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The Secretary to the Code Committee
The Takeover Panel
10 Paternoster Square
London
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**By email:** supportgroup@thetakeoverpanel.org.uk

16 November 2018

Dear Sirs

**Response to PCP 2018/1 – Proposed new Rule 29**

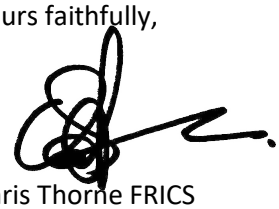
We thank you for the invitation to comment on the proposed new Rule 29 on Asset Valuations referenced in connections with takeovers or mergers.

Our responses to the various questions posed in the consultation paper are attached.

By way of background, Valuology is a consultancy founded by two former executive directors of the International Valuation Standards Council, which provides compliance and risk management advice to valuation firms. The writer was also the volunteer chairman of the RICS Red Book Editorial Board between 2001 and 2008 and in this capacity was responsible for ensuring that the RICS standards contained adequate guidance on the requirements of the Takeover Code.

If you need any further information or wish to discuss any of our comments please do not hesitate to contact the writer.

Yours faithfully,



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# Response to Consultation on new Rule 29

**Q1 Is a period of 12 months prior to the commencement of the offer period an appropriate "look back" period in order for Rule 29 to apply to a valuation under the proposed Rule 29.1(a)(ii)?**

Yes. It clearly would be inappropriate to exclude any material valuation reported before the offer period from the provisions of the Code, as is currently recognised by the Executive. This being the case a time limit is appropriate, and 12 months would seem reasonable.

**Q2 Do you have any comments on the application of Rule 29 to a valuation published in the circumstances described in the proposed Rule 29.1(a)(i), (ii) or (iii)?**

Yes. While supportive of the principle that a valuation prepared before the offer period, that is either referenced or is otherwise material to the offeree's shareholders, should be subject to Rule 29, such retrospective application of the Rule could give rise to a practical problem in relation to valuer independence.

A valuation may have been prepared for a company months before it became the subject of an offer. If the valuation had been prepared in accordance with professional standards, such as issued by RICS or IVSC, the valuer would have established that there was no threat to their objectivity and made appropriate declaration in the valuation report. However, if that company is then subject to an offer, a problem arises if the valuer in question also has an existing relationship with the offeror.

If we assume that the earlier valuation is deemed material and subject to Rule 29, the offeree would need to seek consent from the original valuer to publish or refer to that valuation in connection with the offer. While the explicit requirement for consent in the current Rule 29 is not carried forward into the proposed new rule it is still required by Rule 23.2 and, furthermore, most professional valuation standards include a requirement for the valuer to include limitations on reliance or publication without consent. The offeree may also need to seek confirmation that a current valuation would not be materially different under the proposed 29.5. However, under the scenario described the valuer would not meet the conditions of 29.3 (a) (i). They probably would be unwilling to consent to the reference to the previous valuation without the explicit agreement of both parties, which may not be forthcoming. Neither could they give unilateral advice to the offeree in relation to 29.5. An impasse could result, where the offeree is required by the Code to refer to an earlier valuation in the offer documents, but the valuer considers that providing consent to do so would create a conflict with their pre-existing duty to the offeror, even if they could be considered as meeting the conditions of 29.3 (a).

The problem of ex post facto conflicts is not one that is improbable given that the number of firms with the experience and capacity to value the assets of listed companies is not large and has become fewer over the last decade or so following mergers. For example, more than 90% of the REITS listed in the UK now have their regular independent valuations undertaken by one of only five firms.

We therefore believe that some supporting guidance is required to alert users of the Code to the limitations that might affect publication or reference to reports prepared for another purpose before the offer was made. It may also appropriate to explore with RICS, ICAEW and IVSC whether an appropriate set of protocols can be agreed for dealing with such situations, eg examples of what type of involvements, if any, and any arrangements for their management that would be acceptable to the Panel. This could save time and unnecessary expense once an offer is made.

**Q3 Do you have any comments on the proposed wording "unless the Panel considers that the valuation is not material to offeree company shareholders in making a properly informed decision as to the merits or demerits of the offer"?**

The proposed wording seems appropriate. We consider it sensible to exclude valuations that have no relevance to the offer.

**Q4 Do you have any other comments on the proposed new NB at the beginning of Rule 29, the proposed Rule 29.1(a) or the proposed new Note on Rule 29.1?**

No. The reasons for the exclusion of Rule 29 in the situations described by these codicils are explained in the CP and we agree with them.

**Q5 Should the specific types of asset valuations to which Rule 29 applies be those referred to in the proposed Rule 29.1(b).**

No. We consider identifying only valuations of those assets to which the Rule always applies, with no examples of other assets types to which it may also apply, risks giving an unfortunate perception as to the potential relevance of such assets in making or considering offers.

We understand that it would be neither possible nor desirable to list all asset types to which Rule 29 could ever be applied. However, we consider it a mistake to remove any reference to "intangible assets".

Intangibles are frequently of far greater value than land, buildings, plant or equipment owned by a company especially for companies in the science and technology sectors. The genre of "intangible assets" covers a vast range of items that create value in a company such as brands, customer relationships, customer lists, assembled workforce, patents, research, etc, etc. If the Code does not give a clear indication that valuations of such potentially significant assets are frequently necessary and relevant in mergers and acquisitions and subject to Rule 29 it risks giving the impression to prospective offerors that intangibles are regarded as less significant than physical assets.

This could also affect the wider perception of the UK as a suitable listing location for businesses rich in intangibles, at a time when other countries are seeking to leverage the inherent value of such assets to grow their economies. It does also run contrary to current efforts being made by various UK Government Agencies, for example recent reports by the

Treasury[1], the Intellectual Property Office (in conjunction with the British Business Bank) [2] and the Big Innovation Centre[3], all of which recognise the importance of intangible assets and explore ways in which these can be used to foster economic growth.

If the Code Committee wishes to avoid the "other assets" list appearing in the current 29.1 (a), we would urge that "Intangible Assets" be included in the list of specific asset types to which the rule applies. The proposed proviso that the rule will not apply if the Panel considers a valuation not to be material to an offeree's shareholders will ensure that only intangibles that are material, identifiable and measurable will be subject to the rule.

**Q6 Should the Panel have the ability to apply Rule 29 to a valuation of other assets or liabilities, as referred to in the proposed Rule 29.1(c)?**

Yes, although for the reasons given in response to Q5 we consider that there should be a positive identification of valuations of intangible assets as being subject to the rule rather than being a matter for the Panel's discretion.

**Q7 Do you have any comments on the proposed Rules 29.1(b) and (c)?**

None beyond those already made.

**Q8 Do you have any comments on the proposed Rule 29.1(d) in relation to the publication of a net asset value or adjusted net asset value?**

No. We consider the proposals appropriate and proportionate as in order to calculate a NAV or ANAV a valuation would have been required in any event.

**Q9 Should the Code require that a valuation published during the offer period must be in the form of, or accompanied by, a valuation report?**

Yes. Only by seeing a valuation report which includes the information required by professional standards such as the International Valuation Standards or the RICS Red Book will a shareholder have sufficient information to understand the valuation in its proper context and any assumptions, limitations or conditions that apply.

**Q10 Should the Code require that a valuation report in respect of a valuation falling within the proposed Rule 29.1(a)(ii) or (iii) should be included in the offer document or the offeree board circular (as appropriate) or, if earlier, in the first announcement or document**

[1] Review of the Corporate Intangible Fixed Assets Regime – February 2018
[2] Using Intellectual Property to Access Growth Funding – October 2018
[3] Intangible Asset Reporting and an Intangible Assets Charter – July 2017

**published during the offer period by the offeree company or the securities exchange offeror (as the case may be) which refers to that valuation?**

Yes. Since these reports will already be in the possession of the party in question there should be no obstacle to including these in the first announcement or document published, subject only to obtaining the valuer's consent, but see caution in our response to Q2.

**Q11 Do you have any other comments on the proposed Rule 29.2, regarding the requirement for a valuation report, or on the proposed new Note on Rule 29.2, in relation to the circumstances where it is not possible to obtain a valuation report within the required timeframe?**

No.

**Q12 Do you have any comments on the proposed Rule 29.3 in relation to the requirements applying to valuers?**

We agree with the proposed simplification. With regard to the test of a valuer's independence we refer to our response to Q2 and the potential problem that could arise with retrospective application of Rule 29 to valuations prepared before the takeover or merger was either known or contemplated.

**Q13 Do you have any comments on the proposed Rule 29.4 in relation to a valuation report?**

Yes. We agree with the restructuring of the reporting requirements and removing the current bias towards the requirements for reporting property valuations.

A minor point that we recommend be resolved is the contradiction between the prohibition in 29.4 (b) (ii) on the use of a special assumption and the requirement in Note 3(a) to provide a valuation of development land after the development has been completed and let. This valuation can only be made making a special assumption because the development is neither completed nor let on the relevant valuation date. We recommend that the Note 3(a) be amended as follows:

*(a) the value ~~after~~ on the special assumption that the development has been completed and, if applicable, let.*

We also recommend 29.4(b) (ii) be amended as follows:

> ***(**ii) subject to special assumptions (where assumed facts differ from the facts existing at the date of the valuation),*

*except as required by Note 3(a) below or otherwise with the consent of the Panel, in which case any qualifications or special assumptions must be fully explained.*

**Q14 Do you have any comments on the proposed Rule 29.5 in relation to "no material difference" statements?**

We agree that the proposal is an improvement on the current rule. What constitutes a "current" valuation is problematic and can lead attempts to set an arbitrary time limit which is unrealistic given that market conditions can change overnight due to unforeseeable events. Because the valuation will be invariably be prepared ahead of its publication this means that a statement will be required in most cases. However, the confirmation required from the valuer can be a simple document and providing this on the publication date of the relevant offer or circular should not create undue difficulties or cost.

**Q15 Do you have any comments on the proposed Rule 29.6 in relation to the requirement to give an estimate of the amount of the potential tax liability which would arise upon a sale of the assets?**

No.

**Q16 Do you have any comments on the proposed Rule 29.7 in relation to information in valuation reports which could constitute a profit forecast?**

No

**Q17 Do you have any comments on the proposed Rule 29.8 in relation to the valuation by one party to an offer of another party's assets?**

This is a welcome simplification of the current provisions and adequately deals with the necessary principle.

**Q18 Do you have any comments on the consequential amendments to the Code proposed in Section 9(d) of the PCP?**

We welcome the updating of the references to valuation using language that is consistent with current valuation standards.

**Valuology**
**16 November 2018**