this PCP)?

32. We have no comments on the proposed treatment of such meetings but observe that it may not be clear whether an investment analyst is 'sell-side'. In addition, should Note 3(b)(iv) say "a senior adviser ~~who attends~~ **should attend** the meeting **and** must confirm ..."

Q19 Do you have any comments on the proposed new Rule 20.2?

33. None, other as described in our responses to Qs 9-18.

Q20 Should the new Rule 20.3 in relation to the use of videos be introduced as proposed?

34. Yes. We presume that voice-only recordings or voice notes will also need to be captured for completeness.

Q21 Should the new Rule 20.4 in relation to the use of social media be introduced as proposed?

35. We note that the approach being suggested is particularly restrictive and would (as we expect is the intention) largely eliminate the value of social media being used in this context. We appreciate however that this approach is most practicable from a regulatory oversight point of view and do not object to the introduction of the new rule.

Q22 Should the amendments to Rule 26 in relation to the publication of documents on a website be made as proposed?

36. Yes. By way of clarification however, in the absence of a long-stop time deadline in the new note, does the Executive accept that there may be cases where publication could take place later than noon the following business day? In this regard, in practice we do not accept that in all cases it is possible to post information on a website 'more quickly than was the case when the requirement was initially introduced' (paragraph 4.10 in PCP). We have come across cases where the weight of the documentation to be published has meant that even the current deadline of noon on the following business deadline, has been a practicable challenge.

Q23 Should Rule 19.4 (Advertisements) be amended (and renumbered as Rule 20.5) as proposed?

37. Yes. We have some concern about the broadening of the scope of the rule to include all advertisements "during the course of the offer" as many of these (as noted in the exceptions in the rule should be out-of scope. In respect of the drafting of new Rule 20.5, we would suggest that the rule read '**Save for those advertisements listed in the categories below in this rule**, the publication of advertisements during the course of an offer ...'

38. By way of clarification with respect to Note on Rule 20.5, is the 24 hour lead time for consultation with the Executive confined to working days in the week?

Q24 Should Rule 19.2 (Responsibility) and Note 1 on Rule 3.2 be amended, and Note 5 on Rule 19.1 (Use of other media) be deleted, as proposed?

39. Yes

Q25 Should Rule 19.5 (Telephone campaigns) be amended (and renumbered as Rule 20.6) as proposed?

40. Yes

Q26 Do you have any comments on the minor and consequential amendments to the Code proposed in Section 6 of this PCP?

41. No