

## THE CITY OF LONDON LAW SOCIETY

### COMPANY LAW SUB-COMMITTEE

Minutes of the 226th meeting held at 1p.m. on Tuesday 23 January, 2007  
at Slaughter and May, One Bunhill Row, EC1Y 8YY

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#### 1. Introduction and apologies for absence

Apologies for absence were received from Richard Brown, Mark Curtis, Michael Hatchard and Barney Hearnden. It was noted that Tamsin Nicholls, Jo Weston, John Adebisi and Gary Green attended as their alternates.

#### 2. Approval of minutes

The minutes of the 224<sup>th</sup> and 225<sup>th</sup> meetings were approved.

#### 3. Matters Arising

##### 3.1 Companies Act

James Palmer and Vanessa Knapp updated the Sub-Committee on the Law Society working party's progress in addressing the issues arising from the repeal of section 151 for private companies. It was noted that a meeting had been held with the DTI on Monday 22 January. There were differing views as to the extent of the problem which arises if section 151 is repealed without a saving provision being introduced for financial assistance which would have been capable of being "whitewashed" under the Companies Act 1985 (as amended). The working party's concerns stem from the possibility that the repeal of the statutory prohibition of financial assistance might lead to the revival of a financial prohibition based on *Trevor v Whitworth*. The DTI was clear that this was not the intended result and had agreed to draft a saving provision that would clarify the position. The saving provision will be contained in the explanatory notes to the relevant Statutory Instrument. There will also be an explanatory memorandum tabled in Parliament. The memorandum was expected to address the following points:

- The repeal of section 151, Companies Act 1985 for private companies would not result in the revival of any pre-existing prohibition of financial assistance.
- Notwithstanding the repeal of section 151 for private companies, companies will still need to comply with the maintenance of capital rules, including those derived from *Trevor v Whitworth*.

There have also been discussions with the DTI as to the timing of implementation of the majority of the Companies Act 2006. The Secretary of State is planning to make a statement as to timing in early February. In the meantime, the Law Society is to identify

areas where it considers that there may be difficulties in commencing provisions of the Act in October 2007.

### **3.2 Transparency Directive/Disclosure and Transparency Rules – see item 5.**

### **3.3 Consultation changes to the Listing and Prospectus Rules**

The Sub-Committee's joint working party submission with the Law Society was noted.

### **3.4 DTI Consultation on Shareholder Voting Rights**

It was noted that Kevin Tuffnell, Nick Janmohamed and Simon Jay had prepared a paper for submission. The intention was to submit the paper by Friday 26 January. The response was in line with the Law Society submission, although the working party had gone further than the Law Society in one or two instances. Key points to note were:

- The need for clearer interpretive guidance on the meetings to which the draft directive is intended to apply.
- The proxy definition: The definition is potentially very broad and seems to include corporate representatives. This gives rise to conflict with the Companies Act 2006. The Companies Act 2006 allows more than one corporate representative to be appointed; under the directive only one proxy may be appointed.
- The proposal for a notice period of 30 days for meetings. The view of the Sub-Committee was that a slightly longer period for annual general meetings should not give rise to particular difficulties, but extraordinary general meetings should have a shorter notice period. (When an extraordinary general meeting is called, it is generally because a company wishes to do something quickly.) It was noted that the text of the draft directive may have moved on since the DTI consultation commenced and it is now proposed that, if a company communicates electronically with its shareholders, meetings may be held within a shorter period.

## **4. New matters to be raised or reported**

The Sub-Committee agreed that it would be interested in preparing a response to the FSA's further consultation on Listing Rules for Investment Companies.

## **5. Discussion – Transparency Directive/Disclosure and Transparency Rules**

Kevin Tuffnell led the discussion on the Disclosure and Transparency Rules ("DTRs"). The debate focused on the following areas:

- Scope of DTRs (DTRs 4 and 5): The DTRs apply if the UK is the issuer's home member state, wherever it is listed. This feeds into the UK Listing Rules chapter 14 debate – if the UK is a non-EEA issuer's home member state and the issuer has only a secondary listing on London, it will be subject to the DTR standards.

- Responsibility statements: List 14 states that the persons who are “responsible” will usually be the directors. No distinction is made between executive and non-executive directors, although it remains to be seen if practice will develop in this way. In particular, the Sub-Committee questioned whether an alternative approach would be appropriate for overseas companies with supervisory boards. The impact of section 90A of the Financial Services and Markets Act 2000 (as amended) was noted. Section 90A of the Financial Services and Markets Act 2000 (as amended) provides that liability rests with the issuer and that no other persons are liable except for civil or criminal penalties. It is thought that the reference to “civil penalties” is to penalties under Part VI (the market abuse regime). The Sub-Committee debated whether additional words may be added to the responsibility statement to make clear that the directors’ responsibility is to the issuer and not the world at large. It was noted that this issue had been raised with the FSA at the last UKLA Liaison Committee meeting and that the FSA is considering this issue.
- Interim management statements: Six monthly interim management statements will be required unless an issuer produces quarterly reports. The content of these statements will be driven by market practice. The FSA had indicated that it would provide guidance. However, the guidance only indicates what information may (rather than must) be included in the statements. The FSA has, however, indicated that it will review market practice after 18-24 months and consider whether further guidance is required.
- Share interest notifications: Notifications are broken down into categories – shareholder rights and rights as a result of financial instruments. An interested party may have a notification obligation where his overall level of interest remains the same if there is a change in the make-up of the holding which takes the relevant interested party over or below the relevant thresholds in either category. This point is not immediately obvious on the face of DTR 5.1.2.
- Proxy regime: The FSA assumes that if a shareholder has appointed a discretionary proxy it has disposed of its voting rights for the meeting and the proxy has acquired those voting rights. It ignores the fact that the shareholder retains the right to attend and vote at the relevant meeting. Furthermore, it seems to make little sense for the time of announcement of the voting rights given to the chairman to be tied to the deadline for submission of proxy forms. An alternative view (if an announcement is required at all) is that the announcement should be made after the meeting because the chairman’s right to vote the shares only crystallises at the time of the vote.
- Share buy-backs: If an issuer buys back or sells shares out of treasury, it seems, taking a common sense view, that there is no obligation for the issuer to notify the market when the number of shares in treasury falls below a notification threshold.
- Transitional provisions: The Listing Rule changes apply to issuers from the start of their first financial year commencing on or after 20 January 2007. DTR 6 applies immediately. This has caused a mismatch with the Listing Rules. The FSA has,

however, indicated that issuers operating under the unamended Listing Rules need not follow DTR 6.

- Model Code: The close periods in the Model Code will reflect the new reporting regime. It was indicated in List! 14 that there would be no closed period in relation to interim management statements but one seems to have been imposed (albeit inadvertently). A further copy of List! is due to be published in February which the Sub-Committee are advised will address this and other similar issues.

## **6. Current problems and recent developments**

### **6.1 Company law and legislation**

Nothing to report.

### **6.2 FSMA**

The publication of FSA Market Watch No. 18 and Handbook Development No. 81 was noted.

### **6.3 LPD Rules and practice, LSE admission and disclosure standards, AIM and ICs**

It was noted that the Sub-Committee did not submit a paper on the proposed amendments to the AIM rules. The Sub-Committee understands that the LSE was inundated with comments on the proposals and accordingly, the LSE proposes to establish an AIM advisory group to look at future changes. It was suggested that the LSE be advised that the Sub-Committee would be happy to review and comment on proposed AIM statements in advance of formal publication.

### **6.4 EU/US overseas company and securities law and practice**

John Adebisi (alternate for Michael Hatchard) noted that, on 11 January 2007, the SEC had published proposals to amend the rules pursuant to which non-US issuers required to file annual reports on Form 20-F and other reports with the SEC could "de-register" their securities and terminate their reporting obligations with the SEC pursuant to the Securities Exchange Act of 1934 (SEA 1934), including compliance with requirements of the US Sarbanes-Oxley Act. The current rule permits non-US issuers to de-register if their shares are held by less than 300 US owners. The new proposal is that de-registration and termination of reporting obligations will be permitted:

- if the US average daily trading volume of the relevant class of equity securities has been no greater than 5 per cent. of the average daily trading volume of that class of securities in the issuer's primary trading market during a recent 12 month period; or
- the relevant class of securities is held of record by fewer than 300 persons on a worldwide basis or fewer than 300 persons resident in the US. This test is similar to the test under the SEC's current rules, but the number of US resident security

holders would be counted on a "look-through" basis that is simpler than the counting method currently applicable.

The consultation period on these proposals ends in early February.

**6.5 Accounting standards and practice**

The Chairman drew the Sub-Committee’s attention to the ASB review of Narrative Reporting by UK Listed Companies in 2006. The review provides helpful insight into the accountants’ views of what listed companies should be reporting.

It was also noted that there is a new EU consultation regarding auditors’ liability caps.

The Sub-Committee’s attention was also drawn to the recent press regarding the impact of the Statutory Audit Directive which requires implementation by June 2008. The directive, broadly, requires auditors of non-EU issuers to be subject to regulation in the issuer’s home member state or another EU member state or in a jurisdiction which is regarded as “equivalent”. A consultation as to how the directive will be implemented in each member state has been issued by the European Commission. There is concern as to how the directive will impact on the attractiveness of the EU as a market. It was agreed that the impact of the directive should be discussed by the Sub-Committee at a later date.

**7. Cases (not otherwise reported)**

Nothing to report.

**8. Close**

There being no further business, the meeting closed.

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Chairman