

UK PUBLIC M&A UPDATE

UK Takeover Panel publishes Consultation Paper in relation to asset valuations

26 October 2018

On 17 October 2018, the UK Takeover Panel published Panel Consultation Paper 2018/1 (the *PCP*), which proposes amendments to the UK Takeover Code in relation to asset valuations. The PCP invites comments by Friday, 7 December 2018. Comments may be sent by email to: supportgroup@thetakeoverpanel.org.uk or in writing to: The Secretary to the Code Committee, The Takeover Panel, 10 Paternoster Square, London EC4M 7DY. Responses will be published on the Panel's website (www.thetakeoverpanel.org.uk) unless the respondent specifically requests otherwise.

BACKGROUND

The Panel considers that asset valuations given in relation to a target or securities exchange bidder in the context of a takeover bid are of such fundamental importance to target shareholders in their evaluation of the merits of the bid that they should have the benefit of an opinion on the valuation from an independent, competent valuer. Rule 29 of the Code currently prescribes when such opinions are required, what those opinions must contain and which valuers are permitted to give them.

Asset valuations were published by targets in the following recent UK bids: *Dalmore Capital and Equitix Investment's* successful, recommended bid for *John Laing Infrastructure Fund* (valuation of JLIF's portfolio of investments in various projects), *City Developments'* unsuccessful, recommended bid for *Millennium & Copthorne Hotels* (valuations of various properties held by M&C) and *Constellation Software's* unsuccessful, hostile bid for *Bond International Software* (valuation of Bond International Software's UK office).

However, certain elements of the Panel Executive's practice in relation to asset valuations are not currently reflected in Rule 29 itself. The Panel is therefore proposing that Rule 29 be replaced in its entirety with the amended Rule 29 set out in the PCP in order to codify existing practice, clarify certain aspects of the rules and provide a more logical framework for market participants.

If you have any questions concerning the Panel's proposed changes to the Code, or the procedure for submitting comments to the Panel, please reach out to your regular firm contacts or to:

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The full text of PCP 2018/1 can be accessed via this [link](#).

The full text of the Takeover Code can be accessed via this [link](#).



THE PROPOSALS

The new Rule 29 largely retains the same concepts and requirements prescribed in the current Rule 29 with certain additions and clarifications. The new Rule 29 is summarised in this Alert Memorandum. Unless otherwise stated, references below to rules are to the new Rule 29 as set out in the PCP.

Rule 29.1: Applicable Valuations

Rule 29 applies to valuations published (i) during the offer period; (ii) within the 12 months prior to the start of offer period; and (iii) more than 12 months prior to the start of the offer period *if* the bidder or target draws attention to the valuation in the context of the bid. The Panel has discretion to grant dispensations for valuations that the Panel considers not to be material to target shareholders in assessing the merits of a bid ([Rule 29.1\(a\)](#)).

Rule 29 applies by default to valuations of (i) land, buildings, plant or equipment; (ii) mineral, oil or gas reserves (although not volume quantifications of reserves alone, without a value being stated); and (iii) unquoted investments ([Rule 29.1\(b\)](#)). However, the Panel also has discretion to apply Rule 29 to valuations of other assets or liabilities that would be material to target shareholders in evaluating the merits of the bid, *e.g.*, pension fund surpluses or deficits ([Rule 29.1\(c\)](#)).

Note that an “*illustration of value*” (*i.e.*, where a company seeks to show that if, for example, a particular division were to be valued on the same EBITDA multiple as its market competitors, it would be worth a specified amount) will not usually be subject to the requirements of Rule 29 (but will remain subject to the requirements of Rule 19.1).

Where a securities exchange bidder or a target publishes, or has published, a Net Asset Value or Adjusted Net Asset value (*NAV*) in circumstances where Rule 29 would apply if a valuation had been published in respect of the underlying assets, it must also publish a valuation of the underlying assets and set out any adjustments made in the valuation to allow target shareholders to reconcile any differences between the underlying assets and the NAV ([Rule 29.1\(d\)](#)).

Note that Rule 29 is *not* intended to apply to a valuation which is set out in a company’s financial statements only as a result of accounting practice and

which is not otherwise referred to by the relevant party in the arguments as to the merits or demerits of the offer ([Note on Rule 29.1](#)).

Rule 29.2: Requirement for Valuation Report

Any valuations published during the offer period must be in the form of, or accompanied by, a valuation report ([Rule 29.2\(a\)](#)).

Valuations published before the offer period must either be confirmed or updated with a valuation report which will be circulated with the offer document or defence document (as the case may be) or, if earlier, in the first announcement or first document that refers to the valuation ([Rule 29.2\(b\)](#)).

Valuation reports must be prepared by a valuer that satisfies the requirements of Rule 29.3 ([Rule 29.2\(c\)](#)).

Consistent with current practice, where a target or a securities exchange bidder which has published a valuation prior to the commencement of the offer period is unable to obtain a valuation report within the timeframe set out in Rule 29.2(b), the Panel may consent to a delay in the publication of a valuation report, but will only consent to a delay beyond the date of the offer document or defence document (as the case may be) in exceptional circumstances ([Note on Rule 29.2](#)).

Rule 29.3: The Valuer

[Rule 29.3](#) sets out the requirements for a valuer and removes the current emphasis on property valuations and property valuation practices in the current Rule 29.

A valuer must be: (i) independent to the parties of the offer (for which, see below); (ii) appropriately qualified to conduct valuation (with membership of a professional body being an indicator that a valuer is appropriately qualified); (iii) satisfy any legal or regulatory requirements; and (iv) have sufficient current knowledge of the relevant market and have necessary skills and understanding to prepare the valuation report ([Rule 29.3\(a\)](#)). The Panel must be consulted in advance if there are any doubts as to whether a proposed valuer being satisfies these requirements ([Rule 29.3\(b\)](#)).

For the purposes of determining whether a valuer is independent, the Executive has traditionally applied a lower bar than that applied to financial advisers that wish to be regarded as independent for the purposes of

Rule 3. The Executive will usually consider a valuer to be independent if: (i) neither the valuer nor any party to the offer has a substantial economic interest in the other; and (ii) the valuer is considered by its own professional standards to be independent and/or is not in breach of its own professional standards by carrying out the valuation. The Panel has affirmed this approach in the PCP.

It should be noted that the Panel is proposing to remove the language in the current Rule 29.1(b)(ii), which provides that, where a valuer lacks current knowledge of a particular market, the valuer may be assisted by a person who *does* have such knowledge and the skills and understanding necessary. The Panel's understanding is that, if a valuer does not have sufficient current knowledge of a particular market, market practice is for a valuation of the relevant assets to be carried out by a different valuer who does have sufficient current knowledge of the market. The Panel therefore views the current language as redundant.

Rule 29.4: The Valuation Report

The new [Rule 29.4](#) will combine and refine the requirements currently set out in Rules 29.2, 29.4 and 29.5.

A valuation report must contain: (i) details of the valuer (name, address, qualifications); (ii) date of valuation; (iii) details of assets subject to valuation; (iv) separate valuations of each category or each significant asset(s), consistent with any previous published valuations or normal valuation reporting practices; (v) details of the valuations standards relied on; and (vi) the basis of valuation ([Rule 29.4\(a\)](#)). The valuation report must also be published on a website in manner compliant with the Code ([Rule 29.4\(d\)](#)).

A valuation report published must not be qualified or subject to special assumptions ([Rule 29.4\(b\)](#)).

A valuation must normally be carried out in respect of all of the assets in a portfolio, but, where the portfolio contains a large number of similar assets and the valuer is familiar with the portfolio as a whole, the Panel may permit a valuation of a representative sample of each asset class instead ([Rule 29.4\(c\)](#)). In such cases, the valuer must report on the representative sample and certify the representative nature of the sample and the directors must take sole responsibility for estimates, based on the sample, to cover the remaining properties ([Note 4 on Rule 29.4](#)).

A valuation report must be prepared in accordance with: (i) valuation standards published by the Royal Institution of Chartered Surveyors or the International Valuation Standards Council; or (ii) other appropriate professional standards approved by the Panel, and in each case on a basis which is consistent with past practice in relation to the assets concerned ([Note 1 on Rule 29.4](#)). The basis of valuation should normally be market value ([Note 2 on Rule 29.4](#)).

Additional requirements apply to the valuation of land that is being developed or with immediate development potential ([Note 3 on Rule 29.4](#)).

Rule 29.5: No Material Difference Statement

If the valuation was carried out before the date of the document or announcement in which the valuation report is published, the directors will have to state that the valuer has confirmed that an updated valuation would not be materially different ([Rule 29.5\(a\)](#)). If that statement cannot be made, an updated valuation must be published ([Rule 29.5\(b\)](#)).

Rule 29.6: Potential Tax Liability

The new [Rule 29.6](#) will retain the existing requirement that a valuation report must include a statement as to the tax consequences of a sale of assets, but also codifies the Executive's usual practice of requiring that statement to include an estimate of the amount of tax liability that would arise from the sale. A comment on the likelihood of any such liability crystallizing must also be included ([Rule 29.6\(a\)](#)).

Where the Panel has consented to an estimate being omitted, the document or announcement must contain an explanation as to why a meaningful estimate cannot be given and as to the tax consequences of a sale ([Rule 29.6\(b\)](#)).

Rule 29.7: Profit Forecasts

[Rule 29.7](#) is a new requirement for the Panel to be consulted in advance if a valuation contains a profit forecast for the purposes of Rule 28 (e.g., where industry practice is to set out detailed projections of the revenue and cost cash flows used to derive the valuation). This is most relevant to oil and gas companies, where valuation reports have, in the past,

included numbers which, taken together, constituted a profit forecast.

Rule 29.8: Valuation of Another Party's Assets

[Rule 29.8](#) retains the existing rule (currently contained in Rule 29.1(d)) that a party to an offer will not normally be permitted to publish a valuation of the assets of another party to an offer unless the valuation is the subject of an unqualified valuation report prepared in accordance with Rule 29 by a valuer who has had access to sufficient information to prepare such a report.

However, the Panel is proposing to remove the language currently Rule 29.1(d) that provides that comments by one party about another party's valuation, appraisal or calculation of worth of its own assets may be permitted in exceptional circumstances. The Panel's rationale for removing this language is: (i) subject to Rule 19.1, the Code should not restrict one party's ability to critique an asset valuation published by another party; and (ii) a requirement to consult the Panel might imply that the Panel has pre-vetted the comment, which is unlikely to be the case.

Consequential Amendments to the Code

To align the other rules of the Code with the proposed new Rule 29, minor consequential amendments are being proposed to [Rule 23.2](#) (*Consent to inclusion of advice, opinions and reports*), [Rule 26.3](#) (*Documents to be published on a website following the making of an offer*) and [Rule 27.2](#) (*Subsequent documents*).

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