

### 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 changes to the Takeover Code, as well as of developments relating to the new regime for executive remuneration.

### Takeover Panel: the jurisdiction of the Takeover Panel is to be extended with effect from 30 September 2013

Significant changes to the Takeover Code ('the Code'), announced recently in Takeover Panel Statement 2013/6, will extend the jurisdiction of the Takeover Panel by the partial removal of the so-called 'residency test' for companies with registered offices in the United Kingdom, the Channel Islands or the Isle of Man. The changes also simplify the rules relating to the Code's applicability to private companies. The new regime will come into force on 30 September 2013. It will apply as from that date to all companies and transactions falling within its extended remit, including on-going transactions.

The changes mean that, as from 30 September 2013:

- the Code will apply to all companies with registered offices in the United Kingdom, the Channel Islands or the Isle of Man ('the Relevant Jurisdictions') which are listed on AIM or on another multi-lateral trading facility, such as the ISDX Growth Market, operating in the Relevant Jurisdictions, irrespective of the location of the company's place of central management and control. Accordingly, many AIM listed companies not currently subject to the Code because their place of central management or control is outside the Relevant Jurisdictions will shortly find themselves within the jurisdiction of the Code;
- the Code will continue to apply to those companies listed on a regulated market in the UK (e.g. the main market of the London Stock Exchange or the ISDX Main Board) or on a Channel Islands or Isle of Man stock exchange (e.g. CISX) which have their registered offices in the Relevant Jurisdictions;
- the Code will apply to private companies with registered offices in the Relevant Jurisdictions, if:
  - their place of central management and control is based in one of the Relevant Jurisdictions; and
  - they have publicly marketed their shares in one of the Relevant Jurisdictions (for example, on the main market of the London Stock Exchange or AIM) in the previous 10 years; and
- it will apply to public companies with registered offices in the Relevant Jurisdictions which are not listed on an exchange or multi-lateral trading facility in the Relevant Jurisdictions or, in the case of UK companies only, on an EEA regulated market (for example, if they are listed only on the New York Stock Exchange or are not listed anywhere) if their place of central management and control is based in one of the Relevant Jurisdictions.

Complex issues may arise for shareholders (and other holders of interests in shares) who already have convertible positions in listed companies which only become subject to the Code for the first time on 30 September 2013. If such convertibles were exercised, the resultant shares could take such substantial interest holders through a 30% interest threshold and might, in theory, under the new rules, trigger a requirement for a mandatory ('Rule 9') cash bid. The Takeover Panel, however, considers that there may be various mechanisms which could be used in such circumstances to avoid a mandatory bid being triggered and recommends early discussions with the Panel if such circumstances may arise.

Panel Statement 2013/6, 15 May 2013 - Code Committee-Companies subject to the Takeover Code: Publication of RS 2012/3 available at: [http://www.thetakeoverpanel.org.uk/publication/20136-code-committee-companies-subject-to-the-takeover-code-publication-of-rs-20123/wppa\\_open](http://www.thetakeoverpanel.org.uk/publication/20136-code-committee-companies-subject-to-the-takeover-code-publication-of-rs-20123/wppa_open)

There are certain areas of the Takeover Panel's jurisdiction which are not listed above but which are explained in RS 2012/3, 15 May 2013, available at: <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/RS201203.pdf>

### Corporate governance: executive pay: the new regime for the remuneration of directors of quoted companies: the new-look directors' remuneration report

In the May 2013 edition of this publication, we reported on The Enterprise and Regulatory Reform Act 2013 which introduces the new, much-publicised, regime relating to the remuneration of directors of quoted companies. The changes, which give shareholders a binding vote on executive pay, will apply to the first directors' remuneration report to be published during the company's first financial year beginning on or after 1 October 2013.

To recap: major changes made by the new regime include the following:

- the directors' remuneration report must include a new, separate, section containing details of the company's forward-looking remuneration policy;
- the remuneration policy must be approved by an ordinary resolution of the company's shareholders at least every three years;
- subject to any transitional provisions, no payment for remuneration or loss of office may be made by the company to a director unless the payment conforms to the most recently approved remuneration policy, or has been specifically approved by the company's shareholders; and

- any directors who authorise the company to make a payment to a director that does not conform with approved policy will be potentially liable for any loss suffered by the company.

Under the new system, the remuneration report will continue to include a backward-looking implementation report which will remain subject to an annual advisory vote by shareholders.

Draft regulations, The Large and Medium-sized Companies and Groups (Accounts and Reports) (Amendment) Regulations 2013 ("the Regulations"), contain details of the proposed form and content of the directors' remuneration report with a view to improving standards of remuneration reporting. The Government issued a draft of the Regulations for consultation in March of this year and has recently laid the final, revised, draft Regulations before Parliament. The Regulations are subject to Parliamentary approval, but cannot now be amended, and it is likely that the Parliamentary process will be completed before the summer recess.

In brief, the Regulations provide that the new-look directors' remuneration report must include the following:

- an annual statement from the chair of the remuneration committee: this should summarize the major decisions on directors' remuneration and any substantial changes made during the year, together with details of the context of the committee's decisions;
- the company's forward looking-remuneration policy: this should include:
  - a future remuneration policy table;
  - an illustration of the application of that policy to the directors;
  - the company's policy on payment for loss of office;
  - a statement regarding factors taken into account in deciding policy; and
  - the views of shareholders in the formation of the policy.

The policy section need only be included in the report at three-yearly intervals unless circumstances demand otherwise (for example, on a change of policy in the interim); and

- an annual report on the implementation of the company's remuneration policy: this should include:
  - a 'single total figure' table of remuneration for every person who was a director during the relevant financial year;
  - details of awards made during the year under long-term incentive plans;
  - a summary of the directors' interests in shares;
  - the percentage change in the remuneration of the chief executive officer;
  - details of the members of the remuneration committee and the committee's advisers;
  - the results of shareholder voting on the directors' remuneration report or policy at the last general meeting of the company; and
  - a statement on how the company's policy will be implemented in the following year.

It is of the utmost importance for companies to ensure that all necessary steps are taken for the first binding vote to be passed so that a workable remuneration policy is put in place at the earliest opportunity.

The final draft Large and Medium-sized Companies and Groups (Accounts and Reports) (Amendment) Regulations 2013 are available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/208289/bis-13-963-draft-large-and-medium-sized-companies-amendment-regulations-2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/208289/bis-13-963-draft-large-and-medium-sized-companies-amendment-regulations-2013.pdf)

### **Corporate governance: auditors: changes to the UK's corporate governance regime announced by the FRC aim to make the auditors' report more transparent for investors**

On 4 June 2013, the Financial Reporting Council ('FRC') introduced a significant change to the UK's corporate governance regime with the publication of revised auditing standards to enhance the transparency of the audit report. The revisions to ISA 700 (UK and Ireland) ('The Independent Auditor's Report on Financial Statements') require auditors reporting on companies which apply the UK Corporate Governance Code ('the Code') to explain more about their work by:

- providing an overview of the scope of the audit, showing how the audit addressed the risk and materiality considerations;
- describing the risks that had the greatest effect on:
  - the company's overall audit strategy;
  - the allocation of resources in the audit; and
  - directing the efforts of the engagement team; and
- providing an explanation of how they applied the concept of materiality in planning and performing the audit.

The new regime, which will apply for audits of financial statements for periods beginning on or after 1 October 2012, complements the changes made to the Code and ISAs (UK and Ireland) in the autumn of last year which require:

- the auditor to inform the audit committee about significant audit judgments;
- audit committees to report on their activities to the board;
- boards to describe the work of the audit committee in the annual report; and
- the auditor to report if the board's disclosures do not address the matters communicated by the auditor to the audit committee.

FRC Press Release PN 053 dated 04/06/2013, with links to ISA 700 (UK and Ireland) 700 (Revised) and an example of an auditor's report illustrating how the revised version of ISA (UK and Ireland) 700 might be implemented, available at: <http://frc.org.uk/News-and-Events/FRC-Press/Press/2013/June/FRC-issues-revised-auditing-standard-Making-audit.aspx>

### **Corporate governance: narrative reporting: changes to the regime to require quoted companies to make additional disclosures on human rights, gender representation and greenhouse gas emissions are to come into force for financial years ending on or after 30 September 2013**

Following its consultation on amendments to the form and content of a company's non-financial annual reports, the Government has now published (on 12 June 2013) a revised draft of the secondary legislation which will introduce the new regime: The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013. To recap: the main change proposed by the Government, which is applicable to all companies, is the introduction of a 'strategic report' in place of the existing 'business review'. Quoted companies will be required to make additional disclosures regarding human rights issues, gender representation within the company and greenhouse gas emissions<sup>1</sup>. The new regime will apply to reports produced in relation to financial years ending on or after 30 September 2013.

The latest version of The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 is available at: <http://www.legislation.gov.uk/ukdsi/2013/9780111540169/contents>

### **Corporate governance: risk management reporting: ICSA and Airmic to urge the FRC to tighten up the rules on risk management reporting**

In light of their joint report on risk management reporting, which was published on 11 June 2013, the Institute of Chartered Secretaries and Administrators ('ICSA') and Airmic<sup>2</sup> now plan to urge the Financial Reporting Council ('FRC') to tighten up the rules in this area when it up-dates the UK Corporate Governance Code later this year. The report is based on Airmic's review of the risk management reporting practices adopted by 24 companies, three each from the eight main industrial sectors, with two thirds of the companies reviewed being in the FTSE 100 and the remainder in the FTSE 250. The report, which also high-lights good practice, reveals a wide disparity in the quality of risk reporting and notes that many companies treat risk management reporting in isolation and not in the wider context of overall corporate strategy.

Report on Risk Reporting available at: <http://www.airmic.com/report/risk-reporting>

### **Cybercrime: ICSA launches a Guidance Note on Cyber Risk amid warnings of the perils to British business of cybercrime**

On 7 June 2013, the Institute of Chartered Secretaries and Administrators ('ICSA') published a Guidance Note on Cyber Risk amid warnings of the prevalence and impact of cybercrime on British business. The Guidance Note urges UK companies to treat the risk of this type of crime as a matter of priority, and recommends, among other things, that boards:

- understand the cyber risks particular to the company;
- assess the company's cyber risk across the entire organization;
- analyse the risks posed by the company's third party providers and suppliers;
- allocate a budget for the prevention of cybercrime; and
- seek to build resilience to attacks that manage to get through the system.

ICSA Guidance Note on Cyber Risk available at: [www.icsaglobal.com/getting-wise-to-cyber-crime](http://www.icsaglobal.com/getting-wise-to-cyber-crime)

### **Prospectuses: ESMA publishes a revised version of its document: 'Prospectuses: Questions and Answers'**

On 23 May 2013, the European Securities and Markets Authority ('ESMA') published the nineteenth version of its document 'Prospectuses: Questions and Answers' (the 'Q and As'). The Q and As seek to promote common supervisory approaches and practices in the application of the Prospectus Directive 2003/71/EC ('PD') and its implementing measures without the need to introduce an additional layer of requirements and are aimed at:

- competent authorities under the PD;
- market participants; and
- issuers of securities.

ESMA: 'Prospectuses: Questions and Answers': 19th edition available at: [http://www.esma.europa.eu/system/files/2013-594\\_19th\\_version\\_qa\\_document\\_prospectus\\_related\\_issues\\_may\\_2013.pdf](http://www.esma.europa.eu/system/files/2013-594_19th_version_qa_document_prospectus_related_issues_may_2013.pdf)

<sup>1</sup> On 13 June 2013, the Government published guidelines to help companies comply with their greenhouse gas reporting obligations under the new rules. The guidelines are available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/206392/pb13944-env-reporting-guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206392/pb13944-env-reporting-guidance.pdf)

<sup>2</sup> Airmic is a UK-based organization representing risk managers and buyers of commercial insurance. Members include 75% of FTSE 100 companies.

## **Prospectus Directive: ESMA has published a report containing a comparison of the various national liability regimes in relation to the Prospectus Directive**

On 10 June 2013, the European Securities and Markets Authority ('ESMA') published a report containing a comparison of the various national liability regimes applied in relation to the Prospectus Directive. The report includes an overview of the framework in each member state and describes the administrative, criminal, civil and governmental liability for breaches of the national legislation which implements and transposes the Prospectus Directive and the Prospectus Regulation. The Report, which aims principally to help the European Commission identify and monitor the different regimes, also helps clarify the various liability regimes for the benefit of market participants.

Report: Comparison of liability regimes in member states in relation to the Prospectus Directive available at: [http://www.esma.europa.eu/system/files/2013-619\\_report\\_liability\\_regimes\\_under\\_the\\_prospectus\\_directive\\_published\\_on\\_website.pdf](http://www.esma.europa.eu/system/files/2013-619_report_liability_regimes_under_the_prospectus_directive_published_on_website.pdf)

### **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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