THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 272nd meeting
at 9:00 a.m. on Tuesday, 25 November 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 – for part of the meeting); Michael Hatchard (chairing this meeting); Peter Wilson (secretary); Mark Austin; Lucy Fergusson; Anthony Foster (alternate for Richard Spedding); Tessa Hastie (alternate for Keith Stella); Simon Jay; Vanessa Knapp; Stephen Mathews; James Palmer; Chris Pearson; Kath Roberts (alternate for David Pudge); Patrick Speller; Jeffrey Sultoon (alternate for Nicholas Holmes); Martin Webster; Victoria Younghusband.

Apologies: Nicholas Holmes; Chris Horton; Andrew Pearson; David Pudge; Richard Spedding; Keith Stella.

2. Approval of minutes

The Secretary noted that draft minutes for the meeting held on 23 September 2014 will be circulated for comment in due course.

3. Matters arising

3.1 <u>FCA feedback and consultation on the sponsor regime and other matters</u>

The Committee noted that, on 26 September 2014, the FCA had published consultation paper CP14/21, setting out feedback and final rules following CP14/02 on sponsor competence and on amending the PRs to oblige applicants to submit a compliant and factually accurate prospectus. CP14/21 also includes a consultation on joint sponsors and a call for views on sponsor conflicts.

The deadline for responses on the revised guidance on sponsor competence was 7 November 2014, and the Committee noted that a response had been submitted by the Listing Rules Joint Working Party of the Company Law Committees of the Law Society of England and Wales and the City of London Law Society.

The deadline for consultation responses on joint sponsors and sponsor conflicts is 30 December 2015.

3.2 ESMA reports on draft technical standards under revised Transparency Directive

The Committee noted that, on 29 September 2014, ESMA had published its final report containing draft regulatory technical standards on major shareholdings, and an indicative list of financial instruments subject to notification requirements under the revised Transparency Directive.

3.3 Takeover Panel response statement on miscellaneous Code amendments

The Committee noted that, on 14 November 2014, the Code Committee had published response statement RS 2014/1 regarding miscellaneous amendments to the Takeover Code. The Code amendments, and related changes to the Panel's Rule 8 disclosure forms, will take effect on 1 January 2015.

3.4 Response to Takeover Panel consultation paper PCP 2014/2

The Committee noted that a response had been submitted by the Takeovers Joint Working Party of the Company Law Committees of the Law Society of England and Wales and the City of London Law Society.

The Committee considered that the key issues for determination by the Panel include, in particular, the scope of permitted qualifications and conditions to post-offer undertakings, such as for material changes of circumstances or unspecified events of force majeure.

3.5 Response to Primary Market Bulletin No. 8

The Committee noted that a response had been submitted by the Listing Rules Joint Working Party of the Company Law Committees of the Law Society of England and Wales and the City of London Law Society.

3.6 Response to FCA consultation paper CP14/18

The Committee noted that a response had been submitted by the Listing Rules Joint Working Party of the Company Law Committees of the Law Society of England and Wales and the City of London Law Society.

3.7 Responses to ESMA consultation papers concerning MAR

The Committee noted that responses had been submitted to these two consultation papers by the MAR Joint Working Party of the Company Law Committees of the Law Society of England and Wales and the City of London Law Society.

3.8 "Transparency & Trust" / Small Business, Enterprise and Employment Bill

The Committee noted that the Company Law Committee of the Law Society of England and Wales had submitted written evidence and supplementary written evidence to the House of Commons Public Bill Committee regarding this Bill.

3.9 FRC changes to Provision E.2.4 of the UK Corporate Governance Code

The Secretary noted that, following the meeting held on 23 September 2014, the Chairman had spoken with the person at the FRC responsible for the amendment made to Provision E.2.4 of the Code. This provision now requires that a GM notice and related papers be sent to shareholders "at least 14 working days" before the meeting.

The FRC indicated that it would provide the Chairman with a formal explanation shortly. However, it appears that the FRC did not fully appreciate the implications of this change when they made it. They believed they were just making the position for GMs consistent with the position for AGMs (which were already subject to Provision E.2.4).

Vanessa Knapp noted that she had also spoken with the FRC about this issue, and received a broadly similar response.

In the interim, it was suggested that if a listed company has a good reason to convene a GM on the minimum notice permitted by s.307A of the Companies Act 2006, then it should explain its non-compliance with Provision E.2.4 rather than comply.

4. Discussions

4.1 BIS consults on PSC register

The Committee noted that, on 28 October 2014, BIS had published a discussion paper regarding the proposed new register of people with significant control which companies will be required to maintain once the Small Business, Enterprise and Employment Bill has been enacted into law. The deadline for responses is 9 December 2014.

The Committee's attention was drawn to two key issues raised by this consultation:

- First, whether economic harm alone should be a sufficient reason for protecting from public disclosure certain personal information included on the proposed new register. BIS appears to be inclined towards the view that economic harm alone is insufficient, saying in the discussion paper that "protection… should be granted only to those who are at serious risk of harm. On that basis, we are not persuaded that competition or reputational impact should be taken into account". The Committee considered potential arguments for and against this position.

- Secondly, whether BIS should task an external working group (including experts and practitioners) with preparing statutory guidance about the meaning of "significant influence or control" which would be required by the Bill. The Committee agreed that an external working group was desirable. The discussion paper also asked who should be involved in preparing additional non-statutory guidance on additional matters, which might include the other conditions of being a person with significant control and wider questions around the proposed new register.

The Chairman asked members to give further consideration to the first issue after this meeting. The Chairman will then consider (in light of any responses received from Committee members) whether a focussed consultation response should be submitted to BIS.

4.2 ESMA consults on draft technical standards under revised Prospectus Directive

The Committee noted that, on 26 September 2014, ESMA had published a consultation paper proposing draft regulatory technical standards under provisions of the Prospectus Directive amended by the Omnibus II Directive (2014/51/EU). The draft standards relate to procedures for approval of prospectuses, incorporation by reference, publication of prospectuses, advertisements, and the disclosure of offer-related information. The deadline for responses is 19 December 2014.

4.3 BIS progress report on implementing the Kay Review

The Committee noted that, on 27 October 2014, BIS had published a progress report on the implementation of the Kay Review of UK Equity Markets and Long-Term Decision Making.

Among other things, the progress report notes that:

- The Government is reviewing the impact of its reforms on executive remuneration, and intends to publish the key findings from this work and any policy conclusions drawn from it shortly.

- The Government confirmed its preliminary view that restricting the role of short-term shareholders during a takeover bid would be difficult to implement in practice. Disenfranchising such shareholders also risked being at best ineffective and at worst damaging. Accordingly, the Government has no plans to introduce measures of this kind.

- The Government welcomes the Takeover Panel's proposals in PCP 2014/2 regarding post-offer undertakings and intention statements, and considers that there is no action which the Government needs to take to support the introduction of this new two-tier system.

4.4 Launch of Investor Forum

The Committee noted that, on 27 October 2014, the Investor Forum had launched its new website (www.investorforum.org.uk) and published a discussion paper on its key principles and approach to engagement. The Kay Review had recommended the establishment of the Forum to advocate the position of investors to companies.

The Committee noted that:

- The intention is that the Investor Forum (supported by a panel of law firms) will work with shareholders to facilitate long-term engagement with companies.

- Co-ordinated action of a long-term nature raises some potentially difficult legal issues, including in relation to the possible application of the market abuse regime. For example, it may be more difficult to 'cleanse' (through an announcement) knowledge of matters under consideration of a long-term nature.

- Freshfields (which is on the panel) is primarily responsible for drafting a proposed protocol on how engagement with companies will work, including the process to be followed. This work is at a very early stage.

- The Committee considered that it would be helpful if a draft of the protocol could be shared with the Committee in due course.

- It was suggested that it may be helpful for the Investor Forum to provide guidance addressing examples of matters on which shareholders may wish to engage with a company, and outlining the relevant legal issues. However, the Committee considered that the legal issues and conclusions will inevitably be quite fact-specific. For example, the issue of succession planning may be highly price-sensitive for some companies, but not others. Ultimately, the company is best-placed to assess whether any information disclosed or matters under discussion constitute inside information or not. Accordingly, the Committee did not consider that it would be possible for guidance to identify the legal implications of particular engagement beyond general parameters in any particular situation.

- The Chairman asked Committee members to consider what concerns companies may have regarding engagement, which the protocol may need to address (e.g. shareholder requests for companies to commit to 'cleanse' via announcement). It may be helpful to pass such suggestions on to the Investor Forum for consideration.

5. Recent developments

5.1 Corporate Governance

The Committee noted that, on 20 October 2014, the IMA had published its principles of remuneration and related introductory letter.

Vanessa Knapp drew the Committee's attention to the OECD's consultation on the proposed revised text of the OECD Principles of Corporate Governance. Committee members agreed to take a look at this, and consider whether a working group should be formed to respond. The deadline for responses is 4 January 2015.

5.2 Reporting and Disclosure

The Committee noted that, on 26 September 2014, the CMA had published the Statutory Audit Services for Large Companies Market Investigation (Mandatory Use of Competitive Tender Processes and Audit Committee Responsibilities) Order 2014. The Order will apply to financial years beginning on or after 1 January 2015.

The Committee noted that, on 29 September 2014, the European Council had adopted a Directive amending the Accounting Directive to require disclosure of non-financial and diversity information by certain large companies and public interest entitles. On 15 November 2014, the final Directive (2014/95/EU) had been published in the Official Journal.

The Committee noted that, on 14 October 2014, the FRC had published its Corporate Reporting Review Annual Report for 2014, covering the year ended 31 March 2014.

The Committee noted that, on 27 October 2014, revised drafts of the Reports on Payments to Governments Regulations 2014 and explanatory memorandum had been published. The draft Regulations will implement Chapter 10 of the Accounting Directive, which requires large companies and public interest entities active in the extraction of oil, minerals or gas or the logging of primary forests to publish annual reports detailing payments they make to governments relating to their extraction or logging activities. The Committee noted that a major issue raised by the draft Regulations is the scope of the definition of “government”.

The Committee noted that, on 7 November 2014, the FCA had published policy statement PS14/15 on removing the requirement for issuers to publish interim management statements (reflecting changes to the Transparency Directive). The rule changes took effect on 7 November 2014.

5.3 Public M&A

The Committee noted that, on 14 November 2014, the Panel Executive had published Practice Statement No. 28 on entering into talks during a restricted period.

The Committee’s attention was drawn to section 3 of the Practice Statement. Paragraph 3.2 addresses the situation where a bidder makes a “no intention to bid” statement under Rule 2.8, but then enters into talks with the target during the 6-month restricted period (suspending the Rule 2.8 restrictions). If a leak occurs during the 6-month restricted period, then paragraph 3.2 states that the Panel Executive will not normally require the imposition of a ‘put up or shut up’ (“PUSU”) deadline. The Executive considers the imposition of a PUSU unnecessary in these circumstances, given that the target’s board could end the talks at any time. In that case, the restrictions in Rule 2.8 would again apply to the bidder, but (under paragraphs 2.5 and 3.4) only for the remainder of the restricted period.

However, paragraph 3.3 of the Practice Statement provides that, if the talks continue to the end of the 6-month restricted period, the Panel Executive will then require the imposition of a PUSU deadline. If the bidder does not make a firm offer announcement by the PUSU deadline, then a new 6-month restricted period would commence.

The Committee wondered if this discrepancy may create a disincentive for target companies to end talks during the 6-month restricted period. If they do so, then they will not benefit from the protection of a new, 6-month restricted period.

5.4 Equity Capital Markets

The Committee noted that, on 7 October 2014, the ICAEW had published TECH 14/14CFF, providing guidance on financial position and prospects procedures. The revised guidance applies to all new listing processes commencing on or after 1 December 2014.

The Committee noted that, on 22 October 2014, ESMA had published version 22 of its Prospectuses: Questions and Answers.

The Committee noted that some practical difficulties and the risk of excessive restrictions on controlling shareholders have been experienced when negotiating relationship agreements between controlling shareholders and premium-listed companies (as required by the Listing Rule changes made on 16 May 2014).

It was noted that, at the meeting on 20 May 2014, the Committee had agreed that it should not generally be necessary for premium-listed companies with controlling shareholders to amend their articles of association in order to reflect the independent director election provisions in LR 9.2.2ER and LR 9.2.2FR. A Committee member mentioned that their firm had conducted a survey of listed companies, which only identified one company which was amending its articles to address this point.

Another Committee member noted that post-IPO controlling shareholders are encountering some difficulties in reducing their shareholding through subsequent block trades. Some investment banks are now unwilling to waive lock-up periods. The controlling shareholder is also likely to have nominee directors on the issuer's board. If those nominees pass inside information to the controlling shareholder, this will prevent it from selling shares. Even if they do not, relationship agreements often contain a clause to the effect that the controlling shareholder cannot sell shares if a director could not sell shares.

5.5 Market abuse

The Committee noted that, on 20 November 2014, the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2014 had been published, together with an explanatory memorandum. The Regulations come into force on 15 December 2014.

5.6 Accounting

The Committee noted that, on 7 October 2014, the FRC had published a feedback statement and revised operating procedures for its Conduct Committee.

The Committee noted that, on 12 November 2014, the FRC had published for comment a financial reporting exposure draft (FRED 56) of Draft FRS 104 – Interim Financial Reporting. The deadline for responses is 12 January 2015.

5.7 Cases

The Committee noted the judgment in *Eurasian Natural Resources Corporation Ltd v Judge* [2014] EWHC 3556 (QB). The High Court had struck out ENRC's claim for the delivery up of confidential documents in the possession of Sir Paul Judge, a former non-executive director of ENRC, on the basis that Sir Paul was not subject to a contractual or equitable obligation to deliver up following termination of his directorship (as an extension of his duty of confidentiality).