THE INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES

18 September 2007

Our ref: ICAEW Rep 78/07

The Secretary to the Code Committee
The Takeover Panel
10 Paternoster Square
London
EC4M 7DY

By email

Dear Sir or Madam

THE CODE COMMITTEE TO THE TAKEOVER PANEL
PUBLIC CONSULTATION PAPER 2007/1

The Institute of Chartered Accountants in England and Wales is pleased to respond to your request for comments on *Public Consultation Paper 2007/1 Schemes of Arrangement*.

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours faithfully

Katerina Joannou
Manager, Capital Markets Policy
Corporate Finance Faculty
T +44 (0)20 7920 8806
F +44 (0)20 7920 8784
E katerina.joannou@icaew.com

THE INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES

ICAEW Representation

ICAEW REP 78/07

THE CODE COMMITTEE TO THE TAKEOVER PANEL
PUBLIC CONSULTATION PAPER 2007/1

Memorandum of comment submitted in September 2007 by The Institute of Chartered Accountants in England and Wales, in response to the consultation paper *Schemes of Arrangement* issued by The Code Committee of the Takeover Panel, published in June 2007

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Chartered Accountants' Hall
PO Box 433 Moorgate Place London EC2P 2BJ
www.icaew.com

T +44 (0)20 7920 8100
F +44 (0)20 7920 0547
DX DX 877 London/City

INTRODUCTION

1. The Institute of Chartered Accountants in England and Wales (the ICAEW) welcomes the opportunity to comment on the public consultation paper (PCP) *Schemes of Arrangement* published by The Code Committee of the Takeover Panel.

WHO WE ARE

2. The ICAEW operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the Institute provides leadership and practical support to over 128,000 members in more than 140 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The ICAEW is a founding member of the Global Accounting Alliance with over 700,000 members worldwide.

3. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The ICAEW ensures these skills are constantly developed, recognised and valued.

SUPPORT FOR THE INITIATIVE

4. We welcome the Code Committee's proposals to amend the Rules of the Takeover Code (the Code) as it applies to a transaction regulated by the Code which is implemented by way of a scheme of arrangement effected under section 425 of the Companies Act 1985. We agree that the broad effect of the proposals will be to codify how the Code is applied in practice to such schemes.

RESPONSES TO QUESTIONS

Q1: Do you agree with the proposed definition of "scheme of arrangement or scheme"?

5. We note the proposed definition of "scheme of arrangement or scheme" and are of the view that the definition should also address similar procedures not covered by UK legislation. An example might be the recent bid (covered by the Code) for C.I. Traders Limited by way of scheme of arrangement under Article 125 of the Companies (Jersey) Law 1991.

Q2: Do you agree with the proposed new second paragraph of the definition of "offer"?

6. Yes, we agree.

Q3: Do you agree with the proposed new second paragraphs of the definitions of "offeree company" and "offeror"?

7. Yes, we agree.

Q4: Do you agree with the proposed definition of "offer documents and offeree board circulars"?

8. Yes, we agree.

Q5: Do you agree with the proposed definitions of "shareholder meetings" and "court sanction hearing"?

9. Yes, we agree.

Q6: Do you agree with the proposed amendments to the definition of "irrevocable commitments and letters of intent"?

10. Yes, we agree.

Q7: Do you agree with the introduction of the proposed new second paragraph into the definition of "offer period"?

11. We have some comments to make on the discussion preceding the definition of "offer period". In relation to paragraph 2.26, in the experience of our contributors, in many Implementation Agreements the actions of an offeree board may directly or indirectly cause a scheme to lapse. There are many technical and procedural steps involved in a scheme, ranging from the proper convening of the relevant court meetings, holding of the meetings, counting of the votes, to the petition to the Court, and finally the filing of the petition of the Court (without which the scheme will never become effective). We believe further guidance would be useful, by way of clarification in the Response Statement and/or a subsequently issued Practice Statement, as to which actions of the offeree board would be regarded as frustrating actions or in breach of General Principle 3 and which would not.

12. We would also welcome clarification from the Code Committee on how it sees Implementation Agreements interacting with the Code and the s425 mechanism. Implementation Agreements are now very much the norm for Schemes of Arrangement and these agreements try to govern very closely (and often in more detail and in a stricter fashion than under the Code) the relationship between an offeror and offeree. Any clarification or guidance on the treatment (in particular for Rule 21 purposes) on certain provisions which are commonly found in such agreements would be useful, in particular, in relation to: (i) the payment of damages (liquidated or otherwise) under such agreements for a breach of such agreements (whether or not strictly an inducement fee); (ii) the ability of either party to pursue a remedy of specific performance; (iii) situations where the offeree cannot comply with what the Code (or the Panel) requires or what might actually subsequently prove to be in the interests of shareholders (because of the strictures of an Implementation Agreement); or (iv) circumstances where the Implementation Agreement might fall (for whatever reason) to be in breach of the Code.

Q8: Do you agree that Rule 30.1 should apply in a scheme in the same way as in a contractual offer?

13. Yes, we agree.

Q9: Do you agree with the proposed new Note on Rule 30.2?

14. The issue of getting an opinion from employee representatives on the effects of the scheme on employment is particularly relevant in a scheme of arrangement where the production of an opinion will normally be more readily possible, unlike often for contractual offers where an offer can be more easily announced and posted on the same day.

Q10: Do you agree that Rule 31.1 should be disapplied in a scheme?

15. Yes, we agree.

Q11: Do you agree that, in a scheme, the shareholder meetings should normally be convened for a date which is at least 21 days after the date of the scheme circular?

16. Paragraph 3.16. The circumstances in which the Panel would reserve its right to convene a shareholder meeting in less than 21 days are not clear. We recommend that the word 'normally' be deleted from the text to proposed Section 3 of the Schemes Appendix so that it is consistent with Rule 31.1.

Q12: Do you agree that details relating to the adjournment of a shareholder meeting or court sanction hearing and any other change to the expected timetable of events should be required to be announced as proposed?

17. Yes, we agree.

Q13: Do you agree that the Panel should be consulted as to whether notice of an adjournment or other change to the expected scheme timetable should be posted to shareholders?

18. We believe that, for non-listed or de-listed plcs, notice to offeree shareholders of a change to a scheme timetable should be made by post. By way of illustration, we refer to the example in paragraph 3.23 of announcing a delay of posting consideration to shareholders. In the case of non-listed plcs or plcs that have de-listed since the offer or where the target company is listed on PLUS markets where notice of de-listing is not required within 20 business days, we do not consider announcing the delay to a RIS to be sufficient notice.

Q14: Do you agree that new Notes on Rules 31.6, 31.7 and 31.8 in relation to the announcement of an extension of a contractual offer should be introduced as proposed?

19. See our response in 17.

Q15: Do you agree that Rule 31.3 should be disapplied in a scheme?

20. Yes, we agree.

Q16: Do you agree that Rule 31.4 should be disapplied in a scheme?

21. Yes, we agree.

Q17: Do you agree that, where there is no competitive situation, the Code should not impose maximum time periods in a scheme for the holding of shareholder meetings and/or the fulfilment of other scheme conditions?

22. We agree with the conclusion that, in the absence of a competitive situation, the Code should not impose maximum time periods for the satisfaction of the acceptance condition. In the usual scheme of arrangement situation where the offeree is running the process, we agree that it is difficult to see how the offeree board would be put “under siege” in a scheme. However it has become increasingly common under Implementation Agreements for offerors to shift within their control matters such as timetable and other process requirements and we have, in the recent past, seen schemes which are not recommended by the offeree. For example, Implementation Agreements may place requirements on the target to extend the timetable for shareholder or court meetings at the offeror’s request. In such cases, there may well be an argument for the imposition of a maximum time limit to that obligation.

Q18: Do you agree with the proposed provision relating to the settlement of consideration in a scheme?

23. We agree with the proposed provision but question the usefulness of the word “finally”.

Q19: Do you agree that Rule 31.9 should be disapplied in a scheme?

24. Yes, we agree.

Q20: Do you agree with the proposed provisions in relation to announcements following key events in a scheme?

25. We are of the view that, consistent with Rule 17.1, a longstop date should apply to announcements following key events in a scheme eg before 8 a.m. the following day. We agree that it may not be feasible for the results of the meeting to be made known real time to those present at the meeting (indeed, since it will always take at least some time for a scrutineer to verify the results and for these to be notified by way of announcement to the market generally, were scheme meetings to be held during market trading hours, it may well be more prudent not to notify the results of the meeting first to those attendees of the meeting).

Q21: Do you agree with the proposed amendments to Rule 12.1?

26. We are unclear on the original significance/ intention behind the use of the “first closing date” or "the date when the offer becomes or is declared unconditional as to acceptances" (rather than, say, the date an offer is wholly unconditional) as a cut off date for the operation of the term in contractual offers. Moreover we would welcome clarification of why, for a scheme of arrangement, the reference period and the offer period are not the same (whereas for a contractual offer they are) and of the Code Committee’s intentions behind this distinction.

Q22: Do you agree with the proposed amendment of Rule 12.2 and with the consequential amendments?

27. Subject to the comments above regarding Q21, yes, we agree.

Q23: Do you agree with the proposed provision relating to holding statements made during an offer period involving a scheme?

28. Yes, we agree. In relation to the position on holdings statements, however, under Note 1 in Rule 19.3, we feel it might be useful that the *specific time* by which rival offerors should *normally* get off the fence, whether such statements are made where a contractual or scheme offer is already in existence (i.e. in the case of a scheme, 10 days before the shareholder meetings for the original scheme; in the case of a contractual offer, by Day 50) should be referred to in Note 1 in Rule 19.3 and in paragraph 4 of the schemes Appendix, rather than such guidance simply remaining in practice statements where it is perhaps not so obvious to practitioners. The word "normally" could presumably give the Panel the discretion it requires to be flexible on such timetabling issues.

Q24: Do you agree with the proposed provision in relation to the revision of a scheme?

29. In relation to paragraph 76, we are concerned that there is a risk that the confirmation required to be given to the Panel before a dispensation is granted to the timing period could become a box ticking exercise, and that confirmation is given as a matter of course without being properly tested. We believe that further guidance would be useful from the Code Committee on the supporting materials will the Panel require in order to support these confirmations.

30. The proposed approach of the Code Committee places, in our view, too much onus and weight to the assessment of the offeree board and Rule 3 adviser. Should the Panel not be making the assessments set out in paragraph 7.6(a) to (c) with, of course, the requisite input from the offeree board and Rule 3 adviser? We believe that further guidance would be useful from the Code Committee e.g. if the revision is a simple increase of a cash offer, is consent likely to be granted? On a more substantive level, the tests in (b) and (c) are drawn by reference to the likelihood of the shareholder meetings being adjourned or the resolutions not being passed. However, should one of the confirmations also be the belief that the revision will not or is not likely to result in the Court failing to sanction the scheme on the relevant court sanction date, which of course may occur if, for example, the Courts consider that shareholders were not given sufficient time to consider the revisions to the Scheme?

Q25: Do you agree that Note 4 on Rule 32.1 should be disapplied in a scheme?

31. Yes, we agree.

Q26: Do you agree that paragraph (b) of Note 3 on Rule 32.2 should be disapplied in a scheme?

32. Yes, we agree.

Q27: Do you agree with the proposed amendment to Note 4 on Rule 32.2?

33. Yes, we agree.

Q28: Do you agree that Note 5 on Rule 32.2 should be disapplied in a scheme?

34. Yes, we agree.

Q29: Do you agree with the Code Committee's conclusions in relation to competitive situations involving a scheme and with the introduction of a new Note 3 on Rule 32.5 as proposed?

35. We do not agree that the application of the Code timetable in a situation where a contractual offer is made in competition with an existing scheme is as straightforward as the Code Committee suggests and recommend that further clarification is provided.

Q30: Do you agree with the Code Committee's conclusions in relation to switching?

36. We have a number of issues to raise on the Code Committee's conclusions in relation to switching. Based on the discussion in paragraphs 9.7, 9.11 and 9.12, we agree with the conclusion that offerors should not be prohibited from switching if they have not reserved the right to do so. We note that there is some debate as to whether or not shareholders would be prejudiced if there is a switch as switches are generally aimed at improving deliverability of success for the offeror. This does not however address the situation of the shareholder who has decreased his shareholding in the company having considered that the original structure (e.g. scheme) had a difficult chance to succeed, only to find that the offeror has switched to a contractual offer with a 50% acceptance level.

37. This should be borne in mind when the Panel considers whether to grant its consent to a switch. As presented in the consultation paper (paragraphs 9.13, 9.15 and 9.16), it appears that the Panel is likely to grant its consent in the large majority of cases as the intention behind the switch is usually to improve deliverability (we note in particular the conclusion in paragraph 9.15). We do not feel that the circumstances where the Panel will consent to a switch are clear.

38. In cases other than the type envisaged in paragraph 9.15, what is the Panel's view on the acceptance condition level that is acceptable? 75% or less? It is to be noted however that the 75% acceptance level in a contractual offer is not wholly comparable to the 75% approval test in a scheme - the Code Committee notes the difficulty with comparability - but as switching is likely to be common particularly in competitive situations, further guidance on "deliverability" of a scheme would be helpful. In relation to the example given in paragraph 9.15 i.e. where an offeror has to switch to a contractual offer were it to lose the recommendation of the offeree board - this is not necessarily the case as noted above. The offeror may have contractually bound the offeree, in certain circumstances, to support the scheme mechanics notwithstanding withdrawal of the board's recommendation. This possibility should also be taken into account by the Panel when granting its consent to a switch. We further believe that it should be a requirement of the Code that the acceptance condition that would apply in the event of a switch are stipulated upfront in the offer document (subject to the Panel's right to override that acceptance level in certain circumstances) – to our mind this would provide at least some further certainty to those dealing in the market.

39. We are also of the view that the Code Committee's understanding of the Panel's approach where it is the actions of the offeree which have caused a scheme to lapse without significant prior notice (paragraph 9.16) should be set out in the Code.

40. Based on the discussion of timetable implications of a switch we are unsure if it would be consistent with normal practice for the Panel to make its own announcement of the impact of the offer timetable as indicated in paragraph 9.23.

Q31: Do you agree that Rule 33 should be disapplied in a scheme and that an election for alternative consideration should be capable of being made at least until the date of the shareholder meetings?

41. Yes, we agree.

Q32: Do you agree with the proposed Note on Section 9 of the Schemes Appendix in relation to Rule 11.1?

42. Yes, we agree.

Q33: Do you agree that Rule 34 should be disapplied in a scheme and that a right of withdrawal should be introduced for offeree shareholders who elect for alternative consideration in a scheme as proposed?

43. Yes, we agree.

Q34: Do you agree that Note 2 on Rule 13.5 and Rule 24.13 should be disapplied in a scheme?

44. Yes, we agree.

Q35: Do you agree with the proposed amendments in relation to the return of documents of title?

45. Yes, we agree.

Q36: Do you agree that a mandatory offeror should not be permitted to satisfy its obligations under Rule 9 by way of a scheme?

46. Some, but not all of our contributors, would like the Code Committee to reconsider this area. The understanding has been that one of the key principles behind Rule 9 is to afford all shareholders an opportunity to exit a Code company in circumstances where a controlling shareholder has arisen by acquiring shares in the company and offering some (but not all) shareholders an exit out (at potentially a premium). It was interesting to note in the PCP that the Rule seemingly has another purpose; i.e. to deprive the shareholder who has obtained Code control from obtaining 100% control. It seems excessively harsh to deprive such persons from satisfying their obligations by way of a scheme. Further, we consider that the concerns noted in the PCP regarding the longer time period to implement schemes is overstated as court practice and legal practice/ know how has developed substantially such that schemes are undertaken and completed in much shorter periods that we have seen historically. It is however recognised that some controls would be necessary if the Code were to allow Rule 9 offers to be satisfied by schemes. In particular, if the scheme was not voted through at the relevant shareholder meetings, there would need to be an obligation to proceed as soon as possible to a contractual mandatory offer.

Q37: Do you agree that an offeror proceeding by way of a scheme should only trigger a mandatory offer if it has obtained the Panel's prior consent to switch to a contractual offer?

47. Yes, we agree.

Q38: Do you agree with the proposed amendments to Rule 15(d) and Rule 14.1?

48. Yes, we agree.

Q39: Do you agree with the proposed amendments in relating to voting by connected exempt principal traders?

49. We believe that it would be simpler, both from the Panel's view as well as for market makers, if the proposed provision in the Schemes Appendix stated that connected exempt principal traders cannot vote.

Q40: Do you agree with the proposed Note 6 on Rule 24.2 and the proposed amendment to paragraph (f) of Rule 26?

50. Certain of our contributors did not agree with the proposal to disapply the financial information provisions of Rule 24.2 so far as the offeror is concerned where the consideration is solely in cash and where the Panel is satisfied that the possibility of any person remaining or becoming a minority shareholder in the offeree company is negligible.

51. The proposals appear to imply that the purpose of disclosing the financial information on a cash offeror is to address the needs of target shareholders who elect to remain as a minority shareholder in the target company. A number of observations may be made on this. Such shareholders would not have recourse to the offeror; such an investment decision is not the ostensible purpose of an offer document involving cash only consideration; and the behaviour of a dissenting shareholder would appear to be contrary to that of the majority of the shareholders, and, on a recommended offer, against the advice of the target board. It is thus open to question whether the possible actions of dissenting shareholders of the target should be a driver of a major disclosure obligation regarding the offeror in the Code. If it were accepted that the document should address the needs of such shareholders, it is still, as a general matter, difficult to see that historical financial information about the prospective majority shareholder is likely to be a key factor influencing the investment decision of the dissenting shareholder. It will be the behaviour and intentions of the majority shareholder in relation to the target that will be of concern to the minority shareholder, not its financial position. Furthermore, it would be unwise for the shareholder to place too much emphasis on the information provided as there will be little to prevent the majority shareholder from moving its holding to another related company with a different financial position once the transaction has completed.

52. It would appear to be more appropriate to reconsider the general requirement in relation to financial information on a cash offeror (such consideration might also encompass the requirement of Rule 28.3 for an outstanding forecast made by an offeror offering solely cash to be repeated in an offer document – albeit that it does not need to be reported on). The question of how a target shareholder might take into account the financial information on a cash offeror in making an investment decision remains an open one. We are unsure what the Code

Committee has in mind that could be relevant even for a non-listed, small foreign company making a cash only bid. We would suggest that either the requirements are left unchanged (if the Panel considers the disclosures to be necessary in the context of a cash offer) or that preferably they should be removed, so that disclosures are only required when the offeror is offering non-cash consideration in respect of which its financial position has direct relevance.

53. Paragraph 14.4. We were not clear as to what purpose the information required under paragraphs (i),(ii) or (iii) of Rule 24.2(c) would serve in the context of a wholly cash offer with a non-waivable 90% acceptance condition and an undertaking to invoke statutory squeeze-out rights. What purpose did the Panel have in mind?

54. Paragraphs 14.8 and 4.10. In the first paragraph of the proposed new Note 6 on Rule 24.2, we are of the view that the drafting is not sufficiently clear as to the circumstances in which a dispensation would (or would normally) be granted from the need to disclose financial information on the offeror, in the case of a contractual offer wholly for cash. For example, if, in fact, the Panel's intention is going to be, in effect, before granting a dispensation, always or normally to require a "non-waivable" 90% acceptance condition and an undertaking to exercise compulsory squeeze-out rights, should this not be stated in the note? In addition, would the confirmation regarding the non-waivable nature of the acceptance condition and the undertaking to utilise compulsory squeeze-out rights need to be publicly stated in the offer document or would a private statement to the Panel be sufficient? Would there be any other circumstances in which the dispensation might also normally be granted – e.g. where an offeror has (together with its own shareholding) shares and 'hard' irrevocable undertakings over 90% or more of offeree shares?

Q41: Do you agree with the proposed amendments to the Formula Offers Guidance Note in Appendix 2 of the Code?

55. Yes, we agree.

Q42: Do you agree with that the provisions listed in paragraph 16.1 should be disapplied in a scheme?

56. Yes, we agree.

OTHER POINTS

57. Paragraph 3.10. The Code Committee proposes that in relation to making documents and information available, Rule 30.3 should apply to schemes unless there is objective justification for not doing so, which is the case with contractual offers. This is a new provision of the Code which was introduced by way of implementation of the Takeover Directive (the Directive). We are interested to note that the Code Committee is proposing to apply the same Directive standards to schemes (at least in respect of this Rule) as it does with contractual offers, notwithstanding the fact that schemes do not fall within the definition of an "offer" for purposes of the Takeover Directive. While we are in favour, generally, of an approach which aligns so far as possible contractual offers and schemes, it is unclear what the Panel's approach will be in respect of its grant of derogations and waivers in relation to schemes. In paragraph 2(c) of the Introduction to the Code, it is stated that in relation to transactions which are subject to the requirements of the Directive, derogations or waivers will not be granted by the

Panel unless the "General Principles are respected" (the ‘Respect Principle’). Given the relative ease with which the Panel proposes to allow offerors to switch from contractual offers to schemes (and vice versa) as noted in the PCP, and with the increasingly common situation of schemes competing with offers, we consider that it is important for the Code Committee to clarify whether the Panel will apply a stricter approach in relation to contractual offers than with schemes. Though it may be regarded as ‘gold-plating’ of the Takeover Directive to apply the Respect Principle to schemes, it would not be desirable for differing applications of the Code to apply either vis-à-vis different offerors one (or some) of which proceeds by way of a scheme and one (or some) of which proceeds by way of a contractual offer or even in relation to a single offeror which has switched from an offer to a scheme (or vice versa).

58. Paragraph 46. We believe that reference to “voting shareholders” in paragraph (a) (ii) (aa) of the proposed provision in the Schemes Appendix, 5. Announcements Following Key Events in a Scheme, is ambiguous and should be clearer whether it means “actually voting” or “eligible to vote” shareholders.

59. Paragraph 4.9. We are of the view that it would be preferable for the results of shareholder meetings to be made public at the same time as they are announced to a RIS rather than announced to the meeting itself.

Email: youremail@icaew.com