SQUIRE SANDERS

FLESH ON THE BONES FOR EXECUTIVE PAY DISCLOSURE?

The UK's largest listed companies and their biggest UK institutional investors have today (12 September 2013) released their Directors' Remuneration Reporting Guidance, intended to provide a detailed road map to assist companies to successfully navigate BIS' new directors' remuneration reporting regulations. This follows the BIS acknowledgement that the best parties to plot this course would be a combination of those whose jobs it will be to find their way through the regulations and the stakeholders tasked with judging their orienteering skills. The key question now is whether the Guidance achieves the goal set by BIS and, crucially, whether it sheds light on how companies should approach implementing the new regulations.

Guidance

The challenge for the GC100 Investor Working Group has been to provide guidance and useful suggestions without superseding the regulations themselves. In some respects, this has been achieved, in no small part thanks to the helpful illustrations of what will be considered good practice. The Guidance is of three types:

- "must" (to comply with the law);
- "may wish to consider" (to enhance engagement of companies and investors); and
- "investors generally expect" (to provide context).

For example, when considering the single total figure of remuneration, the Guidance suggests that it would be good practice for companies to obtain written confirmation from each director that they have not received any other items in the nature of remuneration other than those disclosed in the table (nothing on this point is contained in the regulations). The cynical among you may question whether, given this paper was drafted by lawyers, this particular recommendation aims to give Remuneration Committee members contemporaneous evidence that they acted "honestly and reasonably" – which is a statutory defence against any civil proceedings taken against that individual director if a payment is made in breach of the shareholder approved remuneration policy. Going further, the Guidance suggests companies may wish to consider disclosing that they have indeed received such confirmation. It's therefore not unimaginable that, in time, reports which do not disclose that this written confirmation has been obtained will fall behind investors' expected standards.

Does What It Says on the Tin?

Much of the introduction to the Guidance is focused on flexibility, necessary to ensure that remuneration policy can be tailored to individual directors throughout its life, discretion (a concept barely mentioned in the legislation) and judgement. The distinction between the last two is explained. Helpful guidance is given as to the circumstances in which discretion might need to be used.

Useful guidance is provided in respect of the disclosure of the company's approach to recruitment remuneration and, given this is an entirely new disclosure, the suggestions in this area will undoubtedly be welcomed.

The Guidance notes that companies will be mindful that too much detail in this area could raise expectations of potential directors and weaken companies' abilities to negotiate appropriate terms; something that the regulations themselves seem to have ignored.

Similarly, the Guidance contains a suggestion that the disclosure as to the percentage change of remuneration of the CEO as against that of all employees should be based on a *per capita* figure rather than a total. This avoids the inevitable impact of changes in the number of employees comprising the total workforce, such as through acquisitions and disposals. Again, a sensible suggestion.

Guidance Prevailing Over Law?

However, there are times where the Guidance seems to extend the requirements found in the regulations. For example, the regulations state that payments to past directors must be disclosed other than where, amongst other exemptions, the payments are made in respect of "employment with or any other contractual service performed for the company". On a strict reading, this would presumably exempt any payments made pursuant to a contractual consultancy arrangement. The Guidance stops short of suggesting that, where a former director acts as a consultant, this falls **within** the disclosure requirement. However, it makes it clear that "investors generally expect companies to consider carefully the adequacy of disclosure to comply with both the Regulations and best practice".

Part of the DRR Toolkit

As with the regulations themselves, only time will tell how companies' disclosures are affected and how keen remuneration committees are to comply with the suggestions contained in the Guidance. Without question, it will be a useful read for all those involved with drafting directors' remuneration reports but, as has been the case with previous industry and investor guidelines (such as the ABI's Principles of Remuneration), it is worth remembering that this document is not law. We would hope that this Guidance doesn't translate into a stakeholders' checklist when assessing compliance with the regulations, not least because it is inevitable that not all companies will want (or be able) to comply with the level of detail and type of information set by the Guidance. Falling short of the Guidance's recommendations shouldn't be seen as a failure to comply with the regulations themselves; it will be interesting to see whether this is the case in practice.

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