

IRISH TAKEOVER PANEL

CONSULTATION PAPER 2

**PROPOSALS TO AMEND VARIOUS
TAKEOVER RULES**

7 July 2011

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Introduction

This paper sets out proposals to amend the Irish Takeover Panel Act 1997, Takeover Rules, 2007 to 2008 (“the Rules”) primarily in the following areas: the “put up or shut up” mechanism; the terms of a possible offer announcement; statements of intention not to make an offer; pre-conditions and conditions; advertisements; interviews and debates; and a proposed new rule imposing specific obligations on advisers. Certain other miscellaneous rule amendments are also being proposed.

In summary, the main amendments being proposed are as follows:

1. Rules 2.4/35.1 - while there is currently a mechanism under Rule 35.1(b) that enables the Panel to bring an end to a “*siege*” of the offeree, the Panel is of the view that it is appropriate to extend and clarify the Rules, particularly Rule 2.4, in relation to how the “*put up or shut up*” mechanism operates and the restrictions and exemptions applicable in specific circumstances.

2. Rule 35 – it is proposed to amend Rule 35.1(a) (*restrictions following offers*) by extending the restrictions that apply to an offeror whose offer has lapsed or been withdrawn. The purpose of this is to ensure that such an offeror does not take any steps in connection with a possible offer for the offeree during the restricted period.

A new Rule 35.3 is also being proposed which would impose a dealing restriction in the securities of the offeree on a competing offeror whose offer had lapsed. The purpose of the rule is to address issues which arise in competitive situations, particularly when competing offers continue to subsist on Day 46.

3. Rule 2.8 - at present the rule dealing with statements of intention not to make an offer prohibits an offeror who has made such a statement only from making another offer for the offeree concerned within the period of 12 months following the release of the statement. The Panel is of the view that the restrictions imposed on an offeror who has made such a statement should be similar to those under Rule 35.1(a) as both rules give effect to the General Principle that an offeree should not be under siege for longer than is necessary by an offer for its securities. It is proposed to amend Rule 2.8 to align the restrictions imposed under that rule with those to be imposed under Rule 35.1(a).

4. Rule 2.4 - it is proposed that Rule 2.4 be amended to set out the extent to which an offeror will be bound by the information contained in its possible offer announcement. The Rules are currently silent in this regard. A proposed new Rule 2.4(c) will:

- provide that when an offer is made its terms are consistent with any statements made in a previous Rule 2.4 announcement, including any offer terms referred to in that announcement;

- contain a requirement that Panel consent be obtained if an offeror wishes to include in a Rule 2.4 announcement the terms on which an offer might be made and that an offeror who makes such an announcement will be bound by that statement except in specific circumstances;
- contain detailed provisions with regard to the effect of statements made in a Rule 2.4 announcement in relation to the value of an offer; and
- establish the time period in which the restrictions imposed under the new rule will bind the offeror and its concert parties.

5. Rules 2/13 - the Rules do not currently prescribe in any detail the position with regard to the making of possible offer announcements and firm intention to make an offer announcements that are subject to pre-conditions. The effect of Rule 2.3(d) is generally to prohibit such announcements, except with Panel consent. The Panel believes the Rules should be amended to provide more detail with regard to the use of pre-conditions and the circumstances in which they can be invoked. The Panel is proposing that the Rules also address the invocation of offeree protection conditions.

6. Rule 19.4 - it is proposed to amend the rule to clarify that it applies to every form of advertisement and that a publication which would otherwise be treated as an advertisement will not be treated differently under the rule merely because it has been previously published. In addition, some drafting amendments are being proposed which do not change the substance or meaning of the rule but are intended to clarify the restrictions on the publication of advertisements.

7. Rule 19.6 - the Panel is proposing to introduce a new Rule 19.6(c) which will set out the circumstances in which joint interviews and debates will be permitted under the Rules.

8. The Panel is proposing that a new rule be introduced that would impose specific responsibilities on advisers to an offeror and to the offeree.

9. The paper also sets out various other miscellaneous rule amendments.

In undertaking its review of the Rules, the Panel has considered various Code amendments adopted by the Panel on Takeovers and Mergers in the UK. Full sets of the proposed new Rules and Notes are set out in the Annexes to this paper.

The Panel is inviting comments on this consultation paper. Any comments should reach the Panel by 7 October 2011. Comments should be sent in writing to:

Irish Takeover Panel
Lower Ground Floor
76 Merrion Square
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Alternatively, comments may be sent by email to: takeoverpanel@eircom.net

Proposed Amendments to Part B of the Rules and Related Notes

1. “Put up or shut up”

1.1 The Rules set out a specific timetable for the conduct of takeover bids which is designed to balance the competing needs of all parties to a bid. The rationale behind the timetable is, on the one hand, to provide the offeror with sufficient time to consummate its offer while, on the other hand, avoiding a situation where the offeree is “under siege” for an excessive period of time. Essentially, the timetable seeks to balance the requirements of General Principle 2 – that offeree shareholders must have sufficient time and information to enable them to reach a properly informed decision on the bid – against those of General Principle 6, which provides that an offeree must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.

The formal timetable for a bid commences with the release of a Rule 2.5 announcement, i.e. an announcement of a firm intention to make the bid. However, frequently an offer period commences with an announcement of a possible offer pursuant to Rule 2.4 and, in those circumstances, no formal bid timetable is triggered at that point and therefore there is no specific time period within which the offeror’s intentions must be clarified. Accordingly, an excessive period of siege could arise where an announcement of a possible offer is made and a firm intention announcement does not follow within a reasonable period of time.

The principle that an offeree should not be under siege for an excessive period of time is given effect primarily through Rule 35 (*restrictions following offers and possible offers*). Under Rule 35.1(a), a person who has announced a firm intention to make an offer or who has posted an offer which in either case is withdrawn or lapses is prevented from, amongst other things, announcing or making a further offer for the same offeree for a period of 12 months from the date on which the previous offer was withdrawn or lapsed.

The current basis for the Panel to intervene following the announcement of a possible offer and to put an end to a siege is set out in Rule 35.1(b), under which similar restrictions to those imposed by Rule 35.1(a) will apply to a person who makes a possible offer announcement and does not, within a period thereafter which the Panel deems to be reasonable, announce a firm intention either to make or not to make an offer for the offeree concerned. Rule 35.1(b) is therefore specifically designed to prevent an offeree from being under siege for an excessive period of time from an offeror without that offeror announcing a firm intention to make an offer.

The practice of the Panel to date has been not to intervene following a possible offer announcement unless requested to do so by the offeree. Where such a request is made to the Panel, the offeree must persuade the Panel that it is

appropriate to establish a deadline by which the offeror must clarify its intentions. The Panel will then determine what is a reasonable time for the offeror either to announce a firm intention to make an offer pursuant to Rule 2.5 or to make a statement that it does not intend to make an offer. If the offeror announces that it does not intend to make an offer for the offeree, Rule 2.8 will prohibit that offeror from making such an offer for a period of 12 months from the date of that announcement, except with Panel consent, thus ensuring that the offeree is not subjected to excessive siege.

The Panel believes that, while the mechanism described above has been effective to date, it would be beneficial to extend and clarify the Rules in relation to how the mechanism operates and the restrictions and exemptions applicable in specific circumstances.

The Panel is proposing to amend Rule 2.4 so that, where an offeree board is of the view that the offeree is being hindered in the conduct of its affairs for longer than is reasonable as a result of the announcement of a possible offer for the offeree, it can request the Panel to put an end to the uncertainty by imposing a deadline by which the offeror must either announce a firm offer ("*put up*") or make a statement of intention not to make an offer ("*shut up*"). As referred to above, Rule 2.8 provides that, where a person makes a statement that he does not intend to make an offer for a relevant company, that person may not make an offer for that company within a period of 12 months thereafter, except with the consent of the Panel. The Panel is not proposing that the Rules should be amended so as to permit the Panel to intervene where the offeree board is content to tolerate the lack of a specific timetable and the uncertainty arising from this, as such intervention might not be in the interests of the offeree shareholders. However, the proposed new rules would allow the offeree board to request Panel intervention even when the offeree board is in discussions with the offeror, as those discussions may be taking place only so that the directors of the offeree board may satisfy their fiduciary duties.

It should be noted that it is proposed that the new rule would apply only in circumstances where the offeror has been publicly named. Offer periods in which the offeror is unnamed can arise where pursuant to an obligation under Rule 2.2 the offeree releases a Rule 2.4 announcement. If a put-up or shut-up deadline is subsequently issued by the Panel to such an offeror, the Panel would be required to identify the offeror in the announcement of the put-up or shut-up deadline. The Panel feels that this would be inappropriate. On the other hand, it would clearly make no sense for the Panel to issue a put-up or shut-up deadline which did not identify the offeror.

In circumstances where the offeror is unnamed, the offeree can end the offer period by announcing that it, or the offeror, had terminated discussions. Where the offeree had terminated discussions and the offeror wishes to pursue its interest in the offeree, the offeror would then have to make its interest known

publicly. At that point, the offeree would be entitled to make a put-up or shut-up request to the Panel.

It is proposed that the “put up or shut up” mechanism be incorporated in a new Rule 2.4(b) which is set out below.

Rule 2.4 THE ANNOUNCEMENT OF A POSSIBLE OFFER

“(b) At any time during an offer period following the announcement of a possible offer and before any announcement by the offeror of a firm intention to make an offer in respect of the offeree, the Panel may, if the offeror has been publicly named and the offeree so requests, impose a time limit within which the offeror shall clarify its intentions with regard to the offeree. If such a time limit is imposed, the offeror shall, before the expiry of the time limit, announce either a firm intention to make an offer in respect of the offeree pursuant to Rule 2.5 or that it does not intend to make an offer in respect of the offeree, in which latter case the announcement shall be deemed, for all purposes of Rule 2.8, to be a statement to which Rule 2.8 applies made by the offeror in relation to the offeree.”

1.2 The Panel is proposing that the new rules be flexible as to the time restrictions imposed by the “put up or shut up” mechanism, as it is of the view that it would be appropriate to consider the circumstances of each case and to balance the interests of the offeree against those of its shareholders in order to determine the appropriate deadline. It is also envisaged that an extension of the time limit imposed by the Panel would normally be granted only if the board of the offeree approves. This reflects current Panel practice. Furthermore, there may be circumstances where it would not be appropriate for the Panel to impose a deadline, for example, where an offer has lapsed under Rule 12(b)(i) because the European Commission has initiated proceedings in respect of the transaction or has referred it to the competent authority of an EU Member State. The Panel also envisages that it would normally not make the “put up or shut up” mechanism available to an offeree in respect of an offeror who makes a possible offer announcement after a third party has made a firm intention announcement in respect of the offeree. The Panel is proposing that the above considerations should be reflected in notes on Rule 2.4, as set out below.

NOTES ON RULE 2.4

“2. Period for clarification

The precise time limit imposed in any particular case under Rule 2.4(b) will normally be determined by reference to all the circumstances of the case, and the Panel will usually endeavour to balance the potential damage to the business of the offeree arising from the uncertainty caused by the offeror’s interest against the disadvantage to the offeree’s shareholders of losing the prospect of an offer.

3. Extension of time limit

The Panel will normally not extend a time limit unless the offeree board approves the extension.

4. Where time limits may not be imposed

The Panel would not normally impose a time limit in respect of a possible offer where an offer has lapsed under Rule 12(b)(i) because the European Commission has either initiated proceedings in respect of a concentration or referred it to a competent authority of a Member State.

Nor would the Panel normally impose a time limit where, after a third party has announced a firm intention to make an offer, the potential offeror makes a statement that it is considering making a competing offer.

See Note 2 on Rule 19.3.”

1.3 The Panel is also proposing to amend Rule 12(b) (which relates to the European Merger Regulation) to require a “put up or shut up” announcement by an offeror following the clearance of its offer by the European Commission or the competent authority of the Member State concerned where the Commission referred the transaction to that authority. This requirement will be contained in a new Rule 12(b)(iv). As guidance to an offeror that has announced its intention to make an offer should a favourable decision be made by the relevant authority, it is proposed to add a new Note 2 on that rule to the effect that the Panel will normally require such an offer to be announced within 21 days of such a decision.

The new rule will also provide that, where the transaction is prohibited by the relevant authority, the offeror will be subject to the restrictions in Rule 2.8(b) for 12 months.

A new Note 3 on the rule is proposed which will draw attention to the related provisions of Rule 35.1 as proposed to be amended.

The Panel is of the view that these amendments are appropriate as the Rules do not currently impose any timing requirement on an offeror to clarify its intentions following a clearance decision by the European Commission or the competent authority concerned. The Panel also believes that these amendments are in keeping with the proposed amendments to Rule 2.4 outlined above.

The proposed new Rule 12(b)(iv) (to be inserted after the proposed new Rule 12(b)(iii) referred to in paragraph 9.2 below) and associated new notes are set out below.

Rule 12(b) (EUROPEAN COMMISSION)

“(iv) Where, following the lapse of an offer pursuant to Rule 12(b)(i):

(1) the concentration concerned is cleared (with or without conditions or obligations attached) by a decision of the European Commission under Article 8(1) or (2) of the European Merger Regulation or (as the case may be) by a decision of the competent authority of the Member State to which the European Commission referred the concentration under Article 9(1) of that Regulation, the offeror shall immediately consult the Panel and shall, within such time limit as the Panel shall impose, announce either a firm intention to make an offer in respect of the offeree pursuant to Rule 2.5 or that it does not intend to make such an offer, in which latter case the announcement shall be deemed, for all purposes of Rule 2.8, to be a statement to which Rule 2.8 applies made by the offeror in relation to the offeree; or

(2) the concentration concerned is prohibited by a decision of the European Commission under Article 8(3) of the European Merger Regulation or (as the case may be) by a decision of the competent authority of the Member State to which the European Commission referred the concentration under Article 9(1) of that Regulation, then, except with the consent of the Panel, the offeror, every other person who acted in concert with the offeror and every person who is subsequently acting in concert with the offeror or any such other person shall, in relation to the offeree, be subject to the restrictions set out in Rule 2.8(b) during the period of 12 months from the date on which the decision concerned is notified to the offeror.”

Notes on Rule 12(b)

“2. Rule 12(b)(iv)(1)

The Panel will normally require the offeror to announce its decision within 21 days after the issue of the clearance.

3. Rule 12(b)(iii) and (iv)

See Rule 35.1.”

It is also proposed to add the following new Note on Rule 2.2.

NOTES ON RULE 2.2

“4. Rule 12(b)(iii) and (iv)(1)

Announcements by an offeror may be required under these rules, following the lapse of an offer pursuant to Rule 12(b)(i)."

1.4 Should the new Rule 2.4(b) above be adopted, it would no longer be necessary for the Panel to retain the ability to impose a lock-out period under Rule 35.1(b) and, accordingly, that rule would be redundant. Therefore, the Panel is proposing that Rule 35.1(b) and Note 2 on Rule 35.1 be deleted. Rule 35.1(a) would therefore become Rule 35.1; see also paragraph 3 below.

35.1 DELAY OF 12 MONTHS

~~*(b) If a person (in this paragraph (b) referred to as the "offeror") makes an announcement or statement concerning a relevant company (in this paragraph (b) referred to as the "offeree") which, although not amounting to an announcement of a firm intention to make such an offer, raises or confirms the possibility that an offer (not being a partial offer) in respect of the offeree may be made by the offeror, and the offeror does not, within a period which the Panel deems to be a reasonable period thereafter, announce a firm intention either to make, or not to make, such an offer, the restrictions in paragraph (a) shall apply to the offeror, to any person who was acting in concert with the offeror at the time of the announcement and to any person who is subsequently acting in concert with the offeror or any such person. For this purpose, the period of 12 months referred to in paragraph (a) shall be deemed to commence from the date of expiry of that reasonable period.*~~

NOTES ON RULE 35.1

~~*2. Non-firm announcements*~~

~~*Rule 35.1(b) applies irrespective of the precise wording of the announcement and the reason it was made. For example, it is relevant in the case of an announcement that a person is considering his options if, in all the circumstances, those options may reasonably be understood to include the making of an offer. However, the Panel will normally apply this provision only if it is persuaded by the offeree that the damage to its business from the uncertainty outweighs the disadvantage to its shareholders of losing the prospect of an offer. The question as to what is a reasonable time has to be determined by reference to all the circumstances of the case; the stage which the offeror's preparations had reached at the time the announcement was made is likely to be relevant. See also Rule 2.8 in relation to statements by a person that he does not intend to make an offer.*~~

2. Statements of intention not to make an offer – Rule 2.8

2.1 Rule 2.8 sets out the consequences of a statement of intention not to make an offer for a relevant company. The rule states that a person who makes such a statement will not, except with Panel consent, be permitted to make an offer for the company concerned for a period of 12 months after making the statement. As stated above, the purpose of this lock-out is to ensure that the relevant company is not subjected to excessive siege. The lock-out also provides certainty to the market that a person who has made a statement of intention not to make an offer cannot simply change his mind and return shortly afterwards with a bid for the company concerned.

The Panel is of the view that it would be inconsistent with the rationale underpinning the proposed “put up or shut up” mechanism and Rule 2.8 if a person (an “offeror”), having made a statement of intention not to make an offer, were able, in effect, to continue the siege, for example, if it announced that it intended to make an offer for the company concerned (the “offeree”) following the expiration of the 12 month period or if information about the offeror’s attempts to raise financing for a future bid leaked, leading to rumour and speculation about its intentions.

Accordingly, the Panel believes that, once a Rule 2.8 statement has been made, the offeror should be required to “down tools” so far as any public promotion of its possible offer is concerned. The Panel is therefore proposing that Rule 2.8 be amended to prohibit the offeror for 12 months from (i) announcing an offer or possible offer for the offeree; (ii) acquiring any securities of the offeree if the offeror would thereby become obliged under Rule 9 to make an offer for the offeree; (iii) acquiring any securities of the offeree if the offeror holds securities conferring more than 49.95% but not more than 50% of the voting rights in the offeree; (iv) acquiring any securities of the offeree, or rights over securities of the offeree, if, following that acquisition, the securities which the offeror would hold and the securities over which the offeror would hold rights would in aggregate confer 30% or more of the voting rights in the offeree; (v) making any statement that raises or confirms the possibility that an offer might be made for the offeree; or (vi) taking any steps in connection with a possible offer for the offeree where knowledge of the possible offer might be extended beyond a very restricted number of people in the offeror and its immediate advisers. These prohibitions will, in the main, mirror the prohibitions proposed below to be imposed under Rule 35.1 (*restrictions following offers*) on an offeror who has made an unsuccessful offer.

2.2 The Panel is also proposing to amend Rule 2.8 so that it does not (as the existing rule does) apply only to the person who makes the statement of intention not to make an offer but applies also to persons acting in concert with that person. An amended Note 2 to Rule 2.8 will indicate, amongst other things, that, where a Rule 2.8 statement is made otherwise than following a time limit imposed under the “put up or shut up” mechanism, the Panel may grant a

derogation to a concert party if it is made clear in that statement, or at the time that statement is made, that the concert party is continuing to consider an offer for the offeree. The amended Note 2 on Rule 2.8 is discussed further in paragraph 2.4 below.

2.3 The current Rule 2.8 has a very narrow application in that the wording of the rule is such that only those statements that clearly state that the offeror does not intend to make an offer can be regarded as statements falling within the scope of Rule 2.8. This very narrow application means that the Panel does not have the flexibility to regard other statements, having the same effect, as statements falling within the scope of Rule 2.8. Consequently, it is the view of the Panel that Rule 2.8 should be amended to provide it with the flexibility to regard a broader range of statements as statements falling within the scope of Rule 2.8 where the Panel is satisfied that they should be so regarded. The proposed new Rule 2.8 is drafted on the basis that it will also capture statements which suggest, or raise the possibility, that the person concerned will not make an offer. However, it is proposed that in such circumstances the Panel might alternatively require that person to make an announcement withdrawing the statement or otherwise clarifying his intentions.

2.4 The current Rule 2.8 is silent in relation to the inclusion in a statement of intention not to make an offer of a reference to events which, if they occur, would permit that person to set aside the statement and the resulting prohibition. Having considered this matter, the Panel is of the view, having regard to the likely nature of such events, that Panel consent should be required before any Rule 2.8 statement can be set aside. The Panel is therefore proposing that the amended Rule 2.8 would expressly prohibit the making of a Rule 2.8 statement that refers to any event that would purportedly enable the offeror to set aside the statement.

It is proposed to amend Note 2 on Rule 2.8 to set out circumstances in which a Panel derogation from Rule 2.8 might be granted. The note would set out circumstances in which the Panel might consider granting a derogation where a Rule 2.8 statement had been made following a time limit imposed under the “put up or shut up” regime or pursuant to Rule 12(b)(iv)(1) and, separately, where a statement had been made voluntarily. In the former case, the Panel may consider granting a derogation to permit reservations in Rule 2.8 statements where a new offer is to be made with the agreement of the offeree board, where an offer is announced by a third party or where an announcement is made by the offeree of a “whitewash” proposal or of a reverse takeover transaction. As the “put up or shut up” regime is based on the siege principle, the Panel is of the opinion that this approach is appropriate.

In the case of a voluntary Rule 2.8 statement, the amended Note 2 would refer to factors that the Panel might take into account when considering whether to grant a derogation. These would replicate the contents of the existing Note 2 but also

include an additional circumstance to address the fact that Rule 2.8, as proposed to be amended, will be extended to include concert parties of the offeror, as referred to in paragraph 2.2 above.

2.5 The Panel is also proposing to include a new Note 3 on media reports, which will give guidance on the Panel's consideration not only of the Rule 2.8 statement but also of the reporting of that statement. This may be useful to parties and their advisers when drafting, releasing and commenting on such statements.

2.6 The Panel is not proposing to amend the 12 month lock-out period in Rule 2.8.

The proposed new Rule 2.8, which replaces the existing Rule 2.8, and associated new notes are set out below.

"2.8 STATEMENTS OF INTENTION NOT TO MAKE AN OFFER

(a)(i) A person who makes a statement that, or to the effect that, he or she does not intend to make an offer in respect of a relevant company ("a statement to which Rule 2.8 applies") shall make the statement as clear and unambiguous as possible. Except with the consent of the Panel, such a statement shall not specify any event as an event the occurrence of which would purportedly entitle the person making the statement to set aside the statement.

(ii) Where a person makes a statement that in the opinion of the Panel suggests, or raises the possibility, that he or she will not or may not make an offer in respect of a relevant company, the Panel may, if it considers it to be appropriate in the circumstances to do so (including after communicating with such person where in the opinion of the Panel that would be useful and practicable):

(1) determine that such statement shall be deemed, for all purposes of Rule 2.8, to be a statement to which Rule 2.8 applies made by such person in relation to the relevant company on the date on which the Panel notifies him or her of that determination; or

(2) require such person to make an announcement withdrawing the statement or otherwise clarifying his or her intentions in respect of the relevant company concerned in a manner approved by the Panel.

(b) Except with the consent of the Panel, where a person makes a statement to which Rule 2.8 applies, neither the person who made the statement, nor any other person who acted in concert with him or her at that time, nor any person who is subsequently acting in concert with the person who made the statement or any such other person (all such persons being collectively referred to in this rule as the "persons affected"), may within the period of 12 months from the date of the statement:

(i) announce an offer or possible offer or make an offer in respect of the relevant company concerned;

(ii) acquire any securities of the relevant company if any of the persons affected would thereby become obliged under Rule 9 to make an offer in respect of the relevant company;

(iii) acquire any securities of the relevant company if the persons affected or any of them hold securities conferring in the aggregate more than 49.95% but not more than 50% of the voting rights in the relevant company; or

(iv) acquire any securities of the relevant company, or rights over securities of the relevant company, if, following that acquisition, the securities of the relevant company which the persons affected or any of them would hold and the securities of the relevant company over which the persons affected or any of them would hold rights would in aggregate confer 30% or more of the voting rights in the relevant company;

(v) make any statement that raises or confirms the possibility that an offer might be made in respect of the relevant company; or

(vi) take any steps in connection with a possible offer in respect of the relevant company where knowledge of the possible offer might be extended beyond a very restricted number of people in the offeror and its immediate advisers.”

~~2.8 STATEMENTS OF INTENTION NOT TO MAKE AN OFFER~~

~~Except with the consent of the Panel, a person who makes a statement that he or she does not intend to make an offer in respect of a relevant company shall not make an offer in respect of that company within 12 months thereafter. Such statement shall be as clear and unambiguous as possible.~~

NOTES ON RULE 2.8

“2. When derogations may be considered

(a) Where pursuant to Rule 2.4(b) or Rule 12(b)(iv)(1) an announcement made by a person is deemed to be a statement to which Rule 2.8 applies, the circumstances in which the Panel may consider granting a derogation in respect of the 12 month period in Rule 2.8(b) include where:

(i) a new offer is to be made by the person who made the statement in respect of the relevant company concerned with the agreement or recommendation of its board; or

(ii) an offer is announced by a third party in respect of the relevant company; or

(iii) an announcement is made by the relevant company of a “whitewash” proposal (see Note 1 of the Notes on Possible Waivers of and Derogations from Rule 9 and the Whitewash Guidance Note) or of a reverse takeover transaction (see definition in Rule 2.1(a) of Part A of the Rules and Rule 40).

The above criteria may also be relevant to the Panel’s consideration of a request for a derogation permitting reservations in a statement to which Rule 2.8 applies.

(b) Where a statement to which Rule 2.8 applies is made otherwise than in the circumstances specified in paragraph (a), the Panel, in considering whether to grant a derogation in respect of the 12 month period in Rule 2.8(b), may take into account, amongst other factors, whether the original statement was made with due care and after proper consideration of all relevant circumstances and has not misled shareholders or the market. The circumstances in which the Panel may consider granting a derogation include the following:

(i) where a significant amount of time has elapsed ;

(ii) where a material change of circumstance has occurred, sufficient in the opinion of the Panel to justify the person changing his or her intention; or

(iii) if the derogation is sought by a person acting in concert with the person who made the statement, where it was made clear in the statement, or at the time the statement is made, that the person acting in concert was continuing to consider making an offer for the relevant company.”

2. Change of intention

In considering whether a person who has announced that he or she does not intend to make an offer will be permitted to make such an offer, the Panel will take into account whether the original announcement was made with due care, after proper consideration of all relevant circumstances, and has not misled shareholders or the market. This means that a change of intention may be permitted if, for example, a significant amount of time has elapsed or a material change of circumstance has occurred sufficient in the opinion of the Panel to justify the person changing his or her intention.

“3. Media reports

When considering the application of this Rule, the Panel will take into account not only the statement itself but the manner of any subsequent public reporting of it. Advisers should therefore ensure that directors and officials of companies are warned that they must consider carefully the implications of Rule 2.8, particularly when giving interviews to, or taking part in discussions with, the media. It is very difficult after publication to alter an impression given or a remark attributed to a particular person. Control of any possible abuse lies largely with the person being interviewed.

In appropriate circumstances, the Panel will require a statement of retraction or clarification.”

3. Restrictions following offers – Rule 35

3.1 As stated in paragraph 1.1 above, the principle that an offeree should not be under siege for an excessive period of time is given effect primarily through Rule 35 (*restrictions following offers and possible offers*). Under Rule 35.1(a), where an offeror has announced a firm intention to make an offer or has posted an offer and, in either case, that offer is withdrawn or lapses, neither the offeror, nor any other person who acted in concert with the offeror, nor any person who following the expiry of the offer period is acting in concert with the offeror or with any such other person may within the next 12 months, amongst other things, announce or make an offer in respect of the offeree or acquire securities that would as a result oblige any of them under the Rules to make an offer for the offeree. The argument, referred to in paragraph 2.1 above, that an offeror that has made a Rule 2.8 statement should be required to “down tools” so far as any public promotion of its offer is concerned, is clearly equally valid with respect to the restrictions that should be applied under Rule 35.1(a). Consequently, the Panel is proposing that Rule 35.1(a) be amended to reflect equivalent restrictions to those proposed to be included in Rule 2.8(b).

3.2 It is also proposed to amend Rule 35.1(a) so that some of the additional restrictions would not apply in circumstances where the offer lapses under Rule 12(b)(i) as a result of the European Commission initiating proceedings in respect of the offer or referring it to a competent authority of a Member State and the offeror is continuing to seek clearance with a view to making a new offer subsequently. Were the particular restrictions to continue to apply in these circumstances, the offeror would be unable to continue to seek the necessary clearance. A further proposed amendment is that Rule 35.1(a) should cease to apply to an offeror who has made a firm intention announcement in accordance with Rule 12(b)(iv)(1) and to an offeror who has become subject to the restrictions in Rule 2.8(b); in the latter case the offeror will have become bound by restrictions similar to those imposed by Rule 35.1(a).

It is proposed to delete paragraph (a)(iii) in the Note on Rule 35.1(a) as it will be rendered redundant by the adoption of the new Rule 12(b)(iv).

3.3 As a result of the proposed deletion of Rule 35.1(b), referred to in paragraph 1.4 above, Rule 35.1(a) will become Rule 35.1. Rule 35 will no longer apply to possible offers and consequently the title to the rule will be amended to remove the reference to “possible offers”.

3.4 The Panel has also considered whether it would be appropriate to apply any other restriction on an offeror following a lapsed offer. Specifically, the Panel has considered whether there should be any dealing restriction on an offeror and its concert parties where its offer has been one of two or more competing offers and has lapsed.

A competing offeror might enjoy a tactical advantage if it decided not to revise its existing offer on Day 46 but to allow it to lapse on a day prior to Day 60, with the intention of acquiring offeree securities in the market at above the competing offeror’s offer price and thereby frustrating that offer. Such a course of action might also result in a confused signal being sent to the market.

Currently under the Rules, a competing offeror will normally not be permitted by Rule 32.1(a) (*offer open for 14 days after revision*) to acquire offeree securities at above its offer price after Day 46. However, there is currently nothing in the Rules to prevent an offeror whose offer has lapsed from acquiring offeree securities at any price (provided they do not trigger a Rule 9 offer obligation).

Consequently, the Panel is proposing to introduce a new Rule 35.3 which will prohibit an offeror, and any person acting in concert with it, from acquiring securities of the offeree on more favourable terms than those made available under its lapsed offer until the competing offer or, as the case may be, each of the competing offers has either lapsed or become unconditional in all respects.

The proposed amended Rule 35.1 (currently numbered Rule 35.1(a)), with amendments underlined and amended note, and the proposed new Rule 35.3 are set out below.

RULE 35. RESTRICTIONS FOLLOWING OFFERS AND ~~POSSIBLE OFFERS~~

“35.1 DELAY OF 12 MONTHS

Except with the consent of the Panel or as provided in Rule 9.3 or in this Rule, if an offeror has announced a firm intention to make or has despatched an offer (not being a partial offer) and that offer has been withdrawn or has lapsed, neither the offeror, nor any other person who acted in concert with the offeror ~~as respects the offer~~, nor any person who following the expiry of the offer period is acting in concert with the offeror or any such other person (all such persons

being collectively referred to in this rule as the “persons affected”), may, within the 12 months after the date on which such offer is withdrawn or lapses, either:

(a) announce an offer or possible offer or make an offer in respect of the offeree; or

(b) acquire any securities of the offeree if ~~the offeror or any of the foregoing persons~~ any of the persons affected would thereby become obliged under Rule 9 to make an offer in respect of the offeree; or

(c) acquire any securities of the offeree if ~~the offeror and any of the foregoing persons~~ the persons affected or any of them hold securities conferring in the aggregate more than 49.95% but not more than 50% of the voting rights in the offeree; or

(d) acquire any securities of the offeree, or rights over securities of the offeree, if, following that acquisition, the securities of the offeree which the persons affected or any of them would hold and the securities of the offeree over which the persons affected or any of them would hold rights would in aggregate confer 30% or more of the voting rights in the offeree;
or

(e) make any statement that raises or confirms the possibility that an offer might be made in respect of the offeree; or

(f) take any steps in connection with a possible offer in respect of the offeree where knowledge of the possible offer might be extended beyond a very restricted number of people in the offeror and its immediate advisers;

provided that:

(i) the restrictions in Rule 35.1(a),(e) and (f) shall not apply in circumstances where the offer has lapsed pursuant to Rule 12(b)(i) and the offeror is continuing to seek clearance from the authority concerned with a view subsequently to making a new offer; and

(ii) the restrictions in Rule 35.1 shall not apply to an offeror following its making a Rule 2.5 announcement pursuant to Rule 12(b)(iv)(1) nor to a person who becomes subject to the restrictions in Rule 2.8(b).”

“35.3 RESTRICTIONS ON DEALINGS BY A COMPETING OFFEROR WHOSE OFFER HAS LAPSED

Except with the consent of the Panel, where an offer has been one of two or more competing offers and has lapsed, neither that offeror, nor any person acting in concert with that offeror, may acquire any securities of the offeree on terms more favourable than those made available under the lapsed offer until the other competing offer or, as the case may be, each of the other competing offers has either become unconditional in all respects or has itself lapsed. For that purpose, the value of the lapsed offer shall be calculated as at the day on which it lapsed.”

“NOTES ON RULE 35.1

4. When derogations may be granted

(a)

~~(iii) a previous voluntary offer lapsed in accordance with Rule 12(b) and the new offer follows the issuing of a decision either by the European Commission under Article 8(2) of the European Merger Regulation or (as the case may be) by the competent authority of the relevant Member State to which the European Commission referred the offer under Article 9 of that Regulation. Any such offer should normally be announced within 21 days after the issue of such decision; or~~

~~(iii)(iv)~~”

4. Terms of a possible offer – Rule 2.4

4.1 When an offer is in contemplation, it is often the case that an announcement is made by an offeror that raises or confirms the possibility that an offer may be made but does not amount to the announcement of a firm intention to make an offer. Frequently, a possible offer announcement of this kind will be made in order to comply with Rule 2.2 (“when an announcement is required”). Rule 2.4 states that, until a firm intention to make an offer has been announced, a brief announcement that talks are taking place which may or may not lead to an offer will satisfy the requirements of Rule 2.2 unless there are special circumstances requiring a more detailed announcement. Neither Rule 2.4 nor any other Rule expressly sets out what precise information should or should not be included in an announcement of a possible offer. While, in the main, Rule 2.4 announcements are brief and do not contain any material information in relation to the terms of any offer that might be made, some offerors will wish to include details on the terms of the possible offer in such announcements.

The Panel is of the view that offerors should be permitted to include in Rule 2.4 announcements material information relating to their offers as, from the perspective of offeree shareholders and the market generally, more information about a possible offer is preferable to less information. This view is based on the premise that any such information is capable of being relied upon by offeree shareholders and the market generally. The Panel is of the view that, in order to

ensure that such information is capable of being relied upon, the Rules should prescribe the extent to which an offeror will be bound by the information contained in its Rule 2.4 announcement. Currently, the Rules are silent in this regard.

4.2 The Panel is proposing that a new Rule 2.4(c) be introduced to ensure that when an offer is made its terms are consistent with any public statements made by or on behalf of the offeror prior to its Rule 2.5 firm intention announcement, including any terms referred to in a possible offer announcement. The rule will require an offeror to seek Panel consent to make a Rule 2.4 announcement if the terms on which an offer might be made are to be included in such an announcement. The new rule will also provide that, except with Panel consent, an offeror that makes a statement that refers to the terms of its possible offer will be bound by that statement unless, if incorrect, it is withdrawn immediately or unless the offeror has reserved the right to set aside the terms if a specified event occurs and that event actually occurs. As regards any such reservations, the rule will require that they are clear and unambiguous and not dependent upon the subjective judgments of the offeror directors. This would, for example, prevent an offeror from stating that the terms of the offer would be improved if due diligence were satisfactory (although, as indicated in paragraph 5.2.1 below, an offeror may, with Panel consent, include due diligence as a pre-condition in a possible offer announcement).

4.3 Rule 2.4(c) will contain some detailed provisions with regard to the effect of prior statements made in relation to the value of an offer. Except with Panel consent or where there has occurred an event specified in a reservation in the statement, essentially the offeror will not be permitted to make an offer at a lower price or on terms less favourable than those referred to in the statement. An offeror would be permitted to make an offer on more favourable terms provided it had not made an irrevocable “no increase” statement.

4.4 The restrictions imposed under the new rule will bind the potential offeror for the period during which the offeree is in an “offer period” and for a further three months thereafter. Where an offeror has made a statement of intention not to make a bid and the offeree remains in an offer period, the restrictions will apply for 3 months following the making of that statement.

4.5 The rule will extend all restrictions imposed on a potential offeror to its concert parties and to any person who is subsequently acting in concert with the offeror or those concert parties.

4.6 As regards statements by offerees, it is proposed to add a Note 6 to Rule 2.4 which will state that, where an offeree makes a possible offer announcement that includes terms on which an offer may be made, it must make clear whether it is being made with the approval of the offeror. Where it is being made with such approval, the statement will bind the offeror in the manner set out above.

The proposed new Rule 2.4(c) and the associated new notes are set out below.

2.4 THE ANNOUNCEMENT OF A POSSIBLE OFFER

“(c) (i) Until he or she has notified a relevant company of his or her firm intention to make an offer in respect of that company, a person shall not without the consent of the Panel make a public statement (in this Rule 2.4(c) a “Rule 2.4(c)(i) statement”) in relation to the terms on which an offer might be made by that person in respect of that company.

(ii)(1) If any Rule 2.4(c)(i) statement is published by an offeror or on its behalf by any of its directors, officers or advisers prior to any such notification having been made by the offeror and, if incorrect, is not immediately withdrawn, the offeror shall be bound by the statement if it subsequently makes an offer in respect of the offeree, unless the Panel consents otherwise or unless the offeror has reserved (in Rule 2.4(c) a “reservation”) in that statement the right to set aside the statement on terms specified therein if circumstances specified therein occur, those circumstances have occurred and the offeror has exercised that right.

(2) Where an offeror becomes so bound by a Rule 2.4(c)(i) statement, then, without prejudice to the generality of the powers of the Panel to enforce this Rule, the following provisions shall have effect:

(A) where the statement concerned relates to the value of the consideration to be paid in a possible offer, any offer subsequently made by the offeror in respect of the offeree shall be made for a consideration having the same or a higher value;

(B) where the statement concerned relates to the price of a possible offer or a particular exchange ratio in the case of a proposed securities exchange offer, any offer subsequently made by the offeror in respect of the offeree shall be made on the same or better terms. Where all or part of the consideration is expressed in the statement in terms of a monetary value, the offer or that element of the offer shall be made at the same or a higher monetary value. Where all or part of the consideration has been expressed in the statement in terms of a securities exchange ratio, the offer or that element of the offer shall be made on the same or an improved securities exchange ratio; and

(C) where the statement concerned states that the terms of the possible offer “will not be increased” or are “final” or uses a similar expression, the offeror shall not be permitted subsequently to make an offer in respect of the offeree on better terms.

(iii) Where a Rule 2.4(c) (i) statement includes a reservation, that reservation shall be clear and unambiguous and shall not be dependent upon the subjective judgements of the directors of the offeror.

(iv) The first announcement in which a Rule 2.4(c)(i) statement is made shall contain prominent reference to any reservation contained in the statement and shall set out precise details of the reservation. Each subsequent reference by the offeror to that statement shall be accompanied by a reference to the reservation.

(v) Except with the consent of the Panel, the restrictions and obligations imposed by Rule 2.4(c)(ii) to (iv):

(1) shall (subject to subparagraph (2) below) continue to apply until the expiry of the period of three months following the date on which the offeree ceases to be the subject of an offer period ; and

(2) where an offeror has made a statement to which Rule 2.8 applies but the offeree remains thereafter the subject of an offer period, shall continue to apply until the expiry of the period of three months following the date on which that statement was made.

(d) Except with the consent of the Panel, where a Rule 2.4(c)(i) statement is made by or on behalf of an offeror, the consequential restrictions imposed on the offeror by Rule 2.4(c) shall apply equally to any other person acting in concert with the offeror and to any person who is subsequently acting in concert with the offeror or any such other person. “

NOTES ON RULE 2.4

“5. Approximate value

The Panel would not normally give consent to the making of a statement that indicates the approximate price or value at which the offeror is considering making an offer in respect of the offeree. An announcement by the offeror that it is considering making an offer “at a substantial premium” or “at or around” a stated price is unlikely to be acceptable, whereas a statement that the offeror is considering making an offer within a range of stated prices would normally be acceptable.

6. Statements by the offeree

Every statement made by the offeree in relation to the terms on which an offer might be made should also make clear whether that statement is being made with the agreement or approval of the offeror. Where it is not being made with such agreement or approval, the statement should also include a prominent

warning to the effect that there can be no certainty either that an offer will be made or as to the terms on which any offer might be made.

7. Right to vary form/mix of consideration

Where an offeror that has duly reserved the right to vary the form and/or mix of the consideration referred to in the statement concerned but remains bound to a specified minimum value of consideration exercises that right, the value of the consideration in any offer subsequently made by the offeror in respect of the offeree should be the same as or higher than the minimum value of the consideration specified in that statement, calculated as at the time of the announcement of the firm intention to make that offer.”

5. Pre-conditions and conditions

5.1 Under Rule 2.3(d), an offeror is permitted to include pre-conditions (i.e. a condition that must be satisfied before the offer is made) in a Rule 2.4 (possible offer) announcement or in a Rule 2.5 (firm intention) announcement only with the consent of the Panel or where the only pre-condition relates to the receipt of irrevocable commitments. To date the Panel has been very reluctant to grant consent to pre-conditional Rule 2.5 announcements, whereas it has been prepared to grant consent to pre-conditional Rule 2.4 announcements provided, amongst other things, that it is clear from the announcement that it is a possible offer announcement and that consequently there is no certainty that an offer will be made. Apart from the prohibition in Rule 2.3(d), the Rules are silent on the acceptability of pre-conditions in offer announcements.

With regard to offer conditions, firm intention announcements typically contain a number of standard conditions that must be satisfied or waived before the offer can become unconditional in all respects. These usually relate to the level of acceptances, Competition Authority or European Commission competition clearance, other statutory or regulatory clearances and protection conditions, normally for the benefit of the offeror. Under Rule 13.1, an offer may not be subject to a condition the satisfaction of which depends solely on subjective judgments by the offeror directors or is within their control. Under Rule 13.2, an offeror may not lapse an offer on the basis that a condition involving a criterion of materiality, substance or significance has not been satisfied unless the offeror has consulted the Panel and the Panel is satisfied that in the prevailing circumstances it would be reasonable to invoke the relevant condition. Rule 13 is silent in relation to an offeree invoking offer conditions.

The Panel is of the view that the Rules should be amended so as to regulate more fully the use of conditions and pre-conditions and the circumstances in which they can be invoked.

5.2 With regard to pre-conditions, the Panel is proposing that the Rules draw a clear distinction between their use in Rule 2.4 announcements and their use in

Rule 2.5 announcements, on the basis that there is a fundamental difference under the Rules between possible offer announcements and firm intention announcements and that it is therefore appropriate to treat the two circumstances differently.

5.2.1 As an announcement pursuant to Rule 2.4 is an announcement of a possible offer, the offeror is entitled to decide not to proceed with the offer at any stage, and thus the Panel believes it is reasonable and not inconsistent to allow the inclusion of pre-conditions in the case of possible offer announcements. The Panel also believes that the more information about the possible offer that is included in the announcement the better, both for the market and offeree shareholders. In addition, having regard to the nature of possible offer announcements (in which the offeror is not committed to proceeding with the offer even where all the pre-conditions have been satisfied), the Panel also considers it reasonable to allow subjective pre-conditions to be included in such announcements. However, in order to avoid a false market, it is proposed, first, that it must be made clear in every possible offer announcement whether any pre-conditions must be satisfied before an offer can be made or whether they are waivable, and, second, that the announcement must contain a warning that there can be no certainty that a firm offer will be made even if the pre-conditions are satisfied or waived. It is proposed that this matter be addressed by way of a new Note 8 on Rule 2.4.

The Panel is proposing that the current requirement under Rule 2.3(d), as outlined in paragraph 5.1 above, to seek Panel consent in certain circumstances to make a possible offer announcement remain unchanged, i.e. Panel consent will continue to be necessary where an offeror wishes to make a Rule 2.4 announcement which refers to any pre-condition, other than the receipt of irrevocable commitments, to the making of the offer. It is proposed that that part of Rule 2.3(d) relating to possible offer announcements will be transferred to a new Rule 2.4(e). The latter together with the new Note 8 on Rule 2.4 are set out below.

2.4 THE ANNOUNCEMENT OF A POSSIBLE OFFER

“(e) Except as permitted by the Rules or with the consent of the Panel or where the only pre-condition to the making of the offer is the receipt of irrevocable commitments, a person shall not include in any announcement of a possible offer under Rule 2.4 any pre-condition to the making of the offer.”

NOTE ON RULE 2.4

“8. Pre-conditions

Where the consent of the Panel is required by a person proposing to include in a Rule 2.4 announcement any pre-condition to the making of an offer, the Panel, if

it grants consent, will normally require that any such pre-conditional possible offer announcement:

(a) clearly state whether the pre-condition must be satisfied before an offer can be made or whether the pre-condition is waivable; and

(b) include a prominent warning to the effect that the announcement does not amount to an announcement of a firm intention to make an offer and that, accordingly, there can be no certainty that any offer will be made even if the pre-condition is satisfied or waived.”

5.2.2 The Panel believes that, in contrast, the announcement of a firm intention to make an offer pursuant to Rule 2.5 should provide certainty that the offer will proceed, and consequently that an offeror should be permitted not to proceed with its offer only in a very limited number of specified circumstances. Currently, under Rule 2.7 an offeror who has made a firm intention announcement must proceed to make the offer unless another offeror has already despatched a higher offer or the despatch of the offer is subject to the prior satisfaction of a specific condition, announced in compliance with Rule 2.3(d), and that condition has not been satisfied. It is not proposed to amend the substance of Rule 2.7. It is, however, proposed to address the issue of pre-conditions in firm intention announcements through the introduction of a new Rule 13.2 (*acceptability of pre-conditions*). That rule will incorporate that part of Rule 2.3(d) that relates to firm intention announcements. A note on Rule 13.2 will set out the types of pre-conditions likely to be acceptable to the Panel in Rule 2.5 announcements, namely, pre-conditions concerning:

- (a) a decision by the European Commission, under the European Merger Regulation, not to initiate proceedings in respect of the offer nor to refer it to a competent authority of a Member State;
- (b) a decision by the European Commission, under the European Merger Regulation, not to initiate such proceedings nor to make such a referral or, if there is such an initiation of proceedings or such a referral, a decision by the authority concerned to allow the offer to proceed; or
- (c) another material regulatory authorisation relating to the offer and either the offer is publicly recommended by the offeree board or the Panel is satisfied that it is not possible to get clearance within the usual offer timetable.

It is also proposed to add a new Note 4 on Rule 2.5 which will cross-refer that rule to Rule 13. As a consequence of the changes proposed in this paragraph and in paragraph 5.2.1 above, it is proposed that Rule 2.3(d) be deleted and that Rule 2.3(e) be renumbered as Rule 2.3(d). Furthermore, it is proposed to change

the title of Rule 13 from “subjective conditions and materiality” to “pre-conditions in firm offer announcements and offer conditions”.

The relevant amendments are set out below.

“13.2 ACCEPTABILITY OF PRE-CONDITIONS

Except with the consent of the Panel or where the only pre-condition to the making of the offer is the receipt of irrevocable commitments or as otherwise permitted by the Rules, a person shall not announce pursuant to Rule 2.5 a firm intention to make an offer the making of which would be subject to any pre-condition.”

“Note on Rule 13.2

The pre-conditions in respect of which the Panel may consider granting consent normally include a pre-condition that:

(a) relates to a decision by the European Commission, under the European Merger Regulation, not to initiate proceedings in respect of the offer concerned nor to refer it to a competent authority of a Member State;

(b) relates to a decision by the European Commission, under the European Merger Regulation, not to initiate proceedings in respect of the offer nor to refer it to a competent authority of a Member State or, if there is such an initiation of proceedings or referral, to a decision by the authority concerned to allow the offer to proceed (which decision may, in either case, be stated to be on terms acceptable to the offeror); or

(c) involves another material official authorisation or regulatory clearance relating to the offer and:

(i) the offer is publicly recommended by the board of the offeree; or

(ii) the Panel is satisfied that it is likely to prove impossible to obtain the authorisation or clearance within the timetable laid down by the Rules.

Where the Panel grants consent, it will usually, in the case of (a) or (b) above, also consent to the disapplication of Rule 13.3(a).

The Panel will not normally grant consent under (c) above where satisfaction of the pre-condition depends solely on subjective judgements by the directors of the offeror or of the offeree or is within their control.

See Note 4 on Rule 2.5.

Whether a clearance under the Competition Act 2002 could be made the subject of a pre-condition to the making of an offer is, in the first instance, a matter for discussion with the Competition Authority.”

NOTES ON RULE 2.5

“4. Pre-conditions

See Rule 13.2”.

2.3 RESPONSIBILITIES OF OFFERORS AND THE OFFEREE

~~*(d) Except as permitted by the Rules or with the consent of the Panel or where the only pre-condition to the making of the offer is the receipt of irrevocable commitments, a person shall not make an announcement under Rule 2.4 concerning a possible offer which refers to any pre-condition to the making of an offer, or announce pursuant to Rule 2.5 a firm intention to make an offer, the making of which would be subject to any pre-condition.*~~

As the Panel does not envisage that a firm intention announcement will be subject to a pre-condition requiring offeree shareholder action, it is proposed that Rule 23(c) be amended so that it refers only to possible offer announcements under Rule 2.4. The proposed amendment is set out below.

RULE 23 THE GENERAL OBLIGATION AS TO INFORMATION

“(c) If an offeror has announced a possible an offer pursuant to Rule 2.4, the making of which is subject to a pre-condition relating to action by shareholders of the offeree (including, inter alia, the rejection of a proposed acquisition or disposal by the offeree), the first major circular sent by the offeror to the shareholders of the offeree shall include the information that would be required by Rule 24 to be included in that circular if it were an offer document.”

5.3 The current Rule 13.2 (*invoking conditions*) (which is to be renumbered as Rule 13.3) addresses the invocation of conditions to an offer and, as stated above, prohibits an offeror from lapsing the offer by reason of a condition involving a criterion of materiality, substance or significance not having been satisfied, unless the Panel has been consulted and is satisfied that in the circumstances it would be reasonable for the offeror to lapse the offer. The Rule is silent in relation to the invocation of pre-conditions in Rule 2.5 announcements and also in relation to the invocation of offeree protection conditions. The Panel is proposing that Rule 13.2 be amended to address these issues. The Panel is also proposing to adopt new invocation criteria in the new Rule 13.3, as outlined in paragraph 5.3.1 below.

5.3.1 As indicated above, the Panel is proposing to adopt new invocation criteria in Rule 13.3 for invoking conditions and pre-conditions. The current Rule 13.2, which is set out below, contains a “reasonable” test which is narrowly confined in its applicability in that it can be applied only to conditions which include language involving a criterion of materiality, substance or significance. The view of the Panel is that this is unduly restrictive and that, furthermore, the rule could be circumvented by an offeror wishing to lapse its offer.

“13.2 INVOKING CONDITIONS

An offeror shall not lapse an offer by reason of a condition involving a criterion of materiality, substance or significance not having been satisfied except where the offeror has consulted the Panel and the Panel is satisfied that in the prevailing circumstances it would be reasonable for the offeror to lapse the offer.”

It is proposed that the new Rule 13.3 will apply two tests. The first is the test of “material significance” which would be adopted as the primary test for invocation. An offeror would not be permitted to invoke a condition or pre-condition unless it would incur material adverse commercial consequences if it were forced by the Panel to continue with its offer. The test will not be restricted to any particular types of conditions and pre-conditions and will, for example, apply to any bespoke conditions or pre-conditions.

The second test is the “reasonable” test which is in the current Rule 13.2. An offeror who has met the material significance test must also consult with the Panel and seek its confirmation that it is reasonable in the circumstances to invoke the condition or pre-condition. In most cases the expectation would be that when an offeror has met the material significance test it will also meet the reasonable test. The effect of the two tests will be to raise the threshold for invoking conditions (and pre-conditions) above that contained in the current Rule 13.2.

5.3.2 It is important that the standard for the invocation of a condition causing an offer to lapse or be withdrawn should be predictable and readily understood by offeree shareholders, the market and all the parties to an offer. Were the invocation of pre-conditions in firm intention announcements to be allowed other than for reasons normally permitted in relation to offer conditions, there would be a danger that there would not be an orderly and predictable framework within which an offer could be conducted. Therefore, the Panel considers that the same standard should be applied to invoking pre-conditions in firm intention announcements as that which is applied to invoking offer conditions (i.e. the circumstances that give rise to the right of invocation must be of material significance to the offeror, the offeror must have consulted the Panel and the Panel must be satisfied that it would be reasonable for the offeror to invoke the condition or pre-condition in question). The Panel is therefore proposing that Rule 13.2 be amended to bring pre-conditions in firm intention announcements

within the scope of the rule. As a consequence, the title of Rule 13.2 will be changed from “*invoking conditions*” to “*invoking conditions and pre-conditions*”.

In addition, a specific requirement is being included in Rule 13.2 (which is to be renumbered 13.3) that, following the release of a firm intention announcement, an offeror must use all reasonable efforts to satisfy any pre-conditions or conditions to which the offer is subject.

5.3.3 The Panel is proposing that Rule 13 should also address offer conditions which have been included for the benefit of offeree shareholders, referred to in this paper as “offeree protection conditions”. Such conditions are relevant only in recommended transactions and are usually found in the context of securities exchange offers. While the inclusion of offeree protection conditions in offers is rare in this jurisdiction, there have been a number of offers regulated under the UK Takeover Code where such conditions have been included. The Panel is not aware of any good reason why offeree protection conditions should not be permitted and therefore takes the view that it is appropriate to allow the inclusion of such conditions in offers. Notwithstanding the fact that the use of offeree protection conditions is rare in this jurisdiction, the Panel believes it is appropriate that the Rules address the issue.

The Panel is of the view that the position with regard to offeree protection conditions should not be dissimilar to that with offeror conditions. Consequently, it is proposed that (i) Rule 13.1 should also prohibit conditions which depend solely on subjective judgments by directors of the offeree or the satisfaction of which is within their control and (ii) Rule 13.3 (currently 13.2) should prohibit an offeree from invoking any offer condition unless it is of material significance to offeree shareholders in the context of the offer and the offeree has consulted with the Panel and the Panel is satisfied that it would be reasonable for the offeree to invoke the condition in question.

The proposed amendments are set out below.

“13.1 SUBJECTIVE CONDITIONS

Except with the consent of the Panel ~~and except~~ or where permitted under Rule 12, an offer shall not be made subject to any condition the satisfaction of which depends solely on subjective judgements by the directors of the offeror or of the offeree (as the case may be) or is within their control.”

“13.3 INVOKING CONDITIONS AND PRE-CONDITIONS

(a) An offeror shall not invoke:

(i) any condition to the offer (except a condition permitted by Rule 12(a)(i)(2) or by Rule 12(b)(ii) or the acceptance condition); or

(ii) any pre-condition to the making of the offer,

so as to cause the offer not to proceed, to lapse or to be withdrawn unless the circumstances that give rise to the right to invoke the condition or pre-condition are of material significance to the offeror in the context of the offer and the offeror has consulted the Panel and the Panel is satisfied that in the prevailing circumstances it would be reasonable for the offeror to do so.

(b) Following the announcement of a firm intention to make an offer, an offeror shall use all reasonable efforts to ensure the satisfaction of every condition and pre-condition to which the offer or the making of the offer is subject.

(c) An offeree shall not invoke, or cause or permit the offeror to invoke, any condition to an offer so as to cause the offer to lapse or to be withdrawn unless the circumstances that give rise to the right to invoke the condition are of material significance to the shareholders of the offeree in the context of the offer and the offeree has consulted the Panel and the Panel is satisfied that in the prevailing circumstances it would be reasonable for the offeree to do so.

(d) In the determination by the Panel under Rule 13.3(a) or (c) as to whether in the prevailing circumstances it would be reasonable for the offeror or (as the case may be) the offeree to invoke the condition or pre-condition concerned, the fact, if it be so, that the Panel approved the inclusion of that condition or pre-condition shall not be taken into account.”

~~13.2 INVOKING CONDITIONS~~

~~An offeror shall not lapse an offer by reason of a condition involving a criterion of materiality, substance or significance not having been satisfied except where the offeror has consulted the Panel and the Panel is satisfied that in the prevailing circumstances it would be reasonable for the offeror to lapse the offer.~~

5.3.4 As a consequence of the adoption of the proposed new Rule 13.3 above, the Panel is proposing that Rule 2.7(a) be amended so that it more accurately reflects the new position under Rule 13.3, i.e. it should refer to a “pre-condition” and not “condition” and to the invocation of a pre-condition in accordance with Rule 13.3. It is also proposed to amend Rule 2.7(b) to introduce a requirement to obtain Panel consent. The Panel believes this is appropriate as there may be some doubt in, for example, securities exchange offers as to whether a higher offer has been despatched.

2.7 CONSEQUENCES OF A “FIRM ANNOUNCEMENT”

“Except with the consent of the Panel, when there has been an announcement of a firm intention to make an offer, the offeror shall proceed with the offer unless:

~~(a) the despatch of the offer is subject to the prior satisfaction of a specific condition announced in compliance with Rule 2.3 (d) and that condition has not been satisfied; or~~

“(a) the despatch of the offer is subject to the prior satisfaction of a pre-condition and, in accordance with Rule 13.3, the offeror is permitted to invoke the pre-condition; or

(b) another offeror has already despatched a higher offer in respect of the same offeree and the Panel has in those circumstances confirmed that the offeror need not proceed with its offer.”

The Panel is also proposing that Note 1 on Rule 2.7 be amended. The note states that a change in general economic, industrial or political circumstances would not justify a decision not to proceed with an announced offer and that, in order to justify such a decision, circumstances of an exceptional and specific nature would normally be required.

If the amendments to Rule 13.3(a) outlined above are implemented, an offeror will not be able to invoke a pre-condition to the making of an offer (i.e. following the release of a pre-conditional Rule 2.5 announcement but before the offer document has been posted) or a condition to an offer (i.e. after the offer document has been posted) unless the Panel is satisfied that the circumstances that give rise to the right to invoke the condition or the pre-condition are of material significance to the offeror. Where an offeror releases a non pre-conditional Rule 2.5 announcement, Rule 13.3(a) will not apply prior to the posting of the offer.

The Panel is proposing to amend the note so that it indicates that the Panel may consent to the offeror not proceeding where there has been a change in general economic, industrial or political circumstances and those circumstances are of an exceptional nature and are of material significance to the offeror. The Panel is of the view that the note, as amended, would be consistent with the materiality test in Rule 13.3(a).

Notes on Rule 2.7

“1. Change in general economic circumstances

The Panel may consent to an offeror not proceeding with its announced offer where there has been a change in general economic, industrial or political circumstances but only where such circumstances are of an exceptional nature and are of material significance to the offeror in the context of the offer.”

~~1. Failure to proceed – exceptional circumstances~~

~~A change in general economic, industrial or political circumstances would not justify failure to proceed with an announced offer; to justify a decision not to proceed, circumstances of an exceptional and specific nature would normally be required.~~

It is also proposed to amend Note 2 on Rule 2.7 and to delete Note 4 on Rule 21.1 (*frustrating action*). The former note cross-refers to the latter note which states that the Panel may allow an offeror not to proceed with its offer if, at any time during the offer period prior to the despatch of the offer document, the offeree (i) passes a resolution in general meeting as envisaged by Rule 21.1 or (ii) announces a transaction which would require such a resolution but for the fact that it is pursuant to a contract entered into earlier or that the Panel has ruled that an obligation or other special circumstance exists. On the basis that any matter which is caught by Rule 21.1 would normally be the subject of a condition to an offer and that Rule 2.7 provides that an offeror that has announced a firm intention to make an offer will be required to make the offer unless it is permitted to invoke a pre-condition to its offer, the Panel, having taken into account the materiality test in Rule 13.3(a), is of the view that Note 4 on Rule 21.1 is inconsistent with Rule 2.7 and Rule 13.3(a) and should therefore be deleted. As a consequence, the first sentence in Note 2 on Rule 2.7 should also be deleted. The proposed amendments are set out below.

NOTES ON RULE 2.7

“2. When there is no need to despatch an offer

~~The Panel may permit an announced offeror not to proceed with its offer in the circumstances set out in Note 4 on Rule 21.1. For the purposes of Rule 2.7(b), if another offeror has announced a higher offer, the Panel may permit an earlier offeror to defer despatching its offer beyond the time specified in Rule 30.2(a), pending despatch of the higher offer, and thereupon relieve the earlier offeror of the obligation to dispatch its offer.”~~

NOTES ON RULE 21.1

4. When there is no need to despatch an offer

~~The Panel may allow an offeror not to proceed with its offer if, at any time during the offer period prior to the despatch of the offer document, the offeree:~~

~~(a) passes a resolution in general meeting as envisaged by this Rule; or~~

~~(b) announces a transaction which would require such a resolution but for the fact that it is pursuant to a contract entered into earlier or that the Panel has ruled that an obligation or other special circumstance exists.~~

5.3.5 If the proposed amendments to Rule 13.3 are adopted, there is a consequential amendment to Rule 24.6, as set out below, in order to ensure that the terms of an offer include the circumstances in which offer conditions may be invoked and the potential consequences of this occurring.

RULE 24 OFFEROR DOCUMENTS

24.6 INCORPORATION OF OBLIGATIONS AND RIGHTS

“The offer document shall state the time allowed for acceptance of the offer and any alternative offer and shall incorporate language ~~which~~ that appropriately reflects Rules 10.3 to 10.6 and those parts of Rules 13.3(a), 13.3(c) (if applicable), 17 and 31 to 34 (excluding Rule 31.6(b)) ~~which~~ that impose timing obligations ~~or restrictions on offerors~~ or confer rights or impose restrictions on offerors, offerees or shareholders of offerees.”

5.4 The Panel is proposing that the Rules be amended to require the disclosure of side agreements relating to offer pre-conditions and conditions. Rule 2.5(b) sets out the information that must be included in an announcement of a firm intention to make an offer. It is proposed that Rule 2.5(b) be amended to include details of any agreements or arrangements to which an offeror is party and which relate to the circumstances in which it may or may not invoke or seek to invoke a pre-condition or condition to an offer and any consequence of doing so. The Panel is of the view that the details of agreements or arrangements of this type are pertinent information of which offeree shareholders should be made aware prior to making their decisions regarding the offer. The Panel’s view is that such agreements should be disclosed so that shareholders may properly understand offer pre-conditions and conditions.

The Panel is also proposing that a contract or arrangement for the payment of an inducement fee should also be disclosed in the Rule 2.5 announcement, as set out below (details of such fees are currently disclosed in Rule 2.5 announcements as a condition of Panel consent under Rule 21.2). Consequently, it is proposed to add a new Rule 2.5(b)(vi) and (vii) as set out below. The existing Rule 2.5(b)(vi) to (x) will be renumbered accordingly.

2.5 THE ANNOUNCEMENT OF A FIRM INTENTION TO MAKE AN OFFER

(b) When a firm intention to make an offer is announced, the announcement shall contain:

“(vi) details of every agreement or arrangement to which the offeror is party and which relates to the circumstances in which the offeror may or may not invoke or seek to invoke a pre-condition or a condition to its offer and to the consequences of its doing so, including details of any break fees payable as a result;

(vii) if the Panel has given consent to the offeree board to enter into a contract or arrangement of the kind described in Rule 21.2, details of that contract or arrangement;

5.4.1 As a consequence of the proposed addition to Rule 2.5(b) above, certain amendments to Rule 24 and (in relation to side agreements on conditions and pre-conditions) Rule 26 are necessary. The Panel is proposing that Rule 24.2 be amended by the addition of a new Rule 24.2(b)(ix) and (x) and that existing subparagraphs (ix) to (xiii) be renumbered accordingly. The new Rule 24.2 (b)(ix) is being introduced in the same form as the proposed new Rule 2.5 (b)(vi) except that the words “a pre-condition or” will not be included in the former as a pre-condition is not relevant in the context of Rule 24.2.

24.2 FINANCIAL AND OTHER INFORMATION ON THE OFFEROR, THE OFFEREE AND THE OFFER

(b) the offer document (including, where relevant, any revised offer document) shall include:

“ (ix) details of every agreement or arrangement to which the offeror is party and which relates to the circumstances in which the offeror may or may not invoke or seek to invoke a condition to its offer and to the consequences of its doing so, including details of any break fees payable as a result;

(x) if the Panel has given consent to the offeree board to enter into a contract or arrangement of the kind described in Rule 21.2, details of that contract or arrangement;”

It is proposed to amend Rule 26 by the addition of a new Rule 26 (b)(xi) and the renumbering of existing subparagraphs (b)(xi) to (xiv).

RULE 26 DOCUMENTS TO BE ON DISPLAY

(b) The following documents shall be made available for inspection in accordance with paragraph (a):

“(xi) every agreement or arrangement, or, if it is not in writing, a memorandum of the terms of such agreement or arrangement, as disclosed in the offer document pursuant to Rule 24.2 (b)(ix);”.

6. Advertisements – Rule 19.4

Rule 19.4 states that during the course of an offer no person may publish an advertisement in connection with an offer unless it falls within one of a number of specified categories. Furthermore, under the rule Panel approval of the content of an advertisement is required prior to publication unless the advertisement is a

product advertisement not bearing on the offer or an advertisement which is a notice relating to a court scheme.

Rule 19.4 does not define what constitutes an advertisement but merely states in Rule 19.4(c) that the word “advertisement” shall include not only a press advertisement but also an advertisement in other media, including, amongst others, television, radio, internet, video, audio tape and poster. Occasionally, issues arise as to whether certain publications constitute advertisements for the purpose of Rule 19.4. Having regard to such issues, the Panel is proposing to amend Rule 19.4(c) to clarify (i) that the rule applies to every form of advertisement and not merely those advertisements published for the purpose of promoting a product or a service; and (ii) that a publication which would otherwise be treated as an advertisement will not be treated differently under the rule merely because it has been previously published. A draft of the proposed amended Rule 19.4(c) is set out below.

19.4 ADVERTISEMENTS

~~(c) For the purposes of Rule 19.4, the word “advertisement” shall include not only a press advertisement but also an advertisement in other media, including, inter alia, television, radio, video, audio tape and poster.~~

“(c) For the avoidance of doubt, for the purposes of the Rules:

- (i) the word “advertisement” shall include:*
 - (1) every form of advertisement and accordingly its meaning shall not be restricted to advertisements that promote products, services or property or rights of any kind; and*
 - (2) not only a press advertisement but also an advertisement in other media, including, inter alia, television, radio, internet, video, audio tape and poster; and*
- (ii) a publication that would otherwise be treated as an advertisement shall not be treated differently merely because the content, or part of the content, of the publication has been previously published, whether in the same or any different form, context or medium and whether or not in connection with an offer or possible offer.”*

It is also proposed to amend the text of the restrictions on publication of advertisements in Rule 19.4(a). The amendment, which does not change the substance or meaning of the rule in any way, is deemed necessary because it has become clear that the wording of the existing introductory paragraph of Rule 19.4(a) frequently causes confusion and has been misinterpreted by practitioners on a number of occasions. The rule is being amended to make clear that (i) no person may publish an advertisement in connection with an offer

unless it falls within one of a number of specified categories; and (ii) with a couple of specified exceptions, the content of any advertisement to be so published must be pre-approved by the Panel. The amended rule is set out below.

19.4 ADVERTISEMENTS

“(a) (i) Except with the consent of the Panel, no person may publish an advertisement in connection with an offer or possible offer during the course of the offer unless the advertisement falls within one of the categories listed in subparagraph (iii) .

(ii) Except where the advertisement falls within category (1), (8) or (9) in subparagraph (iii), no person shall publish an advertisement in connection with an offer or possible offer during the course of the offer unless its content, format and publication schedule have been approved by the Panel.

(iii) The categories of advertisement referred to in subparagraph (i) are as follows:

- (1) product advertisements not bearing on an offer or possible offer; (if the person proposing to publish an advertisement has any doubt as to the applicability of this category to it, he or she shall consult the Panel);*
- (2) corporate image advertisements not bearing on an offer or possible offer;*
- (3) advertisements confined to non-controversial information about an offer (including, inter alia, reminders as to closing times or the value of an offer); such advertisements shall not include argument or invective;*
- (4) advertisements comprising preliminary or interim results and their accompanying statement, provided that such statement is not used for argument or invective concerning an offer;*
- (5) advertisements giving information, the publication of which by advertisement is required or specifically permitted by the Stock Exchange;*
- (6) advertisements communicating information relevant to holders of bearer securities;*

- (7) *advertisements comprising a tender offer under the Substantial Acquisition Rules;*
- (8) *advertisements which are notices relating to court schemes; and*
- (9) *advertisements published with the specific consent of the Panel.”*

It is also proposed to insert a new note on Rule 19.4 to provide some guidance as to when an advertisement may be regarded as being published “in connection with” an offer. The proposed new note is set out below:

NOTES ON RULE 19.4

“1. *“...in connection with...”*

This phrase is used in a wide sense so that, for example, an advertisement that does not explicitly or implicitly refer to an offer may nevertheless be regarded as published “in connection with” that offer if the advertisement is intended or likely to influence, directly or indirectly, the attitude to the offer of any of the parties to the offer or of any other person concerned with the offer. A useful, if not a definitive, test as to whether an advertisement would fall within this category would be whether it would have been published, or published in its proposed form, in the absence of the offer concerned.”

7. **Interviews – Rule 19.6**

Rule 19.6 essentially requires parties to an offer to use all reasonable endeavours to ensure that new information is not released during an interview and that the sequencing of the interview does not lead to its becoming misleading or open to misinterpretation. The note on Rule 19.6 states that joint interviews and public confrontations between representatives of the offeror and the offeree, or between competing offerors, should be avoided. This note reflects the Panel’s ongoing concern that such joint interviews are of their nature confrontational and lead to an increased risk that statements may be made by the offeror, the offeree or their representatives that would convey new information or that would not satisfy the standards of accuracy, completeness and fair presentation required by the Rules.

However, in order to facilitate constructive discussion which may be helpful to shareholders in considering the merits of any offer or proposed offer, the Panel has decided to permit joint interviews and debates subject to certain safeguards being in place in each case. The Panel is thus proposing to introduce a new Rule 19.6(c) which will set out the circumstances in which joint interviews will be permitted. In summary, such interviews will be permitted, provided that representatives of the financial adviser to the offeror and to the offeree are present at the interview and that, if any misleading or inaccurate statement is made by the representative of the offeror or the offeree, the relevant financial

adviser will be required to immediately correct such statement during the course of the interview. In addition, the financial adviser to the offeror and the offeree will be required to confirm in writing to the Panel, not later than 12.00 noon on the business day following the date of the interview, that no new information bearing on the offer was disclosed by their respective clients during the course of the interview. The existing note on Rule 19.6 will be amended and will highlight the increased risk that the standards of accuracy, completeness and fair presentation required under the Rules will not be achieved in joint interviews. The amended note will also emphasise the importance of the role of the financial adviser to each party involved in a joint interview or debate.

The proposed new Rule 19.6(c) and the amended note on it are set out below.

19.6 INTERVIEWS AND DEBATES

“(c) Representatives of one or more offerors and of the offeree may, during the course of an offer, participate in a joint interview or debate which involves the engagement with each other (either directly or through a third party) of representatives of an offeror and the offeree or of representatives of two or more competing offerors and which is to be simultaneously or subsequently broadcast on or through radio, television, the internet or any other medium, provided that:

- (i) an appropriate representative of the financial adviser to each offeror and the offeree represented at the interview or debate shall himself or herself also be present at and entitled to participate in such interview and debate;*
- (ii) if any misleading or inaccurate statement is made by the representative of an offeror or of the offeree during the course of the interview or debate, the financial adviser to the party concerned shall immediately correct such statement during the course of the interview or debate;*
- (iii) the representative of each financial adviser present thereat shall, during the course of the interview or debate, use all reasonable endeavours to ensure that no new information bearing on the offer is disclosed by that adviser’s client during the course of the interview or debate; and*
- (iv) the representative of the financial adviser to each participating offeror and offeree shall confirm in writing to the Panel, not later than 12.00 noon on the business day following the date of the interview or debate, that no new information bearing on the offer was disclosed by that adviser’s client during the course of such interview or debate.*

Any person who is in any doubt as to his or her obligations under this paragraph (c) shall consult the Panel.”

NOTE ON RULE 19.6

“Joint interviews and debates

Joint interviews and debates between representatives of an offeror and the offeree, or between representatives of competing offerors, are of their nature confrontational and thus increase the risk that the standards of accuracy, completeness and fair presentation required by the Rules may not be safeguarded and that misleading or inaccurate statements may be made. The often heated and complicated nature of such interviews and debates contributes to this problem. Where representatives of the offeror and the offeree or of competing offerors are to participate in a joint interview or debate, the financial adviser to each party has a particular responsibility to ensure that no new information is disclosed, and that no misleading or inaccurate statement is made, by that adviser’s client; and to ensure that, if any such misleading or inaccurate statement is made, it is corrected during the course of the interview or debate, as it is likely to be very difficult to correct the error subsequently, particularly where that interview or debate has received widespread media coverage.

See also Rule 42.”

8. Advisers – proposed new rule

The Rules do not currently impose any specific obligations on advisers to ensure that their clients comply with the Rules. The introductory notes to the Rules merely state that there is a particular responsibility on financial advisers to offerors and offerees to ensure that the full extent of their responsibilities under the Rules is understood and fully observed by their clients and by all others advising, providing services to or otherwise connected with the client for the purposes of the transaction. The Panel has considered whether it would be appropriate under the Rules for specific obligations to be imposed on advisers to the offeree and the offeror in relation to an offer and has concluded that this would be appropriate, on the basis that it would clarify the roles of advisers and provide a greater level of assurance that parties to a takeover are familiar and will comply with the Rules.

The Panel is proposing to introduce a new Rule 42 which, in summary, will: (i) contain an express obligation on all advisers to act honestly and professionally in relation to an offer; (ii) require all advisers, according to their role and function, to give their clients such advice as is necessary to ensure that they understand and comply with the requirements of the Rules and of all rulings and directions made or given by the Panel; and (iii) require the financial and legal advisers, according to their role and function, to review in advance all information that is proposed to

be published in connection with the offer to ensure that its client complies with all applicable rules and all rulings and directions of the Panel.

The proposed new Rule 42 is set out below.

“42. RESPONSIBILITIES OF ADVISERS

- (a) Each of the advisers to the offeree and each of the advisers to the offeror shall, during the course of and in relation to an offer, in addition to complying with the Rules, act honestly, fairly and professionally.*
- (b) Each adviser to the offeree and each adviser to the offeror (including the respective financial advisers and legal advisers) shall, in so far as shall be appropriate according to that adviser's role and function in the transaction concerned, give to its client, during the course of and in relation to an offer, such advice as shall be required to ensure, so far as the adviser reasonably can, that its client understands and complies with the applicable requirements of the Rules and of all rulings and directions made or given by the Panel in connection with the transaction concerned.*
- (c) Each of the financial adviser and the legal adviser to the offeree and each of the financial adviser and the legal adviser to the offeror shall, during the course of an offer and according to its role and function, review in advance all information that is proposed to be published by or on behalf of its client (including, without limitation, all circulars to shareholders, announcements, press releases and advertisements) in connection with the offer for the purpose of ensuring, so far as the adviser reasonably can, that its client complies, in respect of every such communication, with Rules 19 and 20, all other applicable rules and all rulings and directions made or given by the Panel in connection with the transaction concerned.*

An offeree and an offeror each shall ensure that a draft of every such communication is given to each of its relevant advisers in good time for the purposes of this Rule.

- (d) (i) A contravention of this Rule 42 shall be subject to the powers and functions of the Panel under the Act and these Rules.*
- (ii) Subject to subparagraph (i) of this Rule 42(d):*
 - (1) no breach of this Rule 42 shall of itself constitute a cause of action at the suit of any person (other than the Panel) affected by the said breach;*

- (2) *this Rule is without prejudice to any other duty or responsibility of any party to a takeover or other relevant transaction or of any other person, howsoever arising.”*

There is a consequential amendment to Note 1 on Rule 19.1 and this is set out below.

NOTES ON RULE 19.1

“1. ~~Financial Advisers’~~ responsibility for release of information

~~The Panel regards financial advisers as being responsible to the Panel for guiding their client, any relevant public relations advisers and any other relevant persons employed by the client in connection with the offer, with regard to any information released during the course of an offer.~~

Advisers must ensure at an early stage that directors and officials of companies are warned that they must consider carefully the implications under the Rules of what they say, particularly when giving interviews to, or taking part in discussions with, the media. It is very difficult after publication to alter an impression given or a view or remark attributed to a particular person. Control of any possible abuse lies largely with the person being interviewed. In appropriate circumstances, the Panel will require a statement of retraction. Particular areas of sensitivity on which comment must be avoided include future profits and prospects, asset values and the likelihood of the revision of an offer. (See also Rule 20.1(b) and Rule 42.)”

9. Miscellaneous amendments

9.1 When an announcement is required – Rule 2.2

The Panel proposes to amend Rule 2.2(f)(ii) which requires that an announcement be made if the number of potential purchasers or offerors is about to be increased to include more than a very restricted number of people. The current Note 3 on Rule 2.2 states, amongst other things, that in such circumstances the Panel should be consulted in advance. The Panel is of the view that there should be a requirement under the rule to consult with the Panel where the board of the offeree proposes to hold discussions with more than one potential offeror or purchaser.

In addition, it is proposed to amend Rule 2.2(e) to clarify that the rule applies to negotiations or discussions relating to a possible offer.

The proposed amendment of Rule 2.2(e) and (f) and of the Note on the latter are set out below.

2.2 WHEN AN ANNOUNCEMENT IS REQUIRED

*“(e) when negotiations or discussions concerning ~~the~~ a possible offer are about to be extended to include more than a very restricted number of people. An offeror or offeree that proposes to approach a wider group of people (including, *inter alia*, where a group is being organised to make or to finance an offer or where irrevocable commitments are to be sought) shall consult the Panel in advance;*

(f) when a purchaser is being sought for a holding, or aggregate holdings, of securities conferring 30% or more of the voting rights in a relevant company, or when the board of a relevant company is seeking potential offerors, and:

(i) the company is the subject of rumour and speculation or there is an anomalous movement in its share price; or

(ii) the number of potential purchasers or potential offerors approached is about to be increased to include more than a very restricted number of people.

The potential seller or (as the case may be) the board of the relevant company shall in any case consult the Panel in advance where it is proposed to hold discussions with more than one potential purchaser or offeror; or”

NOTES ON RULE 2.2

3. Rule 2.2(f)

“~~If it is proposed to hold discussions with more than one potential offeror (or purchaser) the Panel should be consulted. Following an announcement pursuant to Rule 2.2(f), parties entering into discussions with the relevant company concerned, or with the holders of the shares available for sale, should consult the Panel for guidance on their obligations under the Rules.~~”

9.2 When an announcement is required – Rule 12(b)(iii)

The Panel is proposing to add a new Rule 12(b)(iii) which will require an offeror whose offer has lapsed under Rule 12(b)(i) to make a prompt announcement clarifying its intentions with regard to the offeree. Where an offer would give rise to a concentration within the European Merger Regulation, Rule 12(b)(i) requires an offeror to include in its offer a term that it will lapse if the European Commission either initiates proceedings in respect of the concentration or refers the matter to a competent authority of a Member State before the later of the first closing date and the date when the offer becomes unconditional as to acceptances. Where an offer lapses in accordance with Rule 12(b)(i), under the Rules a new offer period relative to any new offer or possible offer which the offeror may make or propose to make in respect of the offeree automatically

commences at the time of such lapse. However, there is no express requirement under the Rules for an offeror in such circumstances to clarify its intentions. Clearly, where an offeror has no intention of proceeding to seek clearance from the Commission or the regulatory authority concerned no new offer period should commence. However, where an offeror does intend to seek such clearance with a view to making a further offer, a new offer period should commence. Thus, a requirement on an offeror to make an announcement clarifying its intentions will mark either the commencement of the new offer period or its immediate cessation upon the release of an announcement of an intention not to make a further offer. The proposed new rule is set out below.

RULE 12(b) (EUROPEAN COMMISSION)

“(iii) Where an offer lapses pursuant to Rule 12(b)(i), the offeror shall, no later than 12.00 noon on the business day following the day on which the offeror receives notification from the European Commission or (as the case may be) the competent authority concerned of its decision, make an announcement for the purpose of clarifying its intentions in respect of the offeree.”

9.3 Temporary suspension of quotation

The Panel proposes to amend Rules 2.3 and 17.2 by the deletion of references to the temporary suspension of the quotation of an offeree’s securities as, in the view of the Panel, it would be very unlikely that a suspension would be granted in the circumstances envisaged in those rules. The relevant rules have been in place since 1997 and the Panel has concluded that they need to be updated to reflect current practices. In consequence, it is also proposed to delete the Note on Rule 2.3. The proposed amendments are set out below.

2.3 RESPONSIBILITIES OF OFFERORS AND THE OFFEREE

“(b) Following an approach by an offeror to the offeree board which may or may not lead to an offer, the primary responsibility for making an announcement (including an announcement under Rule 2.2(g)) shall normally rest with the offeree board which shall monitor the market for any anomalous movement in the offeree’s share price and for rumour and speculation. ~~provided that if the offeree board proposes to recommend the offer for acceptance and the Stock Exchange is likely to grant a temporary suspension of the quotation of the offeree’s shares, the offeree board may, as an alternative to an immediate announcement, obtain a suspension at the time when the announcement would ordinarily be required and shortly thereafter make an announcement in compliance with Rule 2.~~

(c) An offeror shall not attempt to prevent the offeree board from making an announcement ~~or requesting the Stock Exchange to grant a temporary suspension of its quotation at any time that the offeree board deems appropriate.~~

NOTE ON RULE 2.3

Suspensions

It should be noted that:

~~(a) a suspension will only be granted by the Irish Stock Exchange at the request of the company whose shares are to be suspended;~~

~~(b) the Irish Stock Exchange will not generally grant a suspension for more than 48 hours;~~

~~(c) the primary obligation of the potential offeree is to make the appropriate announcement immediately upon the obligation arising under Rule 2.2, and delay occasioned by an unsuccessful application for suspension may of itself be no excuse.~~

17.2 CONSEQUENCES OF FAILURE TO ANNOUNCE

~~(a) If an offeror fails by the stipulated time to make an announcement in accordance with the requirements of Rule 17.1, the Panel may request the Stock Exchange to suspend temporarily the quotation of the offeree's shares and, where appropriate, the offeror's shares until the appropriate announcement is made.~~

9.4 Announcements outside normal business hours

Rule 2.9 sets out the means by which an announcement made pursuant to the Rules must be made but is silent on the requirements relating to announcements made outside normal business hours. The Panel is proposing to amend Rule 2.9, as set out below, to address this issue.

2.9 MODE OF ANNOUNCEMENT

“(a) Except.....

(b) If the announcement is published outside normal business hours, it shall be submitted, as required by the Rules, to a Regulatory Information Service for release as soon as that service next reopens; it shall also be distributed to not less than two national newspapers and two newswire services.”

9.5 Removal of ability to appoint or nominate board members – Rule 9.6

Rule 9.6 states that, if an obligation to make a Rule 9 offer arises, neither any person who is, or being one of a number of parties acting in concert who is or

may become, obliged to make such offer nor any person acting in concert with such person may appoint or nominate a nominee to the board of the offeree or exercise the voting rights in relation to any securities held in the offeree, until the offer document has been despatched. Having considered the matter, the Panel has concluded that it is the role of the offeree to determine when persons are appointed or nominated to its board. Therefore, it is proposed to amend Rule 9.6 accordingly, as set out below.

9.6 RESTRICTIONS ON EXERCISE OF CONTROL BY AN OFFEROR

“Except with the consent of the Panel, if an obligation to make an offer in respect of a relevant company arises under Rule 9, neither any person who is, or being one of a number of parties acting in concert who is or may become, obliged to make such offer nor any person acting in concert with any such person may ~~appoint or nominate a nominee to the board of that company, or exercise the voting rights conferred by any securities held in that company, until the offer document has been despatched.~~”

9.6 Rule 31.9 (offeree announcements after Day 39) and Rule 32.1 (offer open for 14 Days after revision)

Rule 31.9 prohibits, except with Panel consent, an offeree from announcing trading results, profit or dividend forecasts, asset valuations, a merger benefits statement or a proposal for a dividend payment after Day 39 of the offer timetable. The purpose of the rule is to provide the offeror with sufficient time in which to consider the implications of any such announcements for its offer prior to the deadline for posting any revised offer, i.e. Day 46.

Rule 32.1(b) prohibits, except with Panel consent, in the case of a securities exchange offer, the offeror, after the date from which it is precluded from revising its offer (i.e. Day 46) and before the end of the offer period, from issuing a statement of trading results, a profit or dividend forecast, an asset valuation, a merger benefits statement or a proposal for a dividend payment which would or might have the effect of increasing the value of its offer.

The Panel is of the view that each of the above rules should be amended so that any announcement by the offeree, in the case of Rule 31.9, and by the offeror, in the case of Rule 32.1(b), that contains material new information should fall within the scope of the rules. The proposed amended rules are set out below. There is a minor consequential amendment to the Note on Rule 31.9.

31.9 OFFEREE ANNOUNCEMENTS AFTER THE 39TH DAY

“The offeree board shall not, except with the consent of the Panel, announce any material new information, including trading results, a profit or dividend forecast, an asset valuation, a statement as described in Rule 19.3(b) or a proposal for a

dividend payment, during the period commencing on the day after the 39th day (the “39th day”) following the date of despatch of the offer document and ending with the end of the offer period.”

NOTE ON RULE 31.9

“If the announcement ~~of trading results and a dividend~~ would normally take place after the 39th day, the offeree board should use all reasonable endeavours to bring forward the date of the announcement, but, if the Panel is satisfied that this is not practicable, it may give its consent to a later announcement. If an announcement of the kind referred to in Rule 31.9 is made after the 39th day, the Panel may be prepared to consent to a final closing date later than the 60th day.

If the offeree board wishes to obtain the Panel’s consent to a later announcement, it should consult the Panel at the earliest possible time.”

32.1 OFFER OPEN FOR 14 DAYS AFTER REVISION

“(b) Except with the consent of the Panel, in the case of a securities exchange offer, the offeror, after the date from which it is precluded from revising its offer and before the end of the offer period, shall not announce any material new information, including ~~issue a statement of trading results, a profit or dividend forecast, an asset valuation, a statement as described in Rule 19.3(b) or a proposal for a dividend payment which will or might have the effect of increasing the value of the offer.~~”

9.7 Other miscellaneous amendments

Part A of the Rules

It is proposed to make the following amendments to Rule 2.1(a):

1. the insertion of:

““acting in concert” has the meaning assigned to it by paragraph (b)(vi);”;

2. the replacement of the existing definition of the European Merger Regulation with the following:

““European Merger Regulation” means Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L24, 29.01.2004);”;

3. the substitution of “European Union” for “European Communities” in the definition of “Member State”.

Part B of the Rules

1. It is proposed that “*by virtue of section 2(a) of the Act*” in Rule 24.2(a)(iii) be deleted so that the reference to relevant company includes all relevant companies, including those that are treated as such by Regulation 4 of the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006.
2. It is proposed to substitute “the European Communities (Markets in Financial Instruments) Regulations 2007 (S.I. No. 60 of 2007)” for “the Investment Intermediaries Act, 1995” in Rule 24.2(b)(i).
3. Currently, certain parts of Rule 36 (*Partial Offers*) are not applicable to schemes of arrangement. Having considered the matter, the Panel is of the view that all of Rule 36 should be potentially applicable in circumstances where a partial offer is being effected by means of a scheme of arrangement. Consequently, the Panel is proposing to amend Section 1 of Appendix 4 to the Rules by deleting the existing exclusion of certain parts of Rule 36 and inserting the following note at the end of the Section:

“Note: when it is proposed to implement a partial offer by a scheme of arrangement pursuant to section 201 of the Companies Act 1963, the Panel will have jurisdiction (with the High Court) only where the transaction constitutes a takeover.”

Annexe 1
FULL TEXT OF PROPOSED NEW RULES
Irish Takeover Panel Act, 1997,
Takeover (Amendment) Rules, 2011

8. CITATION, CONSTRUCTION AND COMMENCEMENT

8.1 These Rules may be cited as the [Irish Takeover Panel Act, 1997, Takeover (Amendment) Rules, 2011].

8.2 [These Rules and the Irish Takeover Panel Act, 1997, Takeover Rules, 2007 to 2008, shall be construed together as one and may be cited together as the Irish Takeover Panel Act, 1997, Takeover Rules, 2007 to 2011.]

8.3 These Rules shall come into operation on [] 2011.

8.4 These Rules shall not apply to any transaction which is in being on the date on which these Rules come into operation.

9. INTERPRETATION

(a) [In these Rules, the “**2007 Rules**” means the Irish Takeover Panel Act, 1997, Takeover Rules, 2007, as amended by the Irish Takeover Panel Act, 1997, Takeover (Amendment) Rules, 2008 and the Irish Takeover Panel Act, 1997, Takeover (Amendment) (No. 2) Rules, 2008.]

(b) Unless the context otherwise requires, a reference in these Rules to a rule or an appendix shall be construed as a reference to a rule of, or (as the case may be) an appendix to, the rules contained in, Part B of the 2007 Rules.

10. AMENDMENT OF PART A OF THE 2007 RULES

Rule 2.1 of Part A of the 2007 Rules is hereby amended in paragraph (a) by:

(a) the insertion of the following definition after the definition of the “Act”:

“**acting in concert**” has the meaning assigned to it by paragraph (b)(vi);”;

(b) the substitution for the definition of “European Merger Regulation” of the following new definition:

“**European Merger Regulation**” means Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L24, 29.01.2004); and

(c) the substitution of “European Union” for “European Communities” in the definition of “**Member State**”.

11. AMENDMENT OF PART B OF THE 2007 RULES

11.1 Rule 2.2 is hereby amended by:

- (a) the substitution of “a possible offer” for “the offer” in paragraph (e); and
- (b) the insertion of the following new statement at the end of paragraph (f):

“The potential seller or (as the case may be) the board of the relevant company shall in any case consult the Panel in advance where it is proposed to hold discussions with more than one potential purchaser or offeror; or”.

11.2 Rule 2.3 is hereby amended by:

- (a) the deletion from paragraph (b) of all of the words following “rumour and speculation”;
- (b) the deletion from paragraph (c) of the words “or requesting the Stock Exchange to grant a temporary suspension of its quotation”; and
- (c) the deletion of paragraph (d) and the renumbering of paragraph (e) as paragraph (d).

11.3 Rule 2.4 is hereby amended by:

- (a) the insertion of (a) “ at the beginning of the existing rule; and
- (b) the insertion after paragraph (a) of the following new paragraphs (b), (c) and (d):

“(b) At any time during an offer period following the announcement of a possible offer and before any announcement by the offeror of a firm intention to make an offer in respect of the offeree, the Panel may, if the offeror has been publicly named and the offeree so requests, impose a time limit within which the offeror shall clarify its intentions with regard to the offeree. If such a time limit is imposed, the offeror shall, before the expiry of the time limit, announce either a firm intention to make an offer in respect of the offeree pursuant to Rule 2.5 or that it does not intend to make an offer in respect of the offeree, in which latter case the announcement shall be deemed, for all purposes of Rule 2.8, to be a statement to which Rule 2.8 applies made by the offeror in relation to the offeree.

(c)(i) Until he or she has notified a relevant company of his or her firm intention to make an offer in respect of that company, a person shall not without the consent of the Panel make a public statement (in this Rule 2.4(c) a “Rule 2.4(c)(i) statement”) in relation to the terms on which an offer might be made by that person in respect of that company.

(ii) (1) If any Rule 2.4(c)(i) statement is published by an offeror or on its behalf by any of its directors, officers or advisers prior to any such notification having been made by the offeror and, if incorrect, is not immediately withdrawn, the offeror shall be bound by the statement if it subsequently makes an offer in respect of the offeree, unless the Panel consents otherwise or unless the offeror has reserved (in Rule 2.4(c) a “reservation”) in that statement the right to set aside the statement on terms specified therein if circumstances specified therein occur, those circumstances have occurred and the offeror has exercised that right.

(2) Where an offeror becomes so bound by a Rule 2.4(c)(i) statement, then, without prejudice to the generality of the powers of the Panel to enforce this Rule, the following provisions shall have effect:

(A) where the statement concerned relates to the value of the consideration to be paid in a possible offer, any offer subsequently made by the offeror in respect of the offeree shall be made for a consideration having the same or a higher value;

(B) where the statement concerned relates to the price of a possible offer or a particular exchange ratio in the case of a proposed securities exchange offer, any offer subsequently made by the offeror in respect of the offeree shall be made on the same or better terms. Where all or part of the consideration is expressed in the statement in terms of a monetary value, the offer or that element of the offer shall be made at the same or a higher monetary value. Where all or part of the consideration has been expressed in the statement in terms of a securities exchange ratio, the offer or that element of the offer shall be made on the same or an improved securities exchange ratio; and

(C) where the statement concerned states that the terms of the possible offer "will not be increased" or are "final" or uses a similar expression, the offeror shall not be permitted subsequently to make an offer in respect of the offeree on better terms.

- (iii) Where a Rule 2.4(c) (i) statement includes a reservation, that reservation shall be clear and unambiguous and shall not be dependent upon the subjective judgements of the directors of the offeror.
- (iv) The first announcement in which a Rule 2.4(c)(i) statement is made shall contain prominent reference to any reservation contained in the statement and shall set out precise details of the reservation. Each subsequent reference by the offeror to that statement shall be accompanied by a reference to the reservation.
- (v) Except with the consent of the Panel, the restrictions and obligations imposed by Rule 2.4(c) (ii) to (iv):
 - (1) shall (subject to subparagraph (2) below) continue to apply until the expiry of the period of three months following the date on which the offeree ceases to be the subject of an offer period ; and
 - (2) where an offeror has made a statement to which Rule 2.8 applies but the offeree remains thereafter the subject of an offer period, shall continue to apply until the expiry of the period of three months following the date on which that statement was made.
- (d) Except with the consent of the Panel, where a Rule 2.4(c)(i) statement is made by or on behalf of an offeror, the consequential restrictions imposed on the offeror by Rule 2.4(c) shall apply equally to any other person acting in concert with the offeror and to any person who is subsequently acting in concert with the offeror or any such other person.
- (e) Except as permitted by the Rules or with the consent of the Panel or where the only pre-condition to the making of the offer is the receipt of irrevocable commitments, a person shall not include in any announcement of a possible offer under Rule 2.4 any pre-condition to the making of the offer."

11.4 Rule 2.5 is hereby amended by:

(a) the insertion in paragraph (b) after subparagraph (v) of the following new subparagraph (vi) and (vii):

“(vi) details of every agreement or arrangement to which the offeror is party and which relates to the circumstances in which the offeror may or may not invoke or seek to invoke a pre-condition or a condition to its offer and to the consequences of its doing so, including details of any break fees payable as a result;

(vii) if the Panel has given consent to the offeree board to enter into a contract or arrangement of the kind described in Rule 21.2, details of that contract or arrangement;” and

(b) the renumbering of existing subparagraphs (vi) to (x) in paragraph (b) as subparagraphs (viii) to (xii).

11.5 Rule 2.7 is hereby amended by the substitution for that existing rule of the following new rule under the same heading:

“Except with the consent of the Panel, when there has been an announcement of a firm intention to make an offer, the offeror shall proceed with the offer unless:

(a) the despatch of the offer is subject to the prior satisfaction of a pre-condition and, in accordance with Rule 13.3, the offeror is permitted to invoke the pre-condition; or

(b) another offeror has already despatched a higher offer in respect of the same offeree and the Panel has confirmed that the offeror need not proceed with its offer.”.

11.6 Rule 2.8 is hereby amended by the substitution for that existing rule of the following new rule under the same heading:

“(a)(i) A person who makes a statement that, or to the effect that, he or she does not intend to make an offer in respect of a relevant company (“a statement to which Rule 2.8 applies”) shall make the statement as clear and unambiguous as possible. Except with the consent of the Panel, such a statement shall not specify any event as an event the occurrence of which would purportedly entitle the person making the statement to set aside the statement.

(ii) Where a person makes a statement that in the opinion of the Panel suggests, or raises the possibility, that he or she will not or may not make an offer in respect of a relevant company, the Panel may, if it considers it to be appropriate in the circumstances to do so (including after communicating with such person where in the opinion of the Panel that would be useful and practicable):

(1) determine that such statement shall be deemed, for all purposes of Rule 2.8, to be a statement to which Rule 2.8 applies made by such person in relation to the relevant company on the date on which the Panel notifies him or her of that determination; or

(2) require such person to make an announcement withdrawing the statement or otherwise clarifying his or her intentions in respect of the relevant company concerned in a manner approved by the Panel.

- (b) Except with the consent of the Panel, where a person makes a statement to which Rule 2.8 applies, neither the person who made the statement, nor any other person who acted in concert with him or her at that time, nor any person who is subsequently acting in concert with the person who made the statement or any such other person (all such persons being collectively referred to in this rule as the “persons affected”), may within the period of 12 months from the date of the statement:
- (i) announce an offer or possible offer or make an offer in respect of the relevant company concerned;
 - (ii) acquire any securities of the relevant company if any of the persons affected would thereby become obliged under Rule 9 to make an offer in respect of the relevant company;
 - (iii) acquire any securities of the relevant company if the persons affected or any of them hold securities conferring in the aggregate more than 49.95% but not more than 50% of the voting rights in the relevant company; or
 - (iv) acquire any securities of the relevant company, or rights over securities of the relevant company, if, following that acquisition, the securities of the relevant company which the persons affected or any of them would hold and the securities of the relevant company over which the persons affected or any of them would hold rights would in aggregate confer 30% or more of the voting rights in the relevant company;
 - (v) make any statement that raises or confirms the possibility that an offer might be made in respect of the relevant company; or
 - (vi) take any steps in connection with a possible offer in respect of the relevant company where knowledge of the possible offer might be extended beyond a very restricted number of people in the offeror and its immediate advisers.”.

11.7 Rule 2.9 is hereby amended by:

- (a) the insertion of “(a)” at the beginning of the existing Rule 2.9; and
- (b) the insertion after paragraph (a) of the following new paragraph (b):

“(b) If the announcement is published outside normal business hours, it shall be submitted, as required by the Rules, to a Regulatory Information Service for release as soon as that service next reopens; it shall also be distributed to not less than two national newspapers and two newswire services.”.

11.8 Rule 4.4 is hereby amended by the insertion in paragraph (a) of the words “of the offeree” after “relevant securities”.

11.9 Rule 9.6 is hereby amended by the deletion of “appoint or nominate a nominee to the board of that company, or”.

11.10 Rule 12(b) is hereby amended by the insertion after subparagraph (ii) of the following new subparagraphs (iii) and (iv):

- “(iii) Where an offer lapses pursuant to Rule 12(b)(i), the offeror shall, no later than 12.00 noon on the business day following the day on which the offeror receives notification

from the European Commission or (as the case may be) the competent authority concerned of its decision, make an announcement for the purpose of clarifying its intentions in respect of the offeree.

- (iv) Where, following the lapse of an offer pursuant to Rule 12(b)(i):
- (1) the concentration concerned is cleared (with or without conditions or obligations attached) by a decision of the European Commission under Article 8(1) or (2) of the European Merger Regulation or (as the case may be) by a decision of the competent authority of the Member State to which the European Commission referred the concentration under Article 9(1) of that Regulation, the offeror shall immediately consult the Panel and shall, within such time limit as the Panel shall impose, announce either a firm intention to make an offer in respect of the offeree pursuant to Rule 2.5 or that it does not intend to make such an offer, in which latter case the announcement shall be deemed, for all purposes of Rule 2.8, to be a statement to which Rule 2.8 applies made by the offeror in relation to the offeree; or
 - (2) the concentration concerned is prohibited by a decision of the European Commission under Article 8(3) of the European Merger Regulation or (as the case may be) by a decision of the competent authority of the Member State to which the European Commission referred the concentration under Article 9(1) of that Regulation, then, except with the consent of the Panel, the offeror, every other person who acted in concert with the offeror and every person who is subsequently acting in concert with the offeror or any such other person shall, in relation to the offeree, be subject to the restrictions set out in Rule 2.8(b) during the period of 12 months from the date on which the decision concerned is notified to the offeror.”.

11.11 Rule 13 is hereby amended by:

- (a) the substitution of “**PRE-CONDITIONS IN FIRM OFFER ANNOUNCEMENTS AND OFFER CONDITIONS**” for the title of that rule; and
- (b) the substitution for Rules 13.1 and 13.2 of the following new Rules 13.1, 13.2 and 13.3:

“13.1 SUBJECTIVE CONDITIONS

Except with the consent of the Panel or where permitted under Rule 12, an offer shall not be made subject to any condition the satisfaction of which depends solely on subjective judgements by the directors of the offeror or of the offeree (as the case may be) or is within their control.

13.2 ACCEPTABILITY OF PRE-CONDITIONS

Except with the consent of the Panel or where the only pre-condition to the making of the offer is the receipt of irrevocable commitments or as otherwise permitted by the Rules, a person shall not announce pursuant to Rule 2.5 a firm intention to make an offer the making of which would be subject to any pre-condition.

13.3 INVOKING CONDITIONS AND PRE-CONDITIONS

- (a) An offeree shall not invoke:

(i) any condition to the offer (except a condition permitted by Rule 12(a)(i)(2) or by Rule 12(b)(ii) or the acceptance condition); or

(ii) any pre-condition to the making of the offer,

so as to cause the offer not to proceed, to lapse or to be withdrawn unless the circumstances that the circumstances that give rise to the right to invoke the condition or pre-condition are of material significance to the offeror in the context of the offer and the offeror has consulted the Panel and the Panel is satisfied that in the prevailing circumstances it would be reasonable for the offeror to do so.

(b) Following the announcement of a firm intention to make an offer, an offeror shall use all reasonable efforts to ensure the satisfaction of every condition and pre-condition to which the offer or the making of the offer is subject.

(c) An offeree shall not invoke, or cause or permit the offeror to invoke, any condition to an offer so as to cause the offer to lapse or to be withdrawn unless the circumstances that give rise to the right to invoke the condition are of material significance to the shareholders of the offeree in the context of the offer and the offeree has consulted the Panel and the Panel that in the prevailing circumstances it would be reasonable for the offeree to do so..

(d) In the determination by the Panel under Rule 13.3(a) as to whether in the prevailing circumstances it would be reasonable for the offeror to invoke the condition or pre-condition concerned, the fact, if it be so, that the Panel approved the inclusion of that condition or pre-condition shall not be taken into account.”

11.12 Rule 17.2 is hereby amended by the deletion of paragraph (a) and the deletion of “(b)” at the beginning of the existing paragraph (b).

11.13 Rule 19.4 is hereby amended by:

(a) the substitution for paragraph (a) of the following new paragraph (a):

“(a)(i) Except with the consent of the Panel, no person may publish an advertisement in connection with an offer or possible offer during the course of the offer unless the advertisement falls within one of the categories listed in subparagraph (iii).

(ii) Except where the advertisement falls within category (1), (8) or (9) in subparagraph (iii), no person shall publish an advertisement in connection with an offer or possible offer during the course of the offer unless its content, format and publication schedule have been approved by the Panel.

(iii) The categories of advertisement referred to in subparagraph (i) are as follows:

(1) product advertisements not bearing on an offer or possible offer; (if the person proposing to publish an advertisement has any doubt as to the applicability of this category to it, he or she shall consult the Panel);

(2) corporate image advertisements not bearing on an offer or possible offer;

- (3) advertisements confined to non-controversial information about an offer (including, inter alia, reminders as to closing times or the value of an offer); such advertisements shall not include argument or invective;
 - (4) advertisements comprising preliminary or interim results and their accompanying statement, provided that such statement is not used for argument or invective concerning an offer;
 - (5) advertisements giving information, the publication of which by advertisement is required or specifically permitted by the Stock Exchange;
 - (6) advertisements communicating information relevant to holders of bearer securities;
 - (7) advertisements comprising a tender offer under the Substantial Acquisition Rules;
 - (8) advertisements which are notices relating to court schemes; and
 - (9) advertisements published with the specific consent of the Panel.”; and
- (b) the substitution for paragraph (c) of the following new paragraph (c):
- “(c) For the avoidance of doubt, for the purposes of the Rules:
- (i) the word “advertisement” shall include:
 - (1) every form of advertisement and accordingly its meaning shall not be restricted to advertisements that promote products, services or property or rights of any kind; and
 - (2) not only a press advertisement but also an advertisement in other media, including, inter alia, television, radio, internet, video, audio tape and poster; and
 - (ii) a publication that would otherwise be treated as an advertisement shall not be treated differently merely because the content, or part of the content, of the publication has been previously published, whether in the same or any different form, context or medium and whether or not in connection with an offer or possible offer.”.

11.14 Rule 19.6 is hereby amended by:

- (a) the substitution of “INTERVIEWS AND DEBATES” for the title to that rule; and
 - (b) the insertion after paragraph (b) of the following new paragraph (c):
- “(c) Representatives of one or more offerors and of the offeree may, during the course of an offer, participate in a joint interview or debate which involves the engagement with each other (either directly or through a third party) of representatives of an offeror and the offeree or of representatives of two or more competing offerors and

which is to be simultaneously or subsequently broadcast on or through radio, television, the internet or any other medium, provided that:

- (i) an appropriate representative of the financial adviser to each offeror and the offeree represented at the interview or debate shall himself or herself also be present at and entitled to participate in such interview and debate;
- (ii) if any misleading or inaccurate statement is made by the representative of an offeror or of the offeree during the course of the interview or debate, the financial adviser to the party concerned shall immediately correct such statement during the course of the interview or debate;
- (iii) the representative of each financial adviser present thereat shall, during the course of the interview or debate, use all reasonable endeavours to ensure that no new information bearing on the offer is disclosed by that adviser's client during the course of the interview or debate; and
- (iv) the representative of the financial adviser to each participating offeror and offeree shall confirm in writing to the Panel, not later than 12.00 noon on the business day following the date of the interview or debate, that no new information bearing on the offer was disclosed by that adviser's client during the course of such interview or debate.

Any person who is in any doubt as to his or her obligations under this paragraph (c) shall consult the Panel."

11.15 Rule 23(c) is hereby amended by the substitution of "announced a possible offer pursuant to Rule 2.4" for "announced an offer".

11.16 Rule 24.2 is hereby amended by:

- (a) the deletion of "by virtue of section 2(a) of the Act" in paragraph (a)(iii);
- (b) the substitution of "the European Communities (Markets in Financial Instruments) Regulations 2007 (S.I. No. 60 of 2007)" for "the Investment Intermediation Act, 1995" in paragraph (b)(i);
- (c) the insertion in paragraph (b) after subparagraph (viii) of the following new subparagraphs (ix) and (x):
 - "(ix) details of every agreement or arrangement to which the offeror is party and which relates to the circumstances in which the offeror may or may not invoke or seek to invoke a condition to its offer and to the consequences of its doing so, including details of any break fees payable as a result;
 - (x) if the Panel has given consent to the offeree board to enter into a contract or arrangement of the kind described in Rule 21.2, details of that contract or arrangement;" and
- (d) the renumbering of existing subparagraphs (ix) to (xiii) in paragraph (b) as subparagraphs (xi) to (xv).

11.17 Rule 24.3 is hereby amended by the substitution of "offeree in accordance" for "offeror in accordance" in paragraph (a)(i).

11.18 Rule 24.6 is hereby amended by the substitution for that rule of the following new rule under the same heading:

“The offer document shall state the time allowed for acceptance of the offer and any alternative offer and shall incorporate language that appropriately reflects Rules 10.3 to 10.6 and those parts of Rules 13.3(a), 13.3(c) (if applicable), 17 and 31 to 34 (excluding Rule 31.6(b)) that impose timing obligations or confer rights or impose restrictions on offerors, offerees or shareholders of offerees.”.

11.19 Rule 26(b) is hereby amended by:

(a) the insertion after subparagraph (x) of the following new subparagraph (xi):

“(xi) every agreement or arrangement, or, if it is not in writing, a memorandum of the terms of such agreement or arrangement, as disclosed in the offer document pursuant to Rule 24.2 (b)(ix);”;

(b) the renumbering of existing subparagraphs (xi) to (xiv) as subparagraphs (xii) to (xv); and

(c) the substitution in subparagraph (xiii) (as so renumbered) of “25.3(a) or (c)” for “25.3(b) or (d)”.

11.20 Rule 31.9 is hereby amended by the insertion of “any material new information, including” after “announce”.

11.21 Rule 32.1(b) is hereby amended by the substitution of “announce any material new information, including” for “issue a statement of”.

11.22 Rule 35 is hereby amended by:

(a) the deletion of “**AND POSSIBLE OFFERS**” from the title of the rule;

(b) the substitution for Rule 35.1 of the following new Rule 35.1 under the same heading:

“Except with the consent of the Panel or as provided in Rule 9.3 or in this Rule, if an offeror has announced a firm intention to make or has despatched an offer (not being a partial offer) and that offer has been withdrawn or has lapsed, neither the offeror, nor any other person who acted in concert with the offeror, nor any person who following the expiry of the offer period is acting in concert with the offeror or any such other person (all such persons being collectively referred to in this rule as the “persons affected”), may, within the 12 months after the date on which such offer is withdrawn or lapses, either:

(a) announce an offer or possible offer or make an offer in respect of the offeree; or

(b) acquire any securities of the offeree if any of the persons affected would thereby become obliged under Rule 9 to make an offer in respect of the offeree; or

(c) acquire any securities of the offeree if the persons affected or any of them hold securities conferring in the aggregate more than 49.95% but not more than 50% of the voting rights in the offeree; or

- (d) acquire any securities of the offeree, or rights over securities of the offeree, if, following that acquisition, the securities of the offeree which the persons affected or any of them would hold and the securities of the offeree over which the persons affected or any of them would hold rights would in aggregate confer 30% or more of the voting rights in the offeree; or
- (e) make any statement that raises or confirms the possibility that an offer might be made in respect of the offeree; or
- (f) take any steps in connection with a possible offer in respect of the offeree where knowledge of the possible offer might be extended beyond a very restricted number of people in the offeror and its immediate advisers;

provided that:

- (i) the restrictions in Rule 35.1(a), (e) and (f) shall not apply in circumstances where the offer has lapsed pursuant to Rule 12(b)(i) and the offeror is continuing to seek clearance from the authority concerned with a view subsequently to making a new offer; and
 - (ii) the restrictions in Rule 35.1 shall not apply to an offeror following its making a Rule 2.5 announcement pursuant to Rule 12(b)(iv)(1) nor to a person who becomes subject to the restrictions in Rule 2.8(b)."; and
- (c) the insertion after Rule 35.2 of the following new Rule 35.3:

"35.3 RESTRICTIONS ON DEALINGS BY A COMPETING OFFEROR WHOSE OFFER HAS LAPSED

"Except with the consent of the Panel, where an offer has been one of two or more competing offers and has lapsed, neither that offeror, nor any person acting in concert with that offeror, may acquire any securities of the offeree on terms more favourable than those made available under the lapsed offer until the other competing offer or, as the case may be, each of the other competing offers has either become unconditional in all respects or has itself lapsed. For that purpose, the value of the lapsed offer shall be calculated as at the day on which it lapsed."

11.23 Rule 36.2 is hereby amended by the substitution of "Rule 35.1" for "Rule 35.1(a)" in each of paragraphs (c) and (d).

11.24 The 2007 Rules are hereby amended by the insertion after Rule 41 of the following new Rule 42:

"42. RESPONSIBILITIES OF ADVISERS

- (a) Each of the advisers to the offeree and each of the advisers to the offeror shall, during the course of and in relation to an offer, in addition to complying with the Rules, act honestly, fairly and professionally.
- (b) Each adviser to the offeree and each adviser to the offeror (including the respective financial advisers and legal advisers) shall, in so far as shall be appropriate according to that adviser's role and function in the transaction concerned, give to its client, during the course of and in relation to an offer, such advice as shall be required to ensure, so far as the adviser reasonably can, that its client understands and complies

Annexe 2 PROPOSED NEW NOTES ON RULES

Notes on Part B of the Takeover Rules

13. NOTES ON RULE 2.2

Delete the first sentence from Note 3.

Insert the following new Note 4:

“4. Rule 12(b)(iii) and (iv)(1)

Announcements by an offeror may be required under these rules, following the lapse of an offer pursuant to Rule 12(b)(i).”

14. NOTE ON RULE 2.3

Delete this note.

15. NOTES ON RULE 2.4

Change “NOTE” in the heading to “NOTES”. The existing note to become Note 1.

Insert the following new Notes 2 to 8:

“2. Period for clarification

The precise time limit imposed in any particular case under Rule 2.4(b) will normally be determined by reference to all the circumstances of the case, and the Panel will usually endeavour to balance the potential damage to the business of the offeree arising from the uncertainty caused by the offeror’s interest against the disadvantage to the offeree’s shareholders of losing the prospect of an offer.

3. Extension of time limit

The Panel will normally not extend a time limit unless the offeree board approves the extension.

4. Where time limits may not be imposed

The Panel would not normally impose a time limit in respect of a possible offer where an offer has lapsed under Rule 12(b)(i) because the European Commission has either initiated proceedings in respect of a concentration or referred it to a competent authority of a Member State.

Nor would the Panel normally impose a time limit where, after a third party has announced a firm intention to make an offer, the potential offeror makes a statement that it is considering making a competing offer.

See Note 2 on Rule 19.3.”

5. Approximate value

The Panel would not normally give consent to the making of a statement that indicates the approximate price or value at which the offeror is considering making an offer in respect of the offeree.

An announcement by the offeror that it is considering making an offer “at a substantial premium” or “at or around” a stated price is unlikely to be acceptable, whereas a statement that the offeror is considering making an offer within a range of stated prices would normally be acceptable.

6. Statements by the offeree

Every statement made by the offeree in relation to the terms on which an offer might be made should also make clear whether that statement is being made with the agreement or approval of the offeror. Where it is not being made with such agreement or approval, the statement should also include a prominent warning to the effect that there can be no certainty either that an offer will be made or as to the terms on which any offer might be made.

7. Right to vary form/mix of consideration

Where an offeror that has duly reserved the right to vary the form and/or mix of the consideration referred to in the statement concerned but remains bound to a specified minimum value of consideration exercises that right, the value of the consideration in any offer subsequently made by the offeror in respect of the offeree should be the same as or higher than the minimum value of the consideration specified in that statement, calculated as at the time of the announcement of the firm intention to make that offer.

8. Pre-conditions

Where the consent of the Panel is required by a person proposing to include in a Rule 2.4 announcement any pre-condition to the making of an offer, the Panel, if it grants consent, will normally require that any such pre-conditional possible offer announcement:

(a) clearly state whether the pre-condition must be satisfied before an offer can be made or whether the pre-condition is waivable; and

(b) include a prominent warning to the effect that the announcement does not amount to an announcement of a firm intention to make an offer and that, accordingly, there can be no certainty that any offer will be made even if the pre-condition is satisfied or waived.”

16. NOTES ON RULE 2.5

Insert “NOTES ON RULE 2.5” as the heading and delete “NOTE ON RULE 2.5(a)” and “NOTE ON RULE 2.5(b)”.

Change the caption for the existing note on Rule 2.5(a) to “1. Financial adviser’s responsibility – paragraph (a)”.

Change the caption for the existing first note on Rule 2.5(b) to “2. Unambiguous language – paragraph (b)”.

Change the caption for the existing second note on Rule 2.5(b) to “3. New conditions for increased or improved offers”.

Insert the following new note 4:

“4. Pre-conditions

See Rule 13.2.”

17. **NOTES ON RULE 2.7**

Substitute the following new Note 1 for the existing Note 1:

"1. Change in general economic circumstances

The Panel may consent to an offeror not proceeding with its announced offer where there has been a change in general economic, industrial or political circumstances but only where such circumstances are of an exceptional nature and are of material significance to the offeror in the context of the offer."

Delete the first sentence in Note 2.

18. **NOTES ON RULE 2.8**

Substitute the following new Note 2 for the existing Note 2:

"2. When derogations may be considered

(a) Where pursuant to Rule 2.4(b) or Rule 12(b)(iv)(1) an announcement made by a person is deemed to be a statement to which Rule 2.8 applies, the circumstances in which the Panel may consider granting a derogation in respect of the 12 month period in Rule 2.8(b) include where:

(i) a new offer is to be made by the person who made the statement in respect of the relevant company concerned with the agreement or recommendation of its board; or

(ii) an offer is announced by a third party in respect of the relevant company; or

(iii) an announcement is made by the relevant company of a "whitewash" proposal (see Note 1 of the Notes on Possible Waivers of and Derogations from Rule 9 and the Whitewash Guidance Note) or of a reverse takeover transaction (see definition in Rule 2.1(a) of Part A of the Rules and Rule 40).

The above criteria may also be relevant to the Panel's consideration of a request for a derogation permitting reservations in a statement to which Rule 2.8 applies.

(b) Where a statement to which Rule 2.8 applies is made otherwise than in the circumstances specified in paragraph (a), the Panel, in considering whether to grant a derogation in respect of the 12 month period in Rule 2.8(b), may take into account, amongst other factors, whether the original statement was made with due care and after proper consideration of all relevant circumstances and has not misled shareholders or the market. The circumstances in which the Panel may consider granting a derogation include the following:

(i) where a significant amount of time has elapsed ;

(ii) where a material change of circumstance has occurred, sufficient in the opinion of the Panel to justify the person changing his or her intention; or

(iii) if the derogation is sought by a person acting in concert with the person who made the statement, where it was made clear in the statement, or at the time the statement is made, that the person acting in concert was continuing to consider making an offer for the relevant company."

Insert the following new Note 3:

"3. Media reports

When considering the application of this Rule, the Panel will take into account not only the statement itself but the manner of any subsequent public reporting of it. Advisers should therefore ensure that directors and officials of companies are warned that they must consider carefully the implications of Rule 2.8, particularly when giving interviews to, or taking part in discussions with, the media. It is very difficult after publication to alter an impression given or a remark attributed to a particular person. Control of any possible abuse lies largely with the person being interviewed.

In appropriate circumstances, the Panel will require a statement of retraction or clarification.”

19. NOTES ON RULE 12(b)

The existing note to become “*Note 1*”. Change “*NOTE*” in the heading to “*NOTES*”.

Insert the following new Notes 2 and 3:

“2. Rule 12(b)(iv)(1)

The Panel will normally require the offeror to announce its decision within 21 days after the issue of the clearance.

3. Rules 12(b)(iii) and (iv)

See Rule 35.1.”

20. NOTES ON RULE 13

Insert “*NOTE ON RULE 13.1*” above the existing note on Rule 13.

Insert the following new note:

“NOTE on Rule 13.2

The pre-conditions in respect of which the Panel may consider granting consent normally include a pre-condition that:

(a) relates to a decision by the European Commission, under the European Merger Regulation, not to initiate proceedings in respect of the offer concerned nor to refer it to a competent authority of a Member State;

(b) relates to a decision by the European Commission, under the European Merger Regulation, not to initiate proceedings in respect of the offer nor to refer it to a competent authority of a Member State or, if there is such an initiation of proceedings or referral, to a decision by the authority concerned to allow the offer to proceed (which decision may, in either case, be stated to be on terms acceptable to the offeror); or

(c) involves another material official authorisation or regulatory clearance relating to the offer and:

(i) the offer is publicly recommended by the board of the offeree; or

(ii) the Panel is satisfied that it is likely to prove impossible to obtain the authorisation or clearance within the timetable laid down by the Rules.

Where the Panel grants consent, it will usually, in the case of (a) or (b) above, also consent to the disapplication of Rule 13.3(a).

21. **NOTES ON RULE 19.1**

Substitute the following new note for existing Note 1:

"1. Advisers' responsibility for release of information

Advisers must ensure at an early stage that directors and officials of companies are warned that they must consider carefully the implications under the Rules of what they say, particularly when giving interviews to, or taking part in discussions with, the media. It is very difficult after publication to alter an impression given or a view or remark attributed to a particular person. Control of any possible abuse lies largely with the person being interviewed. In appropriate circumstances, the Panel will require a statement of retraction. Particular areas of sensitivity on which comment must be avoided include future profits and prospects, asset values and the likelihood of the revision of an offer. (See also Rule 20.1(b) and Rule 42.)"

The Panel will not normally grant consent under (c) above where satisfaction of the pre-condition depends solely on subjective judgements by the directors of the offeror or of the offeree or is within their control.

See Note 4 on Rule 2.5.

Whether a clearance under the Competition Act 2002 could be made the subject of a pre-condition to the making of an offer is, in the first instance, a matter for discussion with the Competition Authority."

22. **NOTES ON RULE 19.4**

Insert the following new Note 1:

"1. "...in connection with..."

This phrase is used in a wide sense so that, for example, an advertisement that does not explicitly or implicitly refer to an offer may nevertheless be regarded as published "in connection with" that offer if the advertisement is intended or likely to influence, directly or indirectly, the attitude to the offer of any of the parties to the offer or of any other person concerned with the offer. A useful, if not a definitive, test as to whether an advertisement would fall within this category would be whether it would have been published, or published in its proposed form, in the absence of the offer concerned."

Renumber existing Notes 1 to 4 as Notes 2 to 5.

23. **NOTE ON RULE 19.6**

Substitute the following new note for the existing note:

"Joint interviews and debates

Joint interviews and debates between representatives of an offeror and the offeree, or between representatives of competing offerors, are of their nature confrontational and thus increase the risk that the standards of accuracy, completeness and fair presentation required by the Rules may not be safeguarded and that misleading or inaccurate statements may be made. The often heated and complicated nature of such interviews and debates contributes to this problem. Where representatives of the offeror and the offeree or of competing offerors are to participate in a joint interview or debate, the financial adviser to each party has a particular responsibility to ensure that no new information is disclosed, and that no misleading or inaccurate statement is made, by that adviser's client; and to ensure that, if any such misleading or inaccurate statement is made, it is corrected during the course of the interview or debate, as it is likely to be very difficult to correct the error subsequently, particularly where that interview or debate has received widespread media coverage.

See also Rule 42."

24. **NOTES ON RULE 21.1**

Delete Note 4 and renumber existing Notes 5 to 10 as Notes 4 to 9.

25. **NOTE ON RULE 31.9**

Delete the words "of trading results and a dividend."

26. **NOTES ON RULE 32.1**

Transfer the sentence "*See also Rule 9.7*" from Note 3 to become a new second paragraph in Note 2.

27. **NOTES ON RULE 35.1**

Delete Note 2 and subparagraph (a)(iii) in existing Note 1, renumber subparagraph (iv) in existing Note 1 as subparagraph (iii) and delete "1" at the beginning of existing Note 1. Change heading to "*NOTE ON RULE 35.1*".