PCP 2021/1 2 December 2021

THE TAKEOVER PANEL

PUBLIC CONSULTATION BY THE CODE COMMITTEE

MISCELLANEOUS CODE AMENDMENTS

The Code Committee of the Takeover Panel (the "**Panel**") invites comments on this Public Consultation Paper. Comments should reach the Code Committee by Friday, 18 February 2022.

Comments may be sent by email to:
supportgroup@thetakeoverpanel.org.uk

Alternatively, please send comments in writing to:

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The Takeover Panel
One Angel Court
London EC2R 7HJ

Telephone: +44 (0) 20 7382 9026

All responses to formal consultation will be published on the Panel's website at www.thetakeoverpanel.org.uk unless the respondent requests otherwise. A standard confidentiality statement in an email message will not be regarded as a request for non-disclosure.

Unless the context otherwise requires, words and expressions defined in the Takeover Code have the same meanings when used in this Public Consultation Paper.

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1. Introduction and summary

(a) Introduction

1.1 In this Public Consultation Paper ("**PCP**"), the Code Committee of the Takeover Panel (the "**Code Committee**") proposes amendments to various provisions of the Takeover Code (the "**Code**"), as summarised below.

(b) Requirement for a potential offeror to disclose an obligation to offer a minimum level, or particular form, of consideration

1.2 **Section 2** proposes that a potential offeror which has been publicly identified should be required:

(a) at the beginning of an offer period, to disclose any minimum level, or particular form, of consideration that it would be obliged to offer to offeree company shareholders under **Rule 6** or **Rule 11** as a result of the acquisition of interests in shares in the offeree company by it, or any person acting in concert with it, prior to the commencement of the offer period; and

(b) during the offer period, to make an immediate announcement if it, or any person acting in concert with it, acquires interests in shares in the offeree company as a result of which it would be obliged to offer a minimum level, or particular form, of consideration to offeree company shareholders under **Rule 6** or **Rule 11**.

(c) Restriction on acquisitions of interests in shares by a mandatory offeror at the end of the offer timetable

1.3 **Section 3** proposes that a mandatory offeror, and any person acting in concert with it, should be restricted from acquiring additional interests in shares in the offeree company in the 14 days up to and including the unconditional date of an offer. This would ensure that an offeree company shareholder would be able to make its acceptance decision during this period knowing the maximum percentage of offeree company shares in which the mandatory offeror, and persons acting in concert with it, would be interested if the offer lapsed. The same restriction would also apply in the 14 days prior to the expiry of an acceptance condition invocation notice.

(d) The "look-back period" for determining the price of a mandatory offer

1.4 **Section 4** proposes the introduction of a new **Note 5 on Rule 9.5** which would clarify the application of the "look-back period" for determining the minimum price of a mandatory offer.

(e) The chain principle

1.5 **Section 5** proposes:

(a) the deletion of the "significant purpose" test in limb (b) of **Note 8 on Rule 9.1**, such that the "significant interest" test in limb (a) of **Note 8 on Rule 9.1** would become the sole test for determining whether a "chain principle" mandatory offer is required, other than in exceptional circumstances; and

(b) that the threshold at which relative values would be considered to be "significant" for the purposes of the "significant interest" test in limb (a) of **Note 8 on Rule 9.1** should be reduced from 50% to 30%.

(f) Restrictions following the lapsing of an offer or a statement of no intention to bid

1.6 **Section 6** proposes amendments to:

(a) **Note 1(a) on Rules 35.1 and 35.2**, with regard to the circumstances in which an offeror that made a "no increase statement" or an "acceleration statement" in relation to an offer which subsequently lapsed can proceed to make a new offer even though the offeror did not reserve the right to set that statement aside with the agreement of the offeree board;

(b) **Note 2 on Rule 2.5** and **Note 2 on Rule 2.8**, with regard to the period of time for which a potential offeror should be bound by a statement as to the terms on which a possible offer might be made; and

(c) **Note 1(b) on Rules 35.1 and 35.2**, with regard to the circumstances in which an offeror whose offer has lapsed can proceed to make a new offer if a third party announces a firm intention to make an offer for the offeree company.

(g) Minor issues

1.7 **Section 7** proposes minor amendments in relation to:

(a) the application of the definition of "**interests in securities**" to custodians and depositories;

(b) the wording of **Rule 9.1(a)**;

(c) the requirement for a "Rule 9 waiver" circular to include the offeree board's opinion on the offeror's plans;

(d) the disclosure of ratings and outlooks under **Rule 24.3**;

(e) the timing of the publication of documents on a website;

(f) the removal of the requirement to send documents in hard copy form; and

(g) the default auction procedure under **Appendix 8** of the Code.

(h) Assessment of the impact of the proposals

1.8 **Section 8** provides an assessment of the impact of the proposals.

(i) Invitation to comment

1.9 The Code Committee **invites comments** on the amendments to the Code proposed in this PCP. Comments should reach the Code Committee by Friday, 18 February 2022 and should be sent in the manner set out at the beginning of this PCP.

1.10 The **proposed amendments** to the Code are set out in **Appendix A**. Where amendments are proposed, underlining indicates proposed new text and striking-through indicates text that is proposed to be deleted.

1.11 A list of the **questions** that are put for consultation is set out in **Appendix B**.

(j) Implementation

1.12 The Code Committee expects to publish a Response Statement setting out the final amendments to the Code in Spring 2022.

1.13 The Code Committee anticipates that the amendments to the Code would come into effect approximately one month after the publication of the Response Statement.

2. Requirement for a potential offeror to disclose an obligation to offer a minimum level, or particular form, of consideration

(a) Introduction

2.1 **Section 2** proposes that a potential offeror which has been publicly identified should be required:

(a) at the beginning of an offer period, to disclose any minimum level, or particular form, of consideration that it would be obliged to offer to offeree company shareholders under **Rule 6** or **Rule 11** as a result of the acquisition of interests in shares in the offeree company by it, or any person acting in concert with it, prior to the commencement of the offer period; and

(b) during the offer period, to make an immediate announcement if it, or any person acting in concert with it, acquires interests in shares in the offeree company as a result of which it would be obliged to offer a minimum level, or particular form, of consideration to offeree company shareholders under **Rule 6** or **Rule 11**.

(b) Where a minimum level, or particular form, of consideration is required

(i) Introduction

2.2 In certain circumstances, the Code requires an offeror to offer a minimum level, or particular form, of consideration to offeree company shareholders, as summarised below.

(ii) Rule 6 – Acquisitions resulting in an obligation to offer a minimum level of consideration

2.3 Under **Rule 6.1**, an offer must be made on no less favourable terms than those on which the offeror, or any person acting in concert with it, acquired an interest in shares in the offeree company of the same class:

(a) within the three month period prior to the commencement of the offer period (**Rule 6.1(a)**);

(b) during the period, if any, between the commencement of the offer period and the announcement of a firm intention to make an offer (**Rule 6.1(b)**); or

(c) prior to the three month period referred to in paragraph (a), if the Panel determines that this is necessary in order to afford equivalent treatment to all offeree company shareholders in accordance with **General Principle 1** (**Rule 6.1(c)**).

2.4 Under **Rule 6.2**, if, following the announcement of a firm intention to make an offer, the offeror, or any person acting in concert with it, acquires an interest in shares in the offeree company at above the then offer price, the offeror must increase the offer to not less than that higher price. Under **Rule 6.2(b)**, the offeror must make an immediate announcement that its offer will be so revised.

2.5 In addition, the final paragraph of **Rule 6.1** notes that, following an acquisition which falls within **Rule 6.1(b)**, a potential offeror may be required to make an immediate announcement in accordance with the **Note on Rule 7.1** (see further below).

2.6 **Note 1 on Rule 6** sets out various factors which might be taken into account when the Panel is considering an application by an offeror that it should exercise its discretion to adjust the terms required by **Rule 6.1(a)** or **Rule 6.1(b)**.

(iii) Rule 9 – Consideration to be offered by a mandatory offeror

2.7 Under **Rule 9.5(a)**, a mandatory offer made under **Rule 9.1** must be in cash at not less than the highest price paid by the offeror, or any person acting in concert with it, for any interest in shares in the offeree company of the same class during the 12 months prior to the announcement of the offer.

2.8 Under **Rule 9.5(b)**, if, after a mandatory offer is announced, the offeror, or any person acting in concert with it, acquires an interest in shares in the offeree company of the same class at above the then offer price, the offeror must:

(a) increase the offer for that class to not less than that higher price; and

(b) make an immediate announcement in accordance with **Rule 7.1** (see further below).

2.9 **Note 3 on Rule 9.5** sets out various circumstances which might be taken into account when the Panel is considering an application by an offeror that it should make an adjustment to the highest price required by **Rule 9.5(a)** or **Rule 9.5(b)**.

2.10 In addition, **Note 9 on Rule 9.1** provides that if, during the course of a voluntary offer, an offeror triggers an obligation to make a mandatory offer, it must make an immediate announcement in accordance with **Rule 7.1**.

(iv) Rule 11 – Nature of consideration to be offered

2.11 Under **Rule 11.1**, if an offeror, or any person acting in concert with it, acquires an interest in shares in the offeree company for cash, the offeror may be required to make a cash offer at not less than a particular price. In summary:

(a) if interests in shares in the offeree company representing 10% or more of a particular class are acquired for cash in the 12 months prior to the commencement of, and during, the offer period, the offer for that class must be in cash at not less than the highest price paid during that period (**Rule 11.1(a)**); and

(b) in addition to the requirement in paragraph (a), if any interests in shares in the offeree company of a particular class are acquired for cash during the offer period, the offer for that class must be in cash at not less than the highest price paid during the offer period (**Rule 11.1(b)**).

2.12 Under **Rule 11.2**, if an offeror, or any person acting in concert with it, acquires an interest in shares in the offeree company representing 10% or more of a particular class in exchange for securities in the three months prior to the commencement of, and during, the offer period, the offeror must normally offer such securities to offeree company shareholders of the same class. Under **Note 1 on Rule 11.2**, the securities exchange offer must be made on the basis of the number of securities received by the selling shareholders.

2.13 **Note 6 on Rule 11.1** (which applies also to **Rule 11.2**) notes that, following an acquisition during an offer period which has (or might have) consequences under **Rule 11.1** or **Rule 11.2**:

(a) a firm offeror must make an immediate announcement in accordance with **Rule 7.1**; and

(b) a potential offeror may be required to make an immediate announcement under the **Note on Rule 7.1**.

2.14 **Rule 11.3** provides that the Panel should be consulted if an offeror considers that the Panel should exercise its discretion to adjust the price payable under **Rule 11.1** or **Rule 11.2**. The **Note on Rule 11.3** sets out various factors which the Panel might take into account when considering such an application.

(c) Disclosure of an obligation to offer a minimum level, or particular form, of consideration

(i) Firm offerors

2.15 Under **Rule 2.7(c)(i)**, the announcement of a firm intention to make an offer must include the terms of the offer. Before it announces a firm offer, the offeror will therefore need to assess whether it is required to offer a minimum level, or particular form, of consideration to offeree company shareholders under any of **Rule 6.1**, **Rule 9.5(a)**, **Rule 11.1** or

Rule 11.2 and, if so, ensure that the terms of the offer comply with the relevant requirements (or agree an adjustment with the Panel).

2.16 Under **Rule 24.4(c)**, details of any dealings in the relevant securities of the offeree company by the offeror, or any person acting in concert with it, during the period beginning 12 months prior to the offer period and ending on the latest practicable date prior to the publication of the offer document, must be set out in the offer document. This enables readers to verify that the offeror has satisfied the requirements of **Rules 6**, **9.5** and **11** (as appropriate).

2.17 Following a firm offer announcement, the acquisition by an offeror, or any person acting in concert with it, of an interest in shares in the offeree company may give rise to an obligation for the offer to be revised under **Rules 6**, **9.5** or **11** (as explained above). The fact that a revision will be required in such circumstances is noted in **Note 2 on Rule 32.1**. The offeror must then publish a revised offer document pursuant to **Rule 32.1**. As explained above, an offeror must make an "immediate" announcement if an obligation to revise the offer is triggered by such an acquisition. Under **Rule 7.1**, the announcement must, wherever practicable, state the nature of the interest acquired, the number of shares concerned and the price paid by the offeror or person acting in concert with it.

2.18 In addition to any immediate announcement required under **Rule 7.1**, an offeror, and any person acting in concert with it, must, following the acquisition of <u>any</u> interest in shares in the offeree company, make a public Dealing Disclosure under **Rule 8.1(b)** (in the case of an offeror) or **Rule 8.4** (in the case of a person acting in concert with an offeror) by no later than 12 noon on the business day following the date of the dealing.

(ii) Potential offerors

2.19 Under **Rule 2.5(a)**, if a potential offeror makes a statement in relation to the terms on which an offer might be made for the offeree company, it will be bound by that statement if an offer is subsequently made (i.e. the offer must be on the same or better terms), except where the potential offeror specifically reserves the right not to be so bound (and those circumstances subsequently arise) or in wholly exceptional circumstances. Under **Note 3 on Rule 2.5**, the potential offeror will also be bound by a statement by the offeree company in relation to the terms on which an offer might be made if that statement is made with the agreement or approval of the potential offeror. If this is not the case, the offeree company's statement must make this clear and must include a prominent warning that there can be no certainty as to the terms, if any, on which an offer might be made.

2.20 There is no general requirement for a potential offeror to disclose whether any offer which it might make would be required to be for a minimum level, or in a particular form, of

consideration. However, under the **Note on Rule 7.1**, in certain circumstances a potential offeror must make an immediate announcement if it, or any person acting in concert with it, acquires an interest in shares in the offeree company which will have consequences under **Rule 6**, **9.5** or **11** if the potential offeror proceeds to make an offer. The relevant circumstances are that:

(a) the potential offeror either:

(i) has been referred to in a public announcement (regardless of whether the potential offeror was identified in that announcement); or

(ii) is participating in a "formal sale process" by the board of the offeree company (as described in **Note 2 on Rule 2.6**); and

(b) the price at which the interest in shares in the offeree company is acquired is above either:

(i) the potential offeror's possible offer price, where that price has been publicly stated by either the potential offeror or the offeree company; or

(ii) a competing offeror's firm offer price.

2.21 Any acquisition of an interest in relevant securities in the offeree company by a relevant potential offeror will also be required to be the subject of a Dealing Disclosure under **Rule 8.1(b)** (or, in the case of an acquisition by a person acting in concert with the potential offeror, **Rule 8.4**) by no later than 12 noon on the business day following the date of the dealing. In the event of a dealing in offeree company securities by a potential offeror who either (a) has been referred to in an announcement by the offeree company but has not been publicly identified or (b) is participating in a formal sale process then, under **Note 12(a) on Rule 8**, the potential offeror will be required to be identified as such by no later than the time at which the Dealing Disclosure is published.

(d) Proposed requirement for a potential offeror to disclose any existing obligation under Rule 6 or Rule 11

2.22 The Code Committee considers that if an announcement which commences an offer period, or which first identifies a potential offeror as such, is made by, or with the agreement or approval of, the potential offeror that announcement should specify any existing obligation which the potential offeror would have under **Rule 6** or **Rule 11** if it were to make an offer for the offeree company. If the announcement is made by the offeree company without the agreement or approval of the potential offeror, the Code Committee considers that the potential offeror should make an equivalent announcement as soon as practicable thereafter.

2.23 The Code Committee considers that the fact that any offer made by the potential offeror would have to be at not less than a particular level, or in a particular form, is material information for shareholders in the offeree company and other market participants - particularly those who are considering whether to sell shares in the offeree company - and, accordingly, that such information should be disclosed as soon as practicable after a potential offeror is publicly identified as such. Any potential offeror named on the Disclosure Table published on the Panel's website would be subject to the proposed new requirement. Therefore, this requirement would not apply to an unnamed potential offeror.

2.24 The Code Committee recognises that there might be circumstances in which, as a result of a previous acquisition by it, or a person acting in concert with it, a potential offeror may have an obligation to offer a minimum level of consideration under **Rule 6** or **Rule 11** but the potential offeror considers that the Panel should exercise its discretion to make an adjustment under either **Note 1 on Rule 6** or **Rule 11.3**. The Code Committee understands that, in most cases, it will be possible for the Panel Executive (the "**Executive**") to resolve the issue prior to the time of the relevant announcement. However, where this is not possible, the Code Committee considers that the potential offeror should consult the Executive as to what, if any, announcement should be made pending the resolution of the issue.

2.25 The Code Committee does not consider that a potential offeror should be required to disclose the price at which it, or any person acting in concert with it, has acquired interests in shares in the offeree company in the 12 months prior to the commencement of the offer period where those acquisitions might become relevant under **Rule 9.5** or **Rule 11** if further acquisitions were made during the offer period but the potential offeror has not yet triggered an obligation under those rules. For example, the Code Committee does not consider that a potential offeror which had purchased (for cash) a 9% stake in the offeree company six months prior to the commencement of the offer period should be required to disclose the price at which it acquired those shares, even though that acquisition would become relevant:

(a) under **Rule 11.1**, if the potential offeror acquired a further 1%; and

(b) under **Rule 9.5**, if the potential offeror acquired further interests in shares so as to trigger an obligation to make a mandatory offer.

(e) Proposed requirement for a potential offeror to make an immediate announcement of an acquisition which would trigger an obligation under Rule 6 or Rule 11

2.26 The Code Committee considers that if, after the commencement of the offer period but prior to the announcement of a firm intention to make an offer, a potential offeror, or a

person acting in concert with it, acquires an interest in shares in the offeree company and, as a result of that or any previous acquisition, the potential offeror would have an obligation under **Rule 6** or **Rule 11**, the potential offeror should be required to make an immediate announcement in accordance with **Rule 7.1**. The Code Committee considers that this requirement should not be limited to the categories of potential offeror to whom the **Note on Rule 7.1** currently applies, i.e. any potential offeror:

(a) whose existence has been referred to in any announcement (whether publicly identified or not); or

(b) which is a participant in a formal sale process (regardless of whether it was a participant at the time at which the formal sale process was announced).

2.27 Accordingly, the Code Committee considers that the obligation to make an immediate announcement should apply to a relevant potential offeror in all circumstances. This would be in addition to the obligation to make a Dealing Disclosure under **Rule 8.1(b)** or **Rule 8.4** (as appropriate).

2.28 It is proposed that the new requirement for potential offerors would be reflected in a new **Rule 7.1(a)** and that the existing requirement in the current **Rule 7.1** would be reflected (with minor amendments) in new **Rules 7.1(b)** and **(c)**.

(f) Proposed amendments to the Code

2.29 In the light of the above, the Code Committee proposes to:

(a) introduce a new **Rule 2.4(c)(iii)** (and make other minor amendments to **Rule 2.4(c)**), as follows:

"**2.4 THE ANNOUNCEMENT OF A POSSIBLE OFFER**

…

(c) Any announcement which commences an offer period and any subsequent announcement which first identifies a potential offeror must include:

(i) ~~specify~~ the date on which any deadline thereby set in accordance with Rule 2.6(a) will expire; ~~and~~

(ii) ~~include a~~ a summary of the provisions of Rule 8 (see the Panel's website at www.thetakeoverpanel.org.uk)~~.~~;

(iii) details of any minimum level, or particular form, of consideration that the potential offeror(s) would be obliged to offer under Rule 6 or Rule 11 (as appropriate); and";

(b) delete the current **Note 2 on Rule 2.4** and to replace it with a new **Rule 2.4(c)(iv)**, as follows:

"**(iv) details of any dealing arrangement of the kind referred to in Note 11 on the definition of acting in concert to which the offeree company, a potential offeror or any person acting in concert with the offeree company or a potential offeror is a party.**";

(c) delete the current **Note 1 on Rule 2.4** and introduce a new **Note 1 on Rule 2.4**, as follows:

"***1. Announcement made without the agreement or approval of a potential offeror***

If an announcement is made by the offeree company without the agreement or approval of a potential offeror, the potential offeror must make a further announcement specifying the matters referred to in Rule 2.4(c)(iii) or (iv) (as appropriate) as soon as practicable thereafter.";

(d) introduce a new **Note 2 on Rule 2.4**, as follows:

"***2. Minimum level, or particular form, of consideration***

Where a potential offeror to which Rule 2.4(c)(iii) applies considers that an adjustment should be made under Note 1 on Rule 6 or under Rule 11.3, the Panel must be consulted as to the terms of the announcement.";

(e) delete the current **Rule 7.1** and introduce a new **Rule 7.1**, as follows:

"**7.1 IMMEDIATE ANNOUNCEMENT REQUIRED IF AN OBLIGATION UNDER RULE 6, 9 OR 11 IS TRIGGERED**

(a) During an offer period, a potential offeror (see Note) must make an immediate announcement if it, or any person acting in concert with it, acquires an interest in shares in the offeree company and, as a result of that or any previous acquisition, the potential offeror would be obliged to offer a minimum level, or a particular form, of consideration under Rule 6 or Rule 11 which has not previously been announced.

(b) After it has announced a firm intention to make an offer, an offeror must make an immediate announcement if it, or any person acting in concert with it, acquires an interest in shares in the offeree company and, as a result, the offeror is obliged to revise its offer under Rule 6, Rule 9.5 or Rule 11 or to make a mandatory offer under Rule 9.1.

(c) Any announcement required under Rule 7.1(a) or (b) must state:

(i) the relevant obligation;

(ii) the nature of the interest in shares that has been acquired and the number of shares concerned; and

(iii) the highest price paid.

A Dealing Disclosure will also be required in accordance with Rule 8.1(b) or Rule 8.4 (as appropriate)."; and

(f) amend the **Note on Rule 7.1**, as follows:

"***Potential offerors***

~~The requirement of this~~ Rule 7.1(a) ~~to make an immediate announcement~~ applies to any potential offeror whose existence has been referred to in any announcement (whether publicly identified or not)~~,~~ or which is a participant in a formal sale process (regardless of whether it was a participant at the time at which the formal sale process was announced). See also Note 12(a) on Rule 8.~~, either:~~

~~(a) where a public statement of the level of its possible offer has been made and the potential offeror or any person acting in concert with it acquires an interest in shares above that level; or~~

~~(b) where a third party has announced a firm intention to make an offer and the potential offeror or any person acting in concert with it acquires an interest in shares at above the level of that offer.~~

~~A Dealing Disclosure will also be required in accordance with Rule 8.1(b).~~".

2.30 In addition, the Code Committee proposes to make minor amendments to **Note 11(b) on the definition of acting in concert**, **Rule 6.1**, **Rule 6.2**, **Note 12 on Rule 8**, **Note 6 on Rule 11.1**, **Rule 11.2** and **Note 1 on Rule 11.2**, as set out in **Appendix A**.

Q1 Should the Code be amended as proposed so as to require a publicly identified potential offeror to announce any minimum level, or particular form, of consideration it is obliged to offer to offeree company shareholders?

3. Restriction on acquisitions of interests in shares by a mandatory offeror at the end of the offer timetable

(a) Introduction

3.1 At present:

(a) an offeror (whether a voluntary offeror or a mandatory offeror) is not permitted to revise its offer; and

(b) a voluntary offeror is not permitted to trigger the requirement to make a mandatory offer,

after Day 46, or, if it has made an acceleration statement, after the date which is 14 days before the unconditional date. However, an offeror that triggered the requirement to make a mandatory offer before that date is not restricted from acquiring further interests in shares in the offeree company at or below the offer price after that date. The Code Committee does not consider it appropriate that a mandatory offeror should be able to continue to consolidate its control position during this 14 day period.

3.2 **Section 3** therefore proposes that a mandatory offeror, and any person acting in concert with it, should be restricted from acquiring additional interests in shares in the offeree company in the 14 days up to and including the unconditional date of an offer. This would ensure that an offeree company shareholder would be able to make its acceptance decision during this period knowing the maximum percentage of offeree company shares in which the mandatory offeror, and persons acting in concert with it, would be interested if the offer lapsed. The same restriction would also apply in the 14 days prior to the expiry of an acceptance condition invocation notice (an "**ACIN**").

(b) Background

(i) Revised offer cannot be made in the last 14 days of an offer period

3.3 Under **Rule 6.2**, and, in the case of a mandatory offer, **Rule 9.5(b)**, if an offeror, or any person acting in concert with it, acquires any interest in shares in the offeree company at above the offer price during the course of an offer, it must increase its offer to not less than the highest price paid for the interest in shares so acquired, and must immediately announce that such a revised offer will be made. A revised cash offer may also be required under **Rule 11.1(b)** if the original offer is not for cash and the offeror or any person acting in concert with it acquires any interest in shares in the offeree company for cash during the offer period.

3.4 Under **Rule 32.1(c)**, an offeror is not able to revise its offer after Day 46 (or, if an acceleration statement has been made, after the date which is 14 days prior to the unconditional date). **Note 3(a) on Rule 32.1** therefore states that an offeror must not place itself in a position where it would be required to revise its offer after the date referred to in **Rule 32.1(c)**. Accordingly, an offeror, and any person acting in concert with it, is restricted by **Rule 32.1(c)** from acquiring interests in shares in the offeree company after the 14th day prior to the unconditional date if that acquisition would trigger a requirement to make a revised offer.

(ii) Voluntary offeror cannot switch to a mandatory offer in the last 14 days of an offer period

3.5 If a voluntary offeror acquires an interest in shares in the offeree company during the offer period and those shares (taken together with shares in which it or any person acting in concert with it are interested) carry 30% or more of the voting rights of the offeree company, the voluntary offeror will then be required to make a mandatory offer under **Rule 9**. This is because the offeror is treated as having obtained control of the offeree company.

3.6 Under **Note 4 on Rule 32.1**, the change in nature of an offer from a voluntary offer to a mandatory offer is not viewed as a revision of the offer for the purposes of **Rule 32** if the offeror is not required to revise the offer terms. This would be the case if the voluntary offer was in cash, or was accompanied by a cash alternative, and the acquisition was made at a price that was the same as or less than the price at which the mandatory offer is required to be made.

3.7 However, under both **Note 9 on Rule 9.1** and **Note 4 on Rule 32.1**, a mandatory offer that is triggered during a voluntary offer must remain open for not less than 14 days following the announcement of the mandatory offer. This is because the fact that the offeror has obtained control of the offeree company is likely to be material information for offeree company shareholders who are therefore required, in accordance with **General Principle 2**, to be given sufficient time to absorb this information before making their acceptance decision.

3.8 Accordingly, a voluntary offeror (and any person acting in concert with it) cannot acquire an interest in shares in the offeree company in the 14 days up to and including the unconditional date if that acquisition would trigger a requirement to make a mandatory offer.

(c) Proposed restriction on a mandatory offeror (and any person acting in concert with it) acquiring further interests in shares in the 14 days up to and including the unconditional date

3.9 The Code Committee considers that the consolidation of control of the offeree company by a mandatory offeror (i.e. the acquisition of further interests in shares in the 30% to 50% band) may be as relevant to a shareholder's acceptance decision as the acquisition of control of the offeree company by a voluntary offeror.

3.10 The Code Committee notes that, at present:

(a) a voluntary offeror is restricted after Day 46 from triggering an obligation to make a mandatory offer (by, for example, increasing its shareholding from, say, 29% to 31%), even if it would not thereby trigger a requirement to revise its offer (because it is already offering cash at the same or a higher price as that at which the shares were acquired). This is on the basis that, following the acquisition of control, a mandatory offer must remain open for at least 14 days (**Note 9 on Rule 9.1** and **Note 4 on Rule 32.1**); but

(b) a mandatory offeror is not restricted after Day 46 from acquiring further interests in shares in the offeree company (for cash at or below the price of its offer) so as to increase its shareholding in the offeree company from, say, 31% to 49%, notwithstanding that this would represent a consolidation of control by the offeror. This is on the basis that an offeror which triggered a mandatory offer obligation prior to the 14 day period referred to in **Note 9 on Rule 9.1** and **Note 4 on Rule 32.1** is not restricted from acquiring further interests in shares at or below the offer price in the 14 days up to and including the unconditional date.

3.11 The Code Committee considers that this distinction is illogical and that, in the same way that a voluntary offeror is restricted from acquiring control of the offeree company by acquiring interests in shares through the 30% threshold (or increasing its interest in the 30% to 50% band) in the 14 days up to and including the unconditional date, a mandatory offeror should be restricted from consolidating control of the offeree company during the same period. This would ensure that an offeree company shareholder would be able to make its acceptance decision in the last 14 days of the offer period knowing the maximum percentage of offeree company shares that the mandatory offeror, and persons acting in concert with it, would be interested in if the offer lapsed.

3.12 If the Code is amended as proposed, the mandatory offeror's "control" position would, in effect, be frozen from the date that is 14 days prior to the unconditional date until the outcome of the offer is known. At that point:

(a) if the 50% acceptance condition is satisfied and the mandatory offer becomes unconditional, an offeree company shareholder that did not initially wish to accept the offer would have a further opportunity to accept it. This is because, under **Rule 9.5(d)**, a mandatory offer must remain open for not less than 14 days after it has become unconditional; and

(b) if the 50% acceptance condition is not satisfied by the unconditional date and the mandatory offer lapses, the "control" position of the mandatory offeror (and any person acting in concert with it) would remain as it was on the date that is 14 days prior to the unconditional date.

3.13 The Code Committee notes that **Rule 9.4** restricts a person from acquiring an interest in shares which would give rise to a requirement to make a mandatory offer if the making or implementation of that offer would or might be dependent on the passing of a shareholder resolution or any other conditions, consents or arrangements. The Code Committee considers that a new **Rule 9.4(b)** would therefore be the most appropriate provision in which to include the proposed new restriction on acquisitions by a mandatory offeror (and any person acting in concert with it) in the 14 days prior to the unconditional date.

3.14 In addition, the Code Committee proposes to introduce a new **Rule 9.4(c)** to make clear that a voluntary offeror cannot trigger the requirement to make a mandatory offer unless the mandatory offer can remain open for acceptance for 14 days following the date on which the mandatory offer is announced.

(d) Acceptance condition invocation notices

3.15 The Code Committee notes that an offeror may publish an ACIN under **Rule 31.6**, such that its offer will lapse before the unconditional date if the required level of acceptances has not been reached by the date specified in the ACIN. Any ACIN must be published at least 14 days prior to the date specified in the ACIN.

3.16 A voluntary offeror is not able to acquire further interests in shares in the offeree company in the 14 days prior to the date specified in an ACIN if such an acquisition would trigger the requirement to make a mandatory offer. This is because, following the acquisition of control, a mandatory offer must remain open for at least 14 days (**Note 9 on Rule 9.1** and **Note 4 on Rule 32.1**), and the offer would not be open for the required 14 day period if the offer lapsed on the date specified in the ACIN.

3.17 Consistent with the proposal that an offeree company shareholder should have 14 days prior to the unconditional date of a mandatory offer in which to decide whether to accept an offer knowing that:

(a) the offer will not be revised; and

(b) the percentage of shares in the offeree company that the offeror and any person acting in concert with it would be interested in if the offer lapsed will not be increased,

the Code Committee proposes that a mandatory offeror and any person acting in concert with it should be restricted from acquiring further interests in shares in the offeree company in the 14 days before the date specified in any ACIN published by the mandatory offeror.

(e) Proposed amendments to the Code

3.18 In the light of the above, the Code Committee proposes to re-number **Rule 9.4** as **Rule 9.4(a)** and to introduce a new **Rule 9.4(b)** and a new **Rule 9.4(c)** as follows:

"**9.4 RESTRICTIONS ON ACQUISITIONS**

…

(b) Where an offer has been made under Rule 9, neither the offeror nor any person acting in concert with it may acquire any interest in shares in the offeree company in the 14 days up to and including:

(i) the unconditional date; or

(ii) the expiry of an acceptance condition invocation notice.

(c) Neither a voluntary offeror nor any person acting in concert with it may make an acquisition of any interest in shares which would oblige it to make an offer under Rule 9 unless that offer can remain open for acceptance for at least 14 days.".

3.19 In addition, the Code Committee proposes to:

(a) make minor amendments to **Note 9 on Rule 9.1,** the **Note on Rule 9.4** and **Note 4 on Rule 32.1**; and

(b) re-number the **Note on Rule 31.6** as **Note 1 on Rule 31.6** and introduce a new **Note 2 on Rule 31.6**, which would cross-refer to the new **Rule 9.4(b)**,

as set out in **Appendix A**.

Q2 Should a mandatory offeror, and any person acting in concert with it, be restricted from acquiring additional interests in shares in the offeree company in the 14 days up to and including: (a) the unconditional date; and (b) the expiry of an acceptance condition invocation notice?

4. The "look-back period" for determining the price of a mandatory offer

(a) Introduction

4.1 **Section 4** proposes the introduction of a new **Note 5 on Rule 9.5** which would clarify the application of the "look-back period" for determining the minimum price of a mandatory offer.

(b) Background

4.2 **Rule 9.5(a)** provides that a mandatory offer made under **Rule 9** must, in respect of each class of share capital involved, be in cash, or be accompanied by a cash alternative, at not less than the highest price paid by the offeror, or any person acting in concert with it, for any interest in shares of that class during the 12 months prior to the announcement of the offer (the "**look-back period**"). This reflects the requirements of paragraphs 7(2) and 8(1) of Schedule 1C to the Companies Act 2006.

4.3 Under **Rule 2.2(b)**, a person who triggers an obligation to make a mandatory offer under **Rule 9** is required immediately to make a firm offer announcement. Where **Rule 2.2(b)** is complied with, the application of the look-back period for determining the minimum price of the offer under **Rule 9.5(a)** is straightforward.

4.4 On occasion, however, a person who triggers an obligation to make a mandatory offer does not make an immediate announcement of this fact. For example, if the person does not initially realise that it has triggered **Rule 9**, or if it disputes the application of **Rule 9**, then the announcement of the offer may be delayed. In an extreme case, it may be that by the time the mandatory offer is announced there will have been no dealings by the offeror or any person acting in concert with it in the 12 months preceding the announcement. This could result, on a strict reading of **Rule 9.5(a)**, in there not being a minimum price for the mandatory offer.

4.5 The Code Committee understands that in such cases the Executive's practice has been to treat the look-back period as starting from the date on which the mandatory offer ought to have been announced, had the offeror complied with **Rule 2.2(b)**. The Code Committee agrees with the Executive's practice and considers that, if **Rule 9.5(a)** was not interpreted in this way, a person who triggered an obligation to make a mandatory offer could manipulate the minimum price of the offer by delaying the announcement of the offer, thereby, in effect, setting its own look-back period.

(c) Proposed amendment to the Code

4.6 In order to clarify the position, the Code Committee proposes to introduce a new **Note 5 on Rule 9.5** as follows:

> "***5. "Look-back period"***
>
> *If, notwithstanding Rule 2.2(b), an offer under Rule 9.1 was not announced immediately following the acquisition of the interest in shares which gave rise to the obligation to make the offer, the "look-back period" in Rule 9.5(a) will start on the date which is 12 months prior to the date on which such offer ought to have been announced in accordance with Rule 2.2(b) and will end on the date on which the offer is announced. The same approach will apply to the 12 month periods referred to in Notes 2 and 3 on Rule 9.5.*".

Q3 Should the new Note 5 on Rule 9.5 be introduced as proposed in order to clarify the application of the "look-back period" for determining the minimum price of a mandatory offer?

5. The chain principle

(a) Introduction

5.1 **Section 5** proposes:

(a) the deletion of the "significant purpose" test in limb (b) of **Note 8 on Rule 9.1**, such that the "significant interest" test in limb (a) of **Note 8 on Rule 9.1** would become the sole test for determining whether a "chain principle" mandatory offer is required, other than in exceptional circumstances; and

(b) that the threshold at which relative values would be considered to be "significant" for the purposes of the "significant interest" test in limb (a) of **Note 8 on Rule 9.1** should be reduced from 50% to 30%.

(b) Background

5.2 The rationale for the mandatory offer requirement in **Rule 9.1** is that, if a person acquires or consolidates control of a company, other shareholders should be offered a cash exit opportunity as they may not want to remain in the company once the control position has changed. In addition, underpinned by the requirement for equivalent treatment in **General Principle 1**, if a premium price was paid in order to acquire or consolidate control, all shareholders should be offered that premium price.

5.3 This rationale can apply equally in cases where control (as defined in the Code) of a company to which the Code applies passes indirectly, by virtue of a person acquiring more than 50% of the voting rights of a company which has control of the company to which the Code applies, e.g. "**Acquirer A**" acquires "**Company B**" which, in turn, controls "**Company C**" (to which the Code applies). This is because:

(a) the identity and strategy of Acquirer A may have a material effect on the attractiveness of remaining as a shareholder in Company C once it is controlled by Acquirer A; and

(b) Acquirer A may have ascribed a premium value to the shareholding in Company C in calculating the price it is prepared to pay for the Company B shares.

5.4 This situation is addressed in **Note 8 on Rule 9.1**, which envisages that, in certain circumstances, Acquirer A may be required to make a mandatory offer to the other shareholders in Company C (the "**chain principle**").

5.5 Whilst the philosophy behind requiring a chain principle offer could be applied to any situation in which there is an "A, B, C" chain, the relevant provisions of the Code have always been cast as a presumption that a chain principle offer will not, in fact, be required

unless at least one of two tests of "significance" is satisfied. Currently, these tests are as follows:

(a) the "**limb (a) test**" is satisfied if the interest in shares which Company B has in Company C is "*significant*" in relation to Company B. In assessing significance, **Note 8 on Rule 9.1** stipulates that the Panel will consider factors including the assets, profits and market values of the respective companies, and that relative values of 50% or more will normally be regarded as significant; and

(b) the "**limb (b) test**" is satisfied if securing control of Company C "*might reasonably be considered to be a significant purpose*" of acquiring control of Company B. There is no guidance in the Code on how to interpret "*a significant purpose*" for the purposes of the limb (b) test.

(c) Development of the chain principle tests

5.6 Since the chain principle's inception in the 1970s, the chain principle tests have been strengthened such that it has become increasingly likely that one of the tests will be satisfied:

(a) originally, the limb (a) test required the holding in Company C to constitute a "substantial part" of the assets of Company B, with no reference to profits or market values. This was generally interpreted by the Executive to mean a threshold of approximately 80%;

(b) the original limb (b) test was triggered if "the main purpose" of Acquirer A acquiring Company B shares was to secure control of Company C. This was generally interpreted by the Executive to be relevant only where the limb (a) test produced an anomalous result (for example, where other Company B assets were liquid). On this interpretation, the limb (b) test was essentially an anti-avoidance mechanism which would rarely have been in point;

(c) in 1985, the limb (b) test was changed so that securing control of Company C was no longer required to be "the main purpose" of acquiring control of Company B but rather "one of the main purposes";

(d) in the early 1990s, the Executive began, in practice, to apply the limb (a) test to a basket of measures and not simply "assets". This change in approach was codified in 1998, with the test being amended so as to refer also to profits and market values. At the same time, the reference in limb (a) to a "substantial part", which had been interpreted as an 80% threshold, was replaced by the current reference to "significant", together with an express statement that relative values of 50% would normally be regarded as significant;

(e) in PCP 2009/2, the Code Committee proposed a further strengthening of the chain principle by:

(i) lowering the meaning of "significant" for the purposes of the limb (a) test from 50% to 30%; and

(ii) amending the limb (b) test so that securing control of Company C was no longer required to be "one of the main purposes" of acquiring Company B, but rather that it "might reasonably be considered to be a significant purpose" thereof. The aim of this amendment was both to lower the test (by removing "one of the main purposes") and to rebalance it away from Acquirer A's subjective views (by introducing "might reasonably be considered"), thereby making the test more objective and easier to apply in practice; and

(f) the proposed amendments to the limb (b) test were adopted in RS 2009/2, but the proposed amendment to the limb (a) test was not. This was primarily because the Code Committee:

(i) was concerned that making the proposed amendments to both the limb (a) and the limb (b) tests would automatically result in an increase in the number of chain principle offers. This would have created a risk that Company B's shareholder value would be adversely affected (as the cost of a chain principle offer would be factored into any offer for Company B), the possible market impact of which the Code Committee considered to be undesirable; and

(ii) considered that the practical difficulties presented by the pre-2009 rules (in particular, the difficulty in making an objective judgement about whether securing control of Company C was one of Acquirer A's "main purposes" in acquiring over 50% of the voting rights in Company B) would be largely met by the adoption of the proposed amendments to the limb (b) test.

(d) Issues with the chain principle tests

5.7 The application of the post-2009 chain principle tests has continued to present certain practical issues. In particular, the Executive considers the limb (b) test to have become the *de facto* key test, as its relatively low threshold is likely to be satisfied in every case where the limb (a) test is also satisfied, and also in many where it is not. As a result, the more objective limb (a) test has, in effect, been rendered redundant.

5.8 In addition, exactly what does and does not constitute "a significant purpose" for the limb (b) test, and therefore the point at which a chain principle offer would and would not

be required, is opaque. Consequently, it is difficult for the Executive to give an *ex parte* ruling as to whether the limb (b) test is or, more particularly, is not engaged. This gives rise to considerable uncertainty for potential acquirers of Company B as to whether they will be required to make a chain principle offer. Such uncertainty is especially undesirable because a mandatory offer for Company C would be a major undertaking, potentially requiring a significant additional cash outlay.

(e) Proposal to amend to the chain principle tests

5.9 The Code Committee considers that it would be preferable to:

(a) reduce the emphasis on subjective judgements of the Panel that is currently inherent in **Note 8 on Rule 9.1**, given the current *de facto* primacy of the limb (b) test; and

(b) increase the certainty for a potential Acquirer A as to the circumstances in which the acquisition of Company B will and will not trigger an obligation for it to make a chain principle offer for Company C.

The Code Committee therefore proposes to delete the limb (b) test, thereby making the more objective limb (a) test the sole test for determining whether a chain principle offer is required, other than in exceptional circumstances.

5.10 At the same time, however, Code Committee is conscious of the historical strengthening of the chain principle tests over the years. The Code Committee considers that simply deleting the limb (b) test, whilst leaving the threshold at which relative values would be considered to be "significant" for the purposes of the limb (a) test at 50%, would be an inappropriate reversal of this historical strengthening and result in the bar for triggering a chain principle offer being set inappropriately high.

5.11 The Code Committee therefore proposes to reduce the threshold in the limb (a) test from 50% to 30%. Whilst it is acknowledged that anything other than requiring an offer in any "A, B, C" chain case is arguably inconsistent with the underlying philosophy of the chain principle, the Code Committee considers, on reflection, that a threshold of 30%, as the sole test other than in exceptional circumstances, strikes an appropriate balance between capturing transactions where Company C is significant to Acquirer A, whilst at the same time not inappropriately impacting the value of Company B.

5.12 The Code Committee further considers that any automatic increase in the number of chain principle offers that might result from the reduction of the limb (a) threshold from 50% to 30% will be offset by the fact that a chain principle offer will no longer be required solely on the grounds that securing control of Company C could reasonably be considered to be a significant purpose of Acquirer A acquiring control of Company B.

5.13 The Code Committee acknowledges that the proposed amendments to **Note 8 on Rule 9.1** would retain an element of flexibility for the chain principle to be applied to situations in which the limb (a) test is not satisfied and, therefore, that the uncertainty currently associated with the application of the chain principle will not be entirely eliminated. However, the Code Committee expects that the Panel will use this flexibility only in exceptional circumstances, for example, where it is apparent that an acquisition has been deliberately structured so as to avoid being caught by the proposed 30% threshold. As such, the level of uncertainty will be substantially reduced as compared with the current position.

(f) Proposed amendments to the Code

5.14 The Code Committee proposes to amend **Note 8 on Rule 9.1** in the light of the above, and to make certain additional amendments to improve its overall clarity, as follows:

> "***8. The chain principle***
>
> *~~Occasionally,~~ If a person or group of persons acting in concert ("Acquirer A") acquire~~s~~ing shares in a company ("Company B") which result~~s~~ing in ~~a~~ Acquirer A holding ~~of~~ over 50% of the voting rights of ~~a c~~Company B (which ~~need~~ may or may not be a company to which the Code applies), Acquirer A ~~will~~ may thereby indirectly ~~acquire~~ obtain or consolidate control, as defined in the ~~Code~~ Definitions Section, of a second company ("Company C") because ~~the first c~~Company B either:*
>
> *(a) ~~itself is interested, either directly or indirectly through intermediate companies, in a controlling block of shares in the second~~ controls ~~c~~Company C~~,~~; or*
>
> *(b) is interested in shares in Company C which, when aggregated with those in which ~~the person or group~~ Acquirer A is already interested ~~in~~, ~~secure or~~ will result in Acquirer A obtaining or consolidating~~e~~ control of ~~the second c~~Company C.*
>
> *The Panel will ~~not~~ normally only require an offer to be made under ~~this~~ Rule 9 in these circumstances ~~unless either:~~*
>
> *~~(a)~~ if the interest in shares which ~~the first c~~Company B has in ~~the second c~~Company C is significant in relation to ~~the first c~~Company B. In assessing this, the Panel will take into account a number of factors including, as appropriate, the assets, profits and market values of the respective companies. Relative values of ~~5~~30% or more will normally be regarded as significant.~~; or~~*
>
> *~~(b) securing control of the second company might reasonably be considered to be a significant purpose of acquiring control of the first company.~~*
>
> *~~The Panel should be consulted in all cases which may come within the scope of this Note to establish whether, in the circumstances, any obligation arises under this Rule.~~*".

Q4 Should the test in limb (b) of Note 8 on Rule 9.1 be deleted such that the test in limb (a) would become the sole test for determining whether a chain principle offer is required, other than in exceptional circumstances?

Q5 Should the threshold at which relative values would be considered to be "significant" for the purposes of the test currently set out in limb (a) of Note 8 on Rule 9.1 be reduced from 50% to 30%?

6. Restrictions following the lapsing of an offer or a statement of no intention to bid

(a) Introduction

6.1 **Section 6** proposes amendments to:

(a) **Note 1(a) on Rules 35.1 and 35.2**, with regard to the circumstances in which an offeror that made a "no increase statement" or an "acceleration statement" in relation to an offer which subsequently lapsed can proceed to make a new offer even though the offeror did not reserve the right to set that statement aside with the agreement of the offeree board;

(b) **Note 2 on Rule 2.5** and **Note 2 on Rule 2.8**, with regard to the period of time for which a potential offeror should be bound by a statement as to the terms on which a possible offer might be made; and

(c) **Note 1(b) on Rules 35.1 and 35.2**, with regard to the circumstances in which an offeror whose offer has lapsed can proceed to make a new offer if a third party announces a firm intention to make an offer for the offeree company.

(b) Background

(i) General Principle 6

6.2 **General Principle 6** provides as follows:

> "**An offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a takeover bid for its securities.**".

6.3 The purpose of **General Principle 6** is often explained in terms of avoiding the board of the offeree company being put under excessive "siege" by an unwelcome offeror.

(ii) Rule 35.1 and Note 1 thereon

6.4 In accordance with **General Principle 6**, **Rule 35.1** imposes various restrictions on an offeror, and persons acting in concert with it, for 12 months following the withdrawal or lapsing of an offer. It provides as follows:

> "**35.1 DELAY OF 12 MONTHS**
>
> **Except with the consent of the Panel, where an offer has been announced or made but has not become or been declared unconditional and has been withdrawn or has lapsed, neither the offeror, nor any person who acted in concert with the offeror in the course of the original offer, nor any person who is subsequently acting in concert with any of them, may within 12 months from the date on which such offer is withdrawn or lapses:**

(a) announce an offer or possible offer for the offeree company (including a partial offer which could result in the offeror and persons acting in concert with it being interested in shares carrying 30% or more of the voting rights of the offeree company);

(b) acquire any interest in shares of the offeree company if the offeror or any such person would thereby become obliged under Rule 9 to make an offer;

(c) acquire any interest in, or procure an irrevocable commitment in respect of, shares of the offeree company if the shares in which such person, together with any persons acting in concert with it, would be interested and the shares in respect of which it, or they, had acquired irrevocable commitments would in aggregate carry 30% or more of the voting rights of the offeree company;

(d) make any statement which raises or confirms the possibility that an offer might be made for the offeree company;

(e) take any steps in connection with a possible offer for the offeree company where knowledge of the possible offer might be extended outside those who need to know in the offeror and its immediate advisers; or

(f) purchase, agree to purchase, or make any statement which raises or confirms the possibility that it is interested in purchasing assets which are significant in relation to the offeree company.".

6.5 **Rule 35.2** explains how the restrictions in **Rule 35.1** apply following a partial offer made under **Rule 36** but is not otherwise relevant for the purposes of the proposals put forward in this Section.

6.6 **Note 1 on Rules 35.1 and 35.2** (referred to hereafter as **Note 1 on Rule 35.1**) provides that the Panel will normally grant a dispensation from the restrictions in **Rule 35.1** only in specific and limited circumstances. It provides as follows:

*"**1. When consent may be given***

The Panel will normally only give its consent under Rule 35.1 if:

(a) the board of the offeree company so agrees. Such consent will not normally be given within three months of the lapsing of an earlier offer in relation to which the offeror made a no increase statement or an acceleration statement without a reservation of the right to set the statement aside in the event of an increased or improved offer being recommended by the board of the offeree company;

(b) a third party announces a firm intention to make an offer for the offeree company;

(c) the offeree company announces a "whitewash" proposal (see Note 1 of the Notes on Dispensations from Rule 9) or a reverse takeover; or

(d) the Panel determines that there has been a material change of circumstances.".

6.7 The reason that the Panel will normally be prepared to grant a dispensation in the circumstances described in paragraphs (a) to (c) of **Note 1 on Rule 35.1** is that the former offeror's proposed action will not be contrary to the purpose of **General Principle 6**, i.e. it will not hinder the board of the offeree company in the conduct of its affairs. This is because:

(a) in the circumstances described in **Note 1(a) on Rule 35.1**, the board will have consented to the proposed action;

(b) in the circumstances described in **Note 1(b) on Rule 35.1**, the conduct of the board's affairs will, in any event, be hindered by the third party's offer; and

(c) in the circumstances described in **Note 1(c) on Rule 35.1**, the board will have decided to undertake a transaction which will result in a third party acquiring or consolidating control of the company.

6.8 However, under the second sentence of **Note 1(a) on Rule 35.1**, a former offeror will not normally be permitted to use the offeree board's agreement as a reason for obtaining the Panel's consent to the making of a new offer (or to the taking of any of the other actions restricted by **Rule 35.1**) within three months of the lapsing of its earlier offer where:

(a) the earlier offer lapsed after the offeror had made a "no increase statement" or an "acceleration statement"; and

(b) the offeror did not reserve the right to set that statement aside in the event of an increased or improved offer being recommended by the offeree board.

6.9 The second sentence of **Note 1(a) on Rule 35.1** was introduced at the same time as the introduction of **Rule 32.2** and **Rule 31.5** in relation to (respectively) no increase statements and no extension statements (now acceleration statements), with the intention of avoiding a situation arising in which a hostile offeror regretted having made an "unreserved" no increase or no extension statement and then tried to extricate itself from the restrictions of **Rule 32.2** or **Rule 31.5** by lapsing its offer and immediately seeking the offeree board's consent to make a new offer for the offeree company (potentially on improved terms). This outcome is avoided through the imposition of what is, in effect, a three-month "freeze" on the offeror re-bidding in reliance on the agreement of the offeree board, upholding the principle that market participants who had made investment decisions (or competing offerors who had acted) on the basis of the no increase or acceleration statement should be able to rely on that statement being binding on the offeror.

(iii) Rule 2.5 and Rule 2.8

6.10 **Rule 2.5(a)** states that a potential offeror will be bound by any statement which it makes as to the terms on which an offer might be made. It provides as follows:

> "**2.5 TERMS AND PRE-CONDITIONS IN POSSIBLE OFFER ANNOUNCEMENTS**
>
> **(a) The Panel must be consulted in advance if, prior to the announcement of a firm intention to make an offer, any person proposes to make a statement in relation to the terms on which an offer might be made for the offeree company. If a potential offeror (or its directors, officials or advisers) makes such a statement and it is not withdrawn immediately if incorrect, the potential offeror will be bound by the statement if an offer for the offeree company is subsequently made, except where it specifically reserved the right not to be so bound in certain circumstances at the time the statement was made and those circumstances subsequently arise or in wholly exceptional circumstances. In particular:**
>
> > **(i) where the statement concerned relates to the price of a possible offer (or a particular exchange ratio in the case of a possible securities exchange offer), any offer made by the potential offeror for the offeree company will be required to be made on the same or better terms** … **; and**
> >
> > **(ii) where the statement concerned includes reference to the fact that the terms of the possible offer "will not be increased" or are "final" or uses a similar expression, the potential offeror will not be allowed subsequently to make an offer on better terms.**".

6.11 **Note 2 on Rule 2.5** explains the time period for which a potential offeror will be bound by a statement to which **Rule 2.5** applies. It provides as follows:

> "***2. Duration of restriction***
>
> *The restrictions imposed by Rule 2.5(a) will normally apply throughout the period during which the offeree company is in an offer period and for a further three months thereafter.*
>
> *However, where a potential offeror has made a statement to which Rule 2.8 applies but the offeree company remains in an offer period, the restrictions imposed by Rule 2.5(a) will normally apply for three months following the making of the statement to which Rule 2.8 applies. See also Rule 2.8(f).*".

6.12 **Rules 2.8(a)** to **(f)** impose on a potential offeror (or other person) which has made a statement that it does not intend to make an offer for an offeree company the same restrictions as are imposed under **Rules 35.1(a)** to **(f)** on an offeror whose offer has been withdrawn or has lapsed, but for a period of six rather than 12 months.

6.13 **Note 2 on Rule 2.8** relates to the circumstances in which a "no intention to bid" statement may be set aside. It provides as follows:

"***2. Setting aside a statement to which Rule 2.8 applies***

(a) The circumstances that a person is permitted to specify in a statement to which Rule 2.8 applies as circumstances in which the statement may be set aside are:

(i) subject to paragraph (b), the board of the offeree company so agreeing;

(ii) a third party (including another publicly identified potential offeror) announcing a firm intention to make an offer;

(iii) the offeree company announcing a "whitewash" proposal (see Note 1 of the Notes on Dispensations from Rule 9) or a reverse takeover;

(iv) the Panel determining that there has been a material change of circumstances; or

(v) where the statement is made outside an offer period, such other circumstances as the person may, with the Panel's prior consent, specify.

(b) Where the statement to which Rule 2.8 applies is made after a third party has announced a firm intention to make an offer, the statement may specify the agreement of the board of the offeree company as a circumstance in which the statement may be set aside only to the extent that such agreement is given after that third party offer has been withdrawn or lapsed.

(c) Where the statement to which Rule 2.8 applies is made after a third party has announced a firm intention to make an offer and the person who made the statement, or any person acting in concert with it, acquires an interest in any shares in the offeree company in the period following the making of the statement and prior to the third party offer being withdrawn or lapsing, the agreement of the board of the offeree company may not be relied on as a reason to set aside the statement after the third party offer has been withdrawn or lapsed.

(d) Where the statement to which Rule 2.8 applies is made by a potential offeror which has made a statement to which Rule 2.5(a)(i) or (ii) applies and which did not reserve the right not to be bound by that statement with the agreement of the board of the offeree company, the board of the offeree company may not, except with the consent of the Panel, agree to the restrictions in Rule 2.8(f) being set aside for three months following the date on which the statement to which Rule 2.8 applies is made.".

(c) Offeree board agreement

6.14 Under the first sentence of **Note 1(a) on Rule 35.1**, a former offeror will normally be permitted to make a new offer "*if the board of the offeree company so agrees*". However, the three month "freeze" period in the second sentence of **Note 1(a) on Rule 35.1** applies where "*the offeror made a no increase statement or an acceleration statement without a reservation of the right to set the statement aside in the event of an increased or improved offer being recommended by the board of the offeree company*".

6.15 The Code Committee notes that the two sentences of **Note 1(a) on Rule 35.1** are not entirely consistent, in that there may be circumstances where the offeree board "agrees"

to the former offeror making a new offer even though the board does not intend to "recommend" that offeree company shareholders should accept the offer.

6.16 The Code Committee proposes to conform the two sentences of **Note 1(a) on Rule 35.1** by amending the second sentence so as to refer to the offeror not having reserved the right to set the no increase statement or acceleration statement aside with the "agreement" of the offeree board.

(d) "More favourable terms"

6.17 On a strict interpretation of the second sentence of **Note 1(a) on Rule 35.1**, a former offeror which had made an unreserved no increase statement or acceleration statement in relation to its earlier offer would not normally be able to obtain the Panel's consent to make any new offer for the offeree company during the three month "freeze" period, notwithstanding the offeree board's agreement.

6.18 The Code Committee understands, however, that where the offeror had made an unreserved no increase statement, the Executive would, in fact, be minded to consent to a new offer being made with the offeree board's agreement within the three month "freeze" period, provided that new offer would be on the same, or less favourable, terms than those of the previous offer (i.e. the Executive would normally only withhold its consent where the new offer was proposed to be made on more favourable terms than those of the previous offer). This is because the mischief that the second sentence of **Note 1(a) on Rule 35.1** is designed to avoid, as described in paragraph 6.9, only arises if the offeror is seeking to make a new offer at a higher price than the previous offer. In addition, where any new offer is on the same or less favourable terms than the previous offer, any market participants who had traded in offeree company shares in reliance on the offeror's previous statement as to the level of its final offer could not be said to have made their investment decisions on the basis of a false premise. The Code Committee agrees with the Executive's interpretation of **Note 1(a) on Rule 35.1** and considers that it should be codified.

6.19 The Code Committee considers that **Note 1(a) on Rule 35.1** should apply in the same way if the former offeror had made an unreserved acceleration statement, as opposed to (or in addition to) an unreserved no increase statement. This is on the basis that since, under **Rule 32.1(c)**, no revised offer document may be published after the date which is 14 days prior to the revised unconditional date, an acceleration statement will also be tantamount to (or will in due course, in effect, become) a no increase statement.

6.20 In the light of the above, the Code Committee proposes to amend the second sentence of **Note 1(a) on Rule 35.1** so as to provide that, where the former offeror had made an unreserved no increase statement or acceleration statement, the Panel will not normally

give its consent under the first sentence of **Note 1(a) on Rule 35.1** to the taking of any of the actions referred to in **Rule 35.1** in respect of a new offer or transaction which would be on "more favourable terms" than those made available under the previous offer.

(e) Duration of restricted period under Note 1(a) on Rule 35.1

6.21 Under the second sentence of **Note 1(a) on Rule 35.1**, if a former offeror did not reserve the right to set aside its no increase statement or acceleration statement with the agreement of the offeree board, the Panel will not normally give that offeror its consent under **Rule 35.1** to make a new offer in reliance on the offeree board's agreement "*within three months of the lapsing of [the] earlier offer*". The Code Committee has considered the application of **Note 1(a) on Rule 35.1** in the context of a competitive situation.

6.22 By way of example, an offeror ("**Offeror A**") may make a "final" offer for the offeree company without reserving the right to set the no increase statement aside, either in the event of a competitive situation arising or with the agreement of the offeree board. If, during the course of the offer period, a second offeror ("**Offeror B**") subsequently emerges, Offeror A will then be unable to increase its offer. If Offeror A's offer lapses as a result of a relevant condition not being satisfied, Offeror B will then normally have a period of three months from the lapsing of Offeror A's offer in which to complete its offer, safe in the knowledge that, owing to the second sentence of **Note 1(a) on Rule 35.1**, Offeror A will not be able to use the offeree board's agreement to make a new (higher) offer within that period.

6.23 However, Offeror B may not, in fact, be able to complete its offer within a period of three months if, for example, its offer is conditional upon one or more official authorisations or regulatory clearances which are likely to take more than that period of time to obtain. Offeror B may therefore be fearful that, after a period of three months, Offeror A will seek to agree the terms of a higher offer with the board of the offeree company and then seek the consent of the Panel to make that new offer in accordance with the first sentence of **Note 1(a) on Rule 35.1**.

6.24 The Code Committee considers that, in such circumstances, Offeror A, having voluntarily made an unreserved no increase statement, should be held to the terms of that statement until after Offeror B's offer has either completed or lapsed. In addition, the Code Committee considers that market participants should have clarity that, where Offeror A's offer has been expressed to be "final", with no reservations, they are able to make their investment decisions on the basis that Offeror A will not be able to make a new (higher) offer unless Offeror B's offer lapses in accordance with its terms.

6.25 The Code Committee therefore proposes to amend the second sentence of **Note 1(a) on Rule 35.1** so that the "freeze" period applicable to a former offeror that did not reserve

the right to set aside its no increase statement or acceleration statement with the agreement of the offeree board would run until the later of:

(a) three months from the date on which its earlier offer was withdrawn or lapsed; and

(b) the end of the offer period.

(f) Duration of restricted periods under Note 2 on Rule 2.5 and Note 2(d) on Rule 2.8

6.26 Under **Note 2 on Rule 2.5**, a potential offeror will be bound by a statement as to the terms of its possible offer for the offeree company (subject to any reservations not to be so bound):

(a) for the duration of the offer period and for a period of three months thereafter; or

(b) if the offeree company remains in an offer period after the potential offeror makes a "no intention to bid" statement under **Rule 2.8**, for three months following the date of that statement.

6.27 In the light of its conclusion in section 6(e) with regard to **Note 1(a) on Rule 35.1**, the Code Committee has considered the application of **Note 2 on Rule 2.5** in the context of a competitive situation.

6.28 By way of example, following a firm offer being announced by an offeror ("**Offeror C**"), a potential offeror ("**Offeror D**") may announce that it is considering a possible offer for the offeree company on specified terms. That announcement by Offeror D may include a statement that the terms of the possible offer are "final", without reserving the right not to be bound by the statement in any specified circumstances. Offeror D may subsequently make a "no intention to bid" statement, such that Offeror D would then be unable to make an offer for the offeree company for the six month period referred to in **Rule 2.8**. However, Offeror C may not be able to complete its offer within that six month period if, for example, its offer is conditional upon one or more official authorisations or regulatory clearances which are likely to take more than that period of time to obtain.

6.29 The Code Committee considers that, as is currently the case, Offeror D should be permitted to announce an offer or possible offer for the offeree company once the period of six months referred to in **Rule 2.8** has expired (or in any other circumstances specified in Offeror D's "no intention to bid" statement as being circumstances in which the statement may be set aside). However, the Code Committee considers that, since Offeror D would have voluntarily made an unreserved statement under **Rule 2.5** as to the terms of its possible offer, it should be bound by the terms of that statement until after Offeror C's offer has either completed or lapsed (i.e. that the treatment of Offeror D under

Note 2 on Rule 2.5 should be consistent with the proposed treatment of Offeror A under **Note 1(a) on Rule 35.1**, as set out in paragraph 6.25 above).

6.30 The Code Committee therefore proposes to amend **Note 2 on Rule 2.5** so that a potential offeror would be bound by a statement to which **Rule 2.5** applies until the later of:

(a) three months from the date of any "no intention to bid" statement made under **Rule 2.8**; and

(b) the end of the offer period.

6.31 In addition, the Code Committee proposes to make an equivalent amendment to **Note 2(d) on Rule 2.8**, as set out in paragraph 6.35 below.

(g) Firm offer by a third party

6.32 As explained above:

(a) paragraph (ii) of **Note 2(a) on Rule 2.8** provides that the circumstances that a person is permitted to specify as circumstances in which a "no intention to bid" statement may be set aside include "*a third party (including another publicly identified potential offeror) announcing a firm intention to make an offer*"; and

(b) **Note 1(b) on Rule 35.1** provides that the Panel will normally grant a former offeror a dispensation from the restrictions in **Rule 35.1** if "*a third party announces a firm intention to make an offer for the offeree company*".

6.33 The Code Committee considers that **Note 2(a)(ii) on Rule 2.8** and **Note 1(b) on Rule 35.1** should be applied consistently with each other. However, since **Note 2(a)(ii) on Rule 2.8** refers to a firm offer being announced by "*a third party (including another publicly identified potential offeror)*", whereas **Note 1(b) on Rule 35.1** refers simply to a "*a third party*", there is scope for doubt as to whether the third party referred to in **Note 1(b) on Rule 35.1** includes a potential offeror which had been publicly identified prior to the date on which the former offeror's previous offer lapsed or was withdrawn.

6.34 The Code Committee considers that, consistent with **Note 2(a)(ii) on Rule 2.8**, a third party referred to in **Note 1(b) on Rule 35.1** should include such a potential offeror and, in order to remove any doubt, proposes to amend **Note 1(b) on Rule 35.1** accordingly.

(h) Proposed amendments to the Code

6.35 In the light of the above, the Code Committee proposes to:

(a) amend **Notes 1(a) and (b) on Rule 35.1**, as follows:

"***1. When consent may be given***

The Panel will normally only give its consent under Rule 35.1 if:

(a) the board of the offeree company so agrees. ~~Such consent will not normally be given within three months of the lapsing of an earlier offer in relation to which the offeror made a no increase statement or an acceleration statement without a reservation of the right to set the statement aside in the event of an increased or improved offer being recommended by the board of the offeree company;~~ Where the offeror made a no increase statement or an acceleration statement without a reservation of the right to set the statement aside with the agreement of the offeree board, the Panel will not normally give its consent in relation to a new offer, or any other transaction restricted by Rule 35.1, on more favourable terms than those available under the previous offer until after the later of:

(i) three months from the date on which the previous offer was withdrawn or lapsed; and

(ii) the end of the offer period;

(b) a third party (including a potential offeror which had been publicly identified prior to the date on which the previous offer was withdrawn or lapsed) announces a firm intention to make an offer for the offeree company;";

(b) amend **Note 2 on Rule 2.5**, as follows:

"***2. Duration of restriction***

The restrictions imposed by Rule 2.5(a) will normally apply ~~throughout the period during which the offeree company is in an offer period and for a further three months thereafter.~~ until the later of:

(a) three months from the date on which the potential offeror makes a statement to which Rule 2.8 applies; and

(b) the end of the offer period.

~~However, where a potential offeror has made a statement to which Rule 2.8 applies but the offeree company remains in an offer period, the restrictions imposed by Rule 2.5(a) will normally apply for three months following the making of the statement to which Rule 2.8 applies.~~

See also Rule 2.8(f)."; and

(c) amend **Note 2(d) on Rule 2.8**, as follows:

"***2. Setting aside a statement to which Rule 2.8 applies***

…

(d) Where the statement to which Rule 2.8 applies is made by a potential offeror which has made a statement to which Rule 2.5(a)(i) or (ii) applies and which did not reserve the right not to be bound by that statement with the agreement of the board of the offeree company, the board of the offeree company may not, except with the consent of the Panel, agree to the restrictions in Rule 2.8(f) being set aside ~~for~~ until the later of:

(i) three months following the date on which the statement to which Rule 2.8 applies is made; and

(ii) the end of the offer period.".

Q6 Should Note 1 on Rules 35.1 and 35.2, Note 2 on Rule 2.5 and Note 2 on Rule 2.8 be amended as proposed in relation to the restrictions following the lapsing of an offer or a statement of no intention to bid?

7. Minor issues

(a) Application of the definition of "interests in securities" to custodians and depositaries

7.1 The definition of "**interests in securities**" in the Definitions Section of the Code provides as follows:

> "A person who has long economic exposure, whether absolute or conditional, to changes in the price of securities will be treated as interested in those securities. A person who only has a short position in securities will not be treated as interested in those securities.
>
> In particular, a person will be treated as having an interest in securities if the person:
>
> (1) owns them;
>
> …".

7.2 Whether or not a person is interested in securities is relevant to various requirements of the Code, including the timing restrictions on acquisitions under **Rule 5**, the disclosure of dealings and positions under **Rule 8** and the requirement to make a mandatory offer under **Rule 9**.

7.3 It is well-established practice that a custodian or depository is not treated as interested in relevant securities for the purposes of the Code. This is because the custodian or depository simply holds the securities on a bare trust for, and at the direction of, the beneficial owner. However, the Code Committee understands that the Executive is frequently asked to confirm that custodians or depositories are not treated as being interested in securities and that it would be useful for this to be stated in the Code.

7.4 The Code Committee therefore proposes to introduce a new **Note 10 on the definition of interests in securities** as follows:

> "***10. Custodians and depositories***
>
> *A bank acting as a custodian or depository in the normal course of its business will not be treated as having an interest in the securities it holds as a result of that activity.*".

(b) Wording of Rule 9.1(a)

7.5 **Rule 9.1(a)** provides that, except with the consent of the Panel, when any person acquires, whether by a series of transactions over a period of time or not, an interest in shares which (taken together with shares in which persons acting in concert with that person are interested) carry 30% or more of the voting rights of a company, such person shall extend offers, on the basis set out in **Rule 9.3** and **Rule 9.5**, to the holders of any

class of equity share capital whether voting or non-voting and also to the holders of any other class of transferable securities carrying voting rights.

7.6 **Rule 9.1(a)** implements paragraph 7(1) of Schedule 1C to the Companies Act 2006, which provides as follows:

> "7.(1) Rules must ensure that a person ("P") is required to make a takeover bid ("a mandatory takeover bid") where—
>
> (a) P, or any person acting in concert with P, has acquired securities in a company, and
>
> (b) the acquired securities, when added to any existing securities held by P or by persons acting in concert with P, directly or indirectly give P control of that company.".

7.7 In order to align it more closely with paragraph 7(1) of Schedule 1C, the Code Committee proposes to make minor amendments to **Rule 9.1(a)**, as follows:

> "**9.1 WHEN A MANDATORY OFFER IS REQUIRED AND WHO IS PRIMARILY RESPONSIBLE FOR MAKING IT**
>
> **Except with the consent of the Panel, when:**
>
> **(a) any person acquires~~, whether by a series of transactions over a period of time or not,~~ an interest in shares which (taken together with shares in which the person or any person~~s~~ acting in concert with that person ~~are~~ is interested) carry 30% or more of the voting rights of a company;** …
>
> …
>
> **such person shall extend offers** …".

(c) Requirement for a "Rule 9 waiver" circular to include the offeree board's opinion on the offeror's plans

7.8 **Note 1 of the Notes on Dispensations from Rule 9** provides that the obligation that would otherwise arise for a mandatory offer to be made may be waived if that obligation arises as a result of the issue of new shares and this is approved by a vote of independent shareholders in general meeting. This is currently referred to in the Code as a "**whitewash**". However, the Code Committee intends to replace the term "whitewash" with the term "**Rule 9 waiver**" and to make other minor related amendments to the relevant provisions of the Code (see further below).

7.9 **Appendix 1** of the Code sets out the procedure to be followed where a Rule 9 waiver is sought, which includes the "offeree company" sending a circular to its shareholders setting out the details of the proposals and seeking the approval of the proposals by an independent vote.

7.10 The Rule 9 waiver circular must contain the information and statements, and comply appropriately with the relevant Rules of the Code, as set out in **Section 4 of Appendix 1**. **Section 4** requires the circular to comply with **Rule 24.2** (*Intentions of the offeror with regard to the business, employees and pension scheme(s)*), but does not specifically require the circular to comply with **Rule 25.2** (*Views of the offeree board on the offer, including the offeror's plans for the company and its employees*). However, the Code Committee understands that the Executive's practice is nevertheless to require a Rule 9 waiver circular to comply with **Rule 25.2**. This is consistent with **General Principle 2**, which states:

> "**2.(2) Where it advises the holders of securities, the board of directors of the offeree company must give its views on the effects of implementation of the takeover bid on:**
>
> **(a) employment;**
>
> **(b) conditions of employment; and**
>
> **(c) the locations of the company's places of business.**".

7.11 The Code Committee agrees that a Rule 9 waiver circular should comply with **Rule 25.2** and therefore proposes to amend **Section 4 of Appendix 1**, as follows:

> "**4 ~~WHITEWASH~~ RULE 9 WAIVER CIRCULAR**
>
> **The circular must contain the following information and statements and comply appropriately with the Rules of the Code as set out below:**
>
> …
>
> **(j) Rules 23, 24.2, 24.3, 25.2 and 25.3 (offeror intentions, financial and other information, and views of the offeree board). ~~information which must include f~~Full details of the assets, if any, being injected must be included~~);~~**".

7.12 As mentioned above, the Code Committee also intends to replace the term "whitewash" with the term "Rule 9 waiver" in, and to make the other minor related amendments to:

(a) **Note 2(a) on Rule 2.8**;

(b) **Note 4 on Rule 5.1** and **Note 2 on Rule 5.3**;

(c) **Rule 7.3**;

(d) **Notes 1**, **6**, **10** and **11 on Rule 9.1**;

(e) **Notes 1** (see further below), **2**, **3**, **5** and **6 of the Notes on Dispensations from Rule 9**;

(f) **Notes 3** and **4 on Rule 21.2**;

(g) **Note 1(c) on Rules 35.1 and 35.2**;

(h) **Rule 36.6**;

(i) **Rule 37.1** and **Notes 3**, **5**, **6** and **7 on Rule 37.1**; and

(j) **Appendix 1** (see further below),

as set out in **Appendix A**.

7.13 In the case of **Note 1 of the Notes on Dispensations from Rule 9**, the Code Committee intends to delete a number of provisions which are duplicated in **Appendix 1**. In addition, in the case of **Appendix 1**, the Code Committee intends to delete a number of provisions which it considers to be redundant.

(d) Disclosure of ratings and outlooks under Rule 24.3

7.14 **Rule 24.3(c)** provides that, except with the consent of the Panel, the offer document must contain summary details of any current ratings and outlooks publicly accorded to the offeror and the offeree company by ratings agencies prior to the commencement of the offer period, any changes made to previous ratings or outlooks during the offer period, and a summary of the reasons given, if any, for any such changes.

7.15 The Code Committee is concerned that, as currently drafted, **Rule 24.3(c)** would not capture a situation where a ratings agency first published a rating or outlook in relation to the offeror or the offeree company after the commencement of the offer period but prior to the publication of the offer document. The Code Committee also considers that it should be made clear that the reference to ratings agencies is to credit ratings agencies.

7.16 The Code Committee therefore proposes to delete the words "**prior to the commencement of the offer period**" from **Rule 24.3(c)** and to insert the word "**credit**", as follows:

> "**24.3 FINANCIAL AND OTHER INFORMATION ON THE OFFEROR, THE OFFEREE COMPANY AND THE OFFER**
>
> **Except with the consent of the Panel:**
>
> …
>
> **(c) the offer document must contain summary details of any current ratings and outlooks publicly accorded to the offeror and the offeree company by credit ratings ~~prior to the commencement of the offer period~~, any changes made to previous ratings or outlooks during the offer period, and a summary of the reasons given, if any, for any such changes;**".

(e) Timing of the publication of documents on a website

7.17 Under **Rule 26.1(a)(i)**, any document or information in relation to an offer that is sent to offeree company shareholders by the offeror or offeree company in accordance with **Rule 30.2** (including, for example, the offer document) must be published on a website "*promptly following the publication of the relevant document, announcement or information and in any event by no later than 12 noon on the following business day*".

7.18 Under **Rule 24.1(c)**, an offeror is required to publish the offer document on its website "*[p]romptly following its publication*". Equivalent requirements apply in relation to the publication of the offeree board circular under **Rule 25.1(c)**, a revised offer document under **Rule 32.1(a)** and the offeree board's opinion on a revised offer under **Rule 32.6(a)**.

7.19 The Code Committee understands that, on occasion, the discrepancy between the requirement in **Rule 26.1(a)(i)** to publish a document "*promptly following [its] publication … and in any event by no later than 12 noon on the following business day*" and the requirements in **Rules 24.1(c)**, **25.1(c)**, **32.1(a)** and **32.6(a)** to publish a document "*[p]romptly following its publication*" has caused confusion among advisers to offerors and offeree companies.

7.20 The Code Committee therefore proposes to make minor amendments so as to make clear that the relevant document should be published on a website in accordance with the requirements of **Rule 26.1(a)**. The proposed amendments to each of **Rules 24.1(c)**, **25.1(c)**, **32.1(a)** and **32.6(a)** (including the renumbering of **Rule 32.6(a)(iii)** as **Rule 32.6(b)**) are set out in **Appendix A**. In addition, minor amendments would be made to **Note 1 on Rule 25.9** and **Rule 32.1(b)**, and **Rule 32.6(b)** would be renumbered as **Rule 32.6(c)**, as set out in **Appendix A**.

(f) Removal of the requirement to send documents in hard copy form

7.21 **Rule 30.5** relates to the distribution of documents, announcements and information to the Panel and the advisers to the other parties to an offer, including requirements to send documents in hard copy form and electronic form.

7.22 **Appendix 5** of the Code relates to tender offers and the procedure to be followed where a tender offer is proposed. A tender offer is required to be made either by means of the publication of a paid advertisement in two national newspapers or by sending a circular to shareholders (depending on the circumstances). Under **Section 2(f) of Appendix 5**, a copy of the final text of the advertisements or circulars must be sent to the Financial Conduct Authority (the "**FCA**"), the relevant UK regulated market or UK multilateral trading facility, and the Panel in hard copy form and electronic form. In addition,

Section 2(g) of Appendix 5 includes a requirement for certain documents to be sent to the Panel in hard copy form and electronic form.

7.23 The Code Committee considers that the requirement to send documents to the Panel and advisers in hard copy form as well as electronic form is no longer necessary, and that it should be removed.

7.24 The Code Committee also considers that it is no longer appropriate to specify the manner in which documents should be provided to the FCA and to the relevant UK regulated market or UK multilateral trading facility, as that is a matter for the relevant entity.

7.25 In the light of the above, the Code Committee proposes to:

(a) amend **Rule 30.5(a)** and **Rule 30.5(b)**, as follows:

"**30.5 DISTRIBUTION OF DOCUMENTS, ANNOUNCEMENTS AND INFORMATION TO THE PANEL AND OTHER PARTIES TO AN OFFER**

(a) Before an offer document is published, a copy of the document in ~~hard copy form and~~ electronic form must be sent to the Panel. At the time of publication, a copy must also be sent in ~~hard copy form and~~ electronic form to the advisers to all other parties to the offer.

(b) Copies of all other documents, announcements and information published in connection with an offer by, or on behalf of, an offeror or the offeree company must at the time of publication be sent in electronic form to:

(i) the Panel; and

(ii) the advisers to all other parties to the offer.

~~Documents must also be sent in hard copy form to the Panel and the advisers to all other parties to the offer at the time of publication.~~ Such documents, announcements or information must not be released to the media under an embargo.";

(b) amend **Section 2(f) of Appendix 5**, as follows:

"**2 PROCEDURE AND CLEARANCE**

…

(f) In every case the FCA, the relevant UK regulated market or UK multilateral trading facility and the Panel must be sent a copy of the final text of the advertisements or circulars ~~in hard copy form and electronic form~~ at the same time as they are sent to the newspapers or are published."; and

(c) amend **Section 4 of Appendix 5**, as follows:

"**4 CIRCULARS FROM THE BOARD OF THE OFFEREE COMPANY**

A copy of any document published by the board of the offeree company in connection with the tender offer must be sent to the Panel in ~~hard copy form and~~ electronic form at the same time as it is published.".

(g) The default auction procedure under Appendix 8 of the Code

7.26 **Rule 32.5** provides as follows:

"**32.5 COMPETITIVE SITUATIONS**

If a competitive situation continues to exist in the later stages of the offer period, the Panel will normally require revised offers to be announced in accordance with an auction procedure, the terms of which will be determined and announced by the Panel. That procedure will normally follow the auction procedure set out in Appendix 8. However, the Panel will consider applying any alternative procedure which is agreed between competing offerors and the board of the offeree company. Under any auction procedure, the Panel may set a deadline by which any revised offer document must be sent to offeree company shareholders and persons with information rights.".

7.27 Where the parties to the offer do not agree a "bespoke" auction procedure, the "default" procedure set out in **Appendix 8** of the Code applies. **Sections 2(a)**, **2(b)** and **3(a) of Appendix 8** provide that, in these circumstances:

"**2 GENERAL**

(a) Except with the consent of the Panel, the latest time by which either competing offeror may announce or make a revised offer, other than in accordance with the auction procedure, is 5.00 pm on Day 46.

(b) If a competitive situation continues to exist at 5.00 pm on Day 46, a competing offeror may announce a revised offer thereafter only in accordance with the auction procedure.

…

3 AUCTION DAYS 1 TO 4

(a) The auction procedure will commence on Auction Day 1. Either or both of the competing offerors may announce a revised offer on Auction Day 1. If neither competing offeror announces a revised offer on Auction Day 1, the auction procedure will end at 5.00 pm on Auction Day 1.".

Under the **Definitions and Interpretation** section of **Appendix 8**, "**Auction Day 1**" is defined as the business day immediately following Day 46.

7.28 The Code Committee understands that, in previous cases in which a default auction procedure as set out in **Appendix 8** has applied, certain parties have questioned what would happen if one of the competing offerors were to make a no increase statement in accordance with **Rule 32.2** (whether or not accompanied by a final price increase) shortly

before 5.00 pm on Day 46 and, in particular, if this would mean that the auction would not take place. It was noted that, if this were to be the case, the competing offeror which had not made a no increase statement might not have sufficient time to react to this development by announcing its own revised offer prior to 5.00 pm on Day 46 and might also be precluded from doing so subsequently by virtue of **Section 2(b) of Appendix 8**.

7.29 In the light of the above, in recent cases involving a default auction procedure under **Appendix 8**, the Executive's practice has been to require that, if one competing offeror were to make a no increase statement on or shortly before Day 46, the auction procedure would not commence but the other competing offeror would have a short period of time, typically one or two business days, in which to announce a revised offer.

7.30 The Code Committee agrees that it should not be permissible for one competing offeror to seek to gain a tactical advantage over the other competing offeror (by denying that other competing offeror the opportunity of announcing a revised offer) by making a no increase statement shortly before the deadline specified in **Section 2(a) of Appendix 8**. The Code Committee considers that the outcome achieved by the Executive's recent practice should be incorporated into the default auction procedure by clarifying in **Section 2 of Appendix 8** that, in such circumstances, the offeror which had not made a no increase statement would be allowed to announce a revised offer on Auction Day 1 in accordance with **Section 3(a) of Appendix 8**.

7.31 The Code Committee therefore proposes to introduce a new **Section 2(c) of Appendix 8**, as follows:

> "**(c) If one competing offeror makes a no increase statement either on the day prior to Day 46 or on Day 46 (before 5.00 pm), the other competing offeror may announce a revised offer on Auction Day 1 in accordance with Section 3(a).**".

7.32 The current paragraphs (c) to (j) of **Section 2 of Appendix 8** would, as a consequence, become paragraphs (d) to (k).

Q7 Should the minor amendments to the Code set out in Section 7 of the PCP be adopted as proposed?

8. Assessment of the impact of the proposals

(a) Introduction

8.1 The amendments proposed in this PCP relate to various different provisions of the Code and there is no over-arching theme to the proposals.

(b) Requirement for a potential offeror to disclose an obligation to offer a minimum level, or particular form, of consideration

8.2 The amendments proposed in Section 2 would introduce requirements for a potential offeror:

(a) at the beginning of an offer period, to disclose any minimum level, or particular form, of consideration that it would be obliged to offer to offeree company shareholders under **Rule 6** or **Rule 11**; and

(b) during an offer period, to announce any acquisition which would trigger a requirement for any minimum level, or particular form, of consideration under **Rule 6** or **Rule 11**.

8.3 The fact that any offer made by a potential offeror would have to be at not less than a particular level, or in a particular form, is material information for shareholders in the offeree company and other market participants, and should be disclosed or announced as soon as practicable. The Code Committee considers that the amendments proposed in Section 2 will be of benefit to offeree company shareholders and other market participants and that they will not place any significant new burdens on parties to offers or have any significant additional cost implications.

(c) Restriction on acquisitions of interests in shares by a mandatory offeror at the end of the offer timetable

8.4 The amendments proposed in Section 3 would restrict a mandatory offeror from acquiring additional interests in shares in the offeree company in the 14 days up to and including the unconditional date of an offer and in the 14 days prior to the expiry of an ACIN.

8.5 The Code Committee considers that the amendments proposed in Section 3 will ensure that an offeree company shareholder will be able to make its acceptance decision knowing the maximum percentage of the offeree company shares in which the mandatory offeror would be interested if the offer lapsed, and that they will not place any significant new burdens on parties to offers or have any additional cost implications.

8.6 Whilst the proposed amendments will mean that a mandatory offeror is not able to consolidate control by acquiring additional interests in shares in the offeree company in

the last 14 days of an offer period, the Code Committee notes that a voluntary offeror is already restricted from acquiring control (and triggering the requirement for a mandatory offer) during this period.

(d) The "look-back period" for determining the price of a mandatory offer

8.7 The amendments proposed in Section 4 would clarify the "look-back period" for determining the minimum price of a mandatory offer. The Code Committee believes that the proposed amendments will not place any significant new burdens on parties to offers or have any significant cost implications.

(e) The chain principle

8.8 The amendments proposed in Section 5 would amend the tests for determining whether the chain principle should be applied so as to require a person to make a mandatory offer. If the Code is amended as proposed, the sole test for determining whether Acquirer A is required to make a chain principle offer (other in exceptional circumstances) would be the more objective limb (a) test, i.e. whether the interest in shares which Company B has in Company C is significant in relation to Company B. The threshold at which relative values would be considered to be "significant" for the purposes of the test would be reduced from 50% to 30%.

8.9 The Code Committee considers that the proposed amendments would reduce the emphasis on subjective judgements of the Panel and bring more certainty to the triggering of the chain principle. This should also reduce the risk of the cost of a chain principle offer being factored into an offer for Company B unnecessarily. The Code Committee notes that the potential increase in the number of chain principle offers that might result from the reduction of the limb (a) threshold from 50% to 30% should be offset by the fact that a chain principle offer will no longer be required solely on the grounds that securing control of Company C could reasonably be considered to be a significant purpose of acquiring control of Company B. The Code Committee also notes that chain principle offers have been rare in practice for a number of years. Accordingly, the Code Committee believes that the amendments proposed in Section 5 will be of benefit to offerors and market participants by providing clarity, and that they will not have a negative impact on offeree company shareholders, place any significant new burdens on parties to offers or have any additional cost implications.

(f) Restrictions following the lapsing of an offer or a statement of no intention to bid

8.10 The amendments proposed in Section 6 would make various amendments with regard to:

(a) the circumstances in which an offeror that made a no increase statement or an acceleration statement in relation to an offer which subsequently lapsed can proceed to make a new offer where the offeror did not reserve the right to set that statement aside with the agreement of the offeree board;

(b) the period of time for which a potential offeror should be bound by a statement as to the terms on which a possible offer might be made; and

(c) the circumstances in which an offeror whose offer has lapsed can proceed to make a new offer if a third party announces a firm intention to make an offer for the offeree company.

8.11 The Code Committee acknowledges that the proposed amendments will, in some circumstances, extend the period of time for which:

(a) an offeror whose offer has lapsed is restricted from making a new offer with the agreement of the offeree board; and

(b) a potential offeror which has made a statement as to the terms on which a possible offer might be made will be bound by that statement.

However, the Code Committee considers that an offeror or potential offeror that has voluntarily made an "unreserved" no increase statement or an "unreserved" statement as to the terms on which an offer might be made should be bound by the terms of that statement until a competing offeror's offer has either completed or lapsed.

8.12 The proposed amendments will provide clarity to market participants that where an offer or possible offer has been expressed as final with no reservations, they are able to trade on the basis that the offeror or potential offeror will not be able to make a new offer until a competing offer has been resolved. The Code Committee believes that the proposed amendments will not have any additional cost implications.

(g) Minor issues

8.13 The Code Committee believes that the amendments proposed in Section 7 will make incremental improvements to the Code without placing any significant new burdens on parties to offers or resulting in any additional cost implications.

APPENDIX A

Proposed amendments to the Code

DEFINITIONS

Acting in concert

…

NOTES ON ACTING IN CONCERT

…

11. Indemnity and other dealing arrangements

…

(b) …

Such dealing arrangements must be disclosed as required by ~~Note 2 on~~ Rule 2.4(c)(iv), Rule 2.7(c)(xii), Notes 5 and 6 on Rule 8, Rule 24.13 and Rule 25.6.

…

Interests in securities

…

NOTES ON INTERESTS IN SECURITIES

…

10. Custodians and depositories

A bank acting as a custodian or depository in the normal course of its business will not be treated as having an interest in the securities it holds as a result of that activity.

Rule 2.4

2.4 THE ANNOUNCEMENT OF A POSSIBLE OFFER

…

(c) Any announcement which commences an offer period and any subsequent announcement which first identifies a potential offeror must include:

(i) ~~specify~~ the date on which any deadline thereby set in accordance with Rule 2.6(a) will expire; ~~and~~

(ii) ~~include~~ a summary of the provisions of Rule 8 (see the Panel's website at www.thetakeoverpanel.org.uk)~~.~~;

(iii) details of any minimum level, or particular form, of consideration that the potential offeror(s) would be obliged to offer under Rule 6 or Rule 11 (as appropriate); and

(iv) details of any dealing arrangement of the kind referred to in Note 11 on the definition of acting in concert to which the offeree company, a potential offeror or any person acting in concert with the offeree company or a potential offeror is a party.

NOTES ON RULE 2.4

~~***1. Consequences of subsequent acquisitions of interests in shares***~~

~~*The acquisition of an interest in offeree company shares by a potential offeror whose existence has been announced (whether publicly identified or not), or which is a participant in a formal sale process, or by any person acting in concert with it may require immediate announcement by the potential offeror under the Note on Rule 7.1. See also Note 12 on Rule 8.*~~

1. Announcement made without the agreement or approval of a potential offeror

If an announcement is made by the offeree company without the agreement or approval of a potential offeror, the potential offeror must make a further announcement specifying the matters referred to in Rule 2.4(c)(iii) or (iv) (as appropriate) as soon as practicable thereafter.

~~***2. Indemnity and other dealing arrangements***~~

~~*Where the offeree company, an offeror or any person acting in concert with the offeree company or an offeror enters into any dealing arrangement of the kind referred to in Note 11 on the definition of acting in concert before the start of the offer period or the announcement that first identifies the offeror, details of the arrangement must be included in the relevant announcement as required by Notes 6(b) and (c) on Rule 8.*~~

~~*Where a dealing arrangement of the kind referred to above is entered into during the offer period, see Note 6(a) on Rule 8.*~~

2. Minimum level, or particular form, of consideration

Where a potential offeror to which Rule 2.4(c)(iii) applies considers that an adjustment should be made under Note 1 on Rule 6 or under Rule 11.3, the Panel must be consulted as to the terms of the announcement.

Rule 2.5

2.5 TERMS AND PRE-CONDITIONS IN POSSIBLE OFFER ANNOUNCEMENTS

…

NOTES ON RULE 2.5

…

2. Duration of restriction

The restrictions imposed by Rule 2.5(a) will normally apply ~~throughout the period during which the offeree company is in an offer period and for a further three months thereafter.~~ until the later of:

(a) three months from the date on which the potential offeror makes a statement to which Rule 2.8 applies; and

(b) the end of the offer period.

~~*However, where a potential offeror has made a statement to which Rule 2.8 applies but the offeree company remains in an offer period, the restrictions imposed by Rule 2.5(a) will normally apply for three months following the making of the statement to which Rule 2.8 applies.*~~

See also Rule 2.8(f).

Rule 2.8

2.8 STATEMENTS OF INTENTION NOT TO MAKE AN OFFER

…

NOTES ON RULE 2.8

…

2. Setting aside a statement to which Rule 2.8 applies

(a) The circumstances that a person is permitted to specify in a statement to which Rule 2.8 applies as circumstances in which the statement may be set aside are:

…

(iii) the offeree company announcing a ~~"whitewash"~~ Rule 9 waiver proposal (see Note 1 of the Notes on Dispensations from Rule 9) or a reverse takeover;

…

(d) Where the statement to which Rule 2.8 applies is made by a potential offeror which has made a statement to which Rule 2.5(a)(i) or (ii) applies and which did not reserve the right not to be bound by that statement with the agreement of the board of the offeree company, the board of the offeree company may not, except with the consent of the Panel, agree to the restrictions in Rule 2.8(f) being set aside ~~for~~ until the later of:

(i) three months following the date on which the statement to which Rule 2.8 applies is made; and

(ii) the end of the offer period.

Rule 5

5.1 RESTRICTIONS

…

NOTES ON RULE 5.1

…

4. ~~"Whitewashes"~~ Rule 9 waivers

~~This~~ Rule 5.1 does not prohibit a person from obtaining an interest in shares carrying 30% or more of the voting rights in accordance with Note 1 of the Notes on Dispensations from Rule 9.

…

5.3 ACQUISITIONS FROM A SINGLE SHAREHOLDER – CONSEQUENCES

…

NOTES ON RULE 5.3

…

2. Rights or scrip issues and ~~"whitewashes"~~ Rule 9 waivers

The restrictions imposed by ~~this~~ Rule 5.3 do not prevent a person from receiving an entitlement of shares through a rights or scrip issue as long as the person does not increase the percentage of shares carrying voting rights in which it is interested. Nor do they prevent a person from acquiring further interests in shares in accordance with the Notes on Dispensations from Rule 9.

Rule 6

6.1 ACQUISITIONS BEFORE A FIRM OFFER ANNOUNCEMENT

(a) Except with the consent of the Panel in cases falling under (~~a~~i) or (~~b~~ii), when an offeror or any person acting in concert with it has acquired an interest in shares in the offeree company:

(~~a~~i) within the three month period prior to the commencement of the offer period; or

(~~b~~ii) during the period, if any, between the commencement of the offer period and an announcement made by the offeror in accordance with Rule 2.7; or

(~~c~~iii) prior to the three month period referred to in (~~a~~i), if in the view of the Panel there are circumstances which render such a course necessary in order to give effect to General Principle 1,

the offer to the holders of shares of the same class shall not be on less favourable terms.

(b) If an acquisition of an interest in shares in the offeree company has given rise to an obligation under Rule 11, compliance with that Rule will normally be regarded as satisfying any obligation under this Rule in respect of that acquisition.

(c) In the case of an acquisition under Rule 6.1(a)(ii) ~~paragraph (b)~~, an immediate announcement may be required in accordance with ~~the Note on~~ Rule 7.1.

6.2 ACQUISITIONS AFTER A FIRM OFFER ANNOUNCEMENT

…

(b) Immediately after the acquisition, ~~the offeror must announce that a revised offer will be made in accordance with this Rule (see also Rule 32). Whenever practicable, the announcement should also state the nature of the interest, the number of shares concerned and the price paid~~ an appropriate announcement must be made in accordance with Rule 7.1.

Rule 7

~~7.1 IMMEDIATE ANNOUNCEMENT REQUIRED IF THE OFFER HAS TO BE AMENDED~~

~~The acquisition of an interest in offeree company shares by an offeror or any person acting in concert with it may give rise to an obligation under Rule 6 (minimum level of consideration), Rule 9 (mandatory offer) or Rule 11 (nature of consideration to be offered). Immediately after such an acquisition, an appropriate announcement must be made by the offeror. Whenever practicable, the announcement should also state the nature of the interest, the number of shares concerned and the price paid.~~

7.1 IMMEDIATE ANNOUNCEMENT REQUIRED IF AN OBLIGATION UNDER RULE 6, 9 OR 11 IS TRIGGERED

(a) During an offer period, a potential offeror (see Note) must make an immediate announcement if it, or any person acting in concert with it, acquires an interest in shares in the offeree company and, as a result of that or any previous acquisition, the potential offeror would be obliged to offer a minimum level, or a particular form, of consideration under Rule 6 or Rule 11 which has not previously been announced.

(b) After it has announced a firm intention to make an offer, an offeror must make an immediate announcement if it, or any person acting in concert with it, acquires an interest in shares in the offeree company and, as a result, the offeror is obliged to revise its offer under Rule 6, Rule 9.5 or Rule 11 or to make a mandatory offer under Rule 9.1.

(c) Any announcement required under Rule 7.1(a) or (b) must state:

(i) the relevant obligation;

(ii) the nature of the interest in shares that has been acquired and the number of shares concerned; and

(iii) the highest price paid.

A Dealing Disclosure will also be required in accordance with Rule 8.1(b) or Rule 8.4 (as appropriate).

NOTE ON RULE 7.1

Potential offerors

~~The requirement of this~~ Rule 7.1(a) ~~to make an immediate announcement~~ applies to any potential offeror whose existence has been referred to in any announcement (whether

publicly identified or not)~~,~~ or which is a participant in a formal sale process (regardless of whether it was a participant at the time at which the formal sale process was announced). *See also Note 12(a) on Rule 8.~~, either:~~*

~~(a) where a public statement of the level of its possible offer has been made and the potential offeror or any person acting in concert with it acquires an interest in shares above that level; or~~

~~(b) where a third party has announced a firm intention to make an offer and the potential offeror or any person acting in concert with it acquires an interest in shares at above the level of that offer.~~

~~A Dealing Disclosure will also be required in accordance with Rule 8.1(b).~~

…

7.3 PARTIAL OFFERS AND ~~"WHITEWASHES"~~ RULE 9 WAIVERS

The acquisition of an interest in shares in the offeree company ~~shares~~ by an offeror or any person acting in concert with it may result in the Panel refusing to exercise its discretion to permit a partial offer or to grant a dispensation under Note 1 of the Notes on Dispensations from Rule 9.

Rule 8

RULE 8. DISCLOSURE OF DEALINGS AND POSITIONS

…

NOTES ON RULE 8

…

12. Potential offerors

(a) …

At the same time as or before any such Dealing Disclosure, the potential offeror must also make an announcement that it is considering making an offer, or that it is a participant in the formal sale process (see also ~~the Note on~~ Rule 7.1(a) for when an immediate announcement will be required). The announcement must include a summary of the provisions of Rule 8 (see www.thetakeoverpanel.org.uk).

(b) If a potential offeror has not been identified as such, it will not need to make an Opening Position Disclosure under Rule 8.1(a)(i) or (ii) until after the announcement that first identifies it as a~~n~~ potential offeror. …

Rule 9

9.1 WHEN A MANDATORY OFFER IS REQUIRED AND WHO IS PRIMARILY RESPONSIBLE FOR MAKING IT

Except with the consent of the Panel, when:

(a) any person acquires~~, whether by a series of transactions over a period of time or not,~~ an interest in shares which (taken together with shares in which the person or any person~~s~~ acting in concert with that person ~~are~~ is interested) carry 30% or more of the voting rights of a company; …

…

such person shall extend offers …

…

NOTES ON RULE 9.1

…

1. Coming together to act in concert

Acting in concert requires the co-operation of two or more persons. When a person has acquired an interest in shares without the knowledge of other persons with whom that person subsequently comes together to co-operate as a group to obtain or consolidate control of a company, and the shares in which they are interested at the time of coming together carry 30% or more of the voting rights in that company, the Panel will not normally require an ~~general~~ offer to be made under ~~this~~ Rule 9. Such persons having once come together, however, the provisions of the Rule will apply so that:

…

6. Vendor of part only of an interest in shares

Shareholders sometimes wish to sell part only of their shareholdings or a purchaser may be prepared to purchase part only of a shareholding. This arises particularly where a purchaser wishes to acquire shares carrying just under 30% of the voting rights in a company, thereby avoiding an obligation ~~under this Rule~~ to make an ~~general~~ offer under Rule 9. The Panel will be concerned to see whether in such circumstances the vendor is acting in concert with the purchaser and/ or has effectively allowed the purchaser to acquire a significant degree of control over the shares retained by the vendor such that the purchaser should be treated as having acquired an interest in them by virtue of paragraph (2) of the definition of interests in securities, in which case an ~~general~~ offer under Rule 9 would normally be required. A judgement on whether such significant degree of control exists will obviously depend on the circumstances of each individual case. In reaching its decision, the Panel will have regard, inter alia, to the points set out below.

…

(d) It would be natural for a vendor of part of a controlling holding to select a purchaser whose ideas as regards the way the company is to be directed are reasonably compatible with the vendor's own. It is also natural that a purchaser of a substantial holding in a company should press for board representation and perhaps make the vendor's support for this a condition of purchase. Accordingly, these factors, divorced from any other evidence of a significant degree of control over the retained shares, would not lead the Panel to conclude that an ~~general~~ offer under Rule 9 should be made.

…

8. The chain principle

~~Occasionally,~~ If a person or group of persons acting in concert ("Acquirer A") acquire~~s~~~~ing~~ shares in a company ("Company B") which result~~s~~~~ing~~ in ~~a~~ Acquirer A holding ~~of~~ over 50%

of the voting rights of ~~a c~~Company B (which ~~need~~ may or may not be a company to which the Code applies), Acquirer A ~~will~~ may thereby indirectly ~~acquire~~ obtain or consolidate control, as defined in the ~~Code~~ Definitions Section, of a second company ("Company C") because ~~the first c~~Company B either:

(a) ~~itself is interested, either directly or indirectly through intermediate companies, in a controlling block of shares in the second~~ controls ~~c~~Company C~~,~~; or

(b) is interested in shares in Company C which, when aggregated with those in which ~~the person or group~~ Acquirer A is already interested ~~in~~, ~~secure or~~ will result in Acquirer A obtaining or consolidating~~e~~ control of ~~the second c~~Company C.

The Panel will ~~not~~ normally only require an offer to be made under ~~this~~ Rule 9 in these circumstances ~~unless either:~~

~~(a)~~ if the interest in shares which ~~the first c~~Company B has in ~~the second c~~Company C is significant in relation to ~~the first c~~Company B. In assessing this, the Panel will take into account a number of factors including, as appropriate, the assets, profits and market values of the respective companies. Relative values of ~~5~~30% or more will normally be regarded as significant.~~; or~~

~~(b) securing control of the second company might reasonably be considered to be a significant purpose of acquiring control of the first company.~~

~~The Panel should be consulted in all cases which may come within the scope of this Note to establish whether, in the circumstances, any obligation arises under this Rule.~~

9. Triggering Rule 9 during an offer period*

(a) If it is proposed to incur an obligation to make an offer under ~~this~~ Rule 9 during the course of a ~~non-mandatory~~ voluntary offer, the Panel must be consulted in advance.

(b) ~~Once~~ If such an obligation is incurred, an offer in compliance with ~~this~~ Rule 9 must be announced immediately~~.~~ (~~See~~ see also Rule 7.1~~,~~).

(c) Where there is no change in the consideration ~~is involved~~ offered, a revised offer document will not be required and it will be sufficient, following the announcement, ~~simply~~ to send a notification to offeree company shareholders and persons with information rights setting out:

> *(i) the new ~~number~~ percentage of shares in which the offeror and persons acting in concert with it are interested~~,~~;*
>
> *(ii) ~~of the fact~~ that the acceptance condition (in the form required by Rule 9.3) is the only condition remaining; and ~~of the period for which the offer will remain open following the publication of the document.~~*
>
> *(iii) the unconditional date.*

(d) ~~An~~ The offer made in compliance with ~~this~~ Rule 9 must remain open for not less than 14 days following the publication of ~~the date on which~~ the revised offer document or the sending of the notification referred to in paragraph (c) (as appropriate) ~~is published and as required by Rules 31.2 and 33.1~~.

(e) Rule 9.4(c) and Notes 3 and 4 on Rule 32.1 set out certain restrictions on the incurring of an obligation under ~~this~~ Rule 9 during the offer period.

10. Convertible securities, warrants and options

In general, the acquisition of securities convertible into, warrants in respect of, or options or other rights to subscribe for, new shares does not give rise to an obligation ~~under this Rule~~ to make a<u>n</u> ~~general~~ offer <u>under Rule 9</u> but the exercise of any conversion or subscription rights or options will be considered to be an acquisition of an interest in shares for the purpose of the Rule.

…

11. The reduction or dilution of interests in shares

If a person or a group of persons acting in concert interested in shares carrying more than 30% of the voting rights of a company reduces its interest but not to less than 30%, such person or persons may subsequently acquire an interest in further shares without incurring an obligation to make a<u>n</u> ~~general~~ offer <u>under Rule 9</u> subject to both of the following limitations:

…

If a shareholding has remained above 50% of the voting rights of a company, or is restored to more than 50% by acquisitions permitted under this Note, further acquisitions are unrestricted by the Rule. Otherwise, a percentage interest in shares carrying voting rights of more than 30% which is reduced or diluted may not be restored to its original level without giving rise to an obligation to make a<u>n</u> ~~general~~ offer <u>under Rule 9</u> except as permitted under this Note. However, nothing in this Note affects or restricts subscriptions for new shares approved by independent shareholders in the manner outlined in Note 1 of the Notes on Dispensations from Rule 9.

…

9.4 RESTRICTION<u>S</u> ON ACQUISITIONS

<u>(a)</u> Except with the consent of the Panel, no acquisition of any interest in shares which would give rise to a requirement for an offer under Rule 9 may be made if the making or implementation of that offer would or might be dependent on the passing of a resolution at any meeting of shareholders of the offeror or on any other conditions, consents or arrangements.

<u>(b) Where an offer has been made under Rule 9, neither the offeror nor any person acting in concert with it may acquire any interest in shares in the offeree company in the 14 days up to and including:</u>

<u>(i) the unconditional date; or</u>

<u>(ii) the expiry of an acceptance condition invocation notice.</u>

<u>(c) Neither a voluntary offeror nor any person acting in concert with it may make an acquisition of any interest in shares which would oblige it to make an offer under Rule 9 unless that offer can remain open for acceptance for at least 14 days.</u>

NOTE ON RULE 9.4

When a dispensation may be granted

(a) The Panel will normally only grant a dispensation under Rule 9.4<u>(a)</u> if the share purchase agreement in relation to the acquisition of the interest in shares which would give rise to a requirement for an offer under Rule 9 is made subject to a condition

relating to a material official authorisation or regulatory clearance, which is also included as a condition or pre-condition to the offer, and to no other conditions.

…

9.5 CONSIDERATION TO BE OFFERED

…

NOTES ON RULE 9.5

…

5. "Look-back period"

If, notwithstanding Rule 2.2(b), an offer under Rule 9.1 was not announced immediately following the acquisition of the interest in shares which gave rise to the obligation to make the offer, the "look-back period" in Rule 9.5(a) will start on the date which is 12 months prior to the date on which such offer ought to have been announced in accordance with Rule 2.2(b) and will end on the date on which the offer is announced. The same approach will apply to the 12 month periods referred to in Notes 2 and 3 on Rule 9.5.

…

NOTES ON DISPENSATIONS FROM RULE 9

1. ~~Vote of independent shareholders on the issue of new securities ("Whitewash")~~ Rule 9 waivers

(See also Appendix 1 ~~for Guidance Note~~)

When the issue of new securities as consideration for an acquisition or a cash subscription (or in fulfilment of obligations under an agreement to underwrite the issue of new securities) would otherwise result in an obligation to make an ~~general~~ offer under ~~this~~ Rule 9, the Panel will normally waive the obligation if there is an independent vote at a shareholders' meeting. ~~The requirement for a general offer will also be waived, provided there has been a vote of independent shareholders, in cases involving the underwriting of an issue of shares. If an underwriter incurs an obligation under this Rule unexpectedly, for example as a result of an inability to sub-underwrite all or part of its liability, the Panel should be consulted.~~

~~The appropriate provisions of the Code apply to whitewash proposals. Full details of the potential number and percentage of shares in which the person or group of persons acting in concert might become interested (together with details of the different interests concerned) must be disclosed in the document published in connection with the issue of the new securities, which must also include competent independent advice on the proposals which the shareholders are being asked to approve, together with a statement that the Panel has agreed to waive any consequent obligation under this Rule to make a general offer. The resolution must be made the subject of a poll. In addition, unless the person or group of persons acting in concert has entered into an agreement with the company not to make an offer, or has made a statement in the document that it does not intend to make an offer, the document must contain a statement that the person or group will not be restricted from making an offer for the company in the event that the proposals are approved at the shareholders' meeting. The Panel must be consulted and a proof document submitted at an early stage.~~

~~When a person or group of persons acting in concert may, as a result of such arrangements, come to hold shares carrying more than 50% of the voting rights of the company, specific and prominent reference to the possibility must be contained in the document and to the fact that the person or group will be able to acquire interests in~~

~~*further shares without incurring any further obligation under Rule 9 to make a general offer.*~~

~~*When a waiver has been granted, as described above, in respect of convertible securities, options or rights to subscribe for shares, details, including the fact of the waiver and the maximum number of securities that may be issued as a result, should be included in the company's annual report and accounts until the securities in respect of which the waiver has been granted have been issued or it is confirmed that no such issue will be made.*~~

~~*Notwithstanding the fact that the issue of new securities is made conditional upon the prior approval of a majority of the shareholders independent of the transaction at a general meeting of the company:*~~

~~*(a) the Panel will not normally waive an obligation under this Rule if the person to whom the new securities are to be issued or any persons acting in concert with that person have acquired any interest in shares in the company in the 12 months prior to the publication of the circular relating to the proposals but subsequent to negotiations, discussions or the reaching of understandings or agreements with the directors of the company in relation to the proposed issue of new securities;*~~

~~*(b) a waiver will be invalidated if any acquisitions of interests in shares are made in the period between the publication of the circular and the shareholders' meeting.*~~

In exceptional circumstances, the Panel may consider ~~waiving the requirement for a general offer~~ granting a Rule 9 waiver where the approval of independent shareholders to the transfer of existing shares from one shareholder to another is obtained.

See also Note 5(c).

2. Enforcement of security for a loan

Where shares or other securities are charged as security for a loan and, as a result of enforcement, the lender would otherwise incur an obligation to make an ~~general~~ offer under ~~this~~ Rule 9, the Panel will not normally require an offer if sufficient interests in shares are disposed of within a limited period to persons unconnected with the lender, so that the percentage of shares carrying voting rights in which the lender, together with persons acting in concert with it, is interested is reduced to below 30% in a manner satisfactory to the Panel. (See also Rule 9.7.)

…

3. Rescue operations

There are occasions when a company is in such a serious financial position that the only way it can be saved is by an urgent rescue operation which involves the issue of new shares without approval by a vote of independent shareholders or the acquisition of existing shares by the rescuer which would otherwise ~~fall within the provisions of this Rule and normally~~ require an ~~general~~ offer under Rule 9. The Panel may, however, waive the requirements of the Rule in such circumstances provided that either:

(a) approval for the rescue operation by a vote of independent shareholders is obtained as soon as possible after the rescue operation is carried out; or

(b) some other protection for independent shareholders is provided which the Panel considers satisfactory in the circumstances.

Where neither the approval of independent shareholders nor any other form of protection can be provided, an ~~general~~ offer under ~~this~~ Rule 9 will be required. In such

circumstances, however, the Panel may consider an adjustment of the highest price, pursuant to Note 3 on Rule 9.5.

The requirements of ~~the~~ Rule 9 will not normally be waived in a case where a major shareholder in a company rather than that company itself is in need of rescue. The situation of that shareholder may have little relevance to the position of other shareholders and, therefore, the purchaser from such major shareholder must expect to be obliged to extend an offer under ~~the~~ Rule 9 to all other shareholders.

…

5. Shares carrying 50% or more of the voting rights

The Panel will consider waiving the requirement for an ~~general~~ offer under ~~this~~ Rule 9 where:

…

(c) in the case of an issue of new securities, independent shareholders holding shares carrying more than 50% of the voting rights of the company which would be capable of being cast on a ~~"whitewash"~~ Rule 9 waiver resolution (see Note 1) confirm in writing that they approve the proposed waiver and would vote in favour of any resolution to that effect at a general meeting.

6. Enfranchisement of non-voting shares

There is no requirement to make an ~~general~~ offer under ~~this~~ Rule 9 if a person interested in non-voting shares becomes upon enfranchisement of those shares interested in shares carrying 30% or more of the voting rights of a company, except where shares or interests in shares have been acquired at a time when the person had reason to believe that enfranchisement would take place.

Rule 11

11.1 WHEN A CASH OFFER IS REQUIRED

…

NOTES ON RULE 11.1

…

6. Revision

If an obligation under this Rule arises during the course of an offer period and a revision of the offer is necessary, an immediate announcement must be made by the offeror in accordance with Rule 7.1 ~~(but see Rule 32)~~. ~~The Note on~~ Rule 7.1 may also be relevant to acquisitions by potential offerors.

…

11.2 WHEN A SECURITIES OFFER IS REQUIRED

(a) Where interests in shares …

(b) Unless the vendor or other party to the transaction …

NOTES ON RULE 11.2

1. Basis on which securities are to be offered

Any securities required to be offered pursuant to ~~this~~ Rule 11.2 must be offered …

Rule 21.2

21.2 OFFER-RELATED ARRANGEMENTS

…

NOTES ON RULE 21.2

…

3. ~~"Whitewash" transactions~~ Rule 9 waivers

Rule 21.2 also applies in the context of a ~~"whitewash"~~ transaction which is subject to a Rule 9 waiver. The Panel should be consulted at an early stage where such a ~~"whitewash"~~ transaction is proposed.

4. Disclosure

An announcement of a firm intention to make an offer, an offer document or ~~whitewash~~ a Rule 9 waiver circular, as the case may be, must include a summary of any offer-related arrangement or other agreement, arrangement or commitment permitted under, or excluded from, Rule 21.2 and, subject to Note 6 on Rule 26, a copy of the agreement, arrangement or commitment must be published on a website in accordance with Rule 26.2.

Rule 24

24.1 THE OFFER DOCUMENT

…

(c) ~~Promptly following its publication,~~ In addition, the offeror must:

(i) publish the offer document on a website in accordance with Rule 26.1; and

(ii) announce that the offer document has been so published.

…

24.3 FINANCIAL AND OTHER INFORMATION ON THE OFFEROR, THE OFFEREE COMPANY AND THE OFFER

Except with the consent of the Panel:

…

(c) the offer document must contain summary details of any current ratings and outlooks publicly accorded to the offeror and the offeree company by

credit ratings agencies prior to the commencement of the offer period, any changes made to previous ratings or outlooks during the offer period, and a summary of the reasons given, if any, for any such changes;

Rule 25

25.1 THE OFFEREE BOARD CIRCULAR

…

(c) Promptly following its publication, In addition, the offeree company must:

(i) publish the offeree board circular on a website in accordance with Rule 26.1; and

(ii) announce that the offeree board circular has been so published.

…

25.9 EMPLOYEE REPRESENTATIVES' OPINION AND PENSION SCHEME TRUSTEES' OPINION

…

NOTES ON RULE 25.9

1. Offeree company's responsibility for costs

…

(See also Rule 32.6(bc).)

Rule 30.5

30.5 DISTRIBUTION OF DOCUMENTS, ANNOUNCEMENTS AND INFORMATION TO THE PANEL AND OTHER PARTIES TO AN OFFER

(a) Before an offer document is published, a copy of the document in hard copy form and electronic form must be sent to the Panel. At the time of publication, a copy must also be sent in hard copy form and electronic form to the advisers to all other parties to the offer.

(b) Copies of all other documents, announcements and information published in connection with an offer by, or on behalf of, an offeror or the offeree company must at the time of publication be sent in electronic form to:

(i) the Panel; and

(ii) the advisers to all other parties to the offer.

Documents must also be sent in hard copy form to the Panel and the advisers to all other parties to the offer at the time of publication. Such documents, announcements or information must not be released to the media under an embargo.

Rule 31.6

31.6 ACCEPTANCE CONDITION INVOCATION NOTICE

…

NOTE ON RULE 31.6

1. Prohibition on concurrent notices

…

2. Mandatory offerors

See also Rule 9.4(b).

Rule 32

32.1 PUBLICATION OF REVISED OFFER DOCUMENT

(a) If an offer is revised, a revised offer document, drawn up in accordance with Rules 24 and 27, must be sent to shareholders of the offeree company and persons with information rights. ~~Promptly following its publication,~~ In addition, the offeror must:

(i) publish the revised offer document on a website in accordance with Rule 26.1; and

(ii) announce that the revised offer document has been so published.

(b) At the same time as the revised offer document is published:

…

NOTES ON RULE 32.1

…

4. Triggering Rule 9†

When an offeror, which is making a voluntary offer either in cash or with a cash alternative, acquires an interest in shares 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~~ treated 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 published~~. See also Note 9 on Rule 9.1 and Rule 9.4(c).

…

32.6 THE OFFEREE BOARD'S OPINION AND THE OPINIONS OF THE EMPLOYEE REPRESENTATIVES AND THE PENSION SCHEME TRUSTEES

(a) The board of the offeree company must send to the company's shareholders and persons with information rights a circular containing its opinion on the revised

offer as required by Rule 25.1, drawn up in accordance with Rules 25 and 27. ~~Promptly following its publication,~~ In addition, the offeree company must:

(i) publish the circular on a website in accordance with Rule 26.1; and

(ii) announce that the circular has been published.~~; and~~

(~~iii~~b) At the same time as the circular is published, the offeree company must make the circular readily and promptly available to its employee representatives (or, where there are no employee representatives, to the employees themselves) and to the trustees of its pension scheme(s).

(~~b~~c) Where the board of the offeree company receives in good time before publication of its circular on the revised offer:

Rule 35.1

35.1 DELAY OF 12 MONTHS

…

NOTES ON RULES 35.1 and 35.2

1. When consent may be given

The Panel will normally only give its consent under Rule 35.1 if:

(a) the board of the offeree company so agrees. ~~Such consent will not normally be given within three months of the lapsing of an earlier offer in relation to which the offeror made a no increase statement or an acceleration statement without a reservation of the right to set the statement aside in the event of an increased or improved offer being recommended by the board of the offeree company;~~ Where the offeror made a no increase statement or an acceleration statement without a reservation of the right to set the statement aside with the agreement of the offeree board, the Panel will not normally give its consent in relation to a new offer, or any other transaction restricted by Rule 35.1, on more favourable terms than those available under the previous offer until after the later of:

(i) three months from the date on which the previous offer was withdrawn or lapsed; and

(ii) the end of the offer period;

(b) a third party (including a potential offeror which had been publicly identified prior to the date on which the previous offer was withdrawn or lapsed) announces a firm intention to make an offer for the offeree company;

(c) the offeree company announces a ~~"whitewash"~~ Rule 9 waiver proposal (see Note 1 of the Notes on Dispensations from Rule 9) or a reverse takeover; or

(d) the Panel determines that there has been a material change of circumstances.

Rule 36.6

36.6 WARNING ABOUT CONTROL POSITION

In the case of a partial offer which could result in the offeror, either alone or with persons acting in concert with it, holding shares carrying over 50% of the voting rights of the offeree company, the offer document must contain specific and prominent reference to this and to the fact that, if the offer succeeds, the offeror or, where appropriate, the offeror and persons acting in concert with it, will be free, subject to Rule 36.3 and, where relevant, to Note 4 on Rule 9.1, to acquire further interests in shares without incurring any obligation to make an offer under Rule 9 ~~to make a general offer~~.

Rule 37.1

37.1 POSSIBLE REQUIREMENT TO MAKE A MANDATORY OFFER

When a company redeems or purchases its own voting shares, any resulting increase in the percentage of shares carrying voting rights in which a person or group of persons acting in concert is interested will be treated as an acquisition for the purpose of Rule 9. Subject to prior consultation, the Panel will normally waive any resulting obligation to make an ~~general~~ offer under Rule 9 if there is a vote of independent shareholders and a procedure on the lines of that set out in Appendix 1 is followed.

NOTES ON RULE 37.1

…

3. Situations where a mandatory obligation may arise

Where the directors are aware that a company's redemption or purchase of its own shares would otherwise give rise to an obligation for a person (or group of persons acting in concert) to make a mandatory offer, the board of directors should ensure that an appropriate resolution to approve a Rule 9 waiver ~~of this obligation~~ is put to independent shareholders prior to implementation of the relevant redemption or purchase and as a pre-condition to its implementation. Additionally, each individual director should draw the attention of the board at the time any redemption or purchase of the company's own shares is proposed, and whenever shareholders' authority for any such redemption or purchase is to be sought, to interests in shares of parties acting in concert, or presumed to be acting in concert, with that director.

…

5. Disqualifying transactions

Notwithstanding that the redemption or purchase of voting shares is made conditional upon the prior approval of ~~a majority of the shareholders~~ independent shareholders ~~of the transaction at a general meeting of the company~~:

(a) the Panel will not normally ~~waive an obligation under Rule 9~~ agree to grant a Rule 9 waiver if the relevant person, or any member of the relevant group of persons acting in concert, has acquired an interest in shares in the knowledge that the company intended to seek permission from its shareholders to redeem or purchase its own shares; and

(b) a Rule 9 waiver will be invalidated if any acquisitions are made by the relevant person, or by any member of the relevant group of persons acting in concert, in the

period between the proposed publication date of the circular and the shareholders' meeting.

6. Renewals

Any Rule 9 waiver ~~previously obtained under this Rule~~ will expire at the same time as the relevant shareholders' authority under Chapter 4 of Part 18 of the Companies Act 2006 (whether or not voting shares have in fact been redeemed or purchased). Accordingly, Rule 9 waivers will normally need to be renewed at the same time as the relevant shareholders' authority is renewed.

7. Responsibility for making an offer

If an obligation arises under ~~this~~ Rule 37 for an ~~general~~ offer to be made and a ~~dispensation~~ Rule 9 waiver is not granted, the prime responsibility for making an offer will normally attach to the person who obtains or consolidates control as a result of the redemption or purchase of its own shares by the company. Where control is obtained or consolidated by a group of persons acting in concert, the prime responsibility will normally attach to the principal member or members of the group acting in concert. In exceptional cases, responsibility for making an offer may attach to one or more directors if, in the view of the Panel, there has been a failure by the board as a whole, or by any one or more individual directors, to address satisfactorily the implications of a redemption or purchase by the company of its own shares in relation to interests in shares of directors or parties acting in concert with one or more of the directors.

Appendix 1

APPENDIX 1

~~WHITEWASH GUIDANCE NOTE~~ RULE 9 WAIVERS

(See Note 1 of the Notes on Dispensations from Rule 9)

1 INTRODUCTION

(a) ~~This note~~ Appendix 1 applies where ~~sets out the procedures to be followed if~~ the Panel is ~~to be~~ asked to waive the obligation to make an ~~general~~ offer under Rule 9 which would otherwise arise where, as a result of the issue of new securities as consideration for an acquisition or a cash ~~injection~~ subscription or in fulfilment of obligations under an agreement to underwrite the issue of new securities, a person or group of persons acting in concert acquires an interest, or interests, in shares ~~to an extent which would normally give rise to an obligation to make a general offer~~.

(b) Where the word "offeror" is used in a particular Rule, it should be taken in the context of a ~~whitewash~~ Rule 9 waiver as a reference to the potential controller~~s~~. Similarly, the phrase "offeree company" should be taken as a reference to the company which is to issue the new securities and in which the actual or potential controlling position will arise.

(c) Rules 19, 20, 21.3, 24.15, 26, and 30, where relevant, apply equally to documents, announcements and information published in connection with a transaction which is the subject of the ~~whitewash procedure~~ Rule 9 waiver.

2 SPECIFIC GRANT OF WAIVER REQUIRED

In each case, specific grant of a Rule 9 waiver ~~from the Rule 9 obligation~~ is required. Such grant will be subject to:

(a) there having been no disqualifying transactions (as set out in Section 3 below) ~~by the person or group seeking the waiver in the previous 12 months~~;

…

(e) disenfranchisement of the ~~person or group seeking the waiver~~ potential controller and persons acting in concert with it and of any other non-independent party at any such meeting.

~~NOTES ON SECTION 2~~

~~1. Early consultation~~

~~Consultation with the Panel at an early stage is essential. Late consultation may well result in delays to planned timetables. Experience suggests that the documents published in connection with the whitewash procedure may have to pass through several proofs before they meet the Panel's requirements and no waiver of the Rule 9 obligation will be granted until such time as the documentation has been approved by the Panel.~~

~~2. Other legal or regulatory requirements~~

~~Clearance of the circular in accordance with any other legal or regulatory requirement (for example, under the FCA Handbook) does not constitute approval of the circular by the Panel.~~

3 DISQUALIFYING TRANSACTIONS

Notwithstanding ~~the fact~~ that the issue of new securities is made conditional upon the prior approval of ~~a majority of the shareholders~~ independent ~~of the transaction at a general meeting of the company~~ shareholders:

(a) the Panel will not normally agree to grant a Rule 9 waiver ~~waive an obligation under Rule 9~~ if the ~~person to whom the new securities are to be issued~~ potential controller or any person acting in concert with ~~that person~~ it has acquired any interest in shares in the company in the 12 months prior to the proposed publication date of the circular ~~relating to the proposals~~ but subsequent to negotiations, discussions or the reaching of understandings or agreements with the directors of the company in relation to the proposed issue of new securities; and

(b) a Rule 9 waiver will not be granted, or will be invalidated if any acquisitions of interests in shares are made in the period between the publication of the circular and the shareholders' meeting.

4 ~~WHITEWASH~~ RULE 9 WAIVER CIRCULAR

The circular must contain the following information and statements and comply appropriately with the Rules of the Code as set out below:

…

(b) full details of the number and percentage of shares in which the potential controller and persons acting in concert with it might become interested (together with details of the different interests concerned) ~~maximum potential controlling position~~:

> **(i) where this is dependent upon the outcome of underwriting arrangements, it should be assumed that the potential controller~~s~~ will, in**

addition to any other entitlement, take up ~~their~~ its full underwriting participation; and

(ii) where convertible securities, options or securities with subscription rights are to be issued, the potential controlling position must be indicated on the assumption that only the potential controller~~s~~ will convert or exercise the subscription rights, and will do so in full and at the earliest opportunity (the date of which must also be given);

(c) where the maximum potential shareholding resulting from the proposed transaction will exceed 50% of the voting rights of the company, specific and prominent reference to this possibility and to the fact that, subject to Section 7 below, the potential controller~~s~~ may acquire further interests in shares without incurring any further obligation to make an offer under Rule 9 ~~to make a general offer~~;

…

(e) a statement that the Panel has agreed, subject to shareholders' approval, to waive any obligations to make an ~~general~~ offer under Rule 9 which might result from the transaction;

(f) a statement that, in the event that the proposals are approved at the shareholders' meeting, the potential controller~~s~~ will not be restricted from making an offer for the offeree company, unless the potential controller~~s~~ ~~have~~ has either:

(i) made a statement that ~~they do~~ it does not intend to make an offer (see Rule 2.8), in which case full details of the statement must be included in the circular; or

(ii) …

…

(j) Rules 23, 24.2, 24.3, 25.2 and 25.3 (offeror intentions, financial and other information, and views of the offeree board). ~~information which must include f~~Full details of the assets, if any, being injected must be included~~)~~;

…

6 ANNOUNCEMENTS FOLLOWING SHAREHOLDERS' APPROVAL

(a) Following the meeting at which the proposals are considered by shareholders, an announcement must be made by the ~~offeree~~ company giving the result of the meeting and the number and percentage of ~~offeree~~ the company's shares in which the potential controller~~s are~~ is, or ~~are~~ is entitled to be, interested as a result.

(b) Where the final controlling position is dependent on the results of underwriting, the ~~offeree~~ company must make an announcement following the issue of the new securities stating the number and percentage of shares in which the potential controller~~s are~~ is interested at that time.

(c) Where convertible securities, options or securities with subscription rights are to be issued:

…

(ii) following each issue of new securities a further announcement must be made confirming the number and percentage of shares in which the potential controller~~s are~~ is interested at that time; and

(iii) the information in (i) and (ii) should be included in the company's annual report and accounts until all the securities in respect of which the Rule 9 waiver has been granted have been issued or it is confirmed that no such issue will be made.

…

7 SUBSEQUENT ACQUISITIONS BY POTENTIAL CONTROLLERS

…

Where shareholders approve the issue of convertible securities, or the issue of warrants or the grant of options to subscribe for new shares where no immediate voting rights are obtained, the Panel will view the approval as sanctioning maximum conversion or subscription at the earliest possible moment without the necessity for the making of an offer under Rule 9. However, if the potential controller~~s~~ propose~~s~~ to acquire further interests in voting shares following the relevant meeting, the Panel should be consulted to establish the number of shares to which the Rule 9 waiver will be deemed to apply.

Appendix 5

APPENDIX 5

TENDER OFFERS

…

2 PROCEDURE AND CLEARANCE

…

(f) In every case the FCA, the relevant UK regulated market or UK multilateral trading facility and the Panel must be sent a copy of the final text of the advertisements or circulars ~~in hard copy form and electronic form~~ at the same time as they are sent to the newspapers or are published.

…

4 CIRCULARS FROM THE BOARD OF THE OFFEREE COMPANY

A copy of any document published by the board of the offeree company in connection with the tender offer must be sent to the Panel in ~~hard copy form and~~ electronic form at the same time as it is published.

Appendix 8

APPENDIX 8

AUCTION PROCEDURE FOR THE RESOLUTION OF COMPETITIVE SITUATIONS

…

2 GENERAL

…

(c) If one competing offeror makes a no increase statement either on the day prior to Day 46 or on Day 46 (before 5.00 pm), the other competing offeror may announce a revised offer on Auction Day 1 in accordance with Section 3(a).

(~~c~~d) …

(~~d~~e) …

(~~e~~f) ...

(~~f~~g) ...

(~~g~~h) ...

(~~h~~i) …

(~~i~~j) …

(~~j~~k) …

APPENDIX B

List of questions

Q1 **Should the Code be amended as proposed so as to require a publicly identified potential offeror to announce any minimum level, or particular form, of consideration it is obliged to offer to offeree company shareholders?**

Q2 **Should a mandatory offeror, and any person acting in concert with it, be restricted from acquiring additional interests in shares in the offeree company in the 14 days up to and including: (a) the unconditional date; and (b) the expiry of an acceptance condition invocation notice?**

Q3 **Should the new Note 5 on Rule 9.5 be introduced as proposed in order to clarify the application of the "look-back period" for determining the minimum price of a mandatory offer?**

Q4 **Should the test in limb (b) of Note 8 on Rule 9.1 be deleted such that the test in limb (a) would become the sole test for determining whether a chain principle offer is required, other than in exceptional circumstances?**

Q5 **Should the threshold at which relative values would be considered to be "significant" for the purposes of the test currently set out in limb (a) of Note 8 on Rule 9.1 be reduced from 50% to 30%?**

Q6 **Should Note 1 on Rules 35.1 and 35.2, Note 2 on Rule 2.5 and Note 2 on Rule 2.8 be amended as proposed in relation to the restrictions following the lapsing of an offer or a statement of no intention to bid?**

Q7 **Should the minor amendments to the Code set out in Section 7 of the PCP be adopted as proposed?**