



THE INSTITUTE  
OF CHARTERED  
ACCOUNTANTS  
IN ENGLAND AND WALES

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Our ref: ICAEW Rep 114/08

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

By email [supportgroup@thetakeoverpanel.org.uk](mailto:supportgroup@thetakeoverpanel.org.uk)

Dear Sir

**PUBLIC CONSULTATION PAPER 2008/3  
ELECTRONIC COMMUNICATIONS, WEBSITES AND INFORMATION RIGHTS**

The Institute of Chartered Accountants in England and Wales is pleased to respond to your request for comments on PCP 2008/3 Electronic Communications, Websites and Information Rights.

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 114/08**

**PCP 2008/3 ELECTRONIC COMMUNICATIONS, WEBSITES AND  
INFORMATION RIGHTS**

**Memorandum of comment submitted in October 2008 by  
The Institute of Chartered Accountants in England and Wales, in  
response to The Takeover Panel Code Committee's public  
consultation paper 2008/3 Electronic Communications, Websites  
and Information Rights published in July 2008**

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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 2008/3 Electronic Communications, Websites and Information Rights* published by The Takeover Panel's Code Committee.

## **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 130,000 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. ICAEW 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's Corporate Finance Faculty (the Faculty) is a network of some 6,200 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 welcome the amendments to the Takeover Code proposed in this public consultation paper which reflect recognition of the increasing use made by companies, regulatory authorities, shareholders and other market participants of electronic forms of communication and websites.
6. We consider that protection of shareholders who are not computer-literate must be safeguarded by continuing to make information available in hard copy form. Such protection is provided in most cases in the proposals but we believe that this could be extended to ensure that shareholders who have requested electronic communication under the Companies Act receive an initial hard copy notification of the offer or possible offer (Rule 2.6 communication). This is in recognition of the fact that while shareholders may have in place Companies Act elections to receive shareholder documents in electronic form, at the time such elections are made, shareholders may not consider the possibility of offers or other major corporate actions. There is a concern that this initial communication may not be reviewed in a timely manner (often because personal or home email addresses are provided for Companies Act elections) by shareholders.
7. In our view that the Response Statement could usefully clarify:

- the mechanism(s) by which a party to an offer will usually obtain access to shareholders' email addresses (if other than by way of election under the Companies Act 2006);
  - that the use of a website is optional but that if a party to an offer does plan to use a website, that website must be up and running, accessible and up to date throughout the offer period; and
  - the elections that need to be made by shareholders in order to receive all offer-related company communications in electronic form and how forms of acceptance should be dealt with.
8. We believe that there is tension between competitive concerns and the transparency objective underlying the proposal that all display documents should be on the website. This would represent a significant shift from current practice and we would be interested in hearing the Code Committee's considerations regarding commercial sensitivity, the length of display time and the ability to copy (print) such documents aiding third parties who are neither shareholders nor bona fide competing bidders but who may simply represent business competitors of the offeror, who are looking for commercially confidential information.

## **RESPONSES TO SPECIFIC QUESTIONS**

### **PART A: Publication of Code documents**

***Q1: Should the Code be amended to include a new definition of "electronic form"? Do you have any comments on the proposed definition?***

9. We agree the Code should be amended to include the proposed definition of "electronic form".

***Q2: Should the Code be amended to include a new definition of "hard copy form"? Do you have any comments on the proposed definition?***

10. We agree the Code should be amended to include the proposed definition of "hard copy form".

***Q3: Should the Code be amended to include a new definition of "website notification"? Do you have any comments on the proposed definition and the Note?***

11. We agree the Code should be amended to include the proposed definition of "website notification".
12. As discussed in paragraph 20 below, we consider that notifications for the purpose of Rule 2.6 should be in hard copy form without exception. Accordingly we consider that notification of the materials being posted on the website, should in the first instance be communicated to shareholders in hard copy form (under the Rule 2.6 communication). Thereafter a website communication in electronic form can be made if a shareholder has made either (i) a Companies Act election in relation to the receipt of **all** communications in electronic form or (ii) a specific election in the context of receiving offer-related documents in electronic form but not if (i) a shareholder had made a Companies Act election in relation to the receipt of certain communications (eg accounts-related) in electronic form or (ii) if the offeror has access to the shareholder's email from some other source. We

think there should be clarity on the circumstances in which a website notification can be made, whether in hard copy or electronic form.

**Q4: Should the Code be amended to permit Code documents to be published by sending a copy to the relevant person in electronic form or by means of website publication as an alternative to hard copy form? Do you have any comments on the proposed new Rule 19.8?**

13. We agree, however in relation to proposed new Rule 19.8 (b) and (c), we refer to our response to Q3 and suggest that Rule 2.6 notifications should always be sent in hard copy.

**Q5: Should the choice of whether to publish Code documents in hard copy form, electronic form or by website publication be left to an offeror and/or the offeree company to decide rather than be prescribed by the Code?**

14. We agree so long as shareholders have specifically agreed to receive all company communications in electronic form or specifically agreed to receive offer-related communications in electronic form.

**Q6: The Code Committee considers that the Code should not require (i) a shareholder resolution; (ii) a provision in the offeree company's articles of association; or (iii) any other procedural requirement to be satisfied, before copies of Code documents may be published by an offeror or the offeree company in electronic form or by means of website publication. Do you agree?**

15. We agree, providing that copies of Code documents are also made available in hard copy form.

**Q7: Should the Code be amended to require the offeree company to provide, or instruct its registrar to provide, an offeror with details of addresses, electronic addresses and other information provided to the offeree company by, or on behalf of, offeree company shareholders, persons with information rights and other relevant persons for the receipt of Code documents in hard copy form or electronic form as proposed? Do you have any comments on the proposed new Section 4 of Appendix 4?**

16. We agree the Code should be amended as proposed. We have no further comments on the proposed new Section 4 of Appendix 4.

**Q8: Should the Code be amended to require the offeree company to instruct its registrar to provide an offeror with the offeree company's shareholder register following the announcement of a possible offer and not solely following the announcement of a firm intention to make an offer? Do you have any comments on the proposed amendments to Section 3 of Appendix 4?**

17. We agree the Code should be amended as proposed. We would be interested to know if the Code Committee considered whether there was also a need for the offeror also to be provided with copies of register update requests (RURs) and other documents relevant to in Section 3(c) to Appendix 4 earlier on in the offer period.

**Q9: Should the Code be amended to require the offeree company to provide an offeror with details of the issued shares and the other information set out in Note 3 on Rule 10 upon request following the announcement of a possible offer**

**and not solely following the announcement of a firm intention to make an offer? Do you have any comments on the proposed amendments to Note 3 on Rule 10?**

18. We agree the Code should be amended as proposed. We have no further comments on the proposed amendments to Note 3 on Rule 10.

**Q10: Should the Code be amended to inform an offeror that the use of information provided to it by the offeree company or its registrar pursuant to the new Section 4 of Appendix 4 to the Code for purposes that are not related to the offer may be subject to legal restrictions? Do you have any comments on the proposed new Section 4(c) of Appendix 4?**

19. We agree the Code should be amended as proposed. In relation to the proposed new Section 4(c) of Appendix 4 can the Code Committee clarify whether and what the data protection implications are where an offeror wants to use some of the contact information provided to it by the offeree company to make an equivalent or related offer to holders of other (non-Rule 14 or Rule 15) securities of the offeree company (eg bondholders) in conjunction with the offer to shareholders, and where there is overlap between the shareholder group and, say, the bondholder group?

**Q11: Should the Code be amended to require the offeree company to explain to offeree company shareholders, persons with information rights and other relevant persons that their addresses, electronic addresses and certain other information provided by them for the receipt of communications from the offeree company may be provided to an offeror during the course of an offer as required under the proposed new Section 4 of Appendix 4 to the Code? Do you have any comments on the proposed new paragraph (c) of Rule 2.6?**

20. We reiterate the point made in our response to Q3 that notifications for the purpose of Rule 2.6 should always be made in hard copy form. We believe that the commencement of an offer period is of such importance to the shareholders of an offeree that the risk of a shareholder failing to receive or suffering delay in receiving notification of such an event should be minimised. In maintaining the requirement to circularise all shareholders in writing at the start of an offer period, an important safeguard of the Code is preserved at a relatively small cost to the offeree company.

21. We consider there should be reference in Rule 2.6 to a warning that if a person has made an election then all future communication provided in connection with the offer will be sent electronically and/or posted on the website. In our view it would be helpful to offerors and their advisers if a template form of wording to include in the initial Rule 2.6 communication to shareholders is provided by the Code Committee, as the Committee has done for the summary Rule 8 wording required for Rule 2 announcements. Further, in view of the proposals set out in Q20 we feel that the warning should be further expanded to clarify that shareholders or optionholders will need to make a separate request to receive information incorporated by reference in hard copy form.

22. In the proposed new paragraph (a) of Rule 2.6 we believe that those eligible to receive announcements from the offeree company should also include "persons entitled to receive documents under Rule 15".

23. We consider that in the proposed new paragraph (c) of Rule 2.6 the first phrase "Where necessary" should be replaced with "If the offeror intends to use electronic communication".

**Q12: If a document, announcement or any information is required to be published under the Code and is sent to a person in (i) electronic form; or (ii) by means of website publication, should that person have a right to require a hard copy of the document, announcement or information to be sent to him as proposed? Do you agree that this right should extend to future communications from a party to the offer? Do you have any comments on the proposed Rule 19.9?**

24. Yes. We agree. We suggest that in proposed Rule 19(d), the deadline for the publishing party for sending a relevant person a hard copy of a document, an announcement or any information should be within one not two business days of that person's request being received. Otherwise a request made on a Monday, posted on the Wednesday would result in information being received on the Thursday or Friday - already five days into the timetable. We consider that parties should be able to despatch documents by the end of the business day following the request.

25. We suggest the Code Committee makes it clear and encourages offerors to ensure that they have mechanisms in place to ensure that requests for hard copies can be dealt with in a timely and prompt manner (we would expect hard copies to be available in advance). The need to shorten this time period is compounded by the further delays which may arise where shareholders on reviewing the document then may wish to make a separate request for hard copies of any document incorporated by reference.

**Q13: Do you agree that all persons to whom Code documents are required to be sent would have an equivalent opportunity to (i) gain access to suitable computers or other electronic devices, or make other arrangements to access information published electronically; or (ii) elect to receive communications from a party to an offer in hard copy form whether in advance of, or following publication?**

26. We agree.

**Q14: Do you agree that, provided a person to whom a document, an announcement or any information is sent by means of website publication is sent a hard copy within two business days of the request being received by the relevant party, that person should have sufficient time to reach a properly informed decision on the offer?**

27. Consistent with our response to Q12 we believe that hard copy information should be sent within one business day of the request being received.

**Q15: Should a Code document, including any related website notification, contain a statement that a person to whom it is sent may request a copy of the Code document (and any information incorporated into it by reference to another source) in hard copy form and may also request that all future Code documents sent to that person should be in hard copy form? Do you have any comments on the proposed new Rule 19.9(e)?**

28. We agree insofar as “future Code documents” relate to the offer. We suggest that the phrase “in relation to the offer” is inserted before “should be in hard copy form” in the first sentence in proposed new Rule 19.9(e).

***Q16: Should elections made by offeree company shareholders, persons with information rights and other persons in accordance with applicable legal and regulatory provisions to receive communications from the offeree company in hard copy form also apply to Code documents required to be sent to them by a party to an offer? Do you have any comments in relation to the proposed new Rule 19.9(f)?***

29. We agree with the proposal if, notwithstanding this, an offeror may still ask a shareholder in writing if they wish to receive such documents in electronic form.

***Q17: Should the Code be amended to require the offeree company to provide, or instruct its registrar to provide, an offeror with details of elections made by, or on behalf of, offeree company shareholders, persons with information rights and other relevant persons to receive communications from the offeree company in hard copy form?***

30. Yes.

***Q18: Should the right of persons located in non-EEA jurisdictions to receive hard copies of Code documents that are published in electronic form or by means of website publication be made subject to the provisions of Rule 30.3 and the Note on Rule 30.3?***

31. Yes.

***Q19: Do you have any comments on the proposed new Rule 19.10?***

32. No.

***Q20: Should the Code be amended to enable information to be incorporated into documents by reference to other sources as proposed? Do you have any comments on the proposed new Rule 24.14 or new Note on Rule 19.10?***

33. We agree the Code should be amended as proposed, subject to paragraphs 34 and 35 below.

34. In the proposed new Rule 24.14(c) we consider that hard copy information should be sent within one business day of the request being received.

35. In our view, in new Note on Rule 19.10, an offer document in electronic form should contain hyperlinks to information incorporated by reference.

***Q21: Should shareholders, persons with information rights and other relevant persons be entitled to receive a hard copy of any information incorporated into a document by reference to another source?***

36. Yes, within one business day of the request being received.

***Q22: Should references to Code documents being “posted”, “despatched” or “issued” and to the “posting” of such documents be amended to refer instead to those documents being “sent” to the relevant persons or “published” and/or***

***to their “publication”? Do you have any comments on the proposed amendments set out in Appendix B?***

37. Yes. We have no comments on the proposed amendments in Appendix B.

***Q23: Should references to Code documents having been “posted” be changed to refer instead to the offer having been “made”? Do you have any comments on the proposed amendments set out in Appendix B?***

38. Yes. We have no comments on the proposed amendments in Appendix B.

***Q24: Do you agree with the proposed amendments referred to in paragraph 8.7? Do you have any comments on the proposed amendments set out in Appendix B?***

39. We agree. We have no comments on the proposed amendments in Appendix B.

**PART B: Publication of documents, announcements and information on websites**

***Q25: Should the Code require copies of all documents, announcements and information published in relation to an offer to be made available on a website? Do you have any comments on the proposed new Rule 19.11?***

40. As a general observation on proposed new Rule 19.11 we consider it preferable for the use of a website to be optional if a party to an offer is not planning to use electronic communications. We are concerned that, while most trade offerors are likely to have websites, in the circumstances of a management buy-out or public to private transaction this may not be the case and that additional cost, time and money would be spent which may outweigh the benefits to shareholders. We agree, however, that if a party to an offer plans to use electronic communications, the website should provide a complete picture and include all documents, announcements and information.

41. It would be helpful to those considering the use of a third party website if Note 1 on Rule 19.11 could set out the Panel’s expectations for accessibility, security and general robustness of such a website as well as other factors the Panel would typically consider and /or is keen to understand from parties when it is consulted.

***Q26: Should a party to an offer be able to use a website maintained by a third party to publish copies of documents, announcements and information in connection to an offer (subject to the Panel’s consent)?***

42. We agree provided this is optional.

***Q27: Should the Code permit restrictions on access to Code documents on websites by persons located in non-EEA jurisdictions? Do you have any comments on the proposed new Note 3 on Rule 19.11 or the proposed amendments to Rule 30.3?***

43. We agree. We have no comments on the proposed new Note 3 on Rule 19.11 or the proposed amendments to Rule 30.3.

**Q28: Do you have any comments on the proposed new Notes 4 and 5 on the proposed new Rule 19.11?**

44. No.

**Q29: Should the Code be amended to require display documents to be made available for inspection on a website in addition to hard copy form until the end of the offer (and any related competition reference period)? Do you have any comments on the proposed amendments to Rule 26 or the new Notes 2, 3 and 4?**

45. We understand that the proposal is being made in the interests of transparency. However we remain highly concerned that such practice represents a significant shift from the present situation. We are also unclear who it is the Code Committee means by “all stakeholders” (paragraph 10.3).

46. Offerors and potential offerors already have the benefit of easy access to the documents on display in an offer period given that they can inspect documents and, on request, be provided with hard copies.

47. Experience to date indicates that shareholders very rarely inspect the documents on display. Their primary focus is on the offer document. As an aside, we note that material contracts of any UK incorporated offeree would also be made available to shareholders at the AGM. We find it surprising that shareholders would need information after the end of an offer period. We consider that the needs of shareholders to access this information with ease (given their limited use to date and the nature of the documents in question – being those ancillary to the offer) are far outweighed by the potential adverse consequences and damage that can be caused to offerors or offerees where potentially commercially confidential information is made available principally (in practice, we believe) for the benefit of competitors who are not necessarily bona fide competing bidders. We do not consider that the limited ability to redact such information with Panel consent would fully address this concern and we would expect that the Panel would not wish to be flooded with such requests.

48. We further believe that the length of time the information will be displayed - in particular in cases where there is a potentially long competition reference period - risks information being rendered out of date or incomplete.

49. In relation to Note 2 on Rule 26 this would require an offeror to use a website which, in line with our response to Q25, we do not think should be a Code requirement.

50. In relation to Note 3 on Rule 26 we believe that documents on display should not be capable of being printed. This is consistent with current practice. Also we note that this does not disadvantage a bona fide potential bidder which can already obtain copies of documents under the Code.

**Q30: Should offer documents, revised offer documents, offeree board circulars and offeree board opinions on revised offer documents be added to the list of documents to be on display under Rule 26? Do you have any comments on the proposed new Rules 26(p) and (q)?**

51. Yes. We have no comments on the proposed new Rules 26(p) and (q).

**Q31: Should Rule 32.7(a) be amended as proposed?**

52. Yes.

**Q32: Do you agree that the Code should be amended to recognise the position of persons with information rights under the 2006 Act?**

53. We agree.

**Q33: Do you have any comments on the proposed new definition of a “person with information rights”?**

54. We have no comments on the proposed definition.

**Q34: Should persons with information rights be entitled to be sent Code documents at the same time, and in the same manner, as they are sent to shareholders in the offeree company?**

55. Yes.

**Q35: Do you agree with the proposed consequential amendments relating to “persons with information rights” set out in Appendix B?**

56. We agree.

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