May 2018

Listed Company Update

This edition looks at the key changes since our last Update and at future developments relevant to Official List and AIM companies.

Looking back …

LISTING RULES, PROSPECTUS RULES AND AIM RULES

NEW AIM RULES

Revised AIM Rules for Companies and AIM Rules for Nominated Advisers took effect on **30 March 2018**. The key change for AIM companies is the disclosure of corporate governance arrangements on the company's website. New applicants will need to state their chosen corporate governance code upon admission, but all AIM companies will have until **28 September 2018** to comply with the new requirement, which obliges them to state how they comply with their chosen code (and provide explanations where they do not comply). We understand that on reverse takeovers involving a re-admission, AIM Regulation is expecting companies to comply upon re-admission, in relation to the corporate governance information included in both a company's website and the admission document.

The LSE has clarified that compliance will need to be reviewed annually and the website should include the date of the last review. For further details, please see our client note on this topic.

MAR

FCA FINE FOR MAR BREACH

In **December 2017** the FCA issued a Final Notice fining Tejoori Limited (a BVI company) £70,000 for a delay in disclosing inside information. The FCA found that Tejoori had breached Article 17(1) of MAR (disclosure of inside information) and that this breach had created a false market in Tejoori's shares for over a month. Investors who

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traded in Tejoori's shares during that time would have done so on the basis of materially incomplete information, which prevented them from making fully informed investment decisions.

CORPORATE GOVERNANCE

PRE-EMPTION GROUP STATEMENT ON EXPECTATIONS FOR DISAPPLICATION THRESHOLDS

In **March 2018** the Pre-emption Group issued a statement in relation to the exemption introduced by the Prospectus Regulation, which allows companies with securities admitted to trading on a regulated market to issue, without a prospectus, securities representing less than 20% (increased from 10%) of the same class of securities that are already admitted to trading. The Pre-emption Group had stated last year that it continued to support the overall limit of 10%. It has now reiterated that, whilst decisions about specific placings are a matter for individual shareholders, its Statement of Principles relating to the disapplication of pre-emption rights reflects a generally agreed position supported by the Investment Association and the PLSA, and companies should be mindful of the expectations set out within it. It also reminds companies to use its template resolutions and Appendix of Best Practice in Engagement and Disclosure when applying for authority to disapply pre-emption rights and issuing shares under that authority.

REVISED QCA CORPORATE GOVERNANCE CODE

Towards the end of **April 2018**, the Quoted Companies Alliance published a revised version of its Corporate Governance Code last published in 2013. The key changes include:

- redrafting of the principles and necessary disclosures (there are now ten principles);
- redrafting of the section on effective application of the Code;
- new provisions on board composition; and
- structural changes – the section on the effectiveness of the board, together with the related appendices, have been moved to a separate "Corporate governance files" document, which will be updated on a rolling basis.

The new Code is available to members on the QCA website.

2018 AGM TRENDS SO FAR

The 2018 AGM season has seen continued shareholder activism and, in turn, increased shareholder engagement. The key trends arising so far are:

- **Pre-emption resolutions:** While the disapplication of pre-emption rights of up to 5 per cent. of a company's share capital remains standard, PIRC recommends that shareholders vote against a resolution proposing a further disapplication of pre-emption rights in relation to an acquisition or specified capital investment. This is the case even where the resolution is in line with the Pre-Emption Group's Statement of Principles. While companies are still receiving sufficient votes to pass the resolution, the requirement for such authority should be considered on a case by case basis.
- **Remuneration policy/report:** Many companies are continuing to engage actively with shareholders in connection with their remuneration proposals but this remains an ongoing area of tension. While only Centamin plc has failed to pass its remuneration policy this year, a number of companies have received significant votes against their remuneration policies and/or reports. In addition, both the Chairman and Remuneration Committee Chair of Persimmon plc resigned following shareholder criticism of the company's uncapped Long Term Incentive Plan, and its executive directors agreed to a substantial reduction to their share awards.

- **Overboarding:** While it remains usual for director re-appointments to receive a high number of votes in favour, shareholders have been focusing on the time and commitment of directors and considering whether they are stretching themselves too thinly. The ISS Proxy Voting Guidelines 2018 suggest that directors should hold no more than five mandates, with a non-executive directorship counting as one mandate, a non-executive chairmanship counting as two mandates and an executive directorship counting as three mandates. In addition, a person who holds one executive directorship and one chairmanship will be considered to be overboarded. A number of directors who are overboarded on this basis have received substantial votes against their reappointment at the AGM.

- **Notice of General Meetings:** While the routine resolution to authorise companies to hold a general meeting on 14 clear days' notice is still relatively uncontroversial, some companies have been receiving 10-15 per cent. of votes against. The ISS recommendation is that shareholders should vote in favour of this resolution where the company has provided assurance that the authority will only be used when merited – in limited and time sensitive circumstances where it would clearly be to the advantage of shareholders as a whole – and so it is important that this is noted in the AGM Notice.

TAKEOVERS

TAKEOVER CODE CHANGES

The Takeover Panel has published its response statements on (i) intention statements and (ii) asset sales. Both sets of changes to the Takeover Code took place on **8 January 2018**. In relation to post-offer undertakings, please see our client note on recent developments.

Intention statements

Key changes included:

- requiring the offeror, when making statements of intention with regard to the business, employees and pension schemes of the offeree company (and, where appropriate, of the offeror itself), to make specific statements of intention with regard to any research and development function of the offeree company, any material change in the balance of the skills and functions of the offeree's employees and management, and the likely repercussions of its strategic plans on the location of the offeree's headquarters and headquarters functions;

- bringing forward the requirement for an offeror to make statements of intention to the time of the Rule 2.7 announcement;

- requiring that an offeror must not publish an offer document for 14 days from its 2.7 announcement without the consent of the board of the offeree company; and

- requiring offerors and offeree companies to publish reports on post-offer undertakings and post-offer intention statements given during the course of an offer.

Asset sales

Changes were made to the Takeover Code with effect from 8 January 2018 in relation to "asset transactions in competition with an offer". A bidder is now prevented from purchasing significant assets of a target ("significant" normally meaning 75% or more in value) in circumstances in which it would not be able to acquire the shares of the target. In addition, if a target company proposes to sell all or substantially all of its assets in competition with an offer and return the proceeds to shareholders, any statement quantifying the amount which may be returned to shareholders must be reported on by the target's accountants and financial advisers and the asset purchaser will be restricted from making share purchases until this is done. Further changes were made setting out details of information which must be given to target shareholders when asking them to approve "frustrating action" and requiring a target board to give the same information to bidders as it has provided to certain asset purchasers.

TAKEOVER PANEL: NEW PRACTICE STATEMENT

In **January 2018**, the Takeover Panel published Practice Statement no. 32 on Rule 21.1 (which restricts the board of the offeree a target company from taking, without shareholder approval, any frustrating action in relation to an offer or potential offer, where it has reason to believe that a bona fide offer might be imminent) and its application following the unequivocal rejection of an approach. It clarifies that the Panel considers that the target board will have reason to believe that a bona fide offer might be imminent (and therefore the restrictions in the Rule will apply) as soon as the board has received an approach regarding a possible offer. The restrictions on taking frustrating action will normally cease to apply if the target board unequivocally rejects an approach and the potential bidder does not give the target board reason to believe it is still interested in making an offer in the 48 hour period following the rejection.

OTHER POINTS OF INTEREST

EMPLOYMENT -– CHANGE IN TAXATION OF TERMINATION PAYMENTS

On **6 April 2018**, there was a change to the way that termination payments are taxed. Employees are now taxed on notice pay, even where there is no payment in lieu of notice ("PILON") in the contract. For further details, please see our client note on this topic.

PENSIONS – AUTOMATIC ENROLMENT CHANGES

On **6 April 2018** the minimum contributions required to be paid to a defined contribution pension scheme used for automatic enrolment (or for contractual enrolment as an alternative to automatic enrolment) increased and the same will happen on 6 April 2019. The changes applies to all employers but it is most likely to require action by those employers who pay only the minimum required contributions or have a contribution structure with low contribution rates for some workers (e.g. matched or age-related contributions).

In addition to the ongoing automatic enrolment duties, all employers of UK workers are required every three years to re-enrol workers who have opted out of their automatic enrolment pension scheme. This is to be done on a date selected by the employer that falls within a six month window period set out in the legislation. An employer's first window period begins three months before the third anniversary of the employer's original automatic enrolment "staging date" and ends three months after the third anniversary.

Looking forward…

LISTING RULES, PROSPECTUS RULES AND AIM RULES

PROSPECTUS REGULATION UPDATE

In **July 2018**, the Prospectus Regulation will introduce a change to the consideration threshold which takes an offer of securities outside the scope of the prospectus regime. Currently, the threshold is EUR 5 million (this refers to the total consideration of the offer in the EU, calculated over a period of 12 months). From July, EU Member States can set out in their national law a threshold between EUR1 million and EUR8 million, from which the exemption should apply taking into account the level of domestic investor protection they deem to be appropriate. We are still awaiting confirmation of what this threshold will be in the UK. The remainder of the provisions of the Prospectus Regulation will come into force in **July 2019.**

In **March 2018** ESMA published its final advice on the Prospectus Regulation – this addresses:

- the form and content of the prospectus;
- the content, format and sequence of the EU Growth prospectus; and
- the scrutiny and approval of the prospectus.

The report also sets out ESMA's technical advice on these areas.

CORPORATE GOVERNANCE

REMINDER ABOUT UPCOMING CHANGES TO CORPORATE GOVERNANCE CODE

We are awaiting the FRC's response on its consultation on proposed changes to the UK Corporate Governance Code and the Guidance on Board Effectiveness – please see our client note on this topic.

BEIS COMMITTEE INQUIRY ON EXECUTIVE REMUNERATION

In **March 2018** a BEIS committee inquiry was launched into delivering fair pay. As regards executive pay, it asks what improvements have been made to executive pay reporting and what steps have been taken in the last 12 months by remuneration committees and institutional investors to combat excessive pay. The Committee will look at progress in simplifying the structure of executive pay and pay reporting, and the role of remuneration committees, institutional investors and shareholders in curbing excessive pay. It is likely to look at the use of clawback provisions that enable the recovery of cash and share bonuses following poor performance. Evidence is invited by **8 May 2018**.

The Committee has also been looking at issues relating to compliance with gender pay gap reporting requirements.

BEIS CONSULATION ON CORPORATE GOVERNANCE AND INSOLVENCY

In **March 2018**, BEIS published a consultation paper relating to corporate governance and insolvency. The paper follows on from the proposed corporate governance reforms in relation to executive pay, strengthening the employee and wider stakeholder voice in the boardroom, and corporate governance in large privately held businesses. The consultation paper seeks views on proposals relating to:

- reducing the risk of major company insolvencies occurring through shortcomings of governance or stewardship;
- strengthening the responsibilities of directors of firms when they are in or approaching insolvency; and
- improving the government's investigatory powers when things go wrong.

Responses to the consultation are requested by **11 June 2018**.

OTHER POINTS OF INTEREST

EMPLOYMENT – CONSULTATION ON EMPLOYMENT STATUS

In **February 2018,** the Government published "Good Work", its response to the Taylor Review on modern working practices. The Government has accepted, or agreed to take further action in the form of commencing consultations on, the overwhelming majority of the Taylor Review recommendations, particularly acknowledging that it wants to provide greater clarity on employment status and the need to balance flexible working practices with protection for workers. For further details, please see our client note on this topic.

SHARE SCHEME REPORTING OBLIGATIONS

Any company that operated a share plan for its employees during the 2017/18 tax year must file an online return with HM Revenue and Customs (HMRC) by **6 July 2018** to avoid penalties (initially £100 even if the return is just one day late). The filing obligation applies to both tax-advantaged and non tax-advantaged share incentive arrangements and extends to most acquisitions of shares by employees and directors whether or not this is under a formal set of plan rules. A share plan has to be registered with HMRC before an online return can be submitted and a return is required for a registered plan even if it has been inactive during the year. Companies that have established an employee benefit trust may also find that they are subject to the new

information keeping and reporting requirements that were introduced last year. Please get in touch with us or your relevant contact in our Incentives and Remuneration Group if you would like to discuss any of these obligations further.

Listed Company Advisory Team

We have a dedicated Listed Company Advisory Team who would be pleased to assist you with any enquiries you have in relation to the above changes. This team, led by Laura Summerfield, sits within our Corporate Department and focuses on advising listed companies on day-to-day matters including, corporate law and governance. The team also draws on the expertise of the Travers Smith specialist practice areas, such as employment, tax and employee incentives, to provide clients with a co-ordinated and seamless service.

FOR FURTHER INFORMATION, PLEASE CONTACT

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