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UK PUBLIC COMPANY/AIM MARKET

EC Consultation on review of MAD

The European Commission ("EC") has consulted on possible revisions to the Market Abuse Directive ("MAD"). The directive, which will amend MAD, is scheduled for adoption before the end of 2010.

One of the principal drivers for revision of MAD is the EC's belief that certain gaps in the current legislation with respect to the regulation of certain instruments have been made more apparent by market developments. The proposed changes are intended, among other things, to address the gaps, to harmonise standards and to move closer to the objective of the adoption of a single rule book.

Under the proposals, MAD would be extended to cover all financial instruments (including derivatives) traded on a multilateral trading facility but which are not traded on a regulated market, with some tailoring for small to medium-sized businesses. In addition, MAD would also apply to over-the-counter instruments which can influence the price of financial instruments traded on a regulated market. It is also proposed to adapt the definition of inside information for commodity derivatives to bring this into line with the definition used in MAD. Finally, it is intended that MAD should apply to attempted market manipulation to reduce the burden on authorities that otherwise have to show that the behaviour or action had this result.

Changes to the Prospectus Directive

Following several months of discussion among the EC, the European Parliament, the European Council and market participants, on 17 June 2010, the European Parliament adopted a directive which will amend the Prospectus Directive. The changes will come into force twenty days from publication in the Official Journal, which is expected to occur in September or October 2010. EU member states will need to implement the directive within eighteen months of its adoption. The resulting changes to the Prospectus Directive include:

- extension of the employee share scheme exemption to issuers that do not already have securities admitted to trading on a regulated market if either (i) the issuer's head office is in the European Union; or (ii) the securities are admitted to trading on a third-country market in respect of which the EC has adopted an equivalence decision (this requires the third-country market to be obliged to comply with obligations equivalent to those in Title III (Regulated Markets) of MiFID, the Market Abuse Directive and the Transparency Directive and that such obligations be subject to effective supervision and enforcement in that third country) and, in each case, a document is made available containing information on the number and nature of the securities, and the reasons for and details of the offer;
- the definition of "qualified investor" is to be amended to include only those persons or entities considered or treated on request as professional clients or recognised as eligible counterparties other than those who have requested that they be treated as non-professional clients. In addition, investment firms and credit institutions will be obliged to communicate their classifications on request to the issuer;
- the threshold in the Article 3(2)(b) exemption applicable to offers to fewer than 100 persons per member state has been increased so that the exemption will now apply to offers to fewer than 150 persons per member state;
- the minimum consideration referred to in the Article 3(2)(c) exemption relating to offers to investors for the acquisition of securities has been increased from €50,000 to €100,000;

- the minimum denomination per unit referred to in the Article 3(2)(d) exemption relating to offers of securities has been increased from €50,000 to €100,000;
- the threshold set out in the Article 1.2(h) exemption for the total consideration for offers of securities calculated over the twelve month period within the EU that fall outside the scope of the directive has been increased from €2,500,000 to €5,000,000;
- the €50,000,000 threshold set out in the Article 1.2(j) exemption for the total consideration for offers of non-equity securities issued in a continuous or repeated manner within the EU that fall outside the scope of the directive has been increased so that the exemption will now apply to offers which have a total value of less than €75,000,000;
- an issuer will now be obliged to publish a prospectus on its website or on that of the financial intermediary placing or selling the securities and a prospectus will now be deemed to have been made available to the public from the date of such website publication;
- withdrawal rights will only apply in respect of a prospectus relating to a public offer (and not to admission only) and in circumstances where the publication of the supplementary prospectus was triggered by events which arose before the final closing of the offer and the delivery of securities to the public; and
- certain changes to the summary requirements have been made, including a new obligation to insert “key information” consisting of the essential characteristics of and risks associated with the issuer, any guarantor and/or the securities, the general offer terms, risks associated with the investment and the estimate of expenses.

EC consultation on the modernisation of the Transparency Directive

On 28 May 2010, the EC published a consultation document on the modernisation of the Transparency Directive together with a report on its operation to date.

The areas on which the EC Commission is consulting include:

- the impact of the Transparency Directive on the attractiveness of regulated capital markets for small listed companies. While the obligations of the Transparency Directive are waived for issuers of high-value-denominated debt securities, the obligations are otherwise uniformly applicable to all issuers of securities, both large and small. The concern is that the benefits associated with transparency are not as keenly felt by small listed companies;
- whether an EU regime for the disclosure of holdings of cash-settled derivatives would be beneficial to the market, and whether holdings should be aggregated with holdings of voting rights;
- whether establishing a specific disclosure mechanism for holders of voting rights who do not hold shares between the record date and the shareholders’ meeting would be effective to prevent empty voting practices;
- the enhancement of disclosure requirements for significant holdings, and in that context the possible disclosure of investors’ intentions regarding their investment;
- whether it would be preferable to establish a uniform EU regime for the notification of major holdings of voting rights and also for issuers’ disclosures; and
- whether respondents have any other comments on the Transparency Directive.

FSA Report on the implementation of the Rights Issue Review Group’s recommendations

The Rights Issue Review Group (“RIRG”) was established by the Chancellor of the Exchequer in the summer of 2008 to review the equity capital-raising process, and to make recommendations as to how it could be made more efficient and orderly. On 15 April 2010, the Financial Services Authority (“FSA”) published its report to HM Treasury on the implementation of the recommendations of the RIRG contained in its report dated 24 November 2008. Key points highlighted in the FSA’s report included the following, namely that:

- two of the principal recommendations in the RIRG report had already been implemented in 2009, being:
  - the reduction of the rights issue subscription period to two weeks; and
  - an increase in the ceiling on allotments from one-third to two-thirds of an issuer’s issued share capital;
- the FSA does not have any present intentions to undertake any further consultation on rights issues;
- the FSA does not consider it necessary to consult on rule changes to facilitate compensatory open offers as these have been satisfactorily developed in the market during the course of 2009, *e.g.*, Lloyds Banking Group plc;
- although the FSA has considered further a possible basis for conditional dealing in rights issues, it has concluded that demand for such a structure had been lessened by the increased (two-thirds) ABI allotment ceiling for the general authority to allot shares as, in most practical cases, this has eliminated the need for shareholder approval as a condition to allotment; and
- the appetite in the UK for more accelerated rights issue models such as the Australian RAPIDS model appears to be limited. As a result, the FSA has decided not to take this issue further at the present time.

OFT market study into equity underwriting

On 10 June 2010, the Office of Fair Trading (“OFT”) announced plans to undertake a study into equity underwriting and associated services. The OFT proposed that its report should focus on rights issues and other types of equity-raising by the 350 largest UK public companies and examine any dissatisfaction with underwriting services. The OFT initially sought views as to the scope of the proposed study. On 6 August 2010, the OFT confirmed that its market study would involve the examination of equity underwriting services for the different types of share issue used by listed companies to raise equity capital in the UK, including rights issues, placings and other types of follow-on offer (but not initial public offerings). It will be restricted to those equity issues carried out by FTSE 350 listed companies but will include examination of how underwriting services are purchased and provided, and how the regulatory environment affects the provision of these services.

Rights issue fees inquiry consultation

On 5 July 2010, the Rights Issue Fees Inquiry ("RIFI") was commissioned by the Institutional Investor Council (the new senior body established by the Institutional Shareholders' Committee) to launch a consultation on equity underwriting practices and procedures in the UK.

This consultation is intended to focus on the demand for investment banking services by listed companies and therefore complements the OFT's market study into equity underwriting and associated services (see above).

In its consultation paper, RIFI notes that since the start of the banking crisis, a large number of rights issues have taken place in the UK under challenging market conditions and the level of fees charged by underwriters has been seen to reflect the heightened risks in that period. However, as market conditions have improved, it is noted that there has been little evidence of a corresponding reduction in underwriting costs.

As part of its review, the RIFI will consider:

- the role and selection of advisers and underwriters;
- the pricing and structure of capital raising;
- the level of underwriting fees relative to risk exposure;
- transparency in respect of underwriting fees paid; and
- practices in relation to sub-underwriting.

National Storage Mechanism

The FSA has launched the National Storage Mechanism ("NSM"), which is the online mechanism for storage of regulated information that each member state is required to appoint pursuant to the terms of the Transparency Directive. Prior to this, the regulatory information service ("RIS") regime fulfilled this function on an interim basis.

The FSA has extended the EU obligation with respect to what information must be stored, so that for the purposes of the NSM, regulated information means all information required to be disclosed under the Listing Rules, the Disclosure and Transparency Rules and the Prospectus Rules. The NSM will also store all information that was previously forwarded to the FSA for publication on the document viewing facility ("DVF"). The DVF was discontinued from 31 August 2010.

It should be noted that the NSM does not replace the RIS regime as the mechanism for making information public, so an issuer's obligation to publish information via an RIS will not be satisfied by documents appearing on the NSM. Nor will the availability of a prospectus on the NSM fulfill an issuer's obligation to make the prospectus available to the public under the Prospectus Rules.

From 31 August 2010, all prospectuses approved by the UKLA will be freely available to persons accessing the NSM website so issuers and their advisers will need to consider this when drafting their disclaimers.

The web address for the NSM is at http://www.hemscott.com/nsm/do.

FSA new short selling rules

The Financial Services Act 2010, which received royal assent on 8 April 2010, amended the Financial Services and Markets Act 2000, and has provided the FSA with powers to make rules with respect to short selling.

On 6 August 2010, the FSA exercised its new powers and published the Financial Stability and Market Confidence Sourcebook Instrument 2010, which amends the FSA Handbook to include the new sourcebook, the Financial Stability and Market Confidence Sourcebook ("FINMAR"). The FINMAR contains the new rules on short selling that replace the short selling provisions previously contained in the Code of Market Conduct. The new short selling rules largely reflect those previously in place except that the scope of the securities that are the subject of a rights issue in respect of which the disclosure obligations relate has been narrowed and will now apply only to net short positions of 0.25% or more of the issued share capital of a company whose securities are admitted to trading on a prescribed market in the UK, and where the issuer of such securities is either a UK company or a non-UK company for whom the UK prescribed market is the sole or main trading venue.

Although the FINMAR provisions, which have now been adopted, are largely unchanged from the draft form of the instrument consulted upon earlier this year, the FSA has relaxed its original stance with respect to the disclosure of positions in indices, baskets and exchange-traded funds. The provisions in this respect now take the form of guidance under FINMAR 2.3.8G, rather than a rule, as was originally proposed. In this regard, the FSA intends to carry out a cost-benefit analysis and, if appropriate, consult on whether such guidance should in fact become a rule under FINMAR.

The FSA has stated that the FINMAR provisions are temporary and will be superseded once a pan-European short selling disclosure regime has been adopted.

CESR: Pan-European short selling disclosure regime

As a follow-up to its report and feedback statement containing proposals for a model for a pan-European short selling disclosure regime issued in March 2010, (as reported on in the previous issue of our London Bulletin), the Committee of European Securities Regulators ("CESR") issued a report setting out technical details applicable to the model in May 2010.

The report provides technical guidance on the following: calculation of net short positions and changes to such positions; netting and aggregation of net short positions within a single organisation; disclosure mechanics; and disclosure exemptions.

In its letter that accompanied the report, CESR recommends the introduction of a pan-European short-selling regime as soon as possible.

Short selling: EC proposed regulation

On 15 September 2010, the EC published its proposed regulation to deal with risks associated with short selling and credit default swaps. If this is adopted by the European Parliament it is anticipated that the new regulation will apply from 1 July 2012. Subject to certain exemptions, the proposed regulation covers all financial instruments which are admitted to trading on an EU trading venue. The regulation will not apply in respect of shares of companies where the principal market for such shares is outside the EU. An exemption is also available for market makers who satisfy certain criteria and who have notified the regulator that they intend to rely upon such exemption. Finally, primary market operations performed by dealers to assist sovereign debt issuers of sovereign debt pursuant to stabilisation schemes under MAD are also exempt. The proposed regulation includes provisions on the following:

- Transparency: Natural or legal persons with significant short selling positions relating to EU shares and EU sovereign debt or with significant credit default swap positions relating to EU sovereign debt issuers will be subject to transparency requirements based on the two-tier approach proposed by CESR of private and public disclosure at specified thresholds. This model requires the disclosure of net short positions of 0.2 per cent. of the share capital or above to the regulator and 0.5 per cent. of the share capital or above to the market. Significant net short positions in relation to sovereign debt only require disclosure to the regulator. In addition, all share orders on trading venues involving short sales must be marked short. The requirements also apply to short positions created by over-the-counter trading or derivatives relating to shares or sovereign debt.
- Uncovered short sales: Short sales of shares or sovereign debt must be covered; that is, arrangements must have been made to ensure that the security can be borrowed so that settlement can be effected when due. Trading venues must ensure that adequate arrangements are made for the buy-in of shares or sovereign debt where settlement fails and must impose fines and have the power to prohibit further short sales by any person who fails to settle a transaction.
- Intervention, powers and sanctions: In situations which constitute a serious threat to financial stability to market confidence in an EU country, competent authorities will have temporary powers to impose further transparency requirements and restrictions on short selling and credit default swaps, and to limit persons from entering into derivative transactions. The new European Securities Market Authority (expected to be operational by January 2011), where the emergency situation has cross-border implications, will have a co-ordination function and will be given power to take measures to restrict short selling activities where the relevant competent authorities have not taken adequate measures. The regulation also provides competent authorities with all necessary powers for the enforcement of the rules, including rights to obtain information and to take enforcement action.

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

On 8 April 2010, OPSI published the Financial Services and Markets Act 2000 (Liability of Issuers) Regulations 2010. The regulations are intended to extend the liability regime for issuers of securities to any third parties who suffer loss as a result of any misleading statements or dishonest omissions in information published by the issuer, or any dishonest delay by the issuer in publishing information. The information concerned is any information that is published by an issuer by means of a recognised information service or the availability of which is announced by the issuer by such means.

The regulations are to apply to all issuers whose securities are admitted to trading on a UK regulated market or a UK multilateral trading facility (such as AIM and the PLUS-quoted market) irrespective of whether those securities are issued by a UK issuer or non-UK issuer. They are effective in respect of all information first published on or after 1 October 2010.

UK Listing regime changes

On 6 April 2010, changes to the Listing Rules came into force, including the restructuring of the listing regime into two segments, premium and standard, and changes to the eligibility requirements and continuing obligations. The changes include the following:

- subject to certain transitional provisions, the premium listed segment is available only to equity shares of commercial companies, closed-ended investment funds and open-ended investment companies that meet the full set of super-equivalent requirements;
- all companies with a premium listing are required to "comply or explain" against the UK Code (see below), whether they are UK companies or overseas companies. Previously, a UK company with a primary listing of equity shares was required to comply or explain, whereas an overseas company with a primary listing was required only to disclose whether it complied with the corporate governance regime that applied in its country of incorporation and any significant ways in which its actual corporate governance practices differed from those set out in the UK Code;
- all companies with a listing of equity shares or certificates representing equity shares (including overseas companies in respect of financial years beginning after 31 December 2009) are required to comply with DTR 7.2 (corporate governance statements) if they are not already required to comply with it or were required to comply with corresponding requirements imposed by another EEA member state. Before 6 April 2010, DTR 7.2 had applied only to UK companies with transferable securities admitted to trading on a regulated market; and
- overseas companies with a premium listing will be required to offer pre-emption rights to their shareholders.

Previously, an overseas company with a primary listing was exempt from the requirement to offer its shareholders pre-emption rights in connection with an issue of equity shares or sale of treasury shares for cash.

HM Treasury consultation on new UK financial services regulatory system

On 26 July 2010, HM Treasury published a consultation paper on the Government's proposals for reform of the UK financial services regulatory system. The consultation paper provides details of the new bodies that it is proposed will replace the current tripartite regulatory structure comprising the Bank of England, the FSA and HM Treasury. These new bodies include:

- the Financial Policy Committee (a committee of the Bank of England that will be responsible for macro-prudential regulation, and monitoring and addressing systemic or aggregate risks and vulnerabilities that could threaten the stability of the financial sector as a whole and endanger the wider economy);
- the Prudential Regulation Authority (a subsidiary of the Bank of England that will assume responsibility for the stable and prudent operation of the financial system through the effective regulation and supervision of the day-to-day operations of financial firms); and
- the Consumer Protection and Markets Authority (a statutory corporation to be financed by the financial services industry that will regulate the conduct of business of all financial firms, including conduct in their dealings with ordinary retail customers and more generally in the financial markets).

The consultation paper also includes a statement as to the Government's belief in a strong case for establishing a companies regulator with responsibility for regulating corporate governance, corporate information and its disclosure and stewardship by institutional investors. The consultation paper does not provide any further details of this proposal other than to state that the merger of the UK Listing Authority ("UKLA") and the Financial Reporting Council ("FRC") would be a first step to such a reform. The government will bring forward detailed proposals for consultation in due course. In the meantime, views are requested as to whether there are other aspects of financial markets regulation in which the links to company law are sufficiently close to warrant consideration of transferring them to a new companies regulator.

Issue 2 of Inside AIM newsletter

The second edition of Inside AIM has been published by the AIM regulation team of the London Stock Exchange plc ("Exchange"). The second edition includes the following items of note:

- <u>Corporate governance for AIM companies</u>

  The Exchange considers that a blanket requirement to comply or explain against a particular code of corporate governance, in a "one size fits all" style, is not appropriate for AIM. The system of nominated advisers on AIM means that each company has access to professional advice and guidance on an ongoing basis as to the development of the corporate governance standards with which it is going to comply, having regard to its size, stage of development, business sector, jurisdiction, *etc*. In turn, full adherence to the UK Code (see below) should not therefore be the expectation for all AIM companies, although the Exchange believes it continues to serve as a standard to which all public companies should aspire. The Exchange also supports the use of the Corporate Governance Guidelines for AIM companies published by the Quoted Companies Alliance.

- <u>Guidance on AIM Rules</u>

  The newsletter contains information as to the Exchange's position on among other things, the interpretation of certain of the AIM Rules:

  - *Rule 15 — investing companies*: A company that has become a Rule 15 investing company has twelve months (followed by a six month suspension period) to either implement its investing policy or carry out a reverse takeover. If it wants to remain a cash shell for longer, it must readmit to AIM as a Rule 8 investing company following the usual admission process. It cannot avoid the twelve month deadline for being suspended simply by raising a minimum of £3 million and therefore becoming an investing company subject to Rule 8;
  - *Rule 28 — omission of historical financial information on a target company that is an AIM or Main Market company*: Historical financial information on the target cannot be omitted from the admission document when an AIM company is undertaking a reverse takeover. Rule 28 permits historical financial information to be omitted only for the offeror;
  - *Fast track AIM admission*: Whether or not a company can be admitted to AIM using the fast-track process for companies already quoted on an AIM Designated Market if there have been changes to its business in the past few years depends on the extent of those changes. Where a business has changed substantially, for example, has carried out the equivalent of a Rule 14 reverse takeover, it is possible that the entity will not be able to take advantage of the fast-track route. If the company has performed smaller transactions or taken other actions to substantially change its business, for example, ceasing a major business activity, the AIM team would need to discuss with the nomad whether the fast-track route is available.

Provision of non-audit services and Guidance on Audit Committees

On 23 July 2010, the FRC issued a consultation paper on revisions to its Guidance on Audit Committees relating to non-audit services. The original purpose of the Guidance was to assist boards in implementing the provisions of the Combined Code regarding audit committees, (now the UK Code, see below).

The FRC has issued the consultation at the same time as the Accounting Practices Board ("APB") issued its consultation on Ethical Standards for Auditors, following feedback to the APB's October 2009 consultation on the question of whether to prohibit auditors from undertaking non-audit services for the entities they audit.

The FRC's proposed changes to the Guidance are based on concerns raised with the APB that companies currently provide insufficient disclosure of the nature of non-audit services provided by their auditors, the reasons for engaging the auditors to perform those services and the safeguards that exist to ensure auditor objectivity. A further change covers the separate concern that statutory information relating to the fees charged for non-audit services is often unhelpful.

The changes proposed to address the concerns noted above include the following:

- giving greater prominence in the Guidance to the importance of non-audit services in assessing the objectivity and independence of the auditor;
- requiring the audit committee to establish a list of non-audit services for which specific audit committee approval is required before being contracted. Additional changes require the audit committee to consider whether the auditor is the best person to undertake that work, whether any safeguards of independence established by the auditor in relation to such services are effective and how to disclose these considerations in the company's financial report;
- specifying the types of non-audit services for which pre-approval by the committee may be appropriate, on the basis that the threat to auditor objectivity and independence is considered to be low. This is consistent with the APB proposal to include in its Ethical Standards for Auditors a list of non-audit services that are considered to pose an insignificant risk to auditor objectivity; and
- requiring companies to set out in their financial reports the level of fees paid to auditors for audit services, audit-related services and non-audit services, following the template proposed to be included in the APB's Ethical Standards for Auditors. This is consistent with the approach in the feedback and consultation paper issued by the APB in relation to the proposed changes to the Ethical Standards for Auditors. This does not seek a prohibition on auditors carrying out non-audit services for the entities they audit, but instead seeks to develop the safeguards that auditors must put in place when they are engaged to perform non-audit services.

Both the APB and the FRC consultations are to close on 23 October 2010.

Dodd-Frank Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act, signed into law in the United States on 21 July 2010 (the "Dodd-Frank Act"), has resulted in certain changes to the US securities laws that had immediate effect, and may have consequences to capital markets transactions and investment fund fundraising. In addition, the Dodd-Frank Act has mandated changes to the registration requirements for investment advisers that will go into effect in twelve months' time. Changes of particular note include:

- <u>Change to the Definition of Accredited Investor for Natural Persons</u>

  With immediate effect, the definition of accredited investor as it pertains to natural persons has been updated. In order to be deemed an accredited investor and then eligible to participate in private placements of securities in accordance with Regulation D (promulgated by the SEC under the Securities Act 1933 (as amended)), a natural person (or natural person and his or her spouse) must now have a net worth in excess of US$1 million, excluding the primary residence of such natural person. In the alternative, a natural person will still be deemed an accredited investor if such person has income exceeding US$200,000 in each of the two most recent years or joint income with a spouse exceeding US$300,000 for those years, and a reasonable expectation of the same income level in the current year. The US Securities and Exchange Commission (the "SEC") is expected to increase these income thresholds in the coming months.

- <u>New Registration Requirements for Investment Advisers/New Exemption from Registration for Non-US Private Advisers</u>

  Many investment advisers rely upon various exemptions from registration with the SEC. One of the more commonly used exemptions, for investment advisers with fewer than fifteen clients, has been eliminated by the Dodd-Frank Act. The elimination of this exemption for so-called "private advisers" will have the effect of requiring a large number of currently unregistered advisers to register with the SEC when this change comes into force in twelve months. Notwithstanding the above, the Dodd-Frank Act has introduced a new exemption from registration for any investment adviser that is a "foreign private adviser." A "foreign private adviser" is any investment adviser that:

  - has no place of business in the United States;
  - has, in total, fewer than fifteen clients and investors in the United States in private funds advised by the investment adviser;
  - has aggregate assets under management attributable to clients in the United States and investors in the United States in private funds advised by the investment adviser of less than $25 million, or such higher amount as the SEC may, by rule, deem appropriate; and
  - neither holds itself out generally to the public in the United States as an investment adviser, nor acts as an investment adviser to any registered investment company or any business development company.

  Unless the SEC, by rule-making, significantly increases the $25 million threshold described above, the exemption for this purpose is fairly narrow, and will limit the ability of non-US investment advisers to raise significant funds in the United States without first registering as investment advisers. Again, if this exemption is not available (and no other exemption is available), the non-US investment adviser will be required to register with the SEC when these provisions of the Dodd-Frank Act come into force in twelve months.

Most of the other changes to the US securities laws mandated by the Dodd-Frank Act will not go into force until twelve months' time or will be implemented over the next twelve months by regulations promulgated by the SEC.

TAKEOVERS AND MERGERS

Consultation on aspects of the Code

On 1 June 2010, The Panel on Takeovers and Mergers (the "Panel") issued a consultation paper inviting a review of certain aspects of takeover regulation in the wake of the debate triggered by the takeover of Cadbury plc by Kraft Foods Inc. In a break from its usual practice, the consultation paper does not set out the Panel's specific proposals and/or proposed drafting changes to the City Code on Takeovers and Mergers ("Code"). Instead, it seeks to provide a forum in which possible suggestions for change may be debated. Accordingly, in relation to the nine areas under review, the Panel has set out both the relevant background together with the arguments for and against change and the possible consequences of such change.

The areas under review include:

- the appropriateness of the current 50 per cent. plus one acceptance level;
- whether shares acquired by any person during an offer period should be disenfranchised;
- certain disclosure matters, including the reduction of the Rule 8 disclosure threshold from 1 per cent. to 0.5 per cent. and disclosure by shareholders of their acceptance of the offer;
- an increase in the level of disclosure with respect to the financing of an offer and its implication and effect, including more detailed commentary on the offeree board's views of the bidder's intentions;
- whether offeree shareholders require independent advice separate from that provided to the offeree board; restriction of success fees; public disclosure of advisers' fees and offer costs;
- whether shareholders of the bidder require some protections similar to those provided to offeree shareholders;
- re-examination of the "put-up or shut-up" regime, virtual bids, and the offer timetable;
- inducement fees/deal protection measures; and
- the reintroduction of substantial acquisition rules.

Cold-shouldering decision affirmed

On 14 July 2010, the Takeover Appeal Board upheld the Panel's decision to issue a statement that Messrs. Myerson, Padgett and Posen were individuals unlikely to comply with the Code, a "cold-shouldering statement". On the same date, the Financial Services Authority issued a statement that authorised firms should not act, or continue to act, for such persons on transactions to which the Code applies.

This is only the second time in the forty years during which the Code has existed in substantially its current form that such a sanction has been invoked, which demonstrates the severity of such statement. The sanction was imposed after the individuals had been found to have been party to a deliberate attempt to circumvent Rule 9 of the Code, which deals with the circumstances in which a mandatory cash offer must be made. The gravity of their conduct and the fact that two of the individuals had a number of years' experience in Code matters meant that the more common Panel sanction of public censure was deemed to be "wholly inappropriate" in such circumstances.

CORPORATE GOVERNANCE

UK Corporate Governance Code published

The final version of the UK Corporate Governance Code ("UK Code") was published on 28 May 2010, together with the report of the FRC on the consultation process.

The UK Code applies to all companies with a premium listing of equity shares, whether incorporated in the UK or elsewhere, in respect of accounting periods beginning on or after 29 June 2010. Such companies will be required by the Listing Rules to include a statement in their annual financial reports indicating whether they have:

- complied throughout the accounting period with all relevant provisions set out in the UK Code; or
- not complied throughout the accounting period with all relevant provisions set out in the UK Code and if so, setting out:
  - those provisions, if any, it has not complied with;
  - in the case of all provisions whose requirements are of a continuing nature, the period within which, if any, it did not comply with some or all of those provisions; and
  - the company's reasons for non-compliance.

The Listing Rules do not however, require compliance with the UK Code; companies are required only to state whether they have complied with the provisions of the UK Code and to explain and justify any non-compliance (the "comply or explain" regime).

The UK Code includes amongst the principles and other code provisions:

- a new introduction focusing on what the Board does and its responsibility for ensuring good governance and deciding how to operate in accordance with the UK Code's provisions;

- a provision that all directors of FTSE 350 companies be proposed for annual re-election;
- new principles regarding the leadership to be provided by the chairman and the responsibility of non-executive directors to provide constructive challenge;
- a provision as to the regular review of directors' development needs and, in the case of FTSE 350 companies, the need for an externally facilitated board evaluation at least every three years; and
- a provision as to the improvement of risk management and the board's responsibility for determining the nature and extent of the significant risks they are willing to take.

UK Stewardship Code

On 2 July 2010, the FRC published the UK Stewardship Code. This followed consultation during the first quarter of 2010 and the determination that the Institutional Shareholders' Committee's Code on the Responsibilities of Institutional Investors provided an appropriate basis for the Stewardship Code, with amendments incorporated from Section E of the Combined Code.

The Stewardship Code is addressed in the first instance to those firms who manage assets on behalf of institutional shareholders, but the FRC is encouraging all institutional investors to comply with the Stewardship Code. It is to be applied on a "comply or explain" basis with institutional investors encouraged to publish their statement of compliance on their website.

Unlisted companies in the EU

On 8 April 2010, the Institute of Directors published corporate governance guidance and principles for unlisted companies in Europe; this is the product of an initiative of the European Confederation of Directors' Associations ("ECDA"). Its purpose is to provide guidance for unlisted companies (including family owners, founder-entrepreneurs, subsidiary companies, joint ventures, state-owned companies and social profit organisations) on the issues involved in designing an appropriate corporate governance framework. It sets out fourteen principles of good governance presented on the basis of a dynamic phased approach, taking account of openness, size, complexity and the level of maturity of individual enterprises. Nine of the fourteen principles are intended for all unlisted companies and another five for large and/or more complex companies. Each principle includes key points and practical considerations.

It is the ECDA's hope that, in addition to providing direct guidance for shareholders and directors, the principles will provide a foundation for the development of country-specific principles in individual EU member states.

UK COMPANY LAW

Bribery Act 2010

On 20 July 2010, the Ministry of Justice announced that the Bribery Act 2010 ("Bribery Act") will come into force in April 2011. On 14 September 2010, the Ministry published for consultation its proposed guidance on adequate procedures for commercial organisations that it is required to provide under the terms of the Bribery Act, and which it is proposed will be adopted early in 2011 ahead of the implementation of the Bribery Act. The consultation will close on 8 November 2010.

The Bribery Act will replace the existing piecemeal law on bribery and corruption in the UK and represents the UK's intention to reinforce its reputation as one of the least corrupt countries in the world. The Bribery Act will not be retrospective in effect, and there will be no carve-outs or defences for facilitation payments. The Bribery Act will increase the maximum penalty for bribery from seven to ten years' imprisonment, with an unlimited fine. Separately, under existing legislation which implemented EU procurement directives, (and subject to any discretion provided in such legislation), a company will be automatically disbarred from tendering for any EU public contracts if it, or any of its directors or other persons who have powers of representation, decision or control in relation to such company, is convicted of a bribery offence.

The Bribery Act recasts the existing offences of giving or receiving bribes into active and passive offences respectively, and also introduces two new offences, bribing a foreign public official ("FPO") and the new strict liability corporate offence. The offences set out in the Bribery Act are briefly described in more detail below:

- <u>General offences (active/passive) ("General Offences")</u>: An offence will be committed by any person promising, offering or giving, or requesting, agreeing to receive or receiving an advantage, financial or otherwise, involving the improper performance of a public or business activity that a reasonable person in the UK would expect to be performed in good faith, impartially or in a particular way because of the fiduciary nature of the role. This will cover bribes in the public or private sector.
- <u>Bribing an FPO ("FPO Offence")</u>: An offence will be committed by any person promising, offering or giving an advantage to an FPO intending (i) to influence the FPO in his official capacity; and (ii) to obtain or retain business or an advantage in the conduct of business. The definition of FPO includes anyone holding a legislative, administrative or judicial position of any kind or who exercises a public function for any country, public agency or public enterprise.
- <u>Failing to prevent bribery ("Corporate Offence")</u>: A corporate will be guilty of an offence if a General Offence or FPO Offence is committed by someone who performs services on behalf of that corporate in any capacity intending to obtain/retain business or a business advantage for the corporate. This is intentionally broad and would include any employee, director, agent or consultant as well as other group entities. The corporate will have a defence to the claim if it can show that it had in place adequate procedures designed to prevent bribery.

The Bribery Act will apply to acts committed by any person in the UK. With respect to the General Offences or the FPO Offence, acts committed outside the UK will also be caught but only to the extent that they are committed by persons with a close connection with the UK. Such persons include British citizens, UK residents and UK companies. Accordingly, an FPO Offence or a General Offence may be committed by a UK corporate notwithstanding the fact that the action or omission constituting the offence took place outside the UK. An overseas person will only be liable under the General Offences or the FPO Offence if the action constituting the offence takes place in the UK.

With respect to the Corporate Offence, this will apply to UK partnerships and companies and to any overseas companies and partnerships that carry on any part of their business in the UK, in either case, in respect of acts or omissions wherever committed. A UK parent therefore, may be liable under the Corporate Offence in respect of any acts of its foreign subsidiary (in the context of it performing services for the parent), committed outside the UK, even though the foreign subsidiary itself has no direct liability under the act.

Although commercial organisations can have liability under the General or FPO Offences, it is the new strict liability Corporate Offence that poses a heightened threat to businesses. It is important therefore for all corporates to review their anti-corruption procedures and policies to ensure, insofar as is possible, that the "adequate procedures" defence would be available to them.

The guidance published by the Ministry in this respect does not propose any procedures but is instead based around the following six principles that are intended to be used as a flexible guide for an organisation to determine what procedures will be appropriate for it to adopt based on the particular facts and circumstances applicable to it.

- Risk assessment: Ongoing assessment and monitoring of the particular bribery risks faced by an organisation is recommended. In this regard, factors which may be of relevance include the adequacy of employee training, the countries in which the organisation carries on business, the types of transactions in which the organisation is involved and the nature of an organisation's business partners.
- Top level commitment: This is based on the premise that those at the top of an organisation are best-placed to implement a culture of integrity and zero-tolerance to bribery. Recommendations in this regard include the close involvment of senior management in the development of anti-bribery policies and, where appropriate, the appointment of a senior manager with responsibility for overseeing the development and implementation of the anti-bribery programme.
- Due diligence: Organisations should due diligence all parties to a business relationship, including the supply chain, agents, intermediaries and joint venture partners, in all markets in which they are involved pursuant to effective and appropriately tailored policies and procedures.
- Clear, practicable and accessible policies and procedures: It is recommended that these should include a prohibition on all forms of bribery, guidance on making political or charitable donations, guidance as to what constitutes an appropriate level of *bona fide* hospitality or promotional expense, guidance on what steps need to be taken where bribery is encountered, and advice on relevant laws and regulations.
- Effective implementation: Organisations need to give consideration to the implementation of anti-bribery policies.
- Monitoring and review: Policies and procedures should be monitored and reviewed to ensure that they adequately deal with changing circumstances.

In addition to this guidance other general anti-corruption guidance has also been published by certain bodies, including the Organisation for Economic Co-operation and Development, and the Serious Fraud Office. Also, companies that are subject to the US Foreign Corrupt Practices Act ("FCPA") are likely already to have some procedures in place, although the FCPA is not as broad in scope as the Bribery Act.

Corporate hospitality and promotional expenditure is one particular area of concern that is not covered in detail by the official guidance and in respect of which corporates and individuals will have to rely on prosecutorial discretion. During the act's passage through Parliament, the government's representative indicated that it was not the intention to discourage corporate hospitality generally and that it was not likely to be in the best interest of the public for a prosecution to be brought unless the hospitality in question was excessive or unreasonable. However, as no official guidance as to what may be acceptable in this context is provided, corporates will have to try and guess what may or may not constitute reasonable expense when drafting their corporate entertainment/gift policies.