

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 report, among other things, on changes to the Takeover Code, developments in the area of corporate governance and the latest steps in the reform of the UK's financial services regulatory structure.

Bribery Act 2010: consultation on anti-bribery guidance for transactions published by Transparency International UK

On 1 July 2011, the day the Bribery Act 2010, came into force, Transparency International UK¹ published a consultation on its draft anti-bribery guidance for transactions. The draft guidance aims to provide practical help for companies wishing to undertake anti-bribery due diligence in the course of mergers, acquisitions and investment. The draft guidance sets out good practice principles, lists the questions that should be raised as part of the due diligence process and also provides a checklist of indicators as an aid to due diligence. Comments are requested by 15 September 2011.

Transparency International: Draft guidance for anti-bribery due diligence in mergers, acquisitions and investments available at:

<http://www.transparency.org.uk/publications/250-ti-uk-due-diligence-consultation/download>

Corporate governance: Government's approach set out by Vince Cable in a recent speech to the ABI

In a speech on corporate governance made on 22 June 2011 at the biennial conference of the Association of British Insurers (ABI), Vince Cable, Secretary of State for Business, outlined particular areas of concern and announced the Government's latest initiatives:

Executive remuneration

Dr. Cable advised that remuneration committees and institutional investors should take a firmer line in up-holding the UK Corporate Governance Code, which calls for executive remuneration to be linked to performance and to the long-term success of the company. The Government intends shortly to consult on changes to company reporting generally and will propose stricter provisions on the disclosure of executive pay and its connection to company performance. In the meantime, Dr. Cable will hold discussions with the chairs of remuneration committees and other relevant parties with a view to announcing further action in the autumn.

Equity capital markets: independent review into competitiveness

Dr. Cable announced that the Government has appointed Professor John Kay to undertake an independent review into investment in UK equity markets and its impact on the long-term competitive performance and governance of UK quoted companies.² **For details, click here.**

¹ Transparency International UK is the UK chapter of the world's leading non-governmental anti-corruption organisation.

² The appointment of Professor Kay follows the Government's call for evidence, 'A Long-Term Focus for Corporate Britain', published 25 October 2010. For details, see Capital Markets Practice News round-up: issue no. 7/2010.

Women on boards: FTSE 350 companies urged to publish target figures for 2013 and 2015

Dr Cable also referred to Lord Davies' report, 'Women on boards', published in February this year.³ Among its recommendations, the Davies Report called for chairs of all FTSE 350 companies to publish aspirational targets for the number of women they expect to have on their boards in 2013 and 2015. In his speech, Dr Cable took the opportunity to urge all chairmen to publish their target figures by September this year. At present, the Government intends to see what progress can be made on a voluntary basis but will be reviewing this approach if it considers it necessary.

Text of Dr Cable's speech, published by the Department for Business Innovation & Skills on 23 June 2011, available at: <http://www.bis.gov.uk/news/speeches/vince-cable-association-british-insurers-2011>

Mergers and divisions: new reporting Regulations in force 1 August 2011

The Companies (Reporting Requirements in Mergers and Divisions) Regulations 2011 (SI 2011/1606) (the Regulations)⁴ were published on 5 July 2011 and come into force on 1 August 2011 - although they will not apply to any merger or division where draft terms have been adopted before that date. **For details, click here.**

Prospectuses: new Regulations introducing revised exemptions in force 31 July 2011

The Prospectus Regulations 2011 (SI 2011/1668) (the Regulations)⁵, which were published on 8 July 2011 and come into force at the end of the month, amend the Financial Services and Markets Act 2000:

- to provide that a prospectus will not be required where offers are addressed to fewer than 150 persons per member state. At present, the exemption applies to offers made to fewer than 100 such persons; and
- to increase the threshold for an offer of securities for which a prospectus is required from the current figure of EUR 2.5 million to EUR 5 million (total consideration of the offer in the EU calculated over a 12 month period).

The Prospectus Regulations 2011 available at: <http://www.legislation.gov.uk/ukxi/2011/1668/introduction/made>

Takeover Code: regulation of takeover bids: Code to be amended with effect from 19 September 2011 following proposals for reform to, inter alia, help targets faced by hostile bids

On 21 July 2011, the Takeover Panel (the Panel) published a statement (RS 2011/1) in response to its consultation reviewing certain aspects of the regulation of takeover bids set out in PCP 2011/1, published on 21 March 2011. **For details, click here.**

UK financial services: new regulatory structure: Treasury publishes White Paper

On 16 June 2011, the Treasury published a White Paper: 'A new approach to financial regulation: the blueprint for reform', setting out further details of its proposed reforms to the UK financial services regulatory regime. The White Paper also contains a partial draft of the Financial Services Bill (which will implement the new regime) together with further questions for consultation and feedback on the Treasury's February consultation.⁶ **For details, click here.**

³ For details, see Capital Markets Practice News round-up: issue no. 3/2011.

⁴ The Regulations implement Directive 2009/109/EC of the European Parliament and of the Council amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC and Directive 2005/56/EC as regards reporting and documentation requirements in the case of mergers and divisions.

⁵ The Regulations implement certain provisions of the Directive to amend the Prospectus Directive: Directive 2010/73/EU amending Prospectus Directive 2003/71/EC. Although the amending Directive is not due to be implemented by member states until 1 July 2012, the Government has made the changes introduced by the Regulations in advance of that date in order to help businesses raise equity capital.

⁶ For details, see Capital Markets Practice News round-up: issue 3/2011.

UK financial services: new regulatory structure: FSA considers regulatory approach of new Financial Conduct Authority

In response to the Treasury's White Paper, the FSA has published (27 June 2011) a paper entitled: 'The Financial Conduct Authority: Approach to Regulation' which sets out its preliminary thoughts on the regulatory approach of the new Financial Conduct Authority (FCA). **For details, click here.**

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 Kay Review, which is expected to report to the Government next year, will consider behaviour throughout the investor chain and look at the roles of all concerned (pension funds, pension advisers and fund managers). It will, among other things, consider:

- ways of enhancing engagement between institutional investors and companies;
- ways of increasing transparency for clients, beneficiaries and companies themselves;
and
- the impact of increasing fragmentation and internationalisation of UK share ownership on shareholder engagement.

The Kay Review: Terms of reference available at: <http://www.bis.gov.uk/assets/biscore/business-law/docs/k/11-1015-kay-review-terms-of-reference.pdf>

The Regulations aim to reduce the administrative burden on companies through amendments to Part 17 (A company's share capital) and Part 27 (Mergers and Divisions of public companies) of the Companies Act 2006, as well as to the Companies (Cross-Border Mergers) Regulations 2007 (SI 2007/2974). To this end, the Regulations, among other things:

- allow companies to take advantage of electronic communications and website publication for the circulation of certain documents that might otherwise have to be made available, or filed, in hard copy form; and
- reduce the need for companies to produce and/or obtain share valuation reports, directors' reports or other financial reports, where to do so might duplicate existing information.

The Companies (Reporting Requirements in Mergers and Divisions) Regulations 2011 available at: <http://www.legislation.gov.uk/ukSI/2011/1606/contents/made>

To recap, PCP 2011/1 set out draft amendments to the Takeover Code (the Code) which marked a significant change to the existing regime to address concerns, raised primarily in the context of the takeover by Kraft Food Inc of Cadbury Plc, that the current regime is too favourable to hostile bidders and allows short-term investors an undue level of influence. The changes sought to improve the offer process and take more account of those people (other than the target's shareholders) who are affected by a takeover.¹

The Panel has broadly adopted the changes to the Code proposed in PCP 2011/1 – although some modifications have been made. RS 2011/1 contains a mark-up of the Code showing the agreed amendments which will come into force on 19 September 2011. A new edition of the Code will be issued on the same date.

Offer periods starting on or after 19 September 2011 will be subject to the new regime. There will, however, be implications for offers live on that date. In order to address these, Panel Statement 2011/18, published 21 July 2011, sets out the transitional arrangements.

Depending on the level of bid activity, the Panel intends to review the practical effect of the Code changes at least 12 months after they come into force.

We will discuss in more detail the changes taking effect in September in a future edition of this publication.

Takeover Panel: Response Statement following consultation paper PCP2011/1 available at: <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/RS201101.pdf>

Takeover Panel: Statement 2011/18: Review of certain aspects of regulation of takeover bids: publication of RS2011/1 available at: <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/2011-RS.pdf>

Takeover Panel: Instrument 2011/2: Amendments following the Code Committee's review of the regulation of takeover bids available at: <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/Instrument-2011-2.pdf>

Takeover Panel: Implementation of amendments to the Takeover Code and transitional arrangements available at: <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/transitionalarrangements.pdf>

Additional note: changes to the Introduction to the Code:

On 21 July 2011, the Panel also published Instrument 2011/1 which makes minor amendments (and no material changes) to the Introduction to the Code and to the Rules of Procedures of the Hearings Committee with immediate effect.

Panel Instrument 2011/1 available at: <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/Instrument-2011-1.pdf>

Associated Panel Statement 2011/17 available at: <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/2011-MA.pdf>

¹ For more details, see Capital Markets Practice News round-up: issue 5/2011.



The White Paper confirms that the following three bodies will, between them, be responsible for the majority of the functions now performed by the Financial Services Authority (FSA) which will cease to exist in its current form:

- the Financial Policy Committee: responsible for macro-prudential regulation;
- the Prudential Regulation Authority: responsible for micro-prudential regulation; and
- the Financial Conduct Authority (FCA): responsible for protecting and enhancing confidence in the UK financial system.

The FCA will:

- act as the UK Listing Authority;
- be the body responsible for the regulation of recognised investment exchanges; and
- take over the responsibilities of the FSA in relation to market abuse.

Following the February consultation, the Treasury now also proposes that the FCA be given the power to require the Office of Fair Trading to consider whether there are competitive inefficiencies in specific markets.

The latest consultation closes on 8 September 2011 and it is anticipated expected that the new regime will be in force by the end of 2012 or early 2013.

HM Treasury: A new approach to financial regulation: the blueprint for reform available at: http://www.hm-treasury.gov.uk/d/consult_finreg_new_approach_blueprint.pdf



The paper contains details of:

- the FCA's strategic objective;
- its regulatory activities – especially in relation to the supervision of markets;
- its role in promoting competition; and
- its role in liaising with other relevant authorities (e.g. the European Securities and Markets Authority and the Financial Reporting Council).

The FSA will publish further proposals relating to the FCA's operating model at a later date. In the meantime, comments on the FSA's latest paper are requested by 1 September 2011.

FSA: The Financial Conduct Authority: Approach to Regulation available at:
http://www.fsa.gov.uk/pubs/events/fca_approach.pdf

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