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Capital Markets Update
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Autumn changes to the Takeover Code - material changes in information, profit forecasts and quantified benefits statements

The most recent changes to the UK Takeover Code, which took effect on 30 September 2013, relate to (i) disclosure of material changes in information; (ii) profit forecasts and quantified financial benefits statements; and (iii) companies subject to the Code. This alert looks at (i) and (ii). For more detail on (iii), see our update "Does the Takeover Code apply? A look at which companies will be subject to the Takeover Code from 30 September 2013".

Disclosing material changes in information. Any material changes in information and material new information which come to light after the initial offer document or target circular is published must be announced straight away. This should provide clarity and help ensure shareholders are told about developments promptly and without debate about whether to disclose.

Profit forecasts and quantified financial benefits statements. The rules have been restructured, and made more consistent with other rules and guidance. In some cases they have been relaxed - a new "directors' confirmation" regime has been introduced in place of the more onerous "reporting" regime for some profit forecasts. Merger benefits statements have been expanded in scope and renamed "quantified financial benefits statements", and incorporated into the profit forecast rules. "Profit forecast", "profit estimate" and "quantified financial benefits statement" have become defined terms.

This is the final set of changes to the Takeover Code following the consultations issued by the Panel in July last year. As well as the changes made on 30 September, changes relating to pension scheme trustee issues took effect on 20 May this year. See our update "New rights for pension scheme trustees under the Takeover Code".

Material changes in information – rule 27

	Situation	Requirement	Comment
1	**Material change** in published information	Must be announced. The Panel may also require information to be sent to shareholders / persons with information rights, and made available to the employee representatives and pension scheme trustees.	Pre 30 September, material changes only had to be disclosed if the party concerned published a subsequent document. Whilst unlikely to make much difference in practice (particularly if parties are subject to continuing obligations requirements imposed by a regulator), this should provide clarity and help ensure shareholders are told about developments promptly and without debate about whether to disclose.

	Situation	Requirement	Comment
2	**Material new information** comes to light after the initial offer document / target circular is published	Must be announced. Again, the Panel may require information to be sent to shareholders / persons with information rights, and made readily available to the employee representatives and pension scheme trustees.	This was not part of the Panel's original consultation. Again, this should provide clarity and help ensure shareholders are told about new information without delay.
3	A **new document** is published	The bidder or target must include (i) material changes to previously disclosed information; and (ii) material changes to a list of specified matters (such as changes in the company's financial or trading position, material contracts and irrevocable commitments and letters of intent). If there are no material changes, this must be stated.	Whilst not a new requirement, the list of specified matters has been expanded.
4	A **new document** is published, and an earlier document included a **profit forecast, QFBS or asset valuation**	As well as the requirements in 3, the new document must (unless superseded by information included in the new document) confirm (i) the forecast, statement or valuation remains valid; and (ii) the reporting accountants / financial adviser(s) or independent valuer have confirmed their reports / opinion continue to apply.	This makes it clear the existing requirement to confirm the validity of a profit forecast extends to a QFBS and asset valuation.

Profit forecasts and quantified financial benefits statements – rule 28

Profit forecasts and merger benefits statements published by a cash bidder were not caught by the profit forecast rules pre 30 September, and this continues to be the case - new rule 28 applies to profit forecasts and quantified financial benefits statements published by a target or a securities exchange bidder[1]. However, from 30 September, a non-convertible debt instrument will normally be treated as cash for these purposes. This is helpful to a bidder offering a loan note alternative.

Before 30 September, any profit forecast caught by the rules had to be formally reported on by the reporting accountants and financial advisers (referred to as the **reporting regime**). Going forwards, a new **directors' confirmation regime** has been introduced in place of the reporting regime for some profit forecasts, such as ordinary course forecasts and forecasts for future periods. This involves the directors confirming that the profit forecast has been properly compiled.

1 A new definition of "securities exchange offeror" has been introduced. It means any bidder or potential bidder other than a cash bidder. This is essentially a drafting change.

DEFINITIONS

Definition	Meaning
Profit forecast	Something that states or implies a figure or a minimum or maximum figure for the likely level of profits or losses for the current financial period and/or future financial periods, or contains data from which a calculation of future profits or losses may be made, even if no particular figure is mentioned and the word "profit" is not used. A statement described as a "target", "budget" or similar will normally be treated as a profit forecast unless it is clear that the statement is only an aspiration. *This follows the Prospectus Rules definition of "profit forecast" (with changes to reflect the period to which the forecast relates).*
Quantified financial benefits statement, or "QFBS"	This means either (i) a statement by a securities exchange bidder or the target quantifying any financial benefits expected to accrue to the enlarged group if the offer is successful; or (ii) a statement by the target quantifying any financial benefits expected to accrue to the target from cost saving or other measures and / or a transaction proposed to be implemented by the target if the offer is withdrawn or lapses. *This new concept is broader than a "merger benefits statement", which just caught quantified statements about the expected financial benefits of a proposed takeover or merger. A QFBS also includes statements about benefits expected to arise from cost saving measures and / or an alternative transaction in the event the offer is not successful.*
Profit estimate	A profit forecast for a financial period which has expired and for which audited results have not yet been published. *Profit figures included in an unaudited preliminary statement of annual results will continue to be treated as a profit estimate (and therefore as a profit forecast). But, a profit estimate included in a preliminary statement of annual results which complies with the relevant provisions of the UKLA Rules will be exempt from the reporting requirements (Rule 28.5).*

WHAT ARE THE REQUIREMENTS?

	Situation and new rule reference	What are the requirements?	Comment
1	Profit forecast or QFBS **published during an offer period** Rule 28.1(a)	Reporting regime - the document in which the forecast or QFBS is first published must include reports from (i) reporting accountants; and (ii) financial adviser(s).	For profit forecasts, this is broadly the same as pre 30 September. However, unlike the pre 30 September rules for merger benefits statements, the reporting requirements will apply to a QFBS irrespective of whether or not the offer is recommended.
2	Profit forecasts published by a target or a securities exchange bidder **after an approach but before offer period** Rule 28.1(b)	Reporting regime – the offer document / target circular (or earlier document / announcement published during an offer period in which the profit forecast is referred to) must repeat the profit forecast and include reports from (i) reporting accountants; and (ii) financial adviser(s).	This is broadly the same as pre 30 September.

	Situation and new rule reference	What are the requirements?	Comment
3	**Pre-approach** forecasts Rule 28.(c)	The offer document or target circular (or earlier document / announcement published during the offer period in which the profit forecast is referred to) should (i) repeat the forecast and include "directors' confirmations"; or (ii) include a statement by the directors that the profit forecast is no longer valid, explaining why; or (iii) include a new profit forecast for the relevant period with reports from the reporting accountants and financial adviser(s). This does not apply to pre-approach forecasts in the context of a management buy out – see 7.	The rules are being relaxed. If the target has not received an approach, the directors are unlikely to have been influenced by the possibility of a future offer when making the forecast. Publication for a purpose unrelated to the offer will not be an acceptable explanation as to why the forecast is no longer valid.
4	Statements as to cost savings measures made **before an offer period begins**, and with no knowledge of an impending offer Note 1 to rule 28.6	These will not normally be subject to the requirements relating to a QFBS. But, if a company wants to publish such a statement after is has received an approach, it should consult the Panel.	If a target has made such a statement, then wants to revise that statement during an offer period, the revised statement will be subject to the requirement to publish reports.
5	**Ordinary course** profit forecasts[2] Note 2 to rule 28.1	If published before the beginning of the offer period will be treated as a "pre-approach forecast" – see 3. If published during an offer period, and if all parties agree, the Panel will normally consent to a dispensation from the full reporting requirements and the directors' confirmations regime will apply. If all parties do not consent, the reporting regime will apply.	The Panel will take all relevant factors into account in deciding whether to treat a profit forecast as an ordinary course profit forecast – there are no specific requirements as to past practice in publishing ordinary course forecasts.
6	Profit forecast for a **future financial period** Rule 28.2	If the profit forecast relates to a financial period ending more than 15 months from the date on which it is first published, the Panel will normally consent to a dispensation from the full reporting requirements and the directors' confirmation regime will apply. As an alternative, if the forecast was published before the beginning of the offer period, the relevant document may include a statement by the directors that the profit forecast is no longer valid and an explanation as to why that is the case. If a party publishes a profit forecast for a future financial year, they will also have to publish corresponding profit forecasts for the current financial year and for any intervening years.	The rules have been relaxed. The requirement to publish profit forecasts for the current financial year and any intervening years is to ensure shareholders have a full sequence of projected profits. Where these additional forecasts relate to a financial year ending 15 months or less from the date on which they are first published, they will need to be reported on in the usual way.

2. A profit forecast published by a party in accordance with its established practice and as part of the ordinary course of its communications with its shareholders and the market.

	Situation and new rule reference	What are the requirements?	Comment
7	Profit forecasts by **management buy-out teams and offers by controllers** Note 3 to rule 28.1	Reporting regime. A profit forecast will always have to be reported on and the assumptions stated, irrespective of when the profit forecast is first published (so this will catch profit forecasts first published before the beginning of the offer period).	This is to address concerns that there is a greater risk the directors of the target may look to influence the outcome of an offer by use of a profit forecast.
8	**Third party forecasts – as to own profits** Note 6 to rule 28.1	If bidder or target refers to a forecast for its own future profits which has been published by a third party (including a consensus forecast – see 9), the profit forecast will be treated as having been published by the bidder or target, and rule 28 will apply.	This is a new rule but is in line with the Panel's current practice.
9	**Publication of investment analysts forecasts on a website** Rule 28.7	During the offer period, if a bidder or target publishes on its website profit forecasts that are derived from investment analysts' forecasts, the forecasts on the website must be based on all forecasts provided by investment analysts who have published such forecasts (subject to a couple of exceptions). Various requirements apply, including that for each line in respect of which forecasts are published on the website, the highest and lowest figures forecast by any investment analyst must be stated, together with the arithmetic mean of all investment analysts' forecasts (a **consensus forecast**). It must be prominently stated that the investment analysts' forecasts are not endorsed by the company and that they have not been reviewed or reported on. If the requirements can't be met, the relevant party will have to remove all investment analyst forecasts (including consensus forecasts) from its website.	This steps back from the Panel's original proposal that, on the beginning of an offer period, a party to the offer must remove any profit forecasts (including average figures) from its website.
10	**References to consensus forecasts relating to another party to the offer** Rule 28.8	During the offer period (or in the announcement which begins the offer period), if one party (party A) wants to refer to an investment analysts' forecast relating to the other party (party B), party A must either refer to (i) a consensus forecast (see 9) published on party B's website or (ii) if no consensus forecast has been published on party B's website, a consensus forecast compiled by party A in accordance with certain requirements.	This is a change from the Panel's original proposal, which was to allow a party to refer to the other party's profits by reference to the average of consensus figures published by various independent data providers.
11	**Profit ceilings** Note 4 to rule 28.1	Possible dispensation. The Panel will have an express ability to grant a dispensation from rule 28 where the forecast sets a maximum figure for the likely level of profits for a period, or a "profit ceiling".	This formalises the Panel's existing practice.

	Situation and new rule reference	What are the requirements?	Comment
12	Forecasts which relate to **part of a business** Note 4 to rule 28.1	Possible dispensation. The Panel will have an express ability to grant a dispensation from rule 28 where the profit forecast relates to part of a business.	The starting point is likely to be that if a company decides to publish a profit forecast in relation to part of a business, that forecast is likely to be material, and the profit forecast rules should apply.
13	Profit forecasts where the offer is **not material for the bidder** Note 4 to rule 28.1	Possible dispensation. The Panel will have an express ability to grant a dispensation from rule 28 where the offer is not material for the bidder, i.e. if the offer could not result in the issue of securities representing 10% or more of the enlarged share capital of the bidder and the Panel considers the profit forecast rules are disproportionate in the circumstances.	This dispensation is not available in the case of a management buy-out or an offer made by the controlling shareholder / group of controlling shareholders.
14	**Profit estimates** Rule 28.5	Rule 28 will not apply to a profit estimate included in (i) a preliminary statement of annual results which complies with the UKLA Rules; (ii) a half yearly financial report which complies with the provisions of the UKLA Rules, the AIM Rules for Companies or the ISDX Growth Market Rules for Issuers; or (iii) an interim management statement or other interim financial information, which is published as part of a regulatory requirement and which has been prepared in accordance with the reporting framework set out in IAS 34. The AIM Rules for Companies and the ISDX Growth Market Rules for Issuers do not contain provisions in relation to preliminary statements. With this in mind, note 1 to rule 28.5 says that if a statement of annual results is published by a company whose securities are admitted to trading on a recognised investment exchange but to which the relevant provisions of the UKLA Rules do not apply, the Panel may still apply an exemption from rule 28.1 if it is satisfied that the statement complies with the substance of those provisions.	Pre 30 September, the exemptions for interim and preliminary figures depended on whether the figures complied with the relevant requirements of the UKLA Rules. Companies quoted on AIM wanting to take advantage of the exemptions had to consult with the Panel. From 30 September, there will be a specific exemption for AIM companies – although an AIM company (or any other company not admitted to the Official List) will still need to ask the Panel for an exemption in the case of a preliminary statement of annual results.
15	**Compiling a profit forecast or QFBS** Rules 28.3 and 28.4	A profit forecast or QFBS must be properly compiled and prepared with due care and consideration. It must be understandable, reliable and comparable. The assumptions included for a profit forecast or bases of belief included for a QFBS should provide useful information as to its reasonableness and reliability.	The existing guidance on compilation has been updated and consolidated, and recast to achieve greater consistency with the requirements for profit forecasts prepared for inclusion in prospectuses under the EU Prospectus Directive.

If you have any questions or require specific advice on any matter discussed in this update, please contact:

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