

**THE CITY OF LONDON LAW SOCIETY**

**COMPANY LAW SUB-COMMITTEE**

**Minutes of the 229<sup>th</sup> meeting held at 9.00 a.m. on Tuesday 31 July, 2007 at Slaughter and May, One Bunhill Row, EC1Y 8YY**

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**1. Apologies for absence**

Apologies for absence were received from Lucy Fergusson, Barney Hearnden, Nick Janmohamed, Vanessa Knapp and James Palmer. Gary Green attended as alternate for Barney Hearnden and James Inglis attended as alternate for Lucy Fergusson.

**2. Approval of minutes**

The minutes of the 228<sup>th</sup> meeting of the Sub-Committee were approved.

**3. Matters arising**

**3.1 Companies Act 2006**

Items 3.1(A) - (H) of the agenda were noted.

**3.2 Davies Review of Issuer Liability**

It was noted that Davies' final report on issuer liability had been published and that the report was, broadly, consistent with the Sub-Committee's response to the consultation. Davies had, however, concluded that dishonest delay should be included within the liability regime, which was contrary to the Sub-Committee's recommendation. The final report includes two alternative possible meanings for the "dishonest delay" prohibition, namely, where a person deliberately delays publication for the purpose of:

- (A) (based by analogy on section 397 Financial Services Act 2000) inducing investors to acquire (or possibly dispose of) securities; or
- (B) (based on the approach taken in section 3 of the Fraud Act 2006) making a profit or inflicting a loss on the person who acquired the securities during the period of the delay.

The Sub-Committee was of the view that the narrower standard based on the Fraud Act 2006 would be preferable.

**3.3 Shareholder voting rights**

It was noted that the Sub-Committee did not submit a response to the third European Commission consultation but that the Law Society had done so. It was noted that the directive had now been formally adopted.

It was noted that the Law Society had recently held a roundtable on the topic of “one share, one vote”. Vanessa Knapp sat on the panel and the Chairman had also attended. The Chairman reported that a representative from the European Commission had sought views as to whether there should be mandatory rules providing for “one share, one vote” across Europe. The UK attendees were generally against this, arguing for freedom of contract. However, representatives from the ABI highlighted that the countries in the EU without “one share, one vote” were generally those countries whose capital markets remain closed to foreign investors. Accordingly, a requirement to introduce “one share, one vote” could, effectively, open these markets which would seem to be in the interests of UK investors and companies. Furthermore, the freedom to have “one share, multiple votes” is rarely exercised in the UK because it is not generally acceptable to the UK market so giving up the right would not seem to be a substantial loss in practice.

### **3.4 Investment companies and “directive minimum” listings**

The FSA consultation and feedback paper was noted. It was noted that the Listing Rule changes to Chapters 15 and 16 would come into effect in September 2007 and that the lighter Chapter 14 regime would be retained until, probably, the first quarter of 2008. It was also noted that, in the interim, there will be a specialist funds paper published which it seems will provide for a Prospectus Directive-minimum listing regime which will be outside the Listing Rules altogether. One consequence is that it will probably render it much more difficult for Chapter 14 issuers to raise fresh capital unless they convert to specialist funds.

## **4. Discussions**

### **(A) GC 100 – outcome of meeting: report by the Chairman**

The Chairman noted that he had met with Helen Mahy, General Counsel of National Grid and Chairman of the GC100. The Chairman agreed that agendas and minutes of the Sub-Committee’s meetings would be sent to the chairman and secretary of the GC 100. Conversely, the GC100 will aim to send the Sub-Committee certain papers that they prepare in advance of publication. It was noted that the Sub-Committee are likely to need to respond quickly with comments. Furthermore, private papers will be sent to Sub-Committee members on the basis that circulation is kept to a minimum.

### **(B) ABI – outcome of meeting: report by the Chairman**

The Chairman noted that he had also met with Peter Montagnan and Michael McKirsey of the ABI. It was clear from the meeting that the ABI perceive the Sub-Committee as issuer-focused. However, it was agreed that the Sub-Committee could be a useful forum through which the ABI could obtain legal advice, for example, in relation to the current law on gross negligence in connection with the Davies Review.

(C) **Structure and quality of markets for listed securities – discussion led by the Chairman**

It was noted that the FSA had held a roundtable discussion on the structure and quality of markets for listed securities which was attended by the Chairman. This is an area where we are likely to see developments in the future given the strong desire to maintain London listings as a premium brand. The principal areas of discussion were:

- (i) eligibility – should eligibility requirements (for example, the requirement for a three-year track record) be a matter for the FSA or the London Stock Exchange? On one view, the FSA's listing requirements should be directive-minimum and, therefore, eligibility should be dealt with by the LSE. However, there seems to be no appetite within the LSE for them to take on this role;
- (ii) whether the sponsor regime should be extended to cover a wider range of issuer transactions. This did not seem to attract much support; and
- (iii) whether pre-emption rights are properly dealt with by the Listing Rules. The Chairman had suggested that a “comply or explain” approach should be acceptable, although Peter Montagnon of the ABI strongly disagreed.

**5. Current problems and recent developments**

**5.1 Company law and legislation**

Items 5.1(A) – (C) of the agenda were noted.

**5.2 FSMA/FSA**

Items 5.2(B) – (D) of the agenda were noted.

It was noted that MarketWatch No. 20 had been published. The Sub-Committee commented on the activist shareholder section of the publication which suggested that an investor may be committing market abuse if it acquires a stake in a company knowing that another investor has an “activist” strategy but that strategy has not been disclosed to the market as a whole. There was concern that the suggestion that several shareholders separately acquiring shares in order to avoid triggering notification obligations could amount to market abuse could not be justified given that the DTRs dealt expressly with the tests to determine when an aggregated notification should be made. It should not be market abuse for investors to organise themselves so as to avoid the requirement to aggregate and at the same time keeps purchases below the individual notification threshold. This had been raised with the UKLA at the UKLA Liaison Meeting in June. The UKLA advised that there was no intention to widen the scope of market abuse. The intention was simply to remind shareholders that when they trade in shares they must remember not only the Takeover Code concert party

provisions and the Disclosure and Transparency Rules but the market abuse rules as well.

It was noted that CESR's second set of guidance on possible Level 3 implementing measures for the Market Abuse Directive had been published. Paragraphs 2.10 and 2.11 of the draft guidance (regarding the delay of disclosure under the "legitimate interest" and provision of an audit trail of the reasons for delayed disclosure) were noted, in particular. The Sub-Committee were concerned that the FSA may focus unduly on the suggestion that companies consider recording their reasons for agreeing to delay disclosure of inside information and, therefore, be sceptical that there was a legitimate reason for delay if there was no written evidence of a discussion between the issuer and its broker or solicitors.

In addition, it was noted that the European Securities Market Expert Group (ESME) had published a report on the EU framework for market abuse ([http://ec.europa.eu/internal\\_market/securities/docs/esme/mad\\_070706\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/esme/mad_070706_en.pdf)) which contained some helpful suggestions in relation to some of the problems with the Market Abuse Directive, in particular in relation to the "inside information" definition used. ESME's recommendations have been picked up by CESR who are considering a number of the points. This may lead to some useful changes.

### **5.3 Listing Rules and DTR's**

The FSA's policy statement regarding amendments to the Prospectus Rules and the Listing Rules were noted. It was noted that the amendments were largely as expected and in particular, that 50:50 joint venture parties will no longer be related parties. However, 60:40 joint venture parties will be related parties which seems to be an anomalous result. In addition, the question of when entering into a joint venture should be treated as a revenue transaction is still rather muddled in the Rules. It was also noted that the Model Code no longer strictly applies to employee insiders. However, in the experience of the members of the Sub-Committee, issuers seem to be intending to retain the restriction on employee insiders on a voluntary basis.

Items 5.3(C) – (I) of the agenda were noted. It was agreed that the Sub-Committee would discuss the FSA's conclusions on the operation of internal systems for restricting access to inside information within law firms (item 5.3(H) of the agenda) at the Sub-Committee meeting in September.

### **5.4 AIM**

Item 5.4 of the agenda was noted.

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

It was noted that the Foreign Investment and National Security Act of 2007 (FINSA) has been enacted, revising U.S. national security reviews of foreign investments in U.S.-based entities. In addition to codifying certain existing practices, FINSA will make reviews more rigorous, particularly for transactions in certain sensitive sectors, including

critical infrastructure and critical technologies, as well as transactions involving an entity controlled by a foreign government. By strengthening the review process, FINSA should help remove the political uncertainty that has affected some high-profile, cross-border transactions in recent years.

In addition, it was noted that at <http://www.sec.gov/rules/proposed/2007/33-8818.pdf> is the release of the Securities and Exchange Commission (SEC or Commission) publishing for comment proposed amendments that would permit the SEC to accept from foreign private issuers their financial statements prepared in accordance with IFRS as published by the International Accounting Standards Board (IASB) without reconciliation to US GAAP. To implement this, the SEC is proposing amendments to Form 20-F and conforming changes to Regulation S-X to accept financial statements prepared in accordance with the English language version of IFRS as published by the IASB without reconciliation to U.S. GAAP when contained in the filings of foreign private issuers with the Commission. The SEC is also proposing conforming amendments to other regulations, forms and rules under the Securities Act and the Exchange Act. Current requirements regarding the reconciliation to U.S. GAAP will not change for a foreign private issuer and that uses a basis of accounting other than the English language version of IFRS as published by the IASB. The SEC release indicates that the comment period will expire in September 2007.

**5.6 Accounting standards and practice**

Items 5.6(A) – (D) of the agenda were noted. It was noted that Vanessa Knapp sits on the FRC working group which is considering liability limitation agreements for auditors (item 5.6(C) of the agenda). The Sub-Committee hopes that the working group will consult widely and that the Sub-Committee will be able to comment.

**5.7 Mergers and acquisitions (public)**

Items 5.7(A) – (D) of the agenda were noted. It was noted that the Takeovers Working Party is preparing a draft response to the Panel consultation on schemes of arrangement.

**6. CPD Credit: portion of meeting eligible**

It was noted that the time qualifying for CPD credit would be 1 hour 30.

**7. Close**

There being no further business, the meeting was closed.

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Chairman