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UK PUBLIC COMPANY/AIM MARKET

The Companies (Shareholders' Rights) Regulations 2009

The EC Shareholders' Rights Directive (2007/36/EC) was adopted in order to improve corporate governance in relation to companies whose shares are traded on a regulated market by making specific provision for the exercise of shareholders' voting rights. In the UK the Directive is to be implemented by the Shareholders' Rights Regulations 2009 (*SI 2009/1632*), ("Shareholders' Rights Regulations"), which come into force on 3 August 2009.

The Shareholders' Rights Regulations make a number of amendments to the Companies Act 2006 (the "Act"), primarily to Part 13 (Resolutions and meetings), some of which changes will apply to all companies. These include:

- *Rights of proxies and corporate representatives.* The rights of proxies and corporate representatives to vote at general meetings will be clarified and, in particular, the right to vote both on a show of hands and on a poll. Specifically, a proxy appointed by one or more members will have one vote on a show of hands, save where such proxy has been appointed by more than one member and one or more members has instructed him to vote in favour of the resolution and one or more members has instructed him to vote against the resolution, in which case he will have one vote for and one vote against the resolution. Also, where more than one corporate representative has been appointed and more than one corporate representative seeks to exercise a right to vote then, if all the corporate representatives do not exercise the power in the same way as each other, the power is treated as not exercised.

- *Ability of members to call general meetings*. Section 303 of the Act will be amended to permit shareholders holding 5% or more (previously 10% or more in the case of a private company) of the voting rights to call general meetings in all circumstances.

- *Different voting rights on a poll and written resolution*. A new Section 285A of the Act will render void any provision of the articles of association by which different voting rights apply when voting on a poll compared to the position when voting by way of written resolution on any resolution that is required or authorised by any enactment.

- *Votes cast in advance of a meeting*. A new Section 322A of the Act will provide that a company's articles can provide for votes to be cast in advance of a meeting without appointing a proxy.

The main changes introduced by the Shareholders' Rights Regulations relate to "Traded Companies", that is companies with voting shares admitted to trading on a regulated market in an EEA state. A company whose shares are admitted to the AIM market of the London Stock Exchange will not therefore be affected by these changes. The changes relating to Traded Companies include:

- *Notice of general meetings*. The default minimum notice period for calling general meetings other than annual general meetings ("AGMs") moves from 14 to 21 clear days, although the ability to call such meetings on 14 days' notice is retained where certain requirements are satisfied. The minimum notice period for AGMs of Traded Companies remains at 21 clear days.

- *Additional information*. Certain additional information must be included in notices of general meetings and on the company's website before and (if a poll has been conducted) after the general meeting.

- *Proxy appointments*. A new Section 333A will require an electronic address to be provided for receipt of proxy appointments, which must be available to all members.

- *Right to have questions answered.* A new Section 319A will give shareholders the statutory right to have the company answer questions raised by them at a general meeting, subject to certain limitations.

CESR: Pan European Short Selling Disclosure Regime Consultation

On 8 July 2009, the Committee of European Securities Regulators ("CESR") published a consultation paper outlining its proposal for a pan-European short selling disclosure regime. In response to the credit crisis and concerns about market stability CESR has decided to develop some pan-European standards for transparency in short selling. CESR believes it is important to achieve a permanent and harmonised approach across the EEA by the introduction of European legislation in this area. CESR intends to publish its final proposal by the end of 2009.

CESR's proposal for a pan-European short selling disclosure regime is based on a two-tier system for the disclosure of significant net short positions held in shares admitted to trading on an EEA regulated market or a multilateral trading facility. This would require a short seller reaching a specified initial threshold of 0.1% of the company's issued share capital to make a private disclosure to the regulator of the most liquid market for the share in which the position is held.

If the position reached a second-tier threshold, which is proposed to be set at 0.5%, the short seller would be required to publicly disclose its position to the market as a whole. In addition, further private and public disclosures would be required on each occasion the short position subsequently crosses a 0.1% incremental threshold above 0.5%. A private or public disclosure would also be necessary if the positions fell below any of the trigger thresholds, including the initial trigger thresholds of 0.1% and 0.5%.

Extension of UK Short Selling Regime

On 26 June 2009, the FSA published a policy statement entitled: "Extension of the short selling disclosure obligation" (PS09/10). In this statement the FSA extended without time limit the disclosure obligation ("Disclosure Obligation") in relation to the short selling of stocks in certain UK financial sector companies that had been due to expire on 30 June 2009.

Whilst the FSA has not set another expiry date for the Disclosure Obligation, it does not intend it to apply permanently in its current form, and expects it either to be superseded by broader permanent disclosure measures or to be revoked. In the meantime it expects to issue a feedback statement summarising the responses to its discussion paper on the future short selling regime for all UK stocks (DP09/1) in the third quarter of 2009 and is engaged in the international dialogue on short selling (see above).

FSA Consultation Relating to Financial Penalties in Enforcement Proceedings

On 6 July 2009, the FSA published a consultation paper (CP09/19) concerning proposed changes to its policy on determining the level of financial penalties in enforcement cases brought under its Financial Services and Markets Act 2000 ("FSMA") powers and non-FSMA powers (*e.g.* the Money Laundering Regulations 2007). The consultation includes consideration of possible alternative approaches in enforcement cases where a person claims that paying a financial penalty may result in serious financial hardship.

The proposed new framework for determining financial penalties will involve the FSA taking in each case the following five steps, based on the principles of disgorgement, discipline and deterrence:

- Removal of any profits made (disgorgement).

- Assessing a penalty that reflects the nature, impact and seriousness of the breach, (which in the case of a firm can be a figure representing up to 20% of its relevant income).

- Making adjustment for mitigating and aggravating factors.

- Making adjustment for deterrence.

- Providing allowance (discount) for settled cases.

Whilst possible insolvency of a firm as a result of the imposition of financial penalties is not an impediment to enforcement action, it is the case that the FSA may, in circumstances of potentially serious financial hardship, take into account its regulatory objectives, including the potential impact on consumers, in deciding whether or not to agree to a reduction of that penalty. In the case of an individual rather than a firm, it is proposed that a penalty should only be reduced where its payment would cause that individual's income and capital to fall below certain threshold levels.

Changes to Disclosure and Transparency Rules and AIM Rules Relating to Disclosure of Contracts for Difference

The FSA's Disclosure and Transparency Rules ("DTR's") require disclosure of the direct or indirect holding at or above a 3% threshold of voting rights (different thresholds apply to non-UK issuers) attached to shares of companies that are admitted to trading on a regulated market (including AIM), including the situation where a person is entitled to acquire voting rights as a result of holding certain financial instruments.

The FSA has amended the DTR's as from 1 June 2009 and specifically DTR 5 to require the disclosure of gross long contracts for difference ("CfD"). Previously, DTR 5 did not require disclosure of instruments giving a pure economic exposure to shares but without conferring voting rights, for example, a cash settled CfD. However, following extensive consultation, the FSA decided to amend DTR 5 to require such disclosure in order to improve transparency in the market. Consequently, it has also been necessary, (given that AIM companies are required to comply with DTR 5), to amend the AIM Rules for Companies ("AIM Rules") to align them with DTR 5 (as amended).

All AIM companies, (including those incorporated in a jurisdiction which does not have a similar shareholder disclosure regime to the DTRs ("Non-DTR companies")), must comply with AIM Rule 17 (which requires the disclosure of significant shareholdings). In the case of those AIM companies that are Non-DTR companies, the Guidance Note on Rule 17 explains that such companies are to use all reasonable endeavours to comply with Rule 17. So, for example, where such a company is informed of any relevant change to a significant shareholding resulting from a CfD position (or other similar financial instrument position) this should be announced without delay.

Shareholders in companies subject to the DTR's may calculate the aggregation of their CfD holdings (and other similar financial instruments holdings) on a nominal or delta-adjusted basis until 31 December 2009 after which time reporting must be on a delta-adjusted basis only. In the case of Non-DTR companies, these companies should encourage the disclosure of shareholdings to them on the same basis as for companies subject to the DTR's to ensure consistent market notification of these positions. Disclosure on a nominal or delta-adjusted basis is acceptable until 31 December 2009, after which time shareholders should be encouraged to disclose their holdings on a delta-adjusted basis. However, disclosure on this basis will not be mandatory.

CESR: Action on Market Abuse Directive

On 15 May 2009, CESR published its third set of Level 3 guidance on the common operation of the Market Abuse Directive (2003/6/EC) ("MAD"), covering:

- *Harmonisation of requirements for insider lists*. This includes guidance on the number expected to be on a list, categories of people who may be insiders and the language of insider lists.
- *Suspicious transaction reports ("STRs")*. This includes guidance on the timeframe for notification, method of notification and the content of STRs.
- *The stabilisation regime*. This includes guidance on the safe harbour, reporting mechanisms and the application of the MAD safe harbour to sell side transactions and refreshing the greenshoe (purchases of securities previously sold to facilitate subsequent stabilising activity).

On 10 July 2009, CESR also published its response to the EC Commission's call for evidence on MAD as part of its proposal to simplify MAD and reduce the burdens it imposes on businesses. In its response to a question as to the need for a comprehensive short selling framework to be incorporated within MAD, CESR stated that it "firmly believes that a harmonised regime for short selling is desirable", but that this "might be best dealt with in separate European legislation rather than an amendment to MAD", in which connection a separate consultation paper has been published by CESR (see above) outlining its proposal for a pan-European short selling disclosure regime.

UKLA: List! Issue 21

On 21 May 2009, the FSA in its capacity as the UK Listing Authority, published issue 21 of its List! newsletter. A number of topics are covered, including issues relating to property valuation reports, investment trust rollovers and interim management statements required to be published under the EC Transparency Directive.

The newsletter also includes a number of observations concerning the disclosure of risk factors in prospectuses, which it is felt could be improved. In particular, companies are reminded to avoid the inclusion of generic and irrelevant risk factors and not to include risk factors that conflict with or undermine other rule requirements *e.g.* as to working capital.

In relation to forthcoming developments, the newsletter refers to plans to publish a consultation paper later in 2009 addressing the possibility of compensatory open offers, conditional rights issues and accelerated rights offerings based on the Australian RAPIDS model. Reference is also made in this connection to a joint submission by the UK Listing Authority and the Treasury to the EC Commission, advocating the use of short form prospectuses in rights issues.

EC Commission: Recommendation on Director's Remuneration

The EC Commission on 29 April 2009, adopted as part of a financial package, a recommendation on the regime for the remuneration of directors of listed companies.

This complements previous EC Commission recommendations in this area (2004/913/EC and 2005/162/EC). The EC Commission considers that whilst the form, structure and level of remuneration of a listed company's directors are primarily matters for companies, their shareholders and, where applicable, employee representatives, there remains a need for additional principles governing the structure of directors' remuneration and the process of determining remuneration and the control of that process.

The EC Commission recommendation includes the following:

- Limits should be set on variable components of remuneration.
- The award of variable components of remuneration should be subject to predetermined and measurable performance criteria that promote the long-term sustainability of the company and include non-financial criteria relevant to the company's long term value creation.
- A major part of any variable component of remuneration should be deferred for a minimum period of time.
- Contractual arrangements should include provision that allows a company to reclaim variable components of remuneration awarded on the basis of data which is subsequently proven to have been manifestly misstated.
- Termination payments should be capped at a fixed amount or by reference to a director's remuneration for a fixed period, which should not in general be more than two years of the non-variable element of remuneration.
- Any share based remuneration should not vest for at least three years and the vesting of share options should be subject to predetermined and measurable performance criteria.
- A certain number of shares should be retained by directors until the end of their mandate (this number should be fixed, *e.g.* twice the total value of annual remuneration).

In addition, the EC Commission has adopted a recommendation on remuneration in the financial services sector which sets out principles on remuneration policy applicable to all financial services firms. It recommends that EU member states ensure that financial institutions in all sectors have remuneration policies for risk-taking staff, (that is, employees whose professional activities have a material impact on the risk profile of a financial institution), which are consistent with, and promote, sound and effective risk management and which do not induce excessive risk taking.

The EC Commission has invited EU member states to take the measures necessary to promote the application of its recommendations on remuneration by 31 December 2009, which should include a clear timeframe for companies to adopt remuneration policies consistent with those recommendations.

TAKEOVERS AND MERGERS

Consultation on Extension of Disclosure Regime

The Code Committee published a consultation paper in May 2009 containing the Panel's proposals for extending the disclosure regime. It is intended that any amendments to the City Code on Takeovers and Mergers ("Code") arising out of the proposals would take effect in early 2010 after a transitional period.

The proposed changes include:

- Introduction of a new opening disclosure obligation on an "extended composite" basis (see below) following the commencement of an offer period and following an announcement that first identifies an offeror, which will apply to: the offeree; an offeror (after its identity is first publicly disclosed); any person interested in 1% or more of the relevant securities of any party to the offer (*i.e.* the offeree and any publicly identified non-cash offeror or competing offeror); and exempt principal traders who do not benefit from recognised intermediary status. Disclosures by the offeree or offeror should include information relating to their associates.

- Amendment of Rule 22 so that the offeree and a non-cash offeror will be required to take all reasonable steps to identify persons interested in 1% or more of the relevant securities of that party and to provide this information to the Panel. Offeree companies and non-cash offerors will also be required to send all such persons an explanation of their disclosure obligations under Rule 8 (in addition to the summary of the provisions of Rule 8 contained in the relevant announcement and/or circular).

- Extension of the composite disclosure obligations so that persons who have gross long positions of 1% or more in any class of relevant securities of any party to an offer (other than a cash offeror) would be required to disclose dealings in the relevant securities not only of that party but also of any other party to the offer. Any such dealing disclosure would also require a disclosure of all interests and short positions in relevant securities held by such persons in all parties to an offer.

- Deletion of the definition of associate and amendment of the rules which refer to a party's associates so that such references are replaced by references to persons acting in concert with it.

The Panel does not propose introducing a disclosure requirement for persons with a significant short position but no significant gross long interest in relevant securities of any party to the offer. Nor is it proposed that general disclosure obligations with respect to securities borrowing or lending be included at this stage, on the basis that the costs of introducing new systems and policies to meet such obligations are believed to outweigh any resulting benefit. That said, the Code Committee has proposed some changes to certain rules which would require disclosure of financial collateral arrangements in specific circumstances.

Panel Guidance on Debt Syndication in Offer Periods

The Panel has issued a practice statement providing guidance to offerors and their advisers to help ensure that any syndication of debt financing during offer periods complies with the requirements of the Code. The statement has been issued at the request of the Loan Market Association ("LMA") and the London Investment Banking Association, and the LMA has published a revised form of confidentiality letter for use in connection with syndications. The practice statement focuses on the potential application of General Principle 1 and Rules 16 and 21 of the Code in the context of the syndication process, where the syndicatee is or becomes an offeree shareholder.

General Principle 1 provides that holders of securities of an offeree company of the same class must be afforded equivalent treatment. Rule 16 essentially prevents the offeror or its concert parties from making favourable arrangements with offeree shareholders which are not extended to all offeree shareholders. Rule 21 provides that information about parties to an offer must be made equally available to all offeree company shareholders and persons with information rights.

In the context of Rule 16, the Panel Executive is concerned to ensure that the decisions made by the debt department and the equity department of a syndicatee are sufficiently independent of the other so as to avoid a breach of that rule. In view of the detailed information which is typically made available to potential syndicatees, Rule 21 could potentially be breached where the syndicatees are or become holders of offeree shares during the offer period.

The practice statement sets out steps that may be taken to avoid breaches of the Code, including the establishment of effective information barriers between the debt and equity departments of the syndicatee or where syndicatees are not offeree shareholders, undertakings from them that they will not acquire shares in the offeree except in specified circumstances. The statement also describes the minimum standards that the information barriers should meet and sets out the respective responsibilities of the financial adviser and the mandated lead arranger for compliance with the Code in such circumstances.

UK COMPANY LAW

The Companies (Share Capital and Acquisition by Company of its own Shares) Regulations 2009

A further draft of The Companies (Share Capital and Acquisition by Company of its own Shares) Regulations 2009 has been published which it is intended will come into force on 1 October 2009.

The regulations make three changes to the Act. Firstly, the minimum subscription period for pre-emptive rights issues will be reduced from 21 days to 14 days in line with the EU Directive 77/91/EEC. Since February 2009, listed companies implementing non-pre-emptive rights issues have been able to make use of a shortened minimum subscription period of 10 business days, so the changes will also bring the statutory and non-statutory positions into closer alignment.

The regulations will also introduce a requirement for creditors that object to a reduction of a company's capital to demonstrate that their claim is at risk and has not been adequately safeguarded by the company.

Finally, the 10% limit on companies holding shares in treasury will be removed and the period for which an authority for a company to purchase its own shares may endure will be increased from 18 months to five years. It is believed that these changes will offer companies increased short term flexibility when managing capital without eroding existing shareholders' rights, as shareholders' authority will continue to be required for buy-backs and any sales out of treasury will be subject to pre-emption rights.

Companies Act 2006, 1 October 2009: Impact on Memorandum and Articles of Association for Existing Companies

On 1 October 2009, the remaining provisions of the Act will come into force. On the same date the Companies Act 2006 (Commencement No. 8, Transitional Provisions and Savings) Order 2008 (the "Order") will come into effect which, (among other secondary legislation), sets out the extent to which certain provisions of the Act will apply to companies ("existing companies") incorporated under the Companies Act 1985 ("1985 Act").

A number of the provisions of the Act both directly, and as applied by the Order, will have an impact on an existing company's constitutional documents and certain of the new provisions apply automatically. Notwithstanding that there is no legal requirement for an existing company to amend its memorandum and articles of association, as the Act (with a few limited exceptions) will override inconsistent provisions, a review of these documents prior to 1 October 2009 is advisable in order to assess whether any changes are required to enable an existing company to benefit from certain of the new statutory provisions (where desired) and to ensure that, where relevant, its articles both continue to apply in the way originally intended and are consistent with the new law. The extent to which existing companies may wish to amend their constitutional documents to reflect the changes to the law will largely depend on the individual circumstances applicable to that company, but the following is a general overview of some of the issues that may be relevant for consideration.

From 1 October 2009, under section 28 of the Act, all provisions of an existing company's memorandum (except, broadly, the statement of intention to form an association and the agreement to subscribe for shares) unless expressly disapplied, will be deemed to form part of the articles of association. This will include any statement as to the authorised share capital on registration (as increased from time to time under the 1985 Act). Any statement of the authorised share capital which is included in a company's articles of association, either expressly, or which is deemed included by operation of section 28 of the Act, will continue to operate as a restriction on the number of shares that a company may issue notwithstanding that from 1 October 2009, the concept of an authorised share capital will be abolished. An existing company wishing to benefit from the new regime will therefore need to adopt new articles which exclude all references to authorised share capital. Broadly, under the Act the directors will still require authority to allot new shares for cash and statutory pre-emption rights will continue to apply, although there are relaxations available for private companies with a single class of share capital in certain circumstances.

An existing company's objects as stated in its memorandum will also form part of the articles (to the extent not excluded) by operation of section 28 and will continue to restrict a company's capacity. Under the Act, from 1 October 2009 a company no longer needs to have objects and will have unrestricted capacity unless otherwise provided in its articles. If an existing company's objects are no longer relevant and it wants to have unlimited capacity, its existing objects will need to be deleted.

Other changes to the law from 1 October 2009 to be considered in this regard, include the reversal of the position under the 1985 Act, which required a company to contain an express power in its articles to buy-back its own shares, to issue redeemable shares, or to sub-divide or consolidate its shares. As a result, all companies may carry out such activities (in accordance with the Act) unless otherwise restricted by their articles, subject to the one exception in relation to the issue of redeemable shares by public companies, for which authorisation under the articles under section 684(3) of the Act will continue to be required. Existing companies should therefore review their articles to ensure with respect to such matters that, where desired, the articles will continue to operate in the way originally intended.

Existing companies wishing to take advantage of the new provisions of section 77(1)(b) of the Act, which enable a company to change its name in accordance with any means provided in its articles, will need to insert appropriate provisions in their articles of association. Such new power is in addition to the ability for the name to be changed by way of special resolution of its members.

Overseas Companies Regulations

A revised draft of the Overseas Companies Regulations 2009 was published in May 2009 which it is intended will come into force on 1 October 2009 when the provisions of the 1985 Act that formerly applied to overseas companies will be repealed. The regulations, once implemented, will replace the dual regime that previously applied depending upon whether an overseas company had either "a place of business" or "branch" in the UK. Instead, a single regime will apply to overseas companies that have a "UK establishment", a concept which includes both a "branch" and a "place of business", so simplifying the reporting and notification requirements for overseas companies.

Under the regulations, within one month of opening a UK establishment, the overseas company will need to file a return containing prescribed information together with certain documentation with the Registrar of Companies, including copies of its constitutional documents and its latest published accounting information. Failure to comply with the Part 1 registration requirements constitutes a criminal offence by the company and each officer and agent knowingly and wilfully authorising the default, for which the penalty is a fine.

The new regulations, in particular, simplify the financial information filing requirements that formerly applied. Overseas companies which are required by their parent law to prepare and disclose accounting information, will be required to file such information with the Registrar of Companies. However, overseas companies, which do not have an obligation to disclose accounting information under their parent law, will broadly speaking, have to prepare accounts in accordance with the relevant provisions of the Act, which will then have to be filed with the UK registrar. Companies incorporated in an EEA State, which do not have to prepare and disclose accounting documents under their parent law will be exempt from the requirements in the regulations to file accounting information with the UK registrar. Transitional provisions will apply to the financial information requirements for overseas companies which were formerly subject to the 1985 Act regimes. Specific accounting provisions apply to overseas companies that are credit or financial institutions.

Overseas companies will be required to update the registration information in the event of any changes to the same. An overseas company will also have to comply with the trading disclosure requirements applicable to UK companies, for example with regard to the display of its name at its business premises and in its business communications.

Overseas Companies: Registration of Charges

Section 409 of the 1985 Act extended the provisions relating to registration by companies of certain charges and mortgages over property in England and Wales to companies incorporated outside Great Britain (but with an established place of business in England and Wales). The section applied whether or not an overseas company had followed the registration requirements relating to overseas companies under the 1985 Act. Case law decided that the validity of a charge would not be determined by its registration but by its notification to the Registrar of Companies. This in turn led to defensive filings being made at Companies House by overseas companies which had not otherwise registered under the 1985 Act, where it was unclear whether they had an established place of business in England and Wales. Such filings were known as Slavenburg filings. Although Companies House would make a note of the documents submitted and return these to the sender, as proof of compliance with the relevant section, no central register of filings was maintained in respect of overseas companies that were not registered under the 1985 Act. The system of Slavenburg filings was seen as a defect under the 1985 Act and no equivalent provision to section 409 has been included in the Act.

Provisions relating to the registration of charges created by overseas companies will instead be dealt with in separate regulations. A draft of The Overseas Companies (Company Contracts and Registration of Charges) Regulations 2009 was published in April 2009. Following consultation, it has been announced that the only changes that are expected to be made to the April 2009 draft of these regulations before they become law on 1 October 2009, will be to remove the criminal sanction on a company for failure to register a charge and to include provisions relating to penalties for late registration akin to the existing obligations.

The regulations only apply to the creation of registrable charges by overseas companies which have complied with the registration requirements contained in the Overseas Companies Regulations 2009. They will not apply to charges created by overseas companies which either do not need to register as overseas companies under the Act or which fail to do so. Accordingly, Slavenburg filings will no longer be necessary or possible.

The Government has said that it intends to review the system for registration of charges for both UK and overseas companies and to enter into consultation in respect of proposed changes to the regime in early 2010.

UK COMPANY TAX

Senior Accounting Officers of Large Companies

On 21 July 2009, Finance Act 2009 (the “FA 2009”) came into force. It establishes a new compliance regime, under which nominated senior accounting officers (“SAOs”) of large companies are subject to personal liability for failure to ensure that appropriate tax accounting arrangements are in place for their companies. The new regime applies to accounting periods beginning on or after 21 July 2009.

Broadly, the rules require a qualifying large company to nominate an SAO to have responsibility for the company’s tax affairs. The definition of “company” includes UK incorporated companies, but excludes investment trusts, OEICs, foreign incorporated but UK tax-resident companies, foreign companies with UK branches/permanent establishments and limited liability partnerships.

A company will be treated as large under the Act if it has a turnover of more than £200 million and/or a balance sheet total of more than £2 billion. For groups of companies, these tests are applied on a worldwide, aggregated basis. The test to be satisfied for a company’s inclusion as part of the group is the ownership of a majority of its ordinary share capital.

The SAO is expected to be the director or officer of a company who has overall responsibility for the company’s financial accounting arrangements. In discharging his responsibility under the FA 2009, the SAO will need to establish and maintain appropriate accounting arrangements and to monitor compliance. The regime will also require the company’s relevant tax liabilities to be calculated “accurately” in all material respects. Tax is defined to include corporation tax, VAT, PAYE liabilities, insurance premium tax, SDRT and SDLT, petroleum revenue tax, customs duties and excise duties.

The SAO will have personal liability for these arrangements, and will be obliged to produce an annual compliance certificate to HM Revenue & Customs (“HMRC”) for each financial year of the company, confirming either that the company has appropriate accounting arrangements in place or explaining why this is not the case.

Companies are subject to a penalty of £5,000 for failure to notify HMRC of the name of its SAO. Further, the SAO is subject to a penalty of £5,000 for failure to comply with his duties, or failure to provide a certificate to HMRC. Whilst penalties risk reputational damage, there is no criminal liability under the Act.

Exemption From UK Corporation Tax of Foreign Dividends

The FA 2009 also saw the introduction of a major reform of the taxation of foreign profits received by UK companies. From 1 July 2009, foreign dividends received by UK-resident companies will no longer be subject to UK corporation tax. This puts the tax treatment of foreign and UK dividends (which had benefited from an existing exemption from UK corporation tax) received by UK companies on an equal footing. Prior to 1 July 2009, foreign dividends received by UK companies were subject to UK corporation tax, although a tax credit for foreign tax taxes paid was available in certain circumstances.

The wording of the new exemption is fairly complex, as it distinguishes between small, medium-sized and large companies, and provides for different tests to be met for the exemption to apply. However, from 1 July 2009, all dividends received by UK companies are exempt from tax provided they fall into one of the following five categories, being dividends paid:

- to a parent company that controls the company making the distribution;
- in respect of non-redeemable ordinary shares;
- by a company constituting a portfolio holding;
- where the motive of the dividend paid was not to reduce tax; and
- in respect of a share that would be accounted for as a liability in accordance with generally accepted accounting practice.

These categories of exempt dividend payments are, however, subject to various anti-avoidance provisions. It is also the case that UK dividends received by UK companies must now fall within one of the above five categories to be exempt from UK corporation tax, rather than being exempt outright, as was previously the case (however, this is unlikely to be a concern for most ordinary commercial transactions). The move to exempt foreign-source dividends from UK corporation tax, designed to counter the recent high-profile corporate inversions and also to pre-empt potential EU anti-discriminatory challenges over the tax emption for dividends paid by UK companies has, however, been welcomed.

CORPORATE GOVERNANCE

Corporate Governance: ISC and ICSC Reports

On 5 June 2009, the Institutional Shareholders’ Committee published a paper entitled “Improving Institutional Investors’ Role in Governance.” The paper was intended to be a useful contribution to both the Walker Review and the review of the Combined Code by the Financial Reporting Council (“FRC”) in providing suggestions for improving the quality of the dialogue between institutional investors and listed companies.

One of the issues highlighted concerns the need on occasion for investors to adopt a collective approach for ensuring that messages are heard. An impediment to this in the past has been the fear of the formation of concert parties and concern over the communication of price-sensitive information. Clarification is needed to allay these fears and to ensure that it is possible to ring-fence individuals who receive price-sensitive information in the course of a dialogue with the company.

Separately, on 8 June 2009, the Institute of Chartered Secretaries and Administrators ("ICSA") published its report ("ICSA Report") on boardroom behaviours, as both a contribution to the Walker Review of corporate governance within UK banks and the FRC 's ongoing review of the Combined Code.

The ICSA Report highlights the importance of appropriate boardroom behaviours as an essential component of best practice corporate governance. The ICSA believes that the absence of guidance on such behaviours amounts to a structural weakness in the current system and therefore advocates the inclusion of guidance on appropriate boardroom behaviours in the Combined Code, accompanied by a note on how boards of directors can create the circumstances for an improvement in boardroom behaviours.

CONTRACT/COMMERCIAL

Law Society Guidance: Virtual Closings

As reported in the Spring edition of the London Bulletin, the decision in *R (on the application of Mercury Tax Group Limited and others) v HMRC and others [2008] EWHC 2721 (Admin) 2008,* resulted in significant concern as to the process for completing transactions where not all parties are physically present for signing. The joint working party consisting of The Law Society Company Law Committee and the City of London Law Society Company Law and Financial Law Sub-Committees has now published guidance for practitioners which sets out non-exhaustive options for dealing with execution of documents at "virtual" closings in light of the Mercury case.

EMPLOYMENT

Age Discrimination: Length of Service and Redundancy

When employers seek to consult regarding proposed redundancies, they adopt criteria which are applied to the pool of employees potentially affected in making a selection of individuals at risk of redundancy. It used to be the case that "LIFO" (last in, first out) was one of the main criteria which employers adopted, but following the Employment Equality (Age) Regulations 2006 it became easy to see that LIFO might well be the cause of significant indirect discrimination, as it would tend to protect the jobs of older employees and to disadvantage younger employees. In the case of *Rolls-Royce plc v Unite the Union [2009] EWCA Civ 387; [2009] IRLR 576,* Rolls-Royce sought a declaration that LIFO policies were indirectly discriminatory. The High Court and the Court of Appeal both disagreed and considered that although the policy was indirectly discriminatory, in this instance its application could be justified. Two justifications put forward by the Court of Appeal were that its application in this case was justified and permissible as it was a proportionate means of satisfying a legitimate aim, namely rewarding loyalty and experience. Alternatively, the employer legitimately desired a loyal and stable workforce (this was a permissible benefit for the purposes of the above regulations). Accordingly, LIFO policies are still permissible but only where their application can be justified and an appropriate exception relied upon. In light of this, it seems that reliance upon LIFO as a sole or main criterion for selection should increasingly be avoided.

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