ICAEW REPRESENTATION
86/15

PCP 2015/1 DIVIDENDS

ICAEW welcomes the opportunity to comment on the *PCP 2015/1 Dividends* published by the Code Committee of the Takeover Panel on 11 May 2015, a copy of which is available from this link.

This response of 12 June 2015 has been prepared on behalf of ICAEW by the Corporate Finance Faculty. Recognised internationally as a source of expertise on corporate finance issues and for its monthly *Corporate Financier* magazine, the Faculty is responsible for ICAEW policy on corporate finance issues including submissions to consultations. The Faculty's membership is drawn from professional services groups, advisory firms, companies, banks, private equity, law firms, consultants, academics and brokers. This response reflects consultation with Faculty members experienced in public company advisory work.

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SUPPORT FOR THE PROPOSALS

1. ICAEW supports the Panel's intention to clarify, codify and update the application of the Code to the treatment of dividends paid by an offeree company.

2. We broadly agree with the proposals. We do, however, think that the Code provisions should also address circumstances such as where a dividend is declared but:

    - subsequent to the relevant offer announcement, is not approved or is cancelled (see response to Q1); or

    - remains payable by the offeree following the offer becoming wholly unconditional (see responses to Q1 and Q2).

3. We thought it would be beneficial if a summary of the application of the principal provisions of the Code regarding treatment of dividends was presented as an Appendix to the Practice Statement (for example, in tabular form). A similar process was used when a very useful summary on Rule 28 was presented as an Appendix to the 2012 Response Statement.

4. The proposed Practice Statement explains the Panel's practice with regard to permitting an offeror to reserve the right to reduce the offer consideration if the offeree company pays a dividend. In section 2(f), the reduction in the amount of the non-cash consideration may merit illustration by way of a worked example, to highlight why the pricing adjustment will normally be calculated by reference to the close of trading on the day before the offeror's announcement that the offer consideration is to be reduced. We believe that it is currently not clear from paragraph 2.22 how the adjustment is to be made. Moreover an explanation of the Code Committee determining why the reference date should be the date when the offeror decides that it will reduce its offer would be helpful. We note from paragraph 2.19 in the Practice Statement that there is some leeway on the date of the announcement of a reduction – '*normally* … *as soon as possible* after the offeree company's announcement of the dividend', which we consider appropriate, particularly in such cases where the offeror may require some days to make a proper determination on reduction and the amount thereof. The main body of the PCP does not appear to comment on this topic.

5. Connected with the issues above in relation to non-cash consideration, we also thought that it was generally unclear from the current drafting of the Code and from the proposed amended drafting how dividend payments impact offers or potential offers (a) generally for non-cash consideration or partly for non-cash consideration (for example, if an offer is for part cash and part shares, is the dividend payment allowed to be discounted from either the cash or the share consideration element, in proportions chosen by the offeror or potential offeror?) and/or (b) where the offer consideration includes offeror's securities which are unlisted.

RESPONSES TO SPECIFIC QUESTIONS

Q1: Should Note 4 on Rule 2.5, Note 4 on Rule 2.7 and Note 5 on Rule 24.3 be introduced, and Note 1 on Rule 2.5 amended, as proposed?

6. We are of the view that new Note 4 on Rule 2.5, new Note 4 on Rule 2.7 and Note 5 on Rule 24.3 should also refer to a dividend which has been declared, but which might not have been paid when the offer closes (ie it remains a debt of the offeree company). We suggest the following addition to each of the proposed new notes:

    '…reserve the right to reduce the offer consideration by the amount of all or part of a dividend which is subsequently paid <u>or payable</u> by the offeree company…'

7. We note that the proposed Practice Statement addresses the consequences of purchasing shares when a dividend that has been announced is not ultimately paid. Would the Panel feel it would be beneficial to remind financial advisers to consider any resultant upward adjustment to the offer will have a consequential impact on the requirement for a similarly revised cash confirmation?

8. New Note 4 on Rule 2.7 refers only to dividends that are subsequently paid. However, where a dividend is declared but is not subsequently approved, or is cancelled, the offeror should have the option but not the obligation to increase the offer consideration beyond the circumstances contemplated in section 4 of the proposed Practice Statement provided it has not made any market purchases in excess of the offer value (less the dividend amount). We consider that there should be a separate note to clarify the position in this case as currently the new notes address the situation where the '… offeree company pays a dividend' but not where it has declared a dividend which is subsequently cancelled, withdrawn or not approved (by shareholders).

9. We agree with new Note 5 on Rule 24.3.

10. Regarding Note 1 on Rule 2.5, how does the Panel intend to treat other 'distributions' such as scrip dividends or bonus shares as we note that the proposed Practice Statement addresses distributions other than dividends in section 2(c)? We note the specific reference in the proposed changes to the Code to 'dividends' but not to 'distributions' more generally.

11. We propose the following minor amendment in paragraph 2.18 of the proposed Practice Statement:

    '…Rule 21.1 ~~may~~ <u>should</u> not be considered by an offeror to provide adequate protection against value leakage arising from the payment of dividends…'

Q2: Should Note 5 on Rule 2.5 and Note 6 on Rule 32.2 be introduced as proposed?

12. Following on from our comment in paragraph 6 above, we are of the view that the proposed notes should also provide for dividends which might not be paid during the offer period, but which nevertheless remain a liability of the offeree after the offer has closed. We suggest the following addition to each of new Note 5 on Rule 2.5 and new Note 6 on Rule 32.2:

    '…the offeree company subsequently pays <u>or agrees to pay</u> a dividend…'

13. Has the Panel considered if, how and by whom shareholders should be notified that the offer consideration is actually required to be reduced where an offeror has made a 'no increase' statement and the offeree company pays a dividend; ie that in those circumstances the offeror would be permitted to reduce the offer consideration? Perhaps an approach similar to that proposed in paragraphs 2.19 to 2.21 of the proposed Practice Statement should be followed.

Q3: Should Note 5 on Rule 6, Note 4 on Rule 9.5 and Note 9 on Rule 11.1 be amended as proposed?

14. Yes, we agree with the proposed amendments.