ASSET SALES IN COMPETITION WITH AN OFFER AND OTHER MATTERS

ICAEW welcomes the opportunity to comment on *PCP 2017/1 Asset sales in competition with an offer and other matters*, published by The Code Committee of the Takeover Panel on 12 July 2017, a copy of which is available from this link.

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RESPONSES TO SPECIFIC QUESTIONS

Q1: Should an offeror or potential offeror be restricted from circumventing the provisions of the Code by purchasing the offeree company's assets following the offer or possible offer lapsing or being withdrawn?

1. We are supportive of actions aimed at preventing the avoidance of protection measures afforded by the Takeover Code to shareholders but we have certain reservations regarding the approach in the consultation paper. In dealing with two recent difficult cases the Panel created some precedent for dealing with anti-avoidance actions. We would have liked to understand considerations given to relatively rare scenarios of this nature being dealt with by way of fewer rule changes, for example by means of clear disclaimers and disclosures to the market.

2. The Panel's intention may be to apply equal treatment to two bids for the substance of a business – the proposed amendments extend the Code's remit beyond takeovers to asset deals including, arguably, in respect of those which fall considerably short of 'disposals of the whole'.

3. It will often be the case, by reference to ongoing obligations in the Listing Rules and the AIM Rules, that such asset/ business disposals will themselves be subject to other oversight/ restrictions, including, in many cases, the ability or requirement for target shareholders to vote on whether such a disposal should be made, and further substantial protection for stakeholders or the market may not be necessary. The Code itself provides for such protections under Rule 21. If the restrictions proceed, it would be very helpful if the Panel could comment on how the Code will sit alongside existing regulation applying to asset deals.

Q2: Should the proposed new restriction in each of Rules 2.8, 12.2 and 35.1 apply in relation to the purchase of assets which are significant in relation to the offeree company (as determined in accordance with Note 5 on Rule 2.8)?

Q3: Do you have any comments on the proposed amendments to Rule 2.8, Rule 12.2 and Rule 35.1?

4. As set out in our response to Q1, we question why the market could not simply be made aware (eg through disclosure) that the restrictions applying in certain Takeover Code provisions would not apply to asset transactions.

5. We also question the jump from 'all or substantially all of the assets' to 'significant asset purchases' in Note 5. The interpretation of 'significant' as 'normally more than 50%' means that the restrictions would apply even when the proposed transaction (ie the business disposal) is not comparable to an offer for all the shares of a Code company. We are not persuaded that there are grounds for this.

Q4: Where shareholder approval is sought in general meeting for a proposed action under Rule 21.1, should a requirement be introduced:

(a) for the board of an offeree company to obtain competent independent advice as to whether the financial terms of the proposed action are fair and reasonable; and

(b) for the Panel to be consulted regarding the date on which the general meeting is to be held?

6. We agree with the principle that information presented to help shareholders assess the merits of the proposed action should be verified. However, we are concerned that shareholders may assume that in providing independent advice that the financial terms of the proposed action are 'fair and reasonable' the financial adviser is also providing a direct comparison with the offer. Such comparison with an offer (or possible offers) may not be meaningful, or indeed possible, in all circumstances. Has the Panel considered application of Rule 19 and Rule 19.2 as an alternative to proposed Rule 21.1(e)(i)?

7. We agree, under Q4(b), that the Panel should be consulted regarding the date on which the general meeting is to be held.

Q5: Do you have any comments on the proposed requirement for the board of an offeree company to publish a circular in the circumstances described in the proposed new Rule 21.1(f) containing the information set out in the proposed new Note 1 on Rule 21.1?

8. We think that the reference in Note 1(a) to "**full** details" may be superfluous if Note 1(e) is included.

Q6: Do you have any comments on the proposed amendments to Rule 21.1?

9. We suggest that the drafting in proposed Rule 21.1(f)(ii) could be improved as follows:

   (ii) ~~would be sought in general meeting but for the fact that the~~ is not required if taking of the proposed action is conditional on the offer being withdrawn or lapsing

Q7: Should an offeree company be permitted to pay one or more inducement fees to a counterparty to an agreement to which Rule 21.1 applies provided that the aggregate value of the fees payable does not exceed the 1% limit referred to in Note 8 on Rule 21.1?

10. Yes, it should be permitted.

Q8: Do you have any comments on the proposed new Note 8 on Rule 21.1?

11. We have no comments.

Q9: Where, in competition with an offer or possible offer, an offeree company has announced its intention to sell all or substantially all of the company's assets (excluding cash and cash equivalents) and to return to shareholders all or substantially all of the company's cash balances (including the proceeds of any asset sale), should a statement by the offeree company quantifying the cash sum expected to be paid to shareholders be treated as a quantified financial benefits statement?

12. We agree that shareholders should be provided with information to enable them to understand the intended cash return following a sale of assets/business. However we think that the proposed approach could be improved if the criteria and disclosure requirements in Rule 28 were tailored to the particular type of statements. We would be happy to discuss with the Panel what might be appropriate.

Q10: Do you have any comments on the proposed new Note on the definition of "quantified financial benefits statement"?

13. The proposed new Note should state clearly that it applies only where an offer has been received for the assets. We would also appreciate further guidance on what is meant by 'all or substantially all' of the company's assets.

Q11: Where, in competition with an offer or possible offer, an offeree company has announced an intention to sell all or substantially all of the company's assets (excluding cash and cash equivalents) and to return to shareholders all or substantially all of the company's cash balances (including the proceeds of any asset sale), should a purchaser of some or all of those assets be restricted from acquiring interests in shares in the offeree company during the offer period unless the board of the offeree company has made a statement quantifying the amount per share that is expected to be paid to shareholders and then only to the extent that the price paid does not exceed that amount?

Q12: Do you have any comments on the proposed new Rule 4.7?

14. We agree where a direct comparison to the offer is the winding up of the offeree company following the asset sale. However, as currently drafted, the new Rule 4.7 does not compare like for like where there are remaining assets. Should a purchaser of, for example, 80% of the

assets, be deemed to fall under this new Rule, the price said purchaser could pay for shares during an offer period appears to be limited to the amount per share that is expected to be paid out to shareholders from proceeds of that acquisition. This does not take into account the value of the remaining assets. A more comparable situation to that of an offer for the shares would be to calculate the theoretical proceeds available to shareholders should the company be wound up following the asset purchase. This would take into account the residual value of the company's shares. However, there are difficulties with this approach as well – if no offer has been tabled for the remaining assets, how does the company assess the value of those assets? Would it be required to have an independent valuation produced for those assets?

15. We would appreciate clarity on the consequences of a breach under the new proposal.

Q13: Do you have any comments on the proposed new Note 6 on Rule 21.3?

16. No, we think that the new Note 6 is broadly helpful. However, the different treatment of different timings in paragraph (b) may cause practical difficulties.

Q14: Do you have any comments on the proposed amendment to Rule 2.8 and to the introduction of the proposed new Note 2 on Rule 2.8?

17. We think that the current drafting of Rule 2.8 is preferable but that the new Note 2 is helpful.

Q15: Do you have any comments on the consequential and minor amendments referred to in paragraph 5.9?

18. We have no comments.

Q16: Do you have any comments on the proposed amendments to Note 1 on Rule 19.1, Rule 20.3 and Rule 20.4?

19. We have no comments.

Q17: Do you have any comments on the proposed amendment to Note 5 of the Notes on Dispensations from Rule 9?

20. We have no comments.