

U.K. Takeover Panel Amends Regime for Profit Forecasts and Quantified Financial Benefits Statements

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Significant amendments to the U.K. Takeover Code (the “Code”) took effect from September 30, 2013. The U.K. Takeover Panel (the “Panel”) has widened the categories of companies to which the Code now applies by removing the residency test for companies which have their registered office in the U.K., the Channel Islands or the Isle of Man and which have their securities admitted to trading on a multilateral trading facility in the U.K. This means that U.K. incorporated companies traded on AIM are now subject to the Code even if their place of central management and control is outside the U.K. For more detail on the changes, please see our May 21, 2013 client newsflash [here](#).

The Panel has also amended its requirements for profit forecasts and quantified financial benefits statements in the context of transactions governed by the Code, in some cases relaxing the rules where the forecast is less contentious but in other respects broadening them. The changes to, among others, Rule 28 of the Code were announced in [response statement 2012/1](#).

What is a profit forecast?

A statement can amount to a profit forecast if it expresses or implies a figure (or a minimum or maximum figure) for the likely level of profits or losses of a company, or if it simply contains data from which a calculation of such a figure can be made.

With the recent changes to Rule 28, the Code has been revised to align with the FCA’s Prospectus Rules and states that a profit “target” or “budget” will normally be treated as a profit forecast unless it is clear that it is only aspirational (Note 1 to Rule 28.1).

The profit forecast regime catches statements relating to the current financial period and/or future financial periods, and potentially those relating to a financial period which has expired if audited results have not been published.

Basic requirements of the Code

The basic requirements for profit forecasts remain unchanged in the revised Rule 28. Under Rule 28.1(a), if a target or a bidder offering securities as consideration makes a profit forecast during an offer period, or in an announcement which triggers an offer period, it must comply with the strict content and quality requirements of the Code and must obtain two third party reports:

- a report from its reporting accountant stating that in its opinion the forecast has been properly compiled and is consistent with the company’s accounting policies; and
- a report from its financial adviser stating that in its opinion the forecast has been prepared with due care and consideration.

Similarly, if a profit forecast is published before an offer period commences but after an approach has been made regarding a possible offer, the forecast must be repeated and reported on as set out above (Rule 28.1(b)).

Relaxations to the reporting regime

The amended rules introduce a lighter reporting regime for profit forecasts which are already “on record” before an approach has been made (Rule 28.1(c)). In these circumstances, the company can choose from three options:

- to publish a revised forecast (which will need to comply with the full reporting regime described above);
- to tell shareholders to disregard the profit forecast entirely; or
- to repeat the forecast with certain confirmations made by the directors themselves.

If the company chooses the third of these options, the directors’ confirmations will be similar to those normally required from an accountant, namely that the forecast remains valid, it has been properly compiled and it is consistent with the company’s accounting policies.

Companies that can demonstrate that they have an established practice of updating the market with statements regarding future financial performance may also be able to take advantage of this new directors’ confirmations regime – although if these statements are made during the offer period, this will require the consent of both parties to the offer (Note 2 to Rule 28.1).

The final area where a company may be able to give directors’ confirmations rather than commission third party reports is where the profit forecast is for a future financial period, which the Panel defines as relating to a period which ends more than 15 months after the date on which the forecast is published (Rule 28.2). Given the potential difficulties in obtaining third party reports on this data, directors’ confirmations will be acceptable. However, forecasts for the intervening period will also be required, and these may require full third party reports depending on when they were first published.

Note that dispensations from the full reporting regime are unlikely to be given in respect of management buyouts or offers by controlling shareholders, even where they are for existing “on record” or ordinary course profit forecasts, because the Panel considers that the management team or controlling shareholder might have an incentive to depress a profit forecast in order to acquire the company more cheaply (Note 3 to Rule 28.1).

A helpful table summarising the application of the revised rules is available in Appendix C of [response statement 2012/1](#).

Other amendments to the profit forecast rules

A number of additional amendments have been made to the rules governing profit forecasts as follows:

- **Quantified financial benefits statements** (formerly known as merger benefits statements) – the revised definition expands the operation of these rules to include statements made during recommended offers and also statements made by a target company attempting to quantify financial benefits that may accrue if an offer is rejected. If these statements are made, strict content and quality requirements apply and the company must obtain third party reports from an accountant and a financial adviser as described above.
- **Clarification on when dispensations from the rules may be granted** – a dispensation may be available where the effect of the application of Rule 28 would be disproportionate or otherwise inappropriate. For example, dispensation may be appropriate where the forecast sets out a profit ceiling rather than a floor since, in the context of an offer, it is not normally in the interests of the party making the forecast to set a ceiling. Dispensation may also be appropriate for an offeror’s profit forecast where the consideration securities will not represent a material proportion of its enlarged share capital or the value of the offer (Note 4 to Rule 28.1).

- **Forecasts for part of a business** – the new rules make it clear that they apply in respect of a part of a business in the same way as to a forecast for the whole, although the Panel may grant a dispensation in cases of genuine non-materiality (Note 5 to Rule 28.1).
- **Profit estimates** – exemptions from the requirements remain available for preliminary statements of annual results, half yearly reports or interim financial information provided that they comply with certain specified regulatory and/or accounting standards, on the basis that the numbers should be sufficiently reliable (Rule 28.5).
- **Investment analyst forecasts** – the Code contains a number of rules dealing with forecasts prepared by third parties. Parties to a bid are permitted to refer to “consensus” (average) forecasts on their websites provided that they are calculated in accordance with the Code and the website includes a prominent disclaimer stating that the profit forecasts are not endorsed by the company concerned (Rule 28.7). Additional rules apply if the parties refer to these forecasts in their offer documents or announcements (Note 6 to Rule 28.1 and Rule 28.8).

Comment

The Panel recently published a slide presentation summarising the changes to the profit forecast regime and how Rule 28 is intended to apply in practice, a copy of which can be downloaded [here](#).

The changes to the regime will reduce the burden on parties to an offer where forecasts are less contentious, and are helpful in that the regime is now more closely aligned to the E.U. Prospectus Directive regime, as implemented in the U.K. through the FCA’s Prospectus Rules, and related ESMA recommendations on the consistent implementation of the E.U. Prospectus Regulation.

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