

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. Corporate governance is again in the news, with the publication by the Financial Reporting Council of its Guidance on Board Effectiveness and Lord Davies' report on 'Women on boards', as well as a number of initiatives relating to financial reporting. We report on these, and other developments, below.

UK financial services regulatory structure: second Government consultation document published: the new Financial Conduct Authority

We have previously reported on proposals for the new regulatory structure for the UK services industry contained in the Government's consultation paper of July 2010: *A new approach to financial regulation: judgement, focus and stability*.¹

On 17 February 2011, the Government published a further consultation document, *A new approach to financial regulation: building a stronger system*, which expands on the Government's earlier consultation. Amongst its other proposals, the Government now proposes that, with one exception², all the markets regulatory functions currently carried out by the FSA, including its role as the UK Listing Authority as well as its role in regulating market conduct, be transferred to a new body called the Financial Conduct Authority (FCA)³.

Comments on the latest consultation paper are requested by 14 April 2011. The Government intends to publish a further consultation on detailed proposals and draft legislation by the end of June this year with a view to setting up the new regulatory structure by the end of 2012.

HM Treasury consultation paper: A new approach to financial regulation: building a stronger system: February 2011 available at:

http://www.hm-treasury.gov.uk/d/consult_newfinancial_regulation170211.pdf

Corporate governance: board effectiveness: final guidance published

The Financial Reporting Council (FRC) published its Guidance on Board Effectiveness (the Guidance) on 3 March 2011 to replace the Good Practice Suggestions from the Higgs Report (Higgs Guidance) last reissued in 2006. *For details, [click here](#)*

¹ Capital Markets Practice News round-up: issue no. 1/2011

² The exception being the responsibility for the prudential oversight of clearing and settlement which will transfer to the Bank of England.

³ The FCA had originally been given the working name of 'The Consumer Protection and Markets Authority'.

Corporate governance: executive remuneration: recommendations for listed companies contained in the Hutton Review of Fair Pay in the public sector

The Hutton Review of Fair Pay in the public sector was published on 15 March 2011 together with a number of recommendations for the Government's consideration. While the review focuses on the public sector, it also contains recommendations for the private sector with the aim of encouraging the principle of fair pay across the economy. The recommendations for the private sector include the following:

- that listed companies should be required to publish top to median pay multiples in their annual reports as from January 2012; and
- that the Government should consider commissioning annual 'fair pay reports' on public companies as well as public service organisations.

Hutton Review of Fair Pay in the public sector: final report available at:
http://www.hm-treasury.gov.uk/d/hutton_fairpay_review.pdf

Corporate governance: executive remuneration: uncapped incentive plans

In a letter to the chairmen of the remuneration committees of listed companies, the Association of British Insurers (ABI) has expressed concern regarding the introduction of uncapped long term incentive plans. The ABI advises that the Institutional Voting Information Service will generally recommend a vote against such plans unless certain principles set out in the letter are followed.

ABI letter available at:

http://www.ivis.co.uk/PDF/1.4_Letter_to_RemCo_Chmn_re_Uncapped_Incentive_Plans.pdf

Corporate governance: 'Women on boards': report published

On 24 February 2011, Lord Davies published his report, 'Women on boards', to promote gender equality in the boardroom. The report comes in light of evidence which suggests that companies achieve higher standards of corporate governance when they have female representation at board level, compared to those companies with male only boards, and that inclusive and diverse boards are more likely to be effective boards.

The report does not propose the introduction of statutory quotas as a means of improving the representation of women on boards (and contains no suggestion that there be positive discrimination) but, instead, makes a number of recommendations for a business-led approach. The Government may yet, however, impose statutory quotas if the proposed business-led approach does not lead to significant change. *For details, [click here](#)*

Financial reporting: directors: guidance for directors on accounting records under the Companies Act 2006

The Institute of Chartered Accountants in England and Wales has published technical release *TECH 01/11: Guidance for directors on accounting records under the Companies Act 2006* available at: <http://www.icaew.com/en/about-icaew/what-we-do/technical-releases>

Financial reporting: directors' report: disclosure of principal risks and uncertainties

In light of its concerns about how companies report their principal risks and uncertainties, the Financial Reporting Review Panel of the FRC (FRRP) has published a paper setting out questions that directors should consider when making these disclosures. *For details, [click here](#)*

Financial reporting: FRC inquiry into going concern and liquidity risk reporting

The FRC has launched an inquiry to review its Guidance for Directors of UK Companies on going concern statements and liquidity risk which was last up-dated in late 2009. The FRC invites communication with the inquiry panel and expects the panel's initial conclusions in summer 2011, with final recommendations to be made by the end of the year.

FRC press release available at: <http://www.frc.org.uk/about/sharmaninquiry.cfm>

London Stock Exchange: minor changes to Admission and Disclosure Standards

The amendments, effective 3 March 2011, are largely administrative but include an addition to Rule 3.9, which governs the timetable for an open offer, to bring it into line with market practice. The Rule now stipulates that issuers announce an open offer by 7.15 am on the proposed "ex" date.

Stock Exchange Notice N05/11 available at: <http://www.londonstockexchange.com/traders-and-brokers/rules-regulations/change-and-updates/stock-exchange-notices/2011/n0511.pdf>

Market abuse: Code of Market Conduct amended to remove evidential requirement of intent following decision of the European Court of Justice

The Code of Market Conduct has been amended, with effect from 6 March 2011, by the deletion of MAR 1.3.4E. *For details, [click here](#)*

Prospectus Directive: early implementation of amending provisions to facilitate access to equity finance: Government launches consultation

As previously reported⁴, the Government has already announced its plans to implement certain provisions of the Directive⁵ which amends the Prospectus Directive and the Transparency Directive (the Amending Directive) in advance of the implementation deadline of 1 July 2012.

The Amending Directive includes provisions which place a greater emphasis on the importance of the summary of a prospectus as a source of key information for retail investors when making investment decisions and contains amendments both as to the content of the summary and the liability that attaches to it. It also introduces reduced requirements for rights issues and relaxes the rules regarding the publication of a prospectus.

On 17 March 2011, the Government launched a consultation on the early implementation of the two following amendments to the Prospectus Directive in order to help business, especially small and medium sized enterprises, access equity finance:

- the provision that the threshold for an offer of securities for which a prospectus is required will be raised from EUR2.5m to EUR5m (such figure being the total consideration of the offer in the EU calculated over a period of 12 months); and
- the provision that a prospectus will not be required for offers addressed to less than 150 persons per member state. This exemption is currently applies to offers addressed to less than 100 persons per member state.

Comments requested by 9 June 2011. The Government's aim is that the above two amending provisions will come into force later this summer.

HM Treasury: Consultation on early implementation of amendments to the Prospectus Directive available at: http://www.hm-treasury.gov.uk/d/consult_early_implementation_amendpd.pdf

Directive 2010/73/EU available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:327:0001:0012:EN:PDF>

⁴ Capital Markets Practice News round-up: issue no. 1/2011

⁵ 2010/73/EU

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.

JANE HAXBY

PARTNER: CORPORATE/CORPORATE FINANCE

T: +44 (0)161 830 5144

F: +44 (0)870 460 2753

E: jane.haxby@ssd.com

STEVEN GLOVER

PARTNER: CORPORATE/CORPORATE FINANCE

T: +44 (0)113 284 7476

F: +44 (0)870 460 3473

E: steven.glover@ssd.com

GILES DISTIN

PARTNER: CORPORATE/CORPORATE FINANCE

T: +44 (0)20 7655 1046

F: +44 (0)870 460 2939

E: giles.distin@ssd.com

CHRISTIAN LOWIS

PARTNER: CORPORATE/CORPORATE FINANCE

T: +44 (0)121 222 3369

F: +44 (0)870 458 2712

E: christian.lowis@ssd.com


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The aim of the Guidance is to help companies apply the principles of the UK Corporate Governance Code (the Code), in particular sections A (leadership) and B (effectiveness), and to provoke thought on how boards could perform their role more effectively.

The Guidance is not intended to be prescriptive and reflects the changes made by the Code in 2010 including the greater emphasis now placed on the role of the chairman and the importance of having the right balance on the board. The Guidance deals, among other things, with the respective roles of the chairman, the senior independent director, the executive and non-executive directors and the company secretary. It covers decision making policies and processes as well as the questions of board composition and succession planning and the evaluation of the performance of the board and the directors. Although the main focus of the Guidance is on sections A and B of the Code, it also covers audit, risk and remuneration and relations with shareholders. It does not, however, include the sections contained in the draft guidance¹ relating to the establishment and maintenance of the directors' skills base.

FRC Guidance on Board Effectiveness available at: <http://www.frc.org.uk/images/uploaded/documents/Guidance%20on%20board%20effectiveness%20FINAL5.pdf>

¹ Prepared by the Institute of Chartered Secretaries and Administrators on behalf of the FRC and published for consultation in July last year.




Key recommendations include:

- FTSE 350 companies: by September 2011, all chairmen to announce the percentage of women they aim to have on their boards in 2013 and 2015. FTSE 100 companies should aim for a minimum of 25% of female board representation by 2015¹.
- Quoted companies: to disclose each year:
 - the proportion of women they have on their board
 - the number of women in senior executive positions in the company
 - the number of women employees in the whole organisation.
- UK Corporate Governance Code (the Code): the FRC should amend the Code to require listed companies:
 - to establish a policy on boardroom diversity, including measurable objectives for implementing the policy; and
 - to disclose a summary of the policy annually, together with details of the progress made in reaching the objectives.
 - The FRC has announced that it will undertake a consultation process in light of the report's recommendations.
- Companies to report on the matters referred to in all the above recommendations in their 2012 Corporate Governance Statement whether or not the underlying regulatory changes have been made.
- Companies to periodically advertise non-executive board positions to encourage greater diversity in applications.
- Investors: to have regard to a number of the report's recommendations when considering company reporting and board appointments.

'Women on boards': Lord Davies' review: February 2011 available at: <http://www.bis.gov.uk/assets/biscore/business-law/docs/w/11-745-women-on-boards.pdf>

FRC press release: Financial Reporting Council to consult on getting more Women into the Boardroom: FRC PN 322 available at: <http://www.frc.org.uk/press/pub2521.html>


¹ The current proportion of board positions held by women in FTSE 100 companies is 12.5%. The Davies report recommends that the target for all new board appointments for FTSE 100 companies as from March 2011 be in the ratio two-thirds male to one-third female and applies the same target for FTSE 250 companies.



The FRRP's questions include the following:

- whether the disclosures identify clearly which are the principal risks and uncertainties facing the business;
- whether the description of each principal risk and uncertainty is sufficiently clear for shareholders to understand the nature of the risk or uncertainty and its impact on the company; and
- whether there is a description in the report and accounts of how the company manages each of its principal risks and uncertainties.

FRRP press release, The Financial Reporting Review Panel highlights challenges in the reporting of principal risks and uncertainties: FRRP PN 130, available at: <http://www.frc.org.uk/frp/press/pub2503.html>



The amendment follows a decision of the European Court of Justice (ECJ) in December 2009 in a case¹ concerning the interpretation of the expression 'use of inside information' in Article 2(1) of the Market Abuse Directive (2003/6/EC). The ECJ ruled that, where a person with inside information deals in securities to which the information relates, it will not be necessary to show that there was any intent to use the inside information as the basis of the trades in order to establish that insider dealing has taken place.

Section 118(2) of the Financial Services Markets Act 2000, implementing Article 2 of the Market Abuse Directive, requires that an insider deals "on the basis of" the inside information for insider dealing to have occurred. MAR 1.3.4E reflected the FSA's opinion that if the inside information was the reason for, or a material influence on, the decision to deal that indicated that the person's behaviour was 'on the basis of' inside information.

Following the decision of the ECJ, the FSA no longer considers it necessary to show evidence of intention in order to prove market abuse in the form of insider dealing. Its quarterly consultation paper, CP10/22, proposed that MAR 1.3.4E (which in its view suggested that the FSA would need evidence of a person's intention as a separate element in a case to prove insider dealing) be deleted from the Code of Market Conduct. FSA Handbook Notice 107, published on 25 February 2011, confirmed that the deletion would take effect on 6 March 2011.²

The FSA has confirmed its view that the language of section 118(2) is consistent with the ECJ's decision and that, accordingly, there will be no amendments to FSMA.

FSA Handbook Notice 107 available at: http://www.fsa.gov.uk/pubs/handbook/hb_notice107.pdf

Market Conduct Sourcebook (Amendment No. 10) Instrument 2011 (FSA 2011/9) available at: http://fsahandbook.info/FSA/handbook/LI/2011/2011_9.pdf

¹ Spector Photo Group NV, Chris Van Raemdonck v Commissie voor het Bank, Financie- en Assurantiewezen (CBFA) C-45/08

² Deletion effected by Market Conduct Sourcebook (Amendment No 10) Instrument 2011 (FSA 2011/9).