Linklaters

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UK Corporate Update.

Company administration and filings: reforms in effect in 2015 and 2016

A number of company law reforms were passed before the last election as part of a push to cut red tape and improve public access to information.

A tranche of the new rules in the Small Business, Enterprise and Employment Act 2015 came into force this month, with further implementation this December and in 2016. Changes to the procedures required when an auditor leaves office, introduced by the Deregulation Act 2015, are also now in effect.

We have prepared a briefing (available to subscribers on the Linklaters Knowledge Portal) which covers changes which affect company administration and filings and will, therefore, be of particular interest to company secretaries and administrators. It sets out when the changes come into effect, practical implications and where to find the new rules. There is also a Company Secretary's Checklist.

No opt-out of viability statements for premium-listed companies

The Financial Conduct Authority has confirmed changes to the Listing Rules relating to the UK Corporate Governance Code, along with other minor changes. It is now mandatory for premium-listed companies to publish a viability statement (rather than being able to comply or explain).

Changes to reflect the 2014 version of the UK Corporate Governance Code

The Listing Rules already required premium-listed companies to make disclosures in the annual report on the appropriateness of the company adopting the going concern basis of accounting. These reflect the corresponding provisions of the UK Corporate Governance Code but, because there is an explicit requirement in the Listing Rules, companies do not have the option of not complying with the rules and simply explaining their non-compliance in the annual report (as they would otherwise be able to do under the Code). Following the introduction of a requirement in the 2014 version of the Code for directors to make a statement about the long term viability of the company, the FCA has amended LR 9.8.10R so that it will also be compulsory for premium-listed companies to make a viability statement. If companies do not make a viability statement they will be in breach of the Listing Rules, rather than just being able to explain their non-compliance under the Code.

The definition of the UK Corporate Governance Code has also been amended along with various consequential changes, so that the other obligations in the Listing Rules reflect the September 2014 version of the Code.

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Eligibility requirements – minor changes

The FCA has deleted both the eligibility requirement that a premium-listed company has to show that its constitution and the terms of its equity shares are compatible with electronic settlement and the corresponding continuing obligation. This is because these requirements have been superseded by the EU Central Securities Depositaries Regulation, which requires equity shares to be capable of being settled in dematerialised form and applies to both premium- and standard-listed companies.

LR 6.1 has been amended to clarify the track record required to be shown in order for a scientific research based company to be eligible for listing in circumstances where the company does not yet have a three-year financial track record.

Headlines for announcements

The headline types to be used by PIPs (i.e. regulatory announcement service providers) for the purposes of categorising market announcements by issuers have been amended. For example, a specific ITF (intention to float) heading has been introduced for the first time. These headline types are set out in DTR 8.

Revised rules

Click here for FCA Handbook Notice No 26, which details the changes and contains feedback on the FCA's Quarterly Consultation no.9 (CP 15/19). The changes take effect immediately (23 October 2015) (except for those on Headline types, which take effect on 1 December 2015). The changes relating to the UK Corporate Governance Code will not apply for companies with financial years ending before 30 September 2015 (who will still be reporting against the 2012 version of the Code).

FRC identifies areas for companies to focus on in their reporting

The Financial Reporting Council has identified areas companies should focus on in their reporting, based on reviews of the accounts and reports of 252 listed and large private companies in the year to 31 March 2015. Its Corporate Reporting Review Annual Report 2015, accompanied by the main technical findings of the Conduct Committee's Financial Reporting Review Panel, highlights the areas of corporate reporting that the FRC most frequently discussed with companies over the year. They provide a useful insight for companies wishing to improve their reporting.

The following areas of focus were raised:

> *Materiality*: when considering whether an error in accounts is material, directors should not do so by reference to whether or not restating financial statements for the prior year could be avoided. Instead, they should consider the wider relevance of the error to investors and whether they were providing them with the most reliable and transparent information. Materiality assessments should not be used to conceal errors or achieve a particular presentation.

> *Strategic report*: the business review section should be fair, balanced and comprehensive. The FRC will challenge companies where undue prominence is given to alternative performance measures, e.g. where an adjusted profit measurement was discussed but not an IFRS loss. In order to be comprehensive, the business review must cover not just the year's performance but also the position at end of year. Also, disclosures should include discussions of significant balance sheet and cash flow amounts, not just items that impact the income statement. Disclosures in the

strategic report should be consistent with the business model and unusual and non-recurring items should be explained. Key performance indicators should be able to be reconciled to the relevant amounts.

> *Diversity/greenhouse gases*: companies should ensure they comply with new Companies Act 2006 disclosures. Absolute numbers (rather than percentages) of employees of each sex at various levels within the company should be disclosed. Also, companies should ensure they make all necessary greenhouse gas emissions disclosures, including the intensity ratio, methodology used and total emissions in CO_2 equivalent.

> *Complex supplier arrangements*: the FRC would like to see more discussion of how these arrangements relate to companies' business models and greater transparency regarding the change in estimate between interim and annual reports.

> *Significant accounting judgments*: Companies should consider whether disclosures in the accounts needed to be revisited in view of the enhanced disclosures on significant accounting judgments now being given in audit committee reports. The FRC wrote to companies last year where there was a mismatch.

> *Accounting policies*: these should be included for all material transactions, especially where unusual or non-recurring. Also, if a company has industry specific accounting policies, these should be disclosed clearly without the use of jargon.

> *Clear and concise initiative*: boards should not include irrelevant information *in* their report and accounts on the false premise that it will avoid regulatory enquiry.

The FRC's Annual Report and the FRRP's Technical Findings are available here.

FRC consults on going concern guidance for companies that do not apply the UK Corporate Governance Code

The Financial Reporting Council has published an exposure draft of going concern guidance for companies that do not apply the UK Corporate Governance Code.

The guidance brings together the requirements of company and accounting standards, auditing standards, other regulation and existing FRC guidance relating to reporting of the going concern basis of accounting, solvency and liquidity risk.

The guidance includes:

> factors to consider when determining whether the going concern basis of accounting is appropriate and making assessments of solvency risk and liquidity risk relevant to a company's future viability;

> guidance on the assessment periods for the going concern basis of accounting and solvency and liquidity risks; and

> a summary of the reporting requirements.

The guidance will, when finalised, replace the FRC's 2009 guidance for directors on going concern and liquidity risk.

Additional provisions (such as the requirement to publish a viability statement) apply to listed companies and other companies that voluntarily apply the UK Corporate Governance Code. The FRC published guidance for these companies on going concern and liquidity risk in 2014 as part of its

guidance on risk management, internal control and related financial and business reporting.

The FRC invites comments on the exposure draft by 15 January 2016.

The exposure draft is available here.

ESMA clarifies application of new Transparency rules

The European Securities and Markets Authority has updated its Q&A on the Transparency Directive, which provide guidance to ensure the harmonised application of the Directive throughout the EU. The Q&A now cover some of the points arising from changes made to the Transparency Directive which Member States must implement by 26 November 2015. There are a number of points which will be useful to issuers and those with interests in listed companies in understanding how to apply the new requirements in practice.

New questions and answers deal with the following:

> where interests in an issuer are held by a group of companies, the parent undertaking can make notifications on behalf of that group even if it is only a subsidiary's holdings in the issuer which have changed to trigger a notification requirement;

> the new requirement for annual reports, half-yearly reports and reports on payments to governments to be kept available for ten years (rather than five) will apply in respect of any such reports published in the last five years but not any earlier ones. Therefore any report that is currently on an issuer's website as at 26 November should be kept there for ten years from its publication date but issuers will not have to reload any reports that have already been removed from the website because they were published more than five years ago;

> which issuers should prepare reports on payments to governments;

> how aggregation of interests should work where someone holds a combination of direct or indirect voting rights and a position in financial instruments with similar economic effect;

> confirmation that details of sanctions imposed should be published by competent authorities without delay, which means they do not have to wait for all appeals processes to be exhausted; and

> the effect of changing home Member State (for issuers whose securities are no longer admitted to trading on the regulated market of their home Member State but are traded on a regulated market elsewhere).

Click here for ESMA's Q&A on the Transparency Directive.

At the same time, ESMA has released an indicative list of financial instruments that are subject to notification requirements under the revised Transparency Directive (click here).

ESMA has also published new standard forms for issuers to disclose their home member state (click here) and for shareholders to notify major holdings of voting rights to competent authorities and issuers (click here). We expect that the Financial Conduct Authority will update the Form TR-1 to be used for notifications in the UK when it finalises the changes to the DTRs.

UK Corporate Round-up

We have prepared a round-up of upcoming UK corporate governance and corporate housekeeping developments relevant to listed companies.

This is available to subscribers on the Linklaters Knowledge Portal.

The Matrix – updated index of key sources of corporate governance regulation

We have published an updated copy of the Matrix, our comparative index of corporate governance developments affecting UK listed companies. This aims to put into context UK, EU and US regulatory developments relating to directors, risk management, corporate social responsibility and other corporate governance matters.

This is available to subscribers on the Linklaters Knowledge Portal.

Deal protection measures in Takeover Code offers - new guidance

The Takeover Panel has published a new practice statement (Practice Statement No. 29) which consolidates and codifies its practice on deal protection measures in Takeover Code offers. The restrictions on deal protection measures are set out in Rule 21.2 of the Takeover Code and are designed to ensure that a bidder cannot enter into agreements with the target which would deter competing bidders.

A full briefing is available to subscribers on the Linklaters Knowledge Portal.

Clean team agreements in Takeover Code Offers

The Takeover Panel has published a new practice statement (Practice Statement No.30) which codifies the practice of ring-fencing commercially sensitive information provided to bidders via the use of so-called "clean teams" for the purpose of obtaining regulatory consents while complying with antitrust rules which restrict the disclosure of commercially sensitive information between competitors.

A full briefing is available to subscribers on the Linklaters Knowledge Portal.

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