

THE CITY OF LONDON LAW SOCIETY

COMPANY LAW COMMITTEE

**Minutes of the 255th meeting held at 9.00 a.m. on 24 January 2012
at Slaughter and May, One Bunhill Row, EC1Y 8YY
(Tel: 020 7600 1200; Fax: 020 7090 5000)**

1. Attendees and apologies for absence

The following members were present: William Underhill (Chairman); Robert Boyle; Richard Spedding; Keith Stella; Victoria Youngusband; Martin Webster; Simon Jay; Vanessa Knapp; Lucy Fergusson; Mark Curtis; Simon Griffiths; Michael Hatchard; Nicholas Holmes; Murray Cox (Secretary).

The following members sent apologies: Chris Pearson; Richard Brown; Patrick Speller (alternate: Alasdair Steele); James Palmer (alternate: Alex Kay); David Pudge (alternate: Tim Lewis).

2. Approval of minutes of previous meeting

Minutes for the 253rd, 254th and 255th meetings were approved subject to typographical corrections.

3. BIS consultations: *'The Future of Narrative Reporting: Consulting on a New Reporting Framework'* and *'Executive Remuneration: A Discussion Paper'*

The Chairman suggested that on narrative reporting, it may still be worth corresponding with BIS. As regards executive remuneration, the Committee awaits the government's proposals, outlined by Vince Cable MP in Parliament (see also item 12 below).

4. FRC: Sharman Inquiry: Preliminary Report and Recommendations

The Chairman will circulate a draft of a short note encouraging the FRC to join up with the UKLA on how the work undertaken by the Sharman Inquiry might be relevant in relation to the requirements for prospectuses and working capital statements. Vanessa Knapp noted that a number of the responses to the call for evidence seem to reflect the view that changes were unnecessary. Michael Hatchard remarked that there is perhaps a divergence emerging between the US and UK approach to risk reporting: e.g. in the US, there is no discussion of mitigation. The Chairman expressed the view that the rationale for risk reporting in the US is different from that in the UK, and that it should be possible to comply with both regimes.

Note: since the meeting, at the request of Michael Hatchard, the Chairman has asked the Financial Reporting Lab whether it would be prepared to consider this issue.

5. **European Commission: Market Abuse Directive and Market Abuse Regulation**

The Chairman reported that he had had discussions with HMT, who were considering issues put to them as regards the current regime and the importance of a concept of material price sensitivity in relation to inside information. The FSA would appear not to have accepted that market abuse based on RINGA does not normally apply to information that is not required to be disclosed by a market's disclosure rules (e.g. DTRs for listed issuers), but is expected to conduct a review of market abuse which may provide an opportunity for this issue to be raised.

Vanessa Knapp noted that the Model Code also does not map perfectly onto the market abuse principles or the issuer's disclosure obligation. Moreover, other countries may not be comfortable with the bifurcated regime now proposed by the European Commission.

The Chairman noted that the ESMA Q&A paper (*'Questions and Answers on the common operation of the Market Abuse Directive'* published on 9 January 2012) is problematic in suggesting that dividend information is 'inside information' in relation to derivatives referable to the issuer's securities, because the issuer may not be the issuer of the derivative. He also noted that under a test of material price sensitivity, it may be that dealing in highly-g geared derivatives is unlawful, but dealings in the issuer's ordinary shares may still be permitted.

The Chairman remarked that if the bifurcated approach is inevitable, the Committee should concentrate on the practical implications and press for the inclusion of safe harbours and helpful guidance. The Chairman also referred to the impact assessment accompanying the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2011, which gives the example of an employee who knows that the CEO of his company is about to resign.

6. **Overseas payment service for takeovers**

Vanessa Knapp reported to the Committee that she had attended a working group meeting the previous week, at which this idea had been explored. The idea is that an overseas shareholder could direct the registrar to enter into a currency conversion agreement with, for example, Travelex, in order to receive their consideration in another currency. However, there is some uncertainty about the terms of the contractual relationship between the offeror, the registrar, Travelex and the shareholder in the offeree company, all of which will have to be considered in the light of the Takeover Code's requirements and the requirements of the squeeze-out provisions under the Companies Act 2006. Other issues to work out include how an overseas payment service would interact with the principles and timetable governing schemes of arrangement. Simon Jay mentioned one deal in which USD settlement had been made available.

7. **ESMA consultation: '*Considerations of Materiality in Financial Reporting*'**

The Chairman suggested that the consultation was oriented towards issues in financial reporting and that the accounting profession would be best placed to comment.

Vanessa Knapp suggested that the Committee might seek an opportunity to engage constructively with ESMA more broadly. Nicholas Holmes noted previously successful efforts by the Committee in relation to the Transparency Directive and rights issues, where ESMA had been very receptive to the Committee's contributions.

The Chairman suggested that the Committee consider writing to ESMA proposing an agenda of topics for discussion; Nicholas Holmes will give further consideration to this.

8. Takeovers: Mix and Match Facility

The Committee noted the debate as to whether offering a "mix and match" facility in a scheme of arrangement resulted in there being a public offer requiring the publication of an approved prospectus. The Committee noted the FSA's view that this would result in there being a public offer.

Michael Hatchard noted the important securities registration and filing exemptions available under foreign law that depend on the fact that a scheme of arrangement is not a public offer.

It was agreed that the Committee would contact the FSA with a view to gauging their support for a proposal to take an opinion from counsel jointly with the Committee. The Chairman will make enquiries with the CLLS as to potential cost sharing arrangements and, meanwhile, will circulate to the Committee the draft instructions previously prepared.

9. European Commission: Statutory Audit Directive

The European Commission has proposed amendments to the Statutory Audit Directive. Alex Kay volunteered to co-ordinate a working group to respond to selected aspects of this, particularly the prohibition on contractual obligations requiring a "Big 4" audit and any remarks on comfort letters and the scope of the audit report.

10. Serious Fraud Office: Mabey Engineering (Holdings) Ltd

The Committee agreed that it would be worthwhile engaging with the SFO regarding the press statement recently issued in the case of Mabey Engineering (Holdings) Ltd. In particular, it is not clear what behaviour is expected from "institutional investors" or which institutional investors the SFO has in mind, nor is it clear whether (and if so on what basis) the SFO was able to trace the proceeds of crime into dividend payments to the parent company.

11. ICSA: Payment of dividends electronically

ICSA has proposed that the Committee and the Law Society's Company Law Committee collaborate with a view to endorsing model wording for articles of association permitting a company to pay dividends electronically by default (i.e. not only by agreement with a shareholder). Vanessa Knapp will join this working group.

12. **BIS: Executive compensation**

The Committee noted the statement by Vince Cable MP in Parliament. The Chairman remarked that the CBI had expressed its support for the proposals. Michael Hatchard remarked that the proposals could be problematic for groups with significant overseas interests. Alasdair Steele noted a recent Reuters interview with Michel Barnier, in which the latter had intimated that the European Commission was considering a proposal to cap bankers' bonuses.

It was agreed that the Committee would submit a response to BIS when the consultation was issued, possibly in conjunction with the CLLS Employment Law Committee.

13. **Noted**

- (A) Simon Griffiths circulated a paper by a law professor in Finland challenging the opinion of Robin Potts QC, which concluded that credit default swaps were not contracts of insurance.
- (B) The Secretary will circulate a table listing certain issues dealt with in previous editions of List!, but which have not been consolidated into the UKLA's new series of 'Technical Notes'.
- (C) Keith Stella noted the amendment to the Disclosure Rules and Transparency Rules (see DTR 3.1.4) dealing with a new regulation disapplying the duty to make enquiries concerning changes in notifiable shareholdings (other than for PDMRs). The regulation enters force on 1 February 2012.
- (D) Vanessa Knapp noted that the European Commission intends to issue an online consultation on the future of European company law in January 2012.
- (E) The Committee noted the UKLA's more stringent approach to the vetting of draft prospectuses. The UKLA appear to be unwilling to vet a first draft prospectus that does not include any financial information, although Simon Jay remarked that recent experience suggests it may still be possible to submit a first draft that omitted only the most recent financial information. Tim Lewis noted that the UKLA had refused to vet a first draft prospectus for a mining company on the ground that it did not contain a competent person's report.
- (F) The Committee noted that FTSE's consultation on free float requirements had concluded that the minimum free float requirement for the FTSE UK Index Series should be increased from 15% to 25%.