Standard Life Investments

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

Standard Life Investments
1 George Street
Edinburgh
EH2 2LL

phone: +44 (0)131 245 9894
fax: +44 (0)131 245 6463
email: jonathan_cobb@standardlife.com

www.standardlifeinvestments.com

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Dear Sir

PCP 2011/1 – Proposed Amendments to the Takeover Code

Thank you for your invitation to comment on the proposed amendments to the Takeover Code contained in the consultation paper dated 21st March 2011. Standard Life Investments is one of the UK's leading long-term institutional investors with £157.1bn of assets under management as at 31st March 2011. The majority of these assets comprise UK listed securities. It thus has a strong incentive to ensure that Panel rules remain appropriate and effective.

Our submission follows that which we made in response to PCP 2010/2 and is intended to be consistent with it. In commenting on the proposals, we share the Code Committee's belief that it is neither necessary nor appropriate to change the fundamental nature and purpose of the Code. We therefore hope that our submission will inform and support those amendments that have the express purpose of ensuring that shareholders in an offeree company are treated fairly and are not denied an opportunity to decide on the merits of a takeover. We address the proposed amendments and the issues which are raised by them as follows:

Requiring potential offerors to clarify their position

We support the general aim of the proposals, namely to reduce or eliminate the incidence of "virtual offers". However the proposed amendments may prove to be too cumbersome, particularly where they relate to the disclosure of multiple or competing offers. The proposals may also have the un-intended effect of impeding the confidential engagement of offeree boards with offerors whom they consider to be acting in good faith. We support the alternative approach identified by the Committee in para 2.22 of the consultation, namely the decision as to whether the potential offeror should be publicly identified would rest with the board of the offeree company, other than as determined by the Panel. We would also support the continued use of the "put up or shut up" provision (Rule 2.4 b) as amended under para 2.16 of the consultation. We believe that this would act as the more effective deterrent to vexatious approaches to an offeree company.

Whichever of the proposals are adopted, we are concerned by the ambiguity created by the Committee's use of the term "commencement of an offer period" for the purposes of establishing the offer timetable, most critically "D" day. Rule 2.4 (as amended) says that it commences with the announcement of a potential offer, whereas Rule 24.1 implicitly situates it in the announcement of a firm intention to bid under Rule 2.7. It would be useful to have this issue clarified.

Prohibition of deal protection measures and inducement fees

We support the proposed amendments, except where they relate to dispensation given in circumstances relating to the solicitation of a so-called "white knight". In general, we believe that all inducement fees, whether to a "white knight" or otherwise, have the effect of raising the cost of a potentially competing bid and thus impede the operation of a free market. We would support the use of the Panel's dispensation solely in circumstances where the offeree company was in serious financial distress.

We would also like the language of the Code to be strengthened where it relates to the disclosure of conflicts of interest by directors of an offeree company. In addition to the obvious conflict implicit in the giving of irrevocable acceptances in respect of directors' beneficial shareholdings, we would also ask the Committee to consider disclosure of circumstances where directors of offeree boards are likely to assume fiduciary responsibilities in the acquiring company or entity. This is particularly pertinent where the new controlling entity is not listed on an exchange and is not thereby subject to the same regulations as the offeree company.

Rule 25.1

We note that the proposed amendments give greater prominence to the principle that boards of offeree companies are not limited by the number of criteria by which they may evaluate a bid. This seems to be a useful re-emphasis of the relevant provisions of the Companies Act 2006 (CA 2006).While we support the introduction of a new Note 1 to Rule 25.1 (Offeree Board Circulars), we think that the specific reference to price as the determining factor of an offeree board's opinion is otiose and should therefore be deleted.

Offer related fees and expenses

We support the introduction of new Rules 24.16 and 25.8 and concur with the reasons for their introduction.

Rule 24

We support the elimination of those differences in the reporting requirements that were determined by the nature of the consideration by which an offer was to be settled. We would question the reasons for not requiring the production of a *pro forma* balance sheet for inclusion in an offer document and ask the Committee to give consideration for such a requirement where the offer is recommended.

We welcome the Committee's proposals for improving the quality and nature of disclosures relating to the financing of a takeover in the Offer Document. We support the new Rule 24.3(c) regarding the disclosure of ratings and outlooks by credit rating agencies. We also concur with the introduction of new Rule 24.3(f) and its requirement for a description of how an offer is to be financed. These amendments will enhance the ability of the boards and shareholders of offeree companies to properly evaluate an offer.

Whilst we welcome the desire for improved disclosure implicit in the new Rule 24.2 ("Intentions regarding the offeree company, the offeror company and their employees"), we are concerned about the possibility of un-intended consequences that could negate the fundamental principles of the Code. In attempting to preserve the spirit and substance of the current Rule 24.2(f), the matters described in the new 24.2 (a) may be too prescriptive and thereby frustrate those offers where it has not been possible to conduct the due diligence that would permit compliance with the new rule. This would be particularly pertinent to a "hostile offer" and might unfavourably tilt the balance, in a competitive situation, in favour of a "white knight" offer or one that otherwise enjoyed the support of the board of the offeree company.

For these reasons, we would also question the need to introduce a new Note 3 to Rule 19.1. The binding of an offeror to statements made under new Rule 24.2 (a) and (b) for a period of 12 months could have the consequence of frustrating an offeror that is not in a position to make such a statement for which it would either be prepared to be bound or could reasonably be bound. The new Note 3 implicitly makes the Panel the steward of matters which are more properly the concern of the offeree board as defined by the Code's other rules and the provisions of the CA 2006. By locating the responsibility for "disciplinary action" (para 7.1) for breaches of new Rule 24.2 (a) and (b) with the Panel , the new Note may incentivise the boards of offeree companies to exercise a lower standard of care in their evaluation of the terms of an offer than might otherwise be the case. Additionally, in failing to describe the manner of any subsequent "disciplinary action" in circumstances where control of the offeree company will already have passed, the force of Note 3 will anyway be diminished.

Employee Representatives

We are concerned about the Committee's proposals to improve the ability of employee representatives to make known their views on the effects of the offer on employment. In the first instance, by attempting to satisfy an issue perceived to be of legitimate public and stakeholder interest, the proposals risk appearing to discriminate unfairly against employees of an offeror, who may well be as or more affected by the offer. Secondly, the proposals may not be practical for UK companies operating in numerous jurisdictions with numerous employee bodies and consultative processes across those jurisdictions. Practical problems may also arise when the offeror is a foreign company. Finally, we doubt that the Panel should anyway be seen to attempt, by means of the Code, to give guidance on those matters which are more properly and effectively addressed by existing employment law.

Conclusion

Standard Life Investments supports those proposals and amendments which reduce the risks of a false market in securities, improve the level of disclosure in takeover situations and otherwise improve the workings of the Code in respect of its fundamental principles. Whilst we acknowledge the sensitivity of public interest issues in takeover situations, we do not believe that it is appropriate for the Code to address such issues. Further, the inclusion of such public interest amendments as have been proposed, increases the risk of challenge on matters which are more properly the concern of shareholders under existing Code rules and could paradoxically frustrate the exercise of duties by directors under existing law. We very much hope that this submission helps to improve the robustness of a Code which is generally perceived by long term shareholders to have stood the test of time.

Yours sincerely

Jonathan Cobb
Governance & Stewardship Director
Standard Life Investments