

Review

Corporate Finance



Capital Markets Practice

News round-up

INTRODUCTION

Welcome to the latest in our series of regular alerts containing a round-up of news from our capital markets practice.

In this issue, we bring you details of the new approach the Government proposes to follow when introducing EU legislation in the UK and confirmation of the delayed implementation of the Bribery Act 2010. We report on these, and other developments, below.

Auditors: APB publishes revised Ethical Standards for Auditors with updated guidance on the provision of non-audit services

On 17 December 2010, the Auditing Practices Board (APB) published a revised version of its Ethical Standards for Auditors (the revised Standards) in light of concerns about the perceived threat to auditor independence where non-audit services are provided by the auditor. *For details, [click here](#)*

Bribery Act 2010: implementation deferred until May 2011 at the earliest

The implementation of the Bribery Act 2010, which received Royal Assent on 8 April 2010 and was due to come into force in April 2011, has been delayed until May 2011 at the earliest, pending publication of Government guidance on the 'adequate procedures' defence.

To recap: the Act includes a new corporate offence of failure to prevent bribery by persons working on behalf of a business. A business will have a defence if it can show that it had 'adequate procedures' in place to prevent bribery.

Although Government guidance on the 'adequate procedures' defence was due to have been published early this year, work on the guidance is still on-going and the Government intends to allow a period of three months between the publication of the guidance and the implementation of the Act to give businesses time to prepare.

Corporate governance: FRC consults on recommendations for effective company stewardship

On 7 January 2011, the Financial Reporting Council (FRC) published a discussion paper, *Effective Company Stewardship: Enhancing Corporate Reporting and Audit*, seeking views on its recommendations aimed at improving communications between a company's directors and its shareholders. Comments are requested by 31 March 2011. *For details, [click here](#)*

Equity underwriting fees: the OFT publishes the findings of its market study

The Office of Fair Trading (OFT) published the findings of its market study into equity underwriting fees on 27 January 2011. The study had examined the provision of equity underwriting services for the different types of share issue used by listed companies to raise equity capital in the UK (including rights issues, placings and other types of follow-on offer but excluding initial public offerings) and was limited to equity issues carried out over the past ten years by FTSE 350 companies. *For details, [click here](#)*

EU legislation: the UK Government adopts a new approach to the implementation of EU directives in the UK

The Government has announced that it will take a new approach when introducing EU directives in the UK. The aim is to ensure that UK businesses are not placed at a disadvantage as compared to their EU competitors. *For details, [click here](#)*

FSA fines JJB Sports PLC for failure to disclose information to the market

The Financial Services Authority (FSA) has fined JJB Sports PLC (JJB) for failing to disclose information to the market about the true cost of two acquisitions. The fine of £455,000 (£650,000 before application of early settlement discount) is the second largest fine imposed by the FSA on a company for breach of the Disclosure & Transparency Rules (DTR) and the Listing Rules. *For details of the FSA's findings, [click here](#)*

Listing Rules: the FSA consults on clarifications to the Rules

The FSA is consulting on a number of clarifications it proposes to make to the Listing Rules. Comments on the consultation are requested by 6 March 2011. *For details, [click here](#)*

Mergers and divisions: BIS consults on draft Regulations aimed at simplifying the process

The Department for Business, Innovation and Skills (BIS) is consulting on a draft version of the Companies (Reporting Requirements in Mergers and Divisions) Regulations 2011¹ which were published on 13 January 2011 and are due to come into force on 1 July 2011. Comments requested by 13 March 2011. *For details, [click here](#)*

Narrative reporting: BIS publishes responses to consultation

BIS has published a summary of responses to its consultation on the future of narrative reporting. It confirms that it has no immediate plans for making any changes but aims to prepare policy proposals relating to the corporate governance agenda in readiness for this year's budget. BIS will also take into account comments it has already received since the publication of its paper *A Long Term Focus for Corporate Britain: A Call for Evidence* which considered, among other things, investor engagement, director's remuneration and the takeover regime. BIS had requested responses to this paper by 14 January 2011.

BIS: Summary of responses: The Future of Narrative Reporting: A Consultation available at:

<http://www.bis.gov.uk/assets/biscore/business-law/docs/s/10-1318-summary-of-responses-future-narrative-reporting-consultation.pdf>

¹ The draft Regulations will implement Directive 2009/109/EC (the Amending Directive) which makes various deregulatory amendments to four earlier EU Directives: the Second, Third and Sixth Company law Directives and the Cross—Border Merger Directive. Member states must implement the Amending Directive by 30 June 2011.

How Squire Sanders Hammonds can help

We would be pleased to discuss with you in more detail any of the matters raised in this article.

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The revised Standards take effect on 30 April 2011 and include:

- clarification that the outsourcing of substantially all internal audit activity to an audit firm is unacceptable where the work undertaken is significant to the audited entity; and
- additional guidance in relation to conflicts of interest and the requirement that auditors consider the implications for their independence.

APB Ethical Standards available at: <http://www.frc.org.uk/apb/publications/ethical.cfm>

APB: *Ethical Standards: The provision of non-audit services by auditors: Feedback on July 2010 consultation* available at:

http://www.frc.org.uk/documents/pagemanager/apb/Non_audit_services_by_audit_firms/ES%20Provision%20of%20non-audit%20services%20by%20auditors%20Feedback%20paper.pdf



The paper includes the following recommendations:

- that directors should take full responsibility for ensuring that the annual report, viewed as a whole, provides a fair and balanced report on their stewardship of the business and give details of the action they take to ensure the reliability of the information on which the management of a company is based;
- that the strength of the audit committees in holding management and auditors to account should be enhanced by greater transparency. There should be an expanded audit report, including a new section on the completeness and reasonableness of the audit committee report and identifying any matters in the annual report that the auditors believe are incorrect or inconsistent with the information in the financial statements;
- that companies should take advantage of developments in technology to increase the accessibility of the annual report; and
- that investors should be more involved in the appointment of auditors.

FRC paper: Effective Company Stewardship: Enhancing Corporate Reporting and Audit
available at: <http://www.frc.org.uk/images/uploaded/documents/Effective%20Company%20Stewardship%20Final2.pdf>

FRC press release available at: <http://www.frc.org.uk/press/pub2485.html>



The OFT found that there had been a significant increase in the amount of fees paid to the investment banks since the beginning of the financial crisis in 2008. The increases could, in part, be explained by the increase in risk during 2008 and early 2009 but the level of fees has not decreased in step with the subsequent reduction in risk. The OFT's view is that it would be more efficient and effective for the market to resolve the problems itself rather than by way of further intervention by the competition authorities. Accordingly, the OFT:

- has made a number of recommendations addressed to companies and institutional shareholders aimed at introducing greater competition into the market; and
- has made a provisional decision not to make a market investigation reference to the Competition Commission. It is seeking comments on its decision in this regard by 11 March 2011.

Equity underwriting and associated services: an OFT market study available at:

http://www.offt.gov.uk/shared_offt/market-studies/OFT1303.pdf



The new approach includes the following principles:

- that directives will normally be copied directly into UK law. This procedure will bring to an end the practice of 'gold-plating' EU legislation by the UK Government (i.e. the implementation by the UK Government of national rules that go further than the requirements of the EU directive in question);
- that the Government should engage with the EU Commission before it has adopted proposals in order that the UK has more influence on the drafting of legislative proposals
- that UK legislation should generally come into force on the latest date permitted in the EU directive; and
- that ministers must review the UK implementing legislation every five years to give businesses the opportunity to provide feed-back on how the legislation is working in practice and whether it should be amended to reduce the burden on businesses.

BIS: Guiding Principles for EU Legislation available at: <http://www.bis.gov.uk/policies/better-regulation/policy/european-legislation/guiding-principles-eu-legislation>

BIS: Goldplating available at:

<http://www.bis.gov.uk/policies/better-regulation/policy/european-legislation/goldplating>



In December 2007, JJB announced to the market that it had purchased the retail chain Original Shoe Company (OSC) for £5 million in cash but failed to disclose that, in addition to the cash price, it had had to pay for the in-store stock at a cost of £10.038 million.

In May 2008, JJB announced that it had purchased another retail chain, Qubefootwear Ltd (Qube), for £1 in cash but failed to disclose that, as part of the acquisition, it had agreed to settle Qube's overdraft prior to completion at a cost of £6.47 million.

In each case the cost of the acquisition was inside information and should therefore have been disclosed to the market as soon as possible.¹ JJB's failure to disclose gave a false impression of the costs of OSC and Qube and of the impact of those acquisitions on the true nature and costs of JJB's strategy and amounted to a breach of DTR 2.2.1R and of Listing Principle 4.²

In determining the penalty, the FSA took into account a number of factors, including JJB's co-operation with the FSA's investigation and the fact that the entire executive board, and nearly all the non-executive directors, of JJB have changed since the events in question.

The case is a reminder of the need for companies to seek legal advice in respect of their announcement obligations and to keep their brokers fully briefed.

FSA Press release FSA/PN/015/2011 available at:

<http://www.fsa.gov.uk/pages/Library/Communication/PR/2011/015.shtml>

FSA Final Notice available at: <http://www.fsa.gov.uk/pubs/final/jjbsports.pdf>

1 The true costs of the OSC and Qube acquisitions were disclosed for the first time in September 2008 when JJB published its 2008 Interim Results.

2 DTR 2.2.1R states that an issuer must notify a Regulatory Information Service as soon as possible of any inside information which directly concerns the issuer, unless certain exceptions apply. Listing Principle 4 provides that a listed company must communicate information to holders and potential holders of its listed equity securities in such a way as to avoid the creation or continuation of a false market in such listed equity securities.



The proposed changes include the following:

- *rights issue subscription period*: LR 9.5.6R, LR 9.5.15R (2) (h) and LR 14.3.9R (2) (g) to be amended to confirm that the calculation of the ten business day period begins on the first day on which the rights issue is open for acceptance;
- *open offers*: new rules to clarify that the requirements in LR 9.5.4R and LR 9.5.5R, which apply to rights issues, should also apply to open offers made with a compensatory element, and a new rule to the effect that the open offer subscription period should be a minimum of ten business days;
- *major shareholder disclosures in accounts*: LR 9.8.6R(2)¹ to be clarified to confirm that the rule relates to notifications received as at the end of the period under review, and to include changes which occur between the end of that period and a date not more than one month before the annual general meeting; and
- *omission of information from circulars*: new guidance in relation to LR 13 setting out the grounds on which the FSA considers that information may be omitted from circulars, and a new rule (LR 13.1.8R) to specify how requests for the omission of information should be made.

FSA consultation paper (FSA CP 11/01) available at: http://www.fsa.gov.uk/pubs/cp/cp11_01.pdf

¹ LR 9.8.6R(2) requires a statement to be made in annual reports disclosing major shareholder notifications under DTR 5



The draft Regulations seek to simplify the process for mergers and divisions and reduce the administrative load for companies by amending the current legislation in this area, that is: Part 17 of the Companies Act 2006 (A company's share capital), Part 27 of the Companies Act 2006 (Mergers and divisions of public companies) and the Companies (Cross-Border Mergers) Regulations 2007 (SI 2007/2974). The proposals include the following changes:

- companies would be able to use electronic communication and web-site publication (in place of hard copy format) for the circulation of certain documents; and
- would not be required to produce or obtain share valuation reports, directors' reports or other financial reports where this would lead to duplication of existing information.

Draft Regulations: The Companies (Reporting Requirements in Mergers and Divisions) Regulations 2011 available at: <http://www.bis.gov.uk/assets/biscore/business-law/docs/c/11-534-companies-reporting-requirements-mergers-divisions-regulations-draft>

Explanatory Text available at: <http://www.bis.gov.uk/assets/biscore/business-law/docs/e/11-535-explanatory-text-draft-companies-reporting-requirements-regulations>