The Hundred Group
of Finance Directors

Investor Relations and Markets Committee

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

27 July 2010

Dear Madam / Sir

PCP 2010/2 Consultation on review of certain aspects of the regulation of takeover bids

We are pleased to submit our comments on the above consultation

Who we are

The Hundred Group is a non-political, not-for-profit organisation which represents the finance directors of the UK's largest companies, with membership drawn mainly, but not entirely, from the constituents of the FTSE100 Index. Our aim is to contribute positively to the development of UK and International policy and practice on matters that affect our businesses, including taxation, financial reporting, corporate governance and capital market regulation. Whilst this letter expresses the view of The Hundred Group of Finance Directors as a whole, they are not necessarily those of our individual members or their respective employers.

Our views

Following the widespread commentary and public discussion of the regulation of takeover bids in the UK, we were pleased to note the announcement in February 2010 of consultation over certain aspects of the Takeover Code ('the Code') as an appropriate and timely review of the adequacy of takeover regulation in the UK. Consequently we are supportive over the approach adopted by the Takeover Panel ('the Panel') to the current review as a means to debate possible change.

We believe that the Panel has a strategically important role to play in the creation of a political and regulatory background in which takeovers can be instigated and completed in a free market supporting commercially responsible decision making. However, it therefore follows that not all the concerns raised publicly can or should be addressed solely by the Panel.

In particular, we support all endeavours to ensure that the UK market encourages investment – both domestically and from overseas. The role of the Panel and therefore the Code must be to support the creation of a regulatory environment which permits investment and acquisition in a free market without restricting shareholders unduly, prejudging motives or stifling competition.

We support all efforts to promote long-term and responsible equity ownership and believe that this provides significant benefits to the economy as a whole as well as to corporate governance. We actively encourage, promote and partake in open, constructive deliberation

with our shareholders. However, we are not of the opinion that it is within the direct remit of the Code to dictate how takeovers occur nor to favour certain groups of shareholders.

Whilst understanding the political pressures which led to the current consultation, we would advocate a measured and fully considered response whereby the root causes of any concerns are addressed. It is our belief that the current system and Code in place and as presided over by the Panel is fundamentally robust and that changes to the current legislation should be proposed only in limited circumstances and after further research.

We set out our responses to the Panel's specific questions in the Appendix to this letter.

Please feel free to contact me if you wish to discuss our comments on the proposals.

Yours faithfully

Peter Williams
Chairman
The Hundred Group – Investor Relations and Markets Committee

APPENDIX

Chapter 2 – Acceptance Condition Thresholds

Q1: What are your views on raising the minimum acceptance condition threshold for voluntary offers above the current level of "50% plus one" of the voting rights of the offeree company?
We strongly support the retention of the "50% plus one" model.

We do not believe that the minimum acceptance condition threshold for voluntary and/or mandatory offers should be raised. The current level of "50% plus one" is in line with the general principle that the views of the simple majority should (on most issues) prevail which is consistent with current UK company law and with the realisation of effective control.

The consequences of an increase in the acceptance threshold would, as outlined in chapter 2 of the consultation, raise unintended complexities which we believe would be unwelcome and unsustainable. In particular, such a change could cause a takeover bid to fail despite support from a majority of shareholders for a change in control.

Q2: What are your views on raising the acceptance condition threshold for mandatory offers above the current level of "50% plus one" of the voting rights of the offeree company?
See Q1.

Q3: If you believe that an increase in the acceptance condition thresholds for voluntary and/or mandatory offers would be desirable, at what level do you believe they should be set and why?
Not applicable.

Q4: What are your views on the consequences of raising the acceptance condition thresholds?
As outlined in our reponse to Q1, we believe that it would be untenable to raise the acceptance condition thresholds without an equivalent change to company law. Such a change to company law would be inappropriate.

Chapter 3 – Disenfranchisement of shares acquired during an offer period

Q5: What are your views on the suggestion that shares acquired during the course of an offer period should be "disenfranchised"?
We note that the proposal of disenfranchisemment would successfully provide a mechnaisem whereby the outcome of takeover bids would be determined by a long-term shareholder base.

However, we are concerned that the proposed change would dilute the 'one share, one vote' principle, and the fundamental right of a shareholder to vote their shares. In additon we believe that it would be inappropriate for the Panel to judge the motives or desirability of different shareholders, and note that such a practice could act to frustrate a competing offer in some circumstances.

We note the Panel's comments on the impact of disenfranchisement on the denominator to be used to calculate one's interest in securities which could potentially change on a frequent basis as trades go through during an offer period.

We are therefore of the view that the implications of disenfranchisement should be considered carefully before making any such amendments to the Code, and would support a

decision for further research to be performed in this area before any changes are to be proposed.

Q6: If you are in favour of "disenfranchisement", what are your views on how such a proposal should be implemented? In particular, what are your views on the various consequential issues identified in section 3 of the PCP?
See Q5.

Q7: What are your views on the suggestion that shares in a company should not qualify for voting rights until they have been held by a shareholder for a defined period of time and regardless of whether the company is in an offer period?
We believe that restricting voting rights for a defined period of time regardless of whether the company is in an offer period is against the 'one share one vote' principle and consequently are not in favour of such restrictions being imposed and we do not think the scope of the Code should be extended to address this. In addition we note that any such changes should be considered alongside other regulatory issues, such as whether share holdings with such restrictions would be suitable for premium listing under current regulations.

If longer term ownership of shares is to be promoted we believe that other mechanisms can and should be explored beyond the remit of the Panel.

Chapter 4 – Disclosures in relation to shares and other securities

Q8: What are your views on the suggestion that the threshold trigger at which independent market participants become subject to the Code's disclosure regime, currently 1%, might be lowered to 0.5%?
We note that the recent amendments to the Code's disclosure regime took effect on 19 April 2010 which resulted in an increase in transparency in relation to the positions of, and dealings by, persons involved in takeover offers. We also note that the current 1% threshold is already substantially lower than as required by the EU Transparency Directive, the FSA's Disclosure and Transparency Rules and that in place in many other juridictions.

In additon we believe that if a cost benefit analysis was to be conducted, the potential benefit due to the increased transparency resulting from lowering the threshold is likely to be outweighed by the additional costs of compliance (and monitoring) as well as the likely overflow of information in the market as a result of the increased number of disclosures.

In light of the above we are of the view that the disclosure regime trigger should remain at 1%.

Q9: What are your views on the suggestion that there should be additional transparency in relation to offer acceptance decisions and of voting decisions in relation to schemes of arrangement? If you are in favour of this suggestion, please explain your reasons and how you think such additional transparency should be achieved?
We are of the view that shareholders should not be required to disclose their acceptance/voting decisions.

Q10: What are your views on the suggestion that the application of the Code's disclosure regime to situations where the rights attaching to shares have been "split up" might be clarified?
We understand that there are circumstances where certain of the decisions regarding dealing, voting and offer acceptances have been delegated by the beneficial owner to a fund manager.

In our view, such delegation is a matter between the shareholder and the party to which such decision-making rights have been delegated to and should not be a matter that requires disclosure under the Code. We do not consider that the Panel is appropriately placed to regulate these arrangements nor the interaction between the shareholoder and the ultimate decision maker.

Chapter 5 – Contents of offer documents and offerree board circulars

Q11: What are your views on the suggestion that the same requirements as to the disclosure of financial information on an offeror, the financing of the offer, and information on quantified effects statements should apply regardless of whether:

(a) the consideration being offered is cash or securities;

(b) the offer could result in minority shareholders remaining in the offeree company; or

(c) the offer is hostile or recommended, or whether a competitive situation has arisen?

We would support common information and disclosure requirements and full information for both sets of shareholders, including for offers entirely in cash. We believe that the Panel should consider greater emphaisis on the financing of takeover bids and their implications including plans of the bidder for the target company's business, places of business, production and service lines over the short, medium and long-term.

Q12: What are your views on:

(a) disclosures made by offerors of their intentions in relation to the offeree companies under Rule 24.1; and

(b) the views of the boards of offeree companies on offerors' intentions given under Rule 25.1?

If you consider that greater detail is required, how do you consider that this would be best achieved?

Rule 24.1 sets out the disclosures that an offeror is required to make regarding its intentions in relation to an offeree company.

Rule 25.1 requires the views of the board of an offeree company on an offer to its shareholders.

We are of the view that current disclosure does not always give shareholders the full picture of an offeror's strategic plans, which in turn inhibits their ability to make an informed decision.

We believe that a Practice Statement requiring more detail regarding these matters to be provided in offer documents could be an appropriate way of dealing with this matter rather than requiring any amendments to these specific rules.

We also believe that consideration should be given to enforcement of "truth in takeovers". Where an offeror declares declares a future intention, the offeror should be compelled to act in accordance with this intention.

Q13: What are your views on the matters to which the board of the offeree company should have regard in deciding whether or not to recommend acceptance of an offer?

We do not believe that the Code should stipulate the considerations that the board of an offeree company should have regard to in deciding whether or not to recommend acceptance of an offer. Directors should take into account their fiduciary duties as set out in company law and not be restricted as to the considerations it may have regard to in deciding whether or not to recommend an offer.

If the Panel wish to clarify that there are no restrictions within the Code we would support such a clarification.

Chapter 6 – Advice, advisers and advisory fees

Q14: What are your views on the suggestion that there should be a requirement for independent advice on an offer to be given to offeree company shareholders separately from the advice required to be given to the board of the offeree company?
We are not in favour of the introduction of independent advice to be offered to shareholders separately from the advice required to be given to the board of the offerree company. We believe that there would be significant difficulties in establishing the financial situation of each individual shareholder, and in addition note the Panel's concerns that an advisor providing advice to shareholders may be restricted to public information and therefore be restricted in its advice.

In addition, we note that the rules already require a notice on offer documents to take professional advice if necessary, which we believe is appropriate and right to protect the disparate interests of shareholders. We therefore believe that the current approach should continue to apply.

Q15: What are your views on the suggestion that the board of an offeree company should be restricted from entering into fee arrangements with advisers which are dependent on the successful completion of the offer?
We believe that fee structures which result in a bias towards the outcome of a deal or are likely to conflict the independence of an advisor should be restricted.

However we consider that the appropriate structuring of success fees can provide benefit to the offeree shareholders without generating bias. For example, the pairing of a success fee which is activated only if a deal is concluded at a value superior to the Board's view of the value of the company, coupled with a separate Rule 3 advisor working for a fixed fee, could provide great strong alignment between parties without introducing unneccesary bias. The restriction of such fee arrangements may in practice be detrimental to the offeree shareholders.

We would support further debate around additional guidance for fee structuring.

Q16: What are your views on the suggestion that the fees incurred in relation to an offer should be required to be publicly disclosed?
We support any additional disclosures which would increase transparency and would therefore support full disclosure of fee arrangements. We believe that such disclosure would support the entitlement of shareholders to understand how the company's money is being spent by the directors in relation to the transaction.

Q17: If you are in favour of the disclosure of fees, how do you think that any provision should operate? For example:
(a) to which fees (and other costs) should any provision apply and on what basis?
(b) at what point(s) of the transaction should any disclosure be made?
In our opinion, the aggregate fee to be incurred by the offeree company should be disclosed as well as a separate disclosure highlighting the Rule 3 adviser fee. Such disclosure should include any success fee elements payable.

However, we are of the view that such disclosure should not result in sensitive information about offer tactics being revealed. For example, advisers could be required to disclose the

range of fee that may be payable taking into account any ratchet mechanism without being required to provide the specific terms of the ratchet mechanism to avoid disclosing any sensitive information that may compromise the offeree company's tactics.

We believe that such disclosure should be first disclosed at the time of the firm intention to offer announcement.

Chapter 7 – Protection for offeror company shareholders

Q18: What are your views on the suggestion that shareholders in offeror companies should be afforded similar protections to those afforded by the Code to offeree company shareholders?
The Takeover Code primarily exists to protect the interests of shareholders in target companies. We believe that sufficient protection exists over the interests of shareholders of offeror company shareholders, in particular the requirement for shareholder approval for Class 1 transactions. In addition, we note that the board has a fiduciary duty and therefore it should be assumed that acquisitions are only entered in to after full and careful consideration. We consider that adequate mechanisms exist for shareholders to influence management (including the annual re-election of Boards) if they consider that this is not the case.

In addition, we are concerned that any such protections would be impractical to implement if the offeror is an overseas company which could in turn lead to a competitive disadvantage for UK acquirers over their overseas counterparts.

Q19: If you consider that offeror company shareholders should be afforded protections:
(a) to which offeror companies should such protections apply and in what circumstances?
(b) what form should such protections take?
(c) by whom should such protections be afforded (for example, the Panel, the FSA, the Government or another regulatory body)?
See Q18.

Chapter 8 – The put up or shut up regime, virtual bids and offer timetable

Q20: What are your views on the suggested amendments to the "put up or shut up" regime? In particular:
(a) what are your views on the suggestion that "put up or shut up" deadlines might be standardised, applied automatically and/or shortened?
(b) what are your views on the suggestion that a "private" "put up or shut up" regime might be introduced?
We do not believe that "put up or shut up" deadlines should be standardised, applied automatically or shortened.

In particular, we consider that the ability of the Takeover Panel to impose a deadline only if it is requested and in response to the individual circumstances of the acquisition in question provides it with a pragmatic balance of the interests of both parties.

Our view in respect of a private "put up or shut up" regime is that this could provide some protection for management from 'sieges' that may occur prior to a public offer.

However, as noted in the PCP, an offeree board company can always resolve such a 'siege' situation by publicly disclosing the potential offeror's existence and then seeking a "put up or shut up" deadline. We note this may not always be in an offeree company's interests as it may have to put itself into an offer period in order to seek such a deadline, thus unnecessarily putting itself 'in play' which may be seen as a rather disproportionate way of allowing an offeree company out of an offer period.

In light of the above, we consider that the merits of introducing a private "put up or shut up" regime may have to be publicly consulted further before making any amendments to the current practice. Furthermore, consideration should also be given to how the situation would be dealt with if the existence of a private "put up or shut up" is leaked and becomes public.

Q21: What are your views on possible offer announcements that include the possible terms on which an offer might be made and/or that includes pre-conditions to the making of an offer?
In our view, possible offer announcements with possible terms including pre-conditions should continue to be allowed as long as a prominent warning to the effect that the announcement does not amount to a firm intention to make an offer is included.

The purpose of the Code is not to restrict transactions from taking place and there may be commercial aspects to a transaction which may necessitate a potential offeror stating such pre-conditions to ensure that the market is aware of the potential hurdles before it would consider making a firm announcement. In addition wee note that an offeree board has the ability to seek guidance from the Panel if required.

Q22: What are your views on the deadline for the publication of the offer document and the suggestion that the current 28 day period between the announcement of a firm intention to make an offer and the publication of the offer document might be reduced?
We are of the view that, in practice, offerors do not normally utilise the full 28 day period allowed to post an offer document. However there may be situations where an offeror may be unable to produce an offer document within a shorter timeframe.

We would recommend a more detailed analysis to obtain a better understanding of the extent to which the 28 day period is used, before any decisions to alter the rule are made. If there is evidence to suggest that the posting time can be reduced without impacting the quality and level of detail that offerors should be including in an offer document, then this should be looked into further.

From experience we would expect that the 28 day period could be reduced to, at most, 21 days, if not 14 days, without impacting the quality of offer documents.

Q23: What are your views on the suggestion that the Panel should have the ability unilaterally to foreshorten the timetable for subsequent competing offers?
We do not believe that the Panel should have the ability to unilaterally foreshorten the timetable for subsequent competing offers. We are of the view that each competing offeror should be allowed the same timeframe in which to make an offer.

Chapter 9 – Inducement fees and other deal protection measures

Q24: What are your views on the Panel's approach to inducement fees? In particular:

(a) do you consider that inducement fees should be prohibited?

(b) if you consider that inducement fees should continue to be permitted:

(i) do you regard the *de minimis* nature of inducement fees (and the Panel's approach to what is *de minimis*) as a sufficient safeguard?

(ii) do you consider that any further restrictions should be imposed on inducement fees by the Panel (for example, in relation to the timing of payment or the triggers for payment)?

(iii) what are your views on the suggestion that the Panel should cease to require confirmations from the offeree company board and its financial adviser that they each believe the inducement fee to be in the best interests of shareholders?

We do not believe that inducement fees should be prohibited. We believe that it is the responsibility of the directors to decide whether or not it is appropriate to enter in to such arrangement dependent on the particular circumstances of the bid.

We regard the current *de minimis* level for inducement fees to be a sufficient safeguard. We note the Panel's comments that inducement fees of up to 1% of the offer price have not in practice deterred competing offers and in many cases have been the 'price' of securing a higher offer.

We therefore do not consider that it is appropriate for the Panel to impose any further restrictions in this regard.

Q25: What approach should the Panel take to deal protection measures? In particular, do you consider that any specific deal protection measures should be either prohibited or otherwise restricted? Please explain reasons for your views.

We are of the view that the offeror and offeree should be able to negotiate deal protection arrangements between themselves without Panel involvement. We therefore do not consider that any specific deal protections should be prohibited or restricted and that offeree company directors should consider their fiduciary duties under company law when entering into such arrangements. In principle and under law, directors should always have a "fiduciary-out" in the event of a clearly superior offer.

Q26: What are your views on the suggestion that implementation agreements and other agreements containing deal protection measures should be required to be put on display earlier than at present?

In our view, such agreements should be required to be put on display as soon as they are agreed.

Q27: What are your views on "fiduciary outs" in the context of inducement fee arrangements?

We do not believe that "fiduciary outs" is something that the Code should be pursuing. In our view, and as noted in paragraph 9.22 of the PCP, in practice it is too difficult for the board of the offeree company to be able to rely on fiduciary outs, as this opens up the requirement for consideration by a court of law and the opportunity for an offeror to challenge whether the course of action proposed by the board is a proper discharge of its fiduciary duties.

However, we would emphasise that any deal protection which would undermine "fiduciary outs" must be avoided by the Panel. We believe that Directors must, at all times, be able to fulfil their fiduciary duties, in this case being the preservation of the right to accept a superior, competing bid which is in the best interests of their shareholders

Q28: What are your views on the ability of deal protection measures to frustrate a possible competing offer and on whether linking deal protection measures to the payment of an inducement fee may cure any such potential frustration?
We are of the view that given the *de minimis* nature of inducement fee arrangements, deal protection measures do not frustrate a possible competing offer.

In respect of linking deal protection measures to the payment of an inducement fee, we are of the view that the specific terms of such arrangements should be left to the offeror and offeree to decide and should not be determined by the Panel.

Chapter 10 – Substantial acquisitions of shares

Q29: What are your views on the suggestion that provisions similar to those previously set out in the Rules Governing Substantial Acquisitions of Shares should be re-introduced?
We remain content with the abolition of SARs and do not seek their re-introduction.