THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 268th meeting
at 9:00 a.m. on Tuesday, 25 March 2014
at Slaughter and May, One Bunhill Row, EC1Y 8YY
(Tel: 020 7600 1200; Fax: 020 7090 5000)

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1. Welcome and apologies

Attending: William Underhill (chairman); Peter Wilson (secretary); Mark Austin (alternate for Simon Marchant); Adam Bogdanor (alternate for Keith Stella); Lucy Fergusson; Michael Hatchard; Nicholas Holmes; Chris Horton; Simon Jay; Vanessa Knapp; Stephen Mathews; James Palmer; Andrew Pearson; Chris Pearson; David Pudge; Richard Spedding; Patrick Speller; Martin Webster; Victoria Younghusband.

Apologies: Robert Boyle; Simon Marchant; Keith Stella.

2. Approval of minutes

The Chairman noted that draft minutes for the meeting held on 28 January 2014 will be circulated for comment in due course.

3. Matters arising

3.1 Outcome of FCA consultation on arrangements for disclosure of regulated information

The Committee noted that, on 31 January 2014, the FCA had published policy statement PS14/2.

3.2 MAD II

The Committee noted that, on 4 February 2014 the European Parliament had adopted a proposed Directive on criminal sanctions for market abuse and insider dealing.

3.3 Draft Directive regarding disclosure of non-financial and diversity information

The Chairman noted that the agreed text of the draft Directive amending the Accounting Directive (2013/34/EU) to require the disclosure of certain non-financial information did not appear to be publicly available. This was despite announcements on 26 February 2014 that the Council and European Parliament had reached agreement on the draft Directive.

The Chairman noted the need for the UK government to implement the final Directive in a sensible manner. It may not be sufficient to simply "copy out" the text of the Directive if this would create unnecessary work or uncertainty for UK issuers.

3.4 European Commission draft Regulation regarding supplementary prospectuses

The Committee noted that, on 7 March 2014, the European Commission had published a draft delegated Regulation on situations requiring the publication of a supplementary prospectus.

The Chairman noted that the draft Regulation does not include an equivalent to Article 2(i) of the version contained in ESMA's consultation paper dated 15 March 2013, which had caused the most concern. Proposed Article 2(i) had required the publication of a supplementary prospectus following any judgment or other concluding event, even if subject to appeal, in governmental, legal or arbitration proceedings disclosed in the prospectus.

3.5 European Parliament adopts Omnibus II Directive

The Committee noted that, on 12 March 2014, the European Parliament had adopted a proposed Directive amending (inter alia) the Prospectus Directive in respect of ESMA's powers. The proposed Directive will empower ESMA to draft, and the Commission to adopt, certain regulatory technical standards relating to prospectuses and the dissemination of related advertisements.

The Committee noted that this will increase ESMA's regulatory powers, and the Chairman noted the need to engage with ESMA regarding the exercise of its powers.

3.6 ICSA Registrars Group Guidance on electronic payment of dividends

The Committee noted that the ICSA Registrars Group had recently published its final guidance note on practical issues around articles of association relating to dividend distributions (including model wording to facilitate listed companies' payment of dividends by electronic means).

The Committee discussed the question of whether the FCA considers that a circular proposing to amend a listed company's articles to add wording facilitating the company's payment of dividends by electronic means contains "unusual features" for the purposes of LR 13.2.2R(3). It was noted that it will depend partly on the exact wording proposed, and the extent of the changes from the existing articles. The ICSA Registrars Group had asked the FCA to provide such confirmation in respect of the pro forma wording included in ICSA's guidance. The FCA had previously given such confirmation in respect of a pro forma circular to amend articles to cater for CA 2006 changes which came into effect on 3 August 2009 and 1 October 2009. However, the FCA responded that it could no longer give confirmations of that sort and that any guidance would have to be given via a formal FCA Technical Note following consultation.

The Committee agreed that, in its view, a circular proposing to amend a listed company's articles to adopt the model wording set out in the guidance note issued by the ICSA Registrars Group would not be a circular containing "unusual features" for the purposes of LR 13.2.2R(3).

3.7 Transparency and Trust – Beneficial Ownership

The Chairman outlined the matters discussed at a Roundtable convened by BIS on 4 March 2014 to discuss certain aspects of the proposals in BIS' discussion paper on "Transparency & Trust: enhancing the transparency of UK company ownership and increasing trust in UK business" which had been published in July 2013.

3.8 Transparency and Trust – Nominee directors

The Committee discussed the proposals relating to nominee directors set out in the "Transparency and Trust" discussion paper.

3.9 Response to ESMA's discussion paper on its policy orientations on possible implementing provisions under the Market Abuse Regulation

Victoria Younghusband updated the Committee regarding her meeting with the FCA on 25 February 2014 to discuss the Committee's response to the above ESMA discussion paper. The FCA representatives had some sympathy regarding the Committee's concerns in relation to market soundings and delayed disclosure of inside information. They encouraged the Committee to speak with others outside the UK who may have similar concerns that they wish to raise at a European level.

Victoria has since spoken with Stephanie Hubert, Compliance Director of AMAFI, which has in turn spoken with the AMF. AMAFI agreed with several of the points raised in the Committee's response to the discussion paper regarding market soundings and delayed disclosure. Victoria will also liaise with Bill Ferrari of AFME.

The Chairman suggested that the Committee also liaise with the GC100.

It was suggested that the Committee should consider raising these issues with the European Commission.

4. Discussions

4.1 FCA consultation paper on the sponsor regime and other matters

The Committee noted that, on 30 January 2014, the FCA had published consultation paper CP14/2 proposing amendments to the Listing Rules, a draft new Technical Note, and a draft new Procedural Note, all relating to sponsor competence and the sponsor regime. CP14/2 also proposes amending the Prospectus Rules to oblige applicants to submit a compliant and factually accurate prospectus. The deadline for responses is 30 April 2014.

The Chairman noted that the proposed changes to the Listing Rules in relation to the sponsor regime did not appear to be especially troubling. However, as a related matter he noted that on occasion there had been friction between issuers and sponsors regarding the apparent conflict between the sponsors' obligation to maintain records and the issuers' requirement that legal advice privilege be maintained.

It was agreed that a working party would be formed to work with representatives of investment banks to develop an agreed approach that would reflect the legitimate concerns on both sides.

The Committee then considered the proposed Prospectus Rule changes in CP14/2. The Chairman reported that he had briefly discussed these changes with Marc Teasdale of the UKLA, who had agreed that proposed new PR 3.1.2AR and PR 3.1.2BR should only apply to the final version of a prospectus submitted for FCA approval (and not to any preceding drafts).

The Chairman noted the FCA's brief justification for the new rules. CP14/2 stated that a recent ESMA report ("Comparison of liability regimes in Member States in relation to the Prospectus Directive", 30 May 2013) had found that "it is standard practice in Member States to provide for regulatory sanction in relation to defective prospectuses". However, the FCA considered that the UK regime does not clearly enable such sanctions to be imposed.

Differing views were expressed. Some thought that in the absence of active litigation by investors the market was reliant on regulatory enforcement of prospectus standards and that would justify the change. On the other hand it was noted that the liability regime in s90 FSMA included defences that were not included in the proposed new PR 3.1.2AR and PR 3.1.2BR. It was also noted that the proposed new Prospectus Rules would bring into play the FCA's investigation and enforcement powers in the event of a suspected breach, might create pressure upon issuers to settle with the FCA. However, issuers will also be concerned about the effect of such a settlement upon their (and their directors') potential liability in civil litigation.

It was agreed that the FCA should be encouraged to provide a better justification than is contained in CP14/2, and to permit a more extensive debate, before the proposed new Prospectus Rules become law.

5. Recent developments

5.1 Reporting and Disclosure

The Committee noted that, on 5 February 2014, the Guidelines Monitoring Group had published updated good practice guidelines on reporting under the Guidelines for Disclosure and Transparency in Private Equity (Walker Guidelines).

The Committee noted that, on 13 February 2014, ESMA had published a consultation paper and proposed new guidelines on the presentation of alternative performance measures (APMs). The draft guidelines will apply to all regulated information, and may also apply to prospectuses. The deadline for responses is 14 May 2014.

It was suggested that the scope and content of ESMA's proposed new guidelines appeared to be broadly consistent with CESR's recommendations on APMs published in 2005, which ESMA's new guidelines will replace.

The Chairman suggested that Committee members review the consultation paper and, if there is interest, then a working group could be convened to prepare a response.

5.2 Corporate Governance

The Committee noted that, on 12 February 2014, the ABI had announced its implementation of recommendations (in its July 2013 report on Shareholder Engagement) to establish an Investor Exchange and to invite major shareholders who are not ABI members to join ABI collective engagement meetings, and that the ABI had also published a related guide.

The Chairman noted that it will be interesting to see whether non-ABI members who are activist investors start using ABI collective engagement meetings as a forum in which to advocate corporate actions which they favour.

The Committee noted that, on 4 March 2014, the QCA had published a review of corporate governance disclosures made by 100 small and mid-size quoted companies.

The Committee noted that, on 7 March 2014, the Best Practice Principles Group (BPPG) had published a set of best practice principles for providers of shareholder voting research & analysis. It was noted that the BPPG's members, and charter signatories to the principles, comprise PIRC, Glass, Lewis & Co., ISS, IVOX, manifest, and Proxinvest. The ABI and NAPF are not members, but both had submitted consultation responses on the draft principles.

The Chairman noted that the BPPG's best practice principles are relatively weak. For example, signatories must disclose "a material conflict of interest that cannot be effectively managed" (guidance on Principle Two), but need not disclose any conflict which is effectively managed. Signatories must also disclose whether they engage in dialogue with issuers (guidance on Principle Three), but there is no obligation to engage in such dialogue.

The Committee did not think it would be helpful to engage with the BPPG regarding the content of its best practice principles. The Chairman thought it best to await further legal developments in Europe in this area.

5.3 AIM and FTSE Rules

The Committee noted that, on 27 January 2014, the LSE had published AIM notice 38, an AIM Rules for Companies Consultation Document and an AIM Rules for Nominated Advisers Consultation Document.

The Committee noted that, on 18 March 2014, FTSE had announced that "grandfathered" non-UK companies admitted to the FTSE UK Indices prior to the 2010 free float changes, and which still have a free float under 50% on 1 March 2016, will be removed from the FTSE UK Indices.

5.4 Public M&A

The Committee noted that, on 4 March 2014, the Takeover Panel Code Committee had published Panel Statement 2014/2 and related Instrument 2014/1.

The Committee noted that, on 5 March 2014, the Takeover Panel had published Panel Statement 2014/3 regarding concert party and Rule 9 (mandatory offer) issues relating to the assignment of a loan and subsequent enforcement of a related charge over shares.

5.5 Equity Capital Markets

The Committee noted that, on 7 February 2014, AFME had published guidelines for increased transparency in disclosures relating to lock-up periods agreed in the context of block trades. The guidelines appear to be AFME's response to a letter which the ABI sent to all leading investment banks on 4 June 2013 expressing concern regarding waivers of agreed lock-up periods.

The Chairman noted that the AFME guidelines did not impose any limitations upon the duration of lock-up periods.

5.6 Europe

The Committee noted that, on 18 March 2014, the CLLS Regulatory Law Committee had published a memorandum on the definition of a "derivative" in the European Market Infrastructure Regulation (EMIR) and its application to certain corporate transactions and arrangements.

The Committee noted that, on 21 March 2014, ESMA had published a consultation paper on a draft delegated Regulation on major shareholdings, and an indicative list of financial instruments subject to notification requirements under the revised Transparency Directive. The deadline for responses is 30 May 2014.

It was noted that the indicative list of financial instruments subject to notification requirements was difficult to follow in places. In particular, what did ESMA mean by including "shareholders' agreements having any of the above mentioned financial instruments as an underlying"? It was noted that if such shareholder agreements are to be disclosable financial instruments, then this would tend to undermine the approach previously agreed with the FSA (as it then was) to the disclosure of conditional obligations under (for example) underwriting agreements pursuant to DTR 5.3.1R(1)(b) and DTR 5.1.1R(4).

The Chairman considered that the Committee should form a working party to respond to this consultation.

5.7 Cases

The Committee noted the judgments in:

- *Cramaso LLP v Viscount Reidhaven's Trustees* [2014] UKSC 9; and
- *AB v CD* [2014] EWCA Civ 229.

6. Any other business

6.1 UKLA Liaison Group

The Chairman reported that Marc Teasdale of the UKLA had enquired whether the Committee would be interested in convening another UKLA Liaison Group meeting. The following possible agenda items were suggested:

- Timing of eligibility decisions – in some instances the FCA had re-opened a new applicant's eligibility for listing at a late stage in a transaction. On one deal this occurred after the FCA's comments on the prospectus had been resolved, and while the issuer was on roadshow with a pathfinder prospectus.

  Nicholas Holmes agreed to prepare a paper for the FCA on this issue.

- Issues raised in the ABI report on "Encouraging equity investment" (July 2013) – The FCA may be interested in discussing the IPO issues raised in this report, such as whether it would be possible to publish the prospectus at the same time as research reports by connected analysts. The FCA did not think that it had the powers to regulate brokers' research (except in the context of conduct of business rules for investment banks), but asked the Committee to let it know if the Committee disagrees.

  In this context, the Chairman wondered if the Committee should consider the possibility of connected analysts issuing research reports after the prospectus had been published.

- LR 11 and the investment manager exemption to the definition of a "substantial shareholder" – It was noted that the FCA has not expressed a view on how the exemption in LR 11.1.4AR(1) is intended to operate. In the absence of guidance, this exemption might be used in an overly-broad way by investment managers, which the FCA may consider inappropriate. This point had been raised with the FCA at a previous UKLA Liaison Group meeting.

  Mark Austin agreed to prepare a paper for the FCA on this issue.