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UK Corporate Update.

MAR: FCA publishes rule changes

The Financial Conduct Authority has published changes to its handbook which confirm how UK listed companies will be expected to comply with the new EU Market Abuse Regulation from July. The FCA's publication gives the market a lot more clarity, although there remains a number of outstanding questions.

The key points from the FCA's paper are as follows.

- the Model Code will be deleted completely and previous proposals to introduce an obligation to have a dealing clearance process for PDMRs have been dropped. An industry-led dealing code may be introduced. Many issuers will continue to have an internal dealing code in practice and will be free to do so;
- the FCA has not resolved the issue of the disconnect between closed periods under MAR and the UK practice of issuing preliminary announcements;
- a threshold of €5000 will apply to notifications of PDMR dealings, but issuers may effectively ignore this de minimis threshold and notify all transactions if they wish (as many issuers have indicated they would prefer to do);
- LR 9.2.7, which prevents an issuer dealing in its own securities during a prohibited period, is being removed (but the impact of that is unclear);
- LR 12.2, which prevents share buyback programmes during prohibited periods other than through a pre-arranged broker programme, is being deleted. This does not mean that issuers can freely buy back shares at these times and the practice of appointing a broker to manage such programmes independently is likely to continue; and

Click here for a full briefing. A UK director's guide to the inside information and dealing rules has also been prepared..

In this issue

MAR: changes to AIM Rules

Amendments to the AIM Rules for Companies are now open for consultation. The changes proposed by the London Stock Exchange are to accommodate the Market Abuse Regulation which comes into effect on 3 July 2016.

The main changes proposed include:

AIM Rule 11 (general disclosure of price sensitive information) – the rule will be kept in place but the related guidance note will be amended to make clear that the rule is not intended to replicate MAR but to ensure a fair and orderly market where all users of the market have simultaneous access to the same information to make investment decisions;

AIM Rule 17 (disclosure of miscellaneous information) – deletion of the need to disclose directors' dealings in the AIM company's securities. This will be covered by Article 19 of MAR; and

AIM Rule 21 (restriction on dealing) – deletion of the current rule which restricts dealing during close periods. The rule will be replaced with a new AIM Rule 21 which will require AIM companies to have a reasonable and effective dealing policy in place from admission. Existing companies will need to update their existing policies by 3 July 2016.

The consultation will be open until 12 May 2016.

Click here for AIM Notice 44.

Click here for the proposed changes to the AIM Rules for Companies.

AIM companies prepare for MAR

The London Stock Exchange has published an edition of Inside AIM to support nominated advisers who are preparing their clients for the implementation of the Market Abuse Regulation. The publication essentially provides further detail behind the changes proposed to the AIM Rules in AIM Notice 44 (see above).

- **AIM Rule 11** (general disclosure of price sensitive information) – it is proposed that this rule will be kept in place. Inside AIM recognises the overlap between AIM Rule 11 and Article 17 MAR (public disclosure of inside information) but states that the rules should be considered separately. Whereas the aim of Article 17 is to protect investors from market abuse, the purpose of AIM Rule 11 is to maintain a fair and orderly market. Consideration of the two rules will not necessarily lead to the same result. AIM companies must comply with both rules and must keep in mind that compliance with one does not guarantee compliance with the other. For example, the ability to delay the publication of inside information under MAR would not override an obligation to disclose under AIM Rule 11.
- **AIM Rule 17** (disclosure of miscellaneous information) – it is proposed that this rule will be deleted regarding the need to disclose directors' dealings in the AIM company's securities. **AIM Rule 21**

(restriction on dealing) – it is proposed that this rule, restricting dealing during close periods, will be deleted. Both areas will be covered by Article 19 MAR. However, a new AIM Rule 21 will require AIM companies to have a reasonable and effective dealing policy in place from admission. Existing AIM companies will need to update their existing policies by 3 July 2016. Inside AIM states that the LSE does not intend to prescribe the detailed content of the dealing policy but AIM companies and advisers must ensure that the policy is capable of working in practice. The obligation to have such a policy in place will be separate to the AIM company's compliance with Article 19 MAR, so compliance with Article 19 does not mean that the obligation under AIM Rule 21 will be satisfied.

- Inside AIM also highlights the need, following the implementation of MAR, to implement systems and controls to comply with the rules on insider lists under Article 18 MAR.

FCA proposes changes to the IPO process

The FCA has published a Discussion Paper (DP 16/3) on IPO process reform as part of its investment banking market review.

In the Discussion Paper, the FCA acknowledges that despite industry pressure to reform the IPO process (including around blackout periods), there has been no change to market practice and that this suggests that individual firms are unlikely to make changes without regulatory intervention. The paper explores potential avenues for reform, including amendments to the regulatory framework and is intended to be a stimulus for debate. If implemented, the proposals could have a significant impact on an IPO timetable.

The FCA's stated aim is to: (1) restore the prospectus as the central document in the IPO process by requiring or encouraging a re-sequencing of the process to reduce the reliance placed on connected research to inform investor decisions; (2) foster high standards of market conduct, in particular with respect to connected research; and (3) encourage more unconnected research during the IPO process where there is demand for it, whilst avoiding unnecessary intrusion on established market practice. To this end, the FCA has put forward three possible alternative models to frame their discussion with market participants. The FCA is clear that the options have been presented to stimulate debate on possible improvements and are not definitive proposals for reform.

The suggested models are:

- Requiring a blackout on connected research until 7 days after an approved prospectus is published (by "approved prospectus" the FCA also references the registration document part of the prospectus, for example if the prospectus is split following the French example); or

- Opening any analyst presentation to unconnected research analysts and requiring a blackout on connected research until 7 days after publication of an approved prospectus; or
- Opening any analyst presentation to unconnected analysts and prohibiting such a meeting from taking place before publication of an approved prospectus.

The FCA also raises concerns around analysts' involvement in the "private" phase of an IPO (which they define as prior to formation of the syndicate) and specifically references conduct in meetings between analysts and the issuer's management that occur before a mandate has been awarded and which constitute part of the investment banks' pitch. Corporate finance advisers are reminded of their obligations under the FCA rules. Market participants are asked to respond with views on whether they have any concerns with how conflicts are managed during the pitch process and, if so, how this could be improved (including whether "clarification of the FCA's expectations in this area" would be helpful).

The FCA has also published an Occasional Paper considering the IPO allocation process.

UKLA procedural and technical notes to be amended

In Primary Market Bulletin 13 the UKLA proposes amendments to certain procedural and technical notes, as a result of the Omnibus II Commission Delegated Regulation (EU) No. 2016/301, which establishes regulatory technical standards with respect to the approval and publication of prospectuses (among other things) and came into force on 24 March 2016.

It also proposes amendments affecting sponsors and new technical notes relating to reverse takeovers and early shareholder votes on possible transactions.

Amendments relating to prospectus approval and publication

UKLA/PN/901.3 - Eligibility process

The procedural note is amended to state that eligibility letters should be sent as soon as a draft prospectus (rather than a substantially complete draft prospectus) is ready.

UKLA/PN/903.3 - Review and approval of documents

The procedural note is amended so the procedure for the approval of prospectuses and listing particulars is dealt with separately from the process to approval circulars (which are unaffected by the RTS).

UKLA/PN/904.3 - Public offer prospectus – drafting and approval

The section of the procedural note covering submission of an initial draft prospectus is amended to include, among other things, the need to submit information incorporated by reference in the prospectus which has not been previously approved by, or filed with, the FCA. In addition, if an issuer is seeking permission to omit information from a prospectus it must also include a reasoned request with the initial draft prospectus.

UKLA/PN/905.2 – Passporting

The procedural note is amended to state that if, at the time the first draft of the prospectus is submitted, the issuer knows that it will want to passport the approved prospectus, it should submit the request at the same time as the initial draft in searchable electronic format.

UKLA/TN/604.2 - PD Advertisement regime

The technical note is amended to refer to the RTS.

Changes affecting sponsors

PMB 13 also includes amendments to the knowledge base that affect sponsors specifically.

UKLA/PN/910.2 - Additional powers to supervise sponsors and UKLA/TN/712.2 - Additional powers to supervise and discipline sponsors

Under the Financial Services and Markets Act 2000, the UKLA has competition law powers, including powers under the Competition Act 1998 in relation to agreements and conduct relating to the provision of financial services (which includes the provision of sponsor services). The UKLA is bound by statutory provisions to give 'primacy' to CA98 enforcement in certain situations. These notes have been updated to reflect this.

UKLA/TN/713.1 - Sponsors: Application of principle to deal with the FCA in an open and co-operative manner

This note is the subject of re-consultation, as the guidance given has been expanded.

UKLA/TN/717.1 - Sponsors: Record Keeping Requirements

This proposed technical note provides additional guidance on the application of the record keeping requirements in LR8.6.16AR

Proposed new technical notes

The UKLA is also consulting on a number of new technical notes. These include:

UKLA/TN/312.1 – Shareholder votes in relation to hypothetical transactions

The UKLA has noted a trend for premium-listed issuers to produce circulars that are required for voting purposes at a particularly early stage, when key terms of a transaction are outstanding. The proposed new technical note cautions that for premium listed issuers, it may not be possible to obtain a vote at such an early stage, if the issuer is unable to produce a Listing Rule compliant circular.

UKLA/TN/314.1 - Reverse takeovers and uncapped consideration

This proposed new technical note states that reverse takeovers are subject to the rule, in LR 10 annex 1.1 5R (3), that if the transaction involves uncapped consideration it will be treated as a class 1 transaction when the class tests indicate that it would otherwise be class 2.

The consultation period closes on 10 May 2016.

PRA tells boards of financial institutions how to avoid failure

The Prudential Regulation Authority has published its final supervisory statement on the collective responsibilities shared by board members (SS5/16) in a policy statement (PS13/6) which also sets out responses to its May 2015 consultation on board responsibilities (CP18/15).

The PRA emphasises the importance of the board in keeping financial institutions safe and sound and avoiding failure. The purpose of the supervisory statement is to identify for regulated firms (including banks, insurers, designated investment firms, building societies, friendly societies and credit unions) those aspects of governance to which the PRA attaches particular importance and to which the PRA may devote particular attention in the course of its supervision. It is not intended to provide a comprehensive guide to good or effective governance, as the PRA points out that there are more general guidelines for that purpose, such as the UK Corporate Governance Code.

As set out in its approach documents, the PRA expects boards and managers of regulated firms to run the business prudently, consistent with the firm's own safety and soundness and the continuing stability of the financial system. The firm's strategy should be owned by the board as a whole and there should be a culture of risk awareness and ethical behaviour, with effective oversight of risk. The principles of good governance should apply to all boards and non-executive directors are urged to provide challenge and relevant expertise, whilst executives should make sure that management is open and transparent with the board. The supervisory statement underscores the collective responsibility of the board and that this is expected to complement the additional individual responsibilities introduced through the Senior Managers and Senior Insurance Managers Regimes.

The PRA acknowledges that governance models may differ according to the nature and size of a firm and that expectations of boards should be proportionate as well. The PRA's expectations of boards will also be influenced by the recovery and resolution strategies for the firm or the group.

To provide greater clarity about the scope of the commentary on subsidiary boards and in line with the terminology used elsewhere the PRA now refers to "significant" rather than "material" subsidiaries. The principles of good governance are expected to apply to significant PRA-regulated subsidiaries to help ensure the subsidiary board is alert to possible conflicts of interest and able to take independent action to meet its own legal and governance responsibilities or in the interests of the safety and soundness of the subsidiary.

Capitalisation and indebtedness statement – reflection of recent or future changes

The European Securities and Markets Authority has published an updated version of its prospectus Q&As. This states that capitalisation and indebtedness statements may include an additional column to reflect recent or future material changes. The additional column must be consistent with pro forma financial information set out elsewhere in the prospectus (if required) and be understandable.

Recent changes

If a recent change has triggered the requirement to include pro forma financial information an additional column can included in the capitalisation and indebtedness statement. It should be consistent with the pro forma financial information presented elsewhere in the prospectus. Adjustments may be explained by referring to that pro forma financial information.

If the change is complex but does not necessitate the inclusion of pro forma financial information, such information can still be prepared on a voluntary basis and the additional column can be included in the capitalisation and indebtedness statement as set out above. If an issuer does not wish to prepare pro forma financial information an additional column may still be included in the statement as long as it is comprehensible and easily analysable.

Where the change is straight forward and there is no requirement to prepare pro forma financial information, the inclusion of an extra column is usually allowed.

Future changes

If a future material change triggers the requirement to include pro forma financial information an additional column can included in the capitalisation and indebtedness statement. It should be consistent with the pro forma financial information presented elsewhere in the prospectus. Adjustments may be explained by referring to that pro forma financial information.

Presentation of any potential future change must be factually supportable. If the future outcome is uncertain presenting an additional column reflecting the potential outcome may endanger the comprehensibility and analysability of the prospectus and is therefore normally not allowed.

Directors details and registered offices – new regulations in force

Two sets of regulations, made under the Small Business Enterprise and Employment Act 2015, which amend the Companies Act 2006 came into force on 6 April.

Registrar of Companies and Applications for Striking Off (Amendment) Regulations 2016 - the regulations will amend section 1095 of the Companies Act 2006 to ensure that an application to take a director's details off the register, made by or on behalf of the person named on the register, can only be stopped where the company provides sufficient evidence to show that a person did in fact consent to be a director. An objection will no longer prevent removal of material from the register naming a person as a director.

Companies (Address of Registered Office) Regulations 2016 - the regulations, with new section 1097A of the Companies Act 2006 (Rectification of register relating to company registered office), will introduce a new procedure to allow the registrar of companies to change the registered office of a company or limited liability partnership where, following an application by any person, the registrar considers that the entity is not authorised to use that address. If the entity fails to provide adequate evidence that it is entitled to use the address, the registrar must change the address of the registered office to a default address (a PO Box at Companies House).

EU Referendum: guidance on referendum expenditure

The official referendum period started on Friday 15 April and runs until the date of the referendum on 23 June. The Electoral Commission and the Government have published guidance for organisations on whether spending on common activities counts as "referendum expenditure". Referendum expenditure needs to be monitored because it is an offence for companies and other organisations to spend more than £10,000 without registering with the Electoral Commission.

Campaigning only takes place when an activity is intended to or otherwise in connection with promoting or bringing about a particular referendum outcome. The guidance acknowledges that many activities will not meet the test for referendum spending as business as usual activities are not generally aimed at voters and may not favour one outcome over another. Nevertheless, as activities may form part of a wider engagement in the referendum, organisations are advised to consider whether associated spending may be caught by the rules.

In summary, whilst annual reports and professional advice provided to clients are unlikely to fall within the spending rules, companies will need to be more careful if preparing research reports or risk analysis, organising referendum events and carrying out any polls or surveys. More detail of what the guidance says about specific activities is set out below.

1. Annual reports – The guidance notes that a discussion of the risks associated with the referendum in a company's annual report is unlikely to be intended to promote one side of the debate. If the risks of a particular outcome are described as part of a commentary in relation to the wider context in which the organisation will be operating, this will not be referendum campaigning. However, if the commentary is intended to influence voting choice by expressing a view on an outcome, this is likely to be referendum campaign.

2. Professional advice provided to clients – Professional advice which concerns the referendum is unlikely to count as campaigning where given in a professional capacity to clients as part of an organisation's service to them, rather than to them as voters.

3. Research reports or risk analysis about the impact of the EU referendum – Organisations may incur referendum expenditure if comparing the two outcomes or making a value judgement as to which outcome should be preferred. The use of positive or negative language rather than a neutral, objective tone also makes the spending more likely to fall within the spending rules. Organisations are also advised to consider the intended audience for the report (i.e. is it a professional audience or is the report promoted more widely on a website or to the media which suggests an intention to influence the wider voting public). If the report forms part of a wider campaign by an organisation to promote one side of the referendum debate, then it is more likely to be referendum spending.

4. Events about the referendum – Events caught by the referendum spending rules may include, for example, those which invite a politician or business or sector leader that supports one side of the outcome to speak about the referendum and the impact of the vote. If, however, the event has speakers to represent both sides of the outcome and allows all those attending an equal opportunity to participate, so that the event is not intended to promote or otherwise bring about a particular outcome, then spending on the event is unlikely to be referendum spending. Events held to plan for what a company will do in the event of a particular outcome may not be referendum spending. If the event makes a value judgement as to which outcome is preferred, then the spending is more likely to be referendum spending.

5. Surveys or polls – Money spent on polls or surveys of the public or of an organisation's members to ascertain their views on the referendum may count as referendum spending if, for example, a survey asks leading questions with the aim of obtaining a particular result - this will suggest that the survey intends to influence how people vote and to promote a particular outcome. If a survey gathers information which is then used to promote an outcome, this will be referendum spending. If the survey results remain internal to the organisation, the costs of the survey are not likely to be referendum spending. Publishing the results of the survey more widely, or using it as part of a campaign makes any expenditure incurred more likely to be referendum spending.

Further information for companies was issued by the Cabinet to be read alongside the guidance issued by the Electoral Commission. It is intended as a practical aid and expands on the existing guidance by providing answers to specific queries about:

- communicating the company's views on the referendum to its staff and to the press;
- discussions of the benefits/risks of staying in or leaving the EU in a company's annual report and whether a company can say in the annual report whether it thinks the UK should remain or leave;
- discussion of the referendum decision at company AGMs;
- advice to financial services clients and the publication of research on the implications of Brexit;

- hosting government ministers and campaign representatives during the referendum period to speak on Brexit and non-Brexit related matters; and
- using a company site to host a public meeting or industry event on the referendum.

For a copy of the Electoral Commission guidance click here . For a copy of the Cabinet’s Q&A guidance click here. For our guide to the EU referendum spending and funding rules click here.

Smaller related party transactions- change to Technical note

The FCA is consulting on proposed changes to Technical Note 308.2, Related party transactions – Modified requirements for smaller related party transactions.

The note sets out the requirements for the written confirmation from sponsors confirming that the smaller related party transaction is fair, just and reasonable. Currently the note states that sponsors will need to have discussions with the FCA about the substance of the transaction to be entered into and its classification. The proposed changes state that there will only need to be discussions “where necessary, if the sponsor questions the correct classification” of the transaction.

This consultation is set out in Primary Market Bulletin 14 and closes on 8 June 2016.

FRC confirms changes to role and composition of audit committees to reflect EU audit law

The FRC has published revised versions of the UK Corporate Governance Code and its Guidance on Audit Committees. It has also published a new consolidated Ethical Standard for Auditors and revised Auditing Standards. These changes follow its September 2015 consultation to implement EU legislation on statutory audit, including Regulation 537/2014 and the Order and recommendations of the Competition and Markets Authority following the Competition Commission's review of the FTSE 350 audit market.

The changes take effect for financial periods commencing on or after 17 June 2016.

The FRC has committed to avoid making further updates to the Code until at least 2019.

UK Corporate Governance Code

Provision C3.1 has been amended to require the audit committee to have competence relative to the sector in which its company operates. However, the FRC has decided not to change the Provision to require the audit committee to have “competence in accounting and/or auditing” and is retaining the current formulation for at least one member of the audit committee to have “recent and relevant financial experience”. It considers this to be more flexible. Whilst this deviates from the Audit Regulation, the FRC and FCA take the view that DTR 7.1 sets the basic standard and the Code provides guidance on good practice.

There are also a couple of other minor changes from the version of the Code on which the FRC consulted:

The statement in Provision C3.7 that the audit committee should have primary responsibility for making a recommendation on the appointment, reappointment and removal of the external auditors has been retained in the interests of clarity and for consistency with the FRC Guidance on Audit Committees.

Provision C3.8 has been amended to require advance notice of any retendering plans. The FRC has added the word “any” to ensure that reporting is only undertaken when relevant to give stakeholders details of when the board or audit committee considers it appropriate to retender

The FRC has rejected the CMA’s recommendation that the FRC introduce an advisory vote on audit committee report. The vast majority of investors considered it unnecessary as there are other avenues through which they can raise concerns.

FRC Guidance on Audit Committees

The changes to the FRC’s Guidance for Audit Committees reflect changes to the UK Corporate Governance Code made in 2014 and developments and good practice in relation to risk management and internal audit.

In addition to the changes proposed by the FRC in its September 2015 consultation:

- the section on communication with shareholders has been extended to emphasise that the audit committee’s role goes beyond reporting and should also include meeting investors.
- there is more emphasis on the importance of a range of skills, experience, professional qualifications and knowledge in forming an audit committee. In addition, the audit committee should disclose how the UK Corporate Governance Code provisions on audit committee composition requirements (recent and relevant experience and sectoral competence) have been addressed. These disclosures should be addressed in the audit committee report, if not provided elsewhere.
- there are further revisions to clarify the committee’s role in relation to the fair, balanced and understandable statement and in respect of risk and internal audit.
- there is a new recommendation that the committee consider the clarity of its reporting.

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As previously proposed, the guidance recommends that the audit committee should disclose the nature and extent of any interaction with the FRC's Corporate Reporting Review team and any significant findings by the FRC's Audit Quality Review team and the actions the auditors plan to take in response to those findings. The FRC also encourages audit committees to report even if there were no significant issues to avoid speculation and plans to publish, from 2017, the names of those companies or company audits which have been the subject of review.

Other amendments

The revised Ethical Standard consolidates the Auditing Practices Board's five Ethical Standards for Auditors and the Ethical Standard for Reporting Accountants. The changes are designed to increase auditor independence, underpinning legislative changes such as retendering and auditor rotation. In relation to a public interest entity, the Standard prohibits the provision of certain types of audit service and subjects others to a fee cap of no more than 70% of the audit fee calculated on a rolling three-year basis.

Auditing standards have been revised to accommodate the Audit Regulation and recent changes made by the International Auditing and Assurance Standards Board in relation to extended auditor reporting, reporting on other information (including the strategic report and directors' report), reporting to audit committees on key audit matters and by exception reporting on going concern.

Further information

To access the revised Corporate Governance Code, Guidance on Audit Committees and other materials, click here.

Other regulatory and legislative changes to implement changes to EU law regarding statutory auditors are due to be published by The Department of Business, Innovation and Skills, the Financial Conduct Authority and the Prudential Regulation Authority.

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