Essential corporate news - week ending 12 March 2010

12 March 2010

Introduction
Welcome to Essential Corporate News, our weekly news service covering the latest developments in the UK corporate world.

HM Treasury: Extension of the statutory regime for issuer liability: A Response to consultation

On 9 March 2010 HM Treasury published a response to its consultation paper on proposals to extend the statutory regime for issuer liability, which is contained in section 90A Financial Services and Markets Act 2000 (FSMA) (inserted by section 1270 Companies Act 2006), together with the final draft of The Financial Services and Markets Act 2000 (Liability of Issuers) Regulations 2010 (the FSMA Regulations) and accompanying explanatory memorandum. Section 90A FSMA established a statutory civil liability regime for misstatements to the market, supplementing the existing criminal provisions in FSMA. HM Treasury launched this consultation following the Davies Review on Issuer Liability, which sought to examine the consistency of the regime introduced by section 90A FSMA and whether the provision placed the common law rights of shareholders at risk.

HM Treasury has reached the following conclusions in relation to the regime:

**Basis of liability** - fraud will remain the basis of the liability as opposed to negligence or gross negligence as per the consultation proposal and Professor Davies’ recommendation.

**Markets to which the regime is applicable** - the current regime applies to issuers of securities admitted to trading on UK regulated markets. The regime will be extended to cover all cases where securities are admitted to trading on a securities market where either the market concerned is situated or operating in the UK or the issuer’s home state is the UK. The regime will also be extended such that ‘securities market’ will cover not only UK regulated markets but also UK multilateral trading facilities.

**Securities which should give rise to a right of compensation and who should be considered the issuer of the security** - the regime will apply to “transferable securities” as defined in section 102A(3) FSMA. In the case of depositary receipts and other secondary securities giving a right to acquire or sell other transferable securities, the issuer liable to pay compensation shall be the issuer of the underlying securities. For these purposes, “acquisition or disposal of securities” does not include the acquisition or disposal of a “depository receipt, derivative instrument or other financial instruments representing securities”. Where depositary receipts and other secondary securities are admitted to trading without the consent of the issuer of the underlying securities or derivative instruments are admitted to trading, the issuer will be liable to pay compensation under the regime. For these purposes, the FSMA Regulations will state that “an issuer of securities is not taken to have consented to the securities being admitted to trading on a securities market by reason only of having consented to their admission to trading on another market as a result of which they are admitted to trading on the first mentioned market”.

**Investors to which the regime is applicable** - the regime will be extended to include sellers and holders of securities in addition to acquirers. In order to bring an action, there must have been reliance on the information
published. HM Treasury distinguishes an active holder from a passive holder and concludes that a passive holder will not be entitled to bring an action as they "would not be able to show reliance upon the statement in making their investment decision”.

**Disclosures subject to the regime** - the regime will apply to all information published (or announced) by the issuer by means of a recognised information service. The definition of "recognised information service" will cover information services used to disseminate information required to be published by the rules of a Multilateral Trading Facility. Provided the above is satisfied, the issuer will be liable even if the person claiming damages did not obtain the information from the recognised information service used. In relation to shareholders’ rights, HM Treasury states that the issuer should not be subject to any other liability other than that provided for in paragraph 3 (Liability of issuer for misleading statement or dishonest omission) and paragraph 5 (Liability of issuer for dishonest delay in publishing information) of the FSMA Regulations other than the exceptions set out in paragraph 7.

**Liability for dishonest delay** - the regime will be extended to include liability where the issuer acts dishonestly in delaying the publication of the information. The FSMA Regulations define dishonesty using the criminal test so that a person will be ‘dishonest’ in respect of a delay there “that person’s conduct would be regarded as dishonest by those who regularly trade in the markets in question, and, in addition, the person concerned was aware that their conduct would be regarded as dishonest”.

The FSMA Regulations will not come into force until they have been debated by the House of Commons and the House of Lords. They were, however, laid before Parliament on 8 March 2010 and it is intended that the new regime will apply in relation to information first published on or after 1 October 2010.

*(HM Treasury, Extension of the statutory regime for issuer liability: A Response to consultation, 09.03.10)*

*(The Financial Services and Markets Act 2000 (Liability of Issuers) Regulations 2010)*

*(Explanatory Memorandum)*

**RiskMetrics Group: UK Remuneration Guidance**

In February 2010, RiskMetrics Group (RMG) published their 2010 UK Remuneration Guidance.

RMG was created in 1994 as an internal function within JP Morgan producing measurements of market risk in portfolios. Two years later, RMG was spun out of JP Morgan into a separate company. Its role is to set standards in financial risk management. As part of this role, its analysts examine corporate governance, compliance, accounting, legal, transactional and sustainability risks and produce research reports and voting recommendations.

This guidance has been published in order to provide Remuneration Committees, who are currently having to reach decisions on executive remuneration in uncertain economic circumstances, with a full appreciation of the concerns and expectations of investors. The guidance outlines the most common considerations which RMG will take into account when their analysts issue voting recommendations for remuneration-related proposals by UK public companies in 2010. The guidance is consistent with the policy of the National Association of Pension Funds. RMG has also consulted its clients to ensure it is line with prevailing investor sentiment.

The guidance sets out statements of principle on general policy and practice which RMG proposes will ensure a robust approach to executive remuneration. RMG also provides guidance on various components of the remuneration package including:

**Basic salaries** - RMG states that although the economic climate is improving, post-freeze or ‘catch-up’ salary increases will not be justified and any increases should only reflect the factors set out in their guidance.

**Bonuses** - Policy Statement 09/15: Reforming remuneration practices in financial services - Feedback on CP 09/10 and final rules issued by the Financial Services Authority (FSA) on 12 August 2009 suggests that bonuses and other remuneration arrangements, particularly in banks, have contributed to economic instability. Whilst the FSA Policy Statement was primarily aimed at banks, RMG considers various principles contained in the FSA guidelines could potentially apply to all industry sectors and these have therefore been included in the RMG guidance.
Long term incentive plans - The guidance provides suggestions about the remuneration options available both for “existing awards” and “awards granted in 2010”.

Service contracts - RMG provides guidance in relation to termination provisions including termination payments.

(RiskMetrics UK Remuneration Guidance, February 2010)

Financial Services Authority: Former Cazenove partner found guilty of insider dealing

On 10 March 2010, the Financial Services Authority (FSA) published a press release announcing that Malcolm Calvert, a former equities marketmaker at Cazenove, was found guilty of 5 counts of insider dealing under section 52 Criminal Justice Act 1993 after making £103,883 profit. Malcolm Calvert was, on 11 March 2010, sentenced to a twenty one month custodial sentence. This is the third successful prosecution brought by the FSA for insider dealing.

On the same day, the FSA published the Final Notice it has issued to Bertie Charles Hatcher, a retired bookmaker and insurance broker and a friend of Calvert’s, fining him £56,098 for engaging in market abuse in contravention of section 123 (power to impose in cases of market abuse) Financial Services and Markets Act 2000, in relation to the purchases of various shares of companies trading on the London Stock Exchange. The purchases were made solely upon information received from Calvert and the net profits were shared between them.

Hatcher played a key role in the prosecution against Calvert, having agreed to provide evidence in the trial, not only against himself, but more importantly against Calvert. In return for his cooperation and assistance throughout the investigation, the FSA agreed to sanction Hatcher and did not pursue a criminal prosecution. Instead, the FSA imposed a “substantially” reduced financial penalty of £56,098.

The confiscation and costs hearing will take place on 23 April 2010.

(FSA, Press Release - Former Cazenove partner found guilty of insider dealing - 10.03.2010)

(FSA, Press Release - Former Cazenove broker sentenced to 21 months in prison for insider dealing - 11.03.2010)

(FSA, Final Notice to Bertie Charles Hatcher 13.05.2008)

Disclaimer
This publication is written as a general guide only. It is not intended to contain definitive legal advice which should be sought as appropriate in relation to a particular matter.
Extracts may be copied provided their source is acknowledged.

Website: http://www.nortonrose.com
Contact our 24 hour London switchboard:
Tel +44 (0) 20 7283 6000
Fax +44 (0) 20 7283 6500

© Copyright Norton Rose LLP 2010. All rights reserved.