



THE INSTITUTE
OF CHARTERED
ACCOUNTANTS
IN ENGLAND AND WALES

21 July 2009

Our ref: ICAEW Rep 75/09

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

By email supportgroup@thetakeoverpanel.org.uk

Dear sirs

**TAKEOVER PANEL CODE COMMITTEE PCP 2009/1
EXTENDING THE CODE'S DISCLOSURE REGIME**

The Institute of Chartered Accountants in England and Wales (the ICAEW) is pleased to respond to your request for comments on *PCP 2009/1 Extending the Code's disclosure regime*.

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

Yours faithfully

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ICAEW REPRESENTATION

ICAEW REP 75/09

TAKEOVER PANEL CODE COMMITTEE PCP 2009/1 EXTENDING THE CODE'S DISCLOSURE REGIME

Memorandum of comment submitted in July 2009 by The Institute of Chartered Accountants in England and Wales, in response to The Takeover Panel Code Committee's consultation paper PCP 2009/1 Extending the Code's disclosure regime published in May 2009

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INTRODUCTION

1. The Institute of Chartered Accountants in England and Wales (the ICAEW) welcomes the opportunity to comment on the consultation paper *PCP 2009/1 Extending the Code's disclosure regime* 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 ICAEW provides leadership and practical support to over 132,000 members in more than 160 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 775,000 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.
4. The ICAEW Corporate Finance Faculty is a network of over 5,000 corporate finance professionals. This response draws on the experience of Faculty members and other associates with significant experience of working on transactions to which the Takeover Code applies.

MAJOR POINTS

Support for the initiative

5. We agree with the overall objective to the proposals in PCP 2009/1 to increase transparency in relation to the positions of, and dealings by, persons involved in takeover offers. We have some concerns about the potential effectiveness of some of the disclosure proposals.
6. We are of the view that the ten business day deadlines for "opening position disclosures" and "dealing disclosures" are too long and are unlikely to result in raised disclosure levels from retail investors (paras 11-13).
7. We observe that the proposals for Rule 22 put significant responsibility on boards working together with their brokers and other advisers to ensure shareholders' continuing compliance with the expanded Rule 8 obligations. In our view it is far from clear how, in practice, a company is to fulfil these obligations and what it needs to do to take reasonable steps to find out who is interested in 1% or more, especially for persons holding derivatives (paras 21-22).

RESPONSES TO SPECIFIC QUESTIONS

Q1: Do you agree that the "opening position disclosure" requirement and "extended composite disclosure" should be adopted as proposed?

8. We agree in general with the proposed requirements but do have some queries about the strength of the supporting data. In particular, we would be interested to understand what was the spread/ profile of investors who were not subject to the Rule 8.3 at the time the securities were added to the Disclosure Table and 21 days later (para 2.12 PCP). If and to the extent that the majority of these were retail investors with small shareholdings, this potentially raises two issues: (i) can it be really said that these are persons "who have considerable influence over the outcome" of an offer and if not, this may have an impact on the cost benefit analysis of the

proposed enhanced disclosure regime; and (ii) there is a concern with the level of compliance with the proposed disclosure regime and therefore its effectiveness in practice.

9. Accordingly, we believe it would be helpful if the Response Statement provided the following clarification:
- whether the analysis of the undisclosed interests included in paragraph 2.12 shows the degree to which this is attributable to retail investors and, what the Code Committee proposes to do to raise compliance levels among retail shareholders who may not know about the proposed requirements for disclosure (this is particularly important where shares may be held by nominees and thus ultimate beneficial holders may not be alerted to the start of an offer period by means of a Rule 2.6 letter) and how it believes the practicalities for requiring overseas and retail investors to set up RNS accounts can be addressed.
10. Moreover it may be a challenge for overseas shareholders to put necessary systems in place to ensure they report reliably in respect of the opening position disclosure. Again, to what extent has consideration been given to this factor in considering the effectiveness of the proposed regime?

Q2: Should the deadlines for “opening position disclosures” and “dealing disclosures” be those described above?

11. We have some concerns that the disclosure deadline is too long and believe that regular market participants should be able to disclose the information sooner. An earlier disclosure deadline would permit the Panel to take active steps to remedy any known non-disclosures at an earlier stage. We consider that those investors who are not inclined or able to make the disclosures as soon as possible (within days) are unlikely to do so within ten business days – ie the modest benefits of having such a lengthy period within which to comply with the opening position disclosure would appear to be outweighed by the need to update the market on a more timely basis and to allow for a sufficient time to enforce.
12. We would be interested to understand the rationale for the ten business day deadline and how the deadline compares to other regimes.
13. As a practical suggestion we believe it would be useful if the respective open position disclosure deadlines for each offeree (or offeror, if different) should be set out in the Disclosure Table for ease of reference of market practitioners.

Q3: Do you agree with the proposal as to the time for calculating whether a person has an interest in relevant securities of 1% or more for the purpose of the “opening position disclosure” requirement?

Q4: Do you agree that the positions which should be disclosed in an opening position disclosure are those existing or outstanding at midnight on the day immediately preceding the date on which the disclosure is made?

14. We agree with the time period proposed in para. 2.42 but believe that there should be an exemption from disclosure if the party has sold down below 1%.
15. We agree with the details to be disclosed provided the party is still a 1% shareholder.

Q5: Do you agree with the proposals as to disclosures in relation to more than one party to the offer?

16. While we agree with the aim of the proposals we consider there would be merit in streamlining the procedure.
17. Specifically we believe it would be simpler and less repetitive to require a single disclosure form with details of the resulting position relating to all relevant securities rather than separate forms for each security. This would also reduce the disclosure cost through RNS and the

environmental cost of paper based disclosures. However, for market clarity, we think there is merit in requiring full disclosure on the opening position deadline for all 1% holders; however, in this case, a cross reference to any earlier dealing disclosure should suffice. We consider that the key point here is that it would be helpful for efficient market transparency, for the "opening position disclosure" to contain or incorporate by reference the complete picture in terms of holdings and dealings.

Q6: Do you agree that the current Rule 8.3(b) should be amended as proposed?

18. We agree.

Q7: Do you agree with the proposed amendments to the Code in relation to the matters described in section 2 of this PCP, as set out in Appendix B to this PCP?

Rule 2.11

19. In para 2.15 the PCP states that the Code Committee believes that the parties to an offer should be required to disclose their position in relevant securities at the commencement of the offer period. This, however, is not explicit in the proposed amended rules nor specifically in R2.5 (viii).

20. In order to address the position of irrevocable commitments or letters of intent procured/ executed prior to the commencement of the offer period, we suggest that the opening phrase 'During an offer period' should be deleted and that in Note 1 on Rule 2.11, the first paragraph should be

'A disclosure required by Rule 2.11(a) must be made no later than 12 noon on the business day following the commencement of the offer period or the date of the transaction.'

Rule 22

21. We observe that the proposals for Rule 22 put a great deal of onus on boards to ensure shareholders' continuing compliance with the Rule 8 obligations. In our view it is far from clear how a company can comply with the obligation to take reasonable steps to find out who is interested in 1% or more, especially for persons holding derivatives. We are concerned that the practical challenges involved for companies to identify persons with an interest in 1% or more and the onus on companies to explaining the continuing disclosure obligations will not be outweighed by the benefits and consider that greater analysis of the expected benefits is needed.

22. It would also be helpful if the Code Committee sets out how it will enforce the 'reasonable steps' requirement of boards of offeree companies or paper offerors. In particular, does the Code Committee require boards to go beyond their usual current practice of monitoring their shareholder registers?

Rule 8

23. Whilst not related to the proposed changes, the structure of new Rule 8 includes a new Note 13 on UKLA Rules. It is potentially misleading by omission that these rules alone are singled out as being potentially relevant alongside the requirements to disclose under Rule 8.

Q8: Do you agree that the definitions of "associate" and "acting in concert" should be conformed and that the definition of "associate" should be deleted?

24. We agree.

Q9: Do you agree with the proposed new Note 10 on the definition of "acting in concert"?

25. We agree.

Q10: Do you agree with the proposed amendments in relation to the current Note 6 on Rule 8?

26. We agree.

Q11: Do you agree with the proposed consequential amendments arising out of the definition of “associate”?

27. We agree.

Q12: Should securities borrowing and lending positions be disclosed under the Code as described?

28. We broadly agree with the proposals but consider it would be helpful for the Response Statement to set out how these compare to the developing European position on stock borrowing and lending and indeed query whether there is any merit in waiting to see what the outcome of these deliberations are.

29. We also have some comments on the conclusions drawn by the Code Committee (pp55-6); namely:

29.1. we do not think it is “practice” that lent securities are not recalled by and/or redelivered to the lender during the course of an offer (para 4.18(b) PCP); and

29.2. “borrowing to vote” is not considered by the market to be good corporate governance¹, and is therefore rarely, if at all, something which occurs in practice, so it would appear disproportionate to rely on this conclusion to justify the proposed new regime.

30. Moreover, as regards the netting of securities borrowing and lending positions, we consider there to be an argument that disclosure of a gross rather than a net position would result in greater transparency.

31. Finally we have concerns about the cost implications for companies for implementing the requisite systems to comply with the stock borrowing proposals. The analysis in the PCP does not give an indication of the magnitude of the stock borrowing issue, so a comparison of the benefits versus the costs of disclosure and compliance is difficult. We are aware that this is also an area of development at European level and it would be helpful if the Code Committee set out how the proposed measures are aligned with those developments.

Q13: Should the Code’s disclosure regime apply where a right of use is exercised in respect of relevant securities in which a person is interested or where relevant securities are subject to a title transfer collateral arrangement?

32. We agree the disclosure regime should apply.

Q14: Do you have any comments regarding the Code Committee’s conclusions in relation to the disclosure of securities borrowing and lending and financial collateral arrangements?

33. We have no comments on the proposed conclusions.

Q15: Do you agree with the proposed amendments to Rule 4.6 and its Notes and to the introduction of provisions in relation to financial collateral arrangements into the proposed new Note 5(l) on Rule 8?

34. We agree; however, we believe that new Note 5(l) on Rule 8 should set out the circumstances in which the Panel will grant consent under Rule 4.6 so as not to result in curtailed lending with securities as collateral.

¹ For example, as affirmed in the current version of Hedge Funds Standards Board standards

Q16: Do you agree that Note 17 on Rule 9.1 and Note 2 on Rule 9.3 should be amended as proposed?

35. We agree, subject to the comments in our responses to Qs12-14.

Q17: Do you agree with the Code Committee's conclusion that the Code should not require persons with a significant gross short position in the relevant securities of a party to an offer to disclose their dealings and position in relevant securities if they do not have a gross long interest of 1% or more in any class of relevant securities of a party to the offer?

36. We agree with the conclusion.

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