LIBA

LONDON INVESTMENT BANKING ASSOCIATION
6 Frederick's Place, London, EC2R 8BT
Tel: 020 7796 3606 Fax: 020 7796 4345

Advance copy by e-mail: www.supportgroup@thetakeoverpanel.org.uk

25 September 2009

The Secretary to the Code Committee
The Panel on Takeovers and Mergers
10 Paternoster Square
London
EC4M 7DY

Dear Sirs,

Re: PCP 2009/2 – Miscellaneous Code Amendments

We are writing in response to the referenced PCP on behalf of the London Investment Banking Association (LIBA). LIBA, as you know, is the principal trade association in the United Kingdom for firms which are active in the investment banking and securities industry. The Association represents its members on both domestic and international aspects of this business, and promotes their views to the authorities in the United Kingdom, the European Union, and elsewhere. More information on LIBA is available at www.liba.org.uk.

Please find attached our responses to the specific questions posed in the Consultation Paper. If it would be helpful to discuss any of the issues raised by our responses, we would be very willing to do so.

Thank you for your consideration.

Yours faithfully,

William Ferrari
Director

Enc

LONDON INVESTMENT BANKING ASSOCIATION

PCP 2009/2 Miscellaneous Code Proposals - Questions & Answers

Q.1 **Do you agree with the proposed amendments to Note 8 on Rule 9.1? (Page 7)**

We agree with the proposed amendments to Note 8 on Rule 9.1 which strengthen the presumption in favour of requiring a chain bid to be made.

We suggest that Note 8 (a) be clarified to indicate that a finding that all of the stipulated factors (assets, profits, and market values) must be 30% or more for a finding that the intermediary's interest in the ultimate company is significant (as opposed to one or two measures).

Q2 **Do you agree with the proposed amendment to Note 2 on Rule 16, the proposed deletion of Note 4 on Rule 16, the proposed adoption of new Rule 16.2 and the Notes thereon, the amendment to paragraph 4 of Appendix 1 and the related amendments referred to above? (Page 19)**

We do not consider that there is a need to vary from the current practice under the existing Note 4 on Rule 16. As explained in paragraph 3.4 (b) of the PCP, currently it is not the practice to obtain an opinion from the independent adviser on management incentivisation arrangements where management holds no shares in the offeree company. This recognizes the essence of General Principle 1 which is concerned with fair treatment for all of the target's shareholders by the offeror. Where the concerned management does not own shares in the offeree, there can be no question that the management incentivisation arrangements constitute special treatment of some of the target's shareholders. Equally, we do not share the concern set out in paragraph 3.6(a) of the PCP that non shareholding directors / management who are the proposed recipients of management arrangements are able to influence the outcome of the board's considerations. Any such director would be obliged to disclose any conflict and would be unable to form part of the advice of the board to shareholders required under Rule 25.1.

Currently, and for some time, the Panel has been relying in these cases on the independent adviser's opinion of the offer as a whole (other than where an opinion is required pursuant to the existing Note 4 on Rule 16). Presumably, it has been able to resolve concerns about incentivisation arrangements to its own satisfaction and to the satisfaction of the public and shareholders without further recourse to an independent advisor. The proposals will add cost/complexity where there has been no failure.

In addition, we are not comfortable with the suggestion that, in forming an opinion on management incentivisation arrangements, the Rule 3 adviser must consider the impact that incentivisation arrangements have on the amount of

consideration available to shareholders under the offer (as suggested in para 3.14/3.6(b) of the PCP). We do not believe that Offerors in general approach the pricing of an offer in this way, nor that the economics of a bid can be reduced in this fashion. The financial adviser should simply be satisfied that there is no possible breach of Rule 16 ie. that the management team are being invited to participate in the arrangements because of their positions as management and not by virtue of their shareholding, and should not be asked to give consideration to the impact of the arrangements on the offer as a whole, indeed such an approach could give rise to an ambiguity with the existing obligations of the board to seek independent advice under Rule 3.1.

In addition, the broadening of the whole note to "any form of incentivisation" changes the emphasis of the words and risks capturing too broad a scope of arrangements. We believe the Panel should take this opportunity to clarify that certain arrangements are not subject to Note 4 for not being a mischief that Rule 16 is designed to address. An offeror should be able to engage in normal discussions with offeree management (and non-management staff), whether or not they are shareholders, regarding their future in the same way as it would its own existing employees in the ordinary course, without fear of tripping into the application of Note 4. This should include normal discussions around future employment, roles in the combined organization, and some level of discussion of remuneration. Only if the remuneration discussions are significant, for example they involve a significant uplift (whether cash, equity-based or some form of lock-in or golden handcuffs) beyond the individual's existing remuneration levels should they be considered to be incentivisation to which Note 4 applies.

The proposals would remove in large measure any responsibility on the part of the Panel Executive to take a view on the arrangements. Theoretically, it will not be necessary to consult the Panel Executive in cases where the value is not significant or its nature is unusual in the context of the relevant industry or best practice. However, we are concerned that the proposed process will lead to a significant increase in the need for an independent shareholder vote on such amendments because there will be too little clarity regarding best practice, what constitutes an unusual measure, or what should be deemed significant. The independent adviser will be forced to consult with the Panel Executive who will be likely to put the matter to a vote of independent shareholders. The process will be more difficult where there has been no agreement as to such arrangements because the independent adviser will be dealing with uncertainties and/or variations.

In our view the most important consideration for all shareholders is the adequacy of the bid which is assessed in any case by an independent advisor and by the board as a whole which owes a duty to its shareholders to act in their best interests. If the over-all assessment of the independent adviser is sound, there is little need to determine whether the incentivisation arrangements are sensible. That becomes a problem for the offeror.

Transparency would be useful to the independent adviser and to shareholders in their respective roles. Transparency would suffice without the added costs

and complexity of a specific opinion concerning the incentivisation arrangements.

Q3 **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, 4 and 5?**

In our view the proposals will greatly increase the scope of disclosure in terms of time and availability. Once the information is available on a website, it can be preserved indefinitely. Whereas access to physically displayed documents can be controlled, such will not be the case with respect to a website. We are concerned that there may be unnecessary distribution of proprietary information to parties without direct interest in the transaction. We are not convinced that the balance of advantage/disadvantage tips in favor of the proposal.

Q4 **Do you agree that the Code should be amended to delete Rule 26 (c) as suggested above? Do you agree that Rules 26 (d) and (f) should be amended as suggested above? (Page 31)**

We agree that material contracts entered into by an offeror or the offeree company or their subsidiaries in connection with an offer that is described in the offer document or offeree board circular in compliance with the Rules should be displayed. We also agree that service contracts of offeree company directors and material contracts not connected with the offer need not be displayed.

Q5 **Do you agree that the Note on Rule 2.7 should be amended to make clear that the ability of an offeror to choose not to proceed with an offer where a higher competing offer has been made should be subject to the consent of the Panel? (page 34)**

We agree that the Note on Rule 2.7 should be amended to require the consent of the Panel where an offeror desires not to make an offer where another offeror has made a higher offer. We would suggest that one additional factor to be considered by the Panel would be the risk that the higher offeror would become unable to complete due to financial or regulatory issues. This could be added to the list of factors to be considered by the Panel found in paragraph 5.7 of the PCP.

Q6 **Do you agree that Note 5 on Rule 21.1 should be deleted? (Page 35**

We agree.

Q7 **Do you agree with the proposed amendment to the Note on Rule 2.7 as set out above and to the proposed consequential amendments? (Page 36)**

We agree to the proposed amendment to the Note on Rule 2.7.

Q8 **Do you agree that Rule 12.2 should be amended as proposed?**

We agree.

Q9 **Do you agree with the proposed amendment to Rule 31.3? (Page 41)**

We agree.

Q10 **Do you agree that Rule 25.3 (a) (v) should be amended as proposed? (Page 42)**

We do not support the proposal which would require a director to indicate which offer among any alternative offers he intends to accept. This is unnecessary for purposes of the shareholders' consideration whether to accept an offer and may be misleading because the circumstances affecting individual director-shareholders' decisions will differ.

Q11 **Do you agree that Rule 27.1 should be amended as proposed? (Page 43)**

We agree that any known material changes in the financial or trading position of either party must be sent to shareholders of the offeree and persons with information rights in any documents sent after the initial documents (after the offer circular, offeree board circular).

Q12 **Do you agree that Note 6 on Rule 9.1 should be amended as proposed? (Page 45)**

We agree.

Q13 **Do you agree that Rule 36 should be amended as proposed? (Page 48)**

We agree.