

News round-up

Corporate finance

Introduction

Welcome to the latest in our series of regular alerts containing a round-up of news from our capital markets practice. Among other things, we bring you news of the regulatory approach of the Financial Conduct Authority, as well as news of developments in the field of corporate governance.

London Stock Exchange: the New High Growth Segment of the Main Market has Opened for Business

To recap, the new High Growth Segment has been set up to meet the needs of UK and European mid-sized, high-growth businesses, which are currently under-represented on the UK's public markets and will provide issuers with a transitional route to a full premium listing.

The new market has been open for applications for admission to trading since 27 March 2013. The London Stock Exchange has published the relevant application forms and other documents on its website and has issued the final Rulebook for the High Growth Segment.¹

London Stock Exchange Notice (NO4/13): High Growth Segment, with link to Rulebook and application forms, is available at <http://www.londonstockexchange.com/traders-and-brokers/rules-regulations/change-and-updates/stock-exchange-notices/2013/n0413.pdf>

Reminder: the New UK Financial Regulatory Regime is Now in Place

On 1 April 2013, the Financial Services Authority (FSA) was replaced by two new regulatory bodies: the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA). The Listing, Prospectus and Disclosure Rules, as well as the market abuse and financial promotion regimes, all fall within the remit of the FCA. The PRA takes over responsibility for the regulation of those firms which the UK Government considers should be subject to significant prudential regulation including, for example, banks, building societies, insurers and certain investment firms. The new FCA and PRA handbooks are available at <http://www.fca.org.uk/handbook>.

In the meantime, the Takeover Code has been amended, with effect from 1 April 2013, to reflect, among other things, the restructuring of the UK's financial regulatory framework. More details are available in the Takeover Panel's Statement 2013/3 available at <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2013/01/2013-31.pdf>.

FCA is set to be a Proactive and Transparent Regulator, Adopting a Strong Line on Enforcement to Deter Future Misconduct

The recent developments referred to below all point to the need for companies to review their compliance procedures. We noted in the last edition of this publication (the March 2013 edition: issue 2/2013) that the bar has been raised on the standards expected by the FCA and we now see the FCA raising the stakes even further to increase the consequences of failing to reach the required standards.

In its Business Plan for 2013/14, published on 25 March 2013, the FCA announced that it intends to be a more transparent and proactive regulator than its predecessor. It will develop and use a range of polices to ensure market integrity and plans to take a strong stand on enforcement in order to deter future misconduct.

FCA Business Plan 2013/14 available at <http://www.fsa.gov.uk/static/pubs/plan/bp2013-14.pdf>

FCA: New Power to Publish Information About Warning Notices

The FCA's goal of greater transparency is reflected in proposals regarding the publication of warning notices. A new statutory power (created by the Financial Services Act 2012) authorises the FCA to publish such information about the matter to which a warning notice relates as it considers appropriate. This means that information about a disciplinary matter may be released by the FCA before the subject of the investigation, whom the FCA may identify publicly, has had a chance to challenge the case against it.

By contrast, the FSA had not been able to issue details of a statutory notice in a disciplinary matter until the publication of a decision notice, that is, at the point when the firm or individual concerned had had the opportunity to make representations in response to the FSA's warning notice but before the FSA had made a decision.

¹ For more details about the High Growth Segment, see the January/February 2013 edition of this publication: issue 1/2013.

FSA consultation paper CP13/8 (published on 18 March 2013) contains proposals as to how the FCA will exercise its new power. While it will consider the relevant circumstances of each case, and will consult with the persons to whom the warning notice is given or copied, the FCA will generally publish a statement (but not the notice itself) where a warning notice has been issued. The statement will not normally contain details about the sanction proposed and the FCA will not publish a statement where it would be unfair to the person under investigation, prejudicial to the interests of consumers, or detrimental to the stability of the UK's financial system.

Publication would be "unfair" if it could materially affect the health of the person under investigation, lead to a disproportionate loss of income or livelihood, prejudice criminal proceedings or "give rise to some other equal degree of harm". The fact that a statement could damage the reputation of the firm or individual concerned will not, alone, prevent the FCA from making a statement on the grounds of unfairness.

Comments are requested by 18 June 2013. In the meantime, the FCA will not use the new power until the consultation has ended and a policy on the use of the power has been published in the FCA's Enforcement Guide.

FSA CP13/8 available at <http://www.fsa.gov.uk/static/pubs/cp/cp13-08.pdf>

Higher Fines for Breaches of the UKLA's Rules: Precedent Set in a Recent Case

News of the FCA's enforcement policy comes in the wake of the case concerning Lamprell plc ("Lamprell") where, for the first time, the Financial Services Authority (FSA) imposed a fine for breach of UKLA rules linked to market capitalization. The case marks a development which is expected to lead to much higher penalties than in the past.

The FSA fined Lamprell more than £2.4 million for significant failings in its systems and controls which had meant that Lamprell had been unable adequately to monitor its financial performance against its budget and against market expectations, and had failed in its obligations to keep the market fully informed of its deteriorating financial position during early 2012. This failure resulted in breaches of the Listing Principles, the Disclosure and Transparency Rules and the Model Code on directors' dealings in securities.

The fine in the Lamprell case was the first imposed for breaches of this kind under the new penalty policy which links the level of penalties to market capitalization. In making its determination, the FSA had taken into account a number of factors including Lamprell's co-operation during the investigation and the remedial steps it had taken to address the issues concerned. Even so, the fine was significantly higher than in other recent cases of this kind and forms part of a larger regulatory initiative to hold listed companies to account for failure to publish material information.

FSA Final Notice to Lamprell plc available at <http://www.fca.org.uk/static/fca/documents/finalised-guidance/lamprell.pdf>

Initial Public Offerings: the ICAEW Publishes New Guidance on Financial Position and Prospects Procedures

The Institute of Chartered Accountants in England and Wales (ICAEW) has published new technical guidance on the financial position and prospects (FPP) procedures that companies must establish before listing on the main market of the London Stock Exchange, AIM or the ISDX Growth Market. The guidance, which replaces Technical Release FRAG 10/95, is aimed principally at directors, sponsors and reporting accountants. It also deals with the role of nominated advisers and corporate advisers, and advises how they should approach their regulatory obligations in relation to FPP procedures. The implementation date for the new guidance is 1 September 2013, although the ICAEW is encouraging earlier compliance. In the meantime, the Lamprell case (referred to above) serves as a timely reminder of how important it is to have these procedures in place.

ICAEW Guidance on financial position and prospects procedures (TECH 01/12CFF) available at <http://www.icaew.com/~media/Files/Technical/Corporate-finance/Financing%20change/tecpln11794-tr-fppp-final.pdf>

Corporate Governance: Executive Remuneration: the Local Authority Pension Fund Forum has Issued Guidelines on Directors' Pay Aimed at FTSE 350 Companies

In a move which underlines on-going public concern at the levels of executive remuneration, the Local Authority Pension Fund Forum (LAPFF), which represents pension funds with over £115 billion in assets, has published guidelines on executive pay. The guidelines, which aim to ensure that levels of executive remuneration are more in line with long-term, sustainable returns and shareholder value, urge the remuneration committees of FTSE 350 companies to comply, among other things, with the following recommendations:

- executive directors should be remunerated principally by means of their base salary
- the total pay for a new executive director should be set at a level below that of the departing director
- directors should participate in company pension arrangements on the same terms as employees generally
- bonuses should be clawed back in certain circumstances e.g. where ethical standards have been breached
- the use of market benchmarks should be discouraged, and the ratio between the average employee pay and average executive director pay published

- all new executive director positions should be publicly advertised, recruitment processes should be transparent and serious consideration given to internal candidates
- companies should actively consult with institutional shareholders on pay policies, and the views of managers and employees taken into consideration when setting executive pay
- discretion should only be used to reduce the overall levels of remuneration.

The changes that would be needed to comply with these guidelines are radical for guidelines and it is very unlikely that any quoted companies will seek fully to comply with them. However, the LAPFF has some interesting suggestions which may well influence the market.

LAPFF: Expectations for Executive Pay available at <http://www.lapfforum.org/TTx2/news/files/2013MarchExpectationsonPayFINAL.pdf>

Corporate Governance: New Share Owner Group to Voice Trade Union Views in Corporate Governance Debates at FTSE 350 AGMs

The Trades Union Congress (TUC) and its two largest affiliated unions, Unite and UNISON, have recently launched a new group, Trade Union Share Owners, to ensure that, as from 1 April 2013, their funds take a common voting position at FTSE 350 AGMs. The members of the group see the new co-ordinated approach as an effective means of giving voice to trade union views in corporate governance debates in another development that reflects public concern about the level of directors' pay.

The group will vote in line with a new set of policy guidelines drawn up by the TUC. The guidelines (which are even more radical than the LAPFF's) address certain issues that concern the trade unions - all-male boards, excessive director remuneration, and the non-advertisement of new director positions - and, among other things, include policies:

- to limit the growing gap in the pay of those at the very top and bottom of companies, with the aim of achieving a 20:1 pay ratio
- to ensure that the levels of pay increases for directors mirror those offered to employees generally
- to ensure that at least a quarter of board positions are held by women
- to ensure that all board vacancies are advertised
- to limit the number of board positions that directors can hold
- to abolish annual bonuses for directors.

At present, the members of the group together represent pension funds with over £1 billion in assets, although the TUC hopes that many more of its affiliated unions will join the group in the coming year. It remains to be seen whether the publicity generated by the group's voting policies will be effective despite the comparatively small level of funds currently involved.

Trade Union Share Owners: Trade Union Voting and Engagement Guidelines are available at http://www.tuc.org.uk/tucfiles/557/TUC_Trade_Union_Voting_and_Engagement_Guidelines_March_2013.pdf

Corporate Governance: Women on Boards: Lord Davies Publishes His Second Annual Review Which Shows an Increase in the Number of Women in the Boardroom and Indicates His Continuing Commitment to a Self-Regulatory Approach

To recap, in 2010 the UK Government appointed Lord Davies to investigate what was preventing women becoming board members, and to develop a strategy to increase the number of women on the boards of listed companies.

On 10 April 2013, Lord Davies published his second annual review which tracks the number of women on the boards of FTSE 350 companies. Lord Davies reports that there has been an increase in the number of women in boardrooms: women now account for 17.3 percent of FTSE 100 and 13.2 percent of FTSE 250 board directors, up from 12.5 percent and 7.8 percent respectively in February 2011 – an increase of nearly 40 percent. Only six all-male boards remain among FTSE 100 companies, down from 21 in 2010. Currently, nearly four out of ten board appointments made by FTSE 350 companies are women, while Cranfield University reports that the FTSE 100 is on track to achieve 25 percent female representation on boards by 2015 and 34.4 percent by 2020.

In an open letter, Lord Davies calls on businesses to build on the progress made to date in a move that reflects his preference for a self-regulatory model for the UK. To this end, Lord Davies recommends that:

- FTSE 350 chairmen should review their targets for female board representation by 2015 and those companies that have not yet set targets should do so
- FTSE 250 companies should aim for a minimum of 25 percent of female board representation by 2015, in line with the recommendations previously made by Lord Davies for FTSE 100 companies
- FTSE 350 chief executives should, by the end of September 2013, set out the percentage of women they aim to have on their executive committees and at senior management levels in 2015
- executive committee members should be released to serve on the boards of other companies as part of the overall executive development plan
- companies should conduct a pilot for advertising director opportunities to test the pros and cons of advertising

Policy Paper: Women on Boards 2013: Second annual review available at <https://www.gov.uk/government/publications/women-on-boards-2013-second-annual-review>

Women on Boards; an open letter to business available at: <https://www.gov.uk/government/news/women-on-boards-an-open-letter-to-business>

How Squire Sanders 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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