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Insights

UK CORPORATE BRIEFING AUGUST 2024

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SUMMARY

Welcome to the Corporate Briefing, where we review the latest developments in UK corporate law that you need to know about. In this month's issue we discuss:

Final Listing Rules – changes to note

- Following various consultations, the FCA has published feedback and final rules for the revised Listing regime which came into force on 29 July 2024.

FCA consultations on the new public offers and admissions regime and a new public offer platform

- The FCA has published two consultation papers with proposed rules for (i) replacing the existing prospectus regime with a new regime which would not require a prospectus for a further issuance, except in limited circumstances; and (ii) a new public offer platform regime allowing firms to facilitate companies making public offers of shares to investors outside public markets when raising more than £5m.

What will the FTSE index include after the listing rules reform?

- FTSE Russell has outlined changes to the future composition of the FTSE UK Index Series, following the FCA's update to the UK Listing Rules.

Draft Audit Reform and Corporate Governance Bill

- The King's Speech announced that this Bill will be brought forward to strengthen audit and corporate governance.

A recent case highlights the importance of clear drafting

- This Court of Appeal case highlights the uncertainty that can result from simply having an adjective at the beginning of a list: does it relate to the first item only, or all of them? In this case, approximately $7.5m turned on the answer.

BHS directors liable for wrongful trading and misfeasance

- This high profile case has a number of key takeaways for directors.

FINAL LISTING RULES – CHANGES TO NOTE

Following various consultations, the FCA has published feedback and final rules for the revised Listing regime. The new UK Listing Rules ("UKLR") sourcebook along with some transitional provisions came into force on 29 July 2024.

The FCA has created a new single listing category for UK listings of equity shares in commercial companies which will replace the previous premium and standard listing categories.

Under the new Listing Rules class transactions will no longer require prior shareholder approval (except for reverse takeovers) and a related party transaction above the 5% threshold will require an announcement by the board containing a 'fair and reasonable' statement confirmed by the sponsor.

This briefing highlights key changes from the previous consultation.

CONTROLLING SHAREHOLDER REGIME

The FCA has reverted to their original proposals and relinquished the requirement for a relationship agreement between commercial companies and their controlling shareholders. However, it is likely, at least for the foreseeable future, that issuers will continue to have these type of agreements in place and the FCA have stated that they will continue to support relationship agreements. Other aspects of the controlling shareholder regime will continue to apply.

To ensure that a controlling shareholder does not take advantage of their position, where they propose a shareholder resolution which a director considers is intended or appears to be intended to circumvent the proper application of the Listing Rules, the circular accompanying the notice of meeting must set out a statement by the board of the director's opinion of the resolution.

DUAL CLASS SHARE STRUCTURES

It was previously proposed that enhanced voting rights were to be held by specified persons including directors, natural persons who are investors or shareholders of the issuer and employees of the issuer. The list of persons entitled to hold enhanced voting rights has been extended to include legal persons who are already investors/shareholders in the company at the time of the IPO. However, such holders will be subject to a time-limited sunset clause of 10 years to ensure they do

not hold enhanced voting rights in perpetuity and “to ensure a degree of visibility and predictability to other shareholders and prospective shareholders”.

SIGNIFICANT TRANSACTIONS

As previously consulted, significant transactions (at the 25% threshold) will no longer require shareholder approval (except for reverse takeovers). The final rules contain revised notification requirements with the FCA removing the need to disclose two years historical financial information on the target of an acquisition in the announcement; this has been retained for disposals only.

An announcement must be made as soon as possible after the terms of the significant transaction are agreed. This announcement is similar to the previous Class 2 announcement but includes a sweeper provision requiring the company to consider whether further relevant information should be notified at this stage.

A subsequent announcement must be notified as soon as possible after the terms of the transaction are agreed, and the information has been prepared or the issuer becomes, or ought reasonably to have become, aware of the information and in any event by no later than completion of the transaction. This must include non-financial information and for disposals only, additional disclosures around historical financial information going back two years.

A final announcement must be made as soon as possible after completion of the transaction.

CLOSED-ENDED INVESTMENT FUNDS

The FCA has aligned the significant transaction rules for funds with the rules for companies in the equity shares (commercial companies) category. However, the FCA has retained additional requirements for changes to the investment manager’s fees or other remuneration, requiring a sponsor’s fair and reasonable opinion at ≥0.25%, and shareholder approval and related circular requirements for changes of ≥5% or above, as well as uncapped fees.

SHELL COMPANIES

The FCA has implemented its proposals regarding the concept of an “initial transaction” ie. a reverse takeover, which will require shell companies to complete an initial transaction within 24 months from the date of admission or otherwise cease operations. However, the FCA has amended the draft rules to provide that this period can be extended by a period of 12 months with shareholder approval for up to three times.

REVISED ADMISSION AND DISCLOSURE STANDARDS (“STANDARDS”)

Changes to reflect the new Listing regime have been made to the Standards including the removal of reference to the High Growth Segment which is now redundant. This Segment closed with effect from 29 July 2024; there were no issuers on this segment.

FCA CONSULTATIONS ON THE NEW PUBLIC OFFERS AND ADMISSIONS REGIME AND A NEW PUBLIC OFFER PLATFORM

Following various consultations and engagement with the market, the FCA has published two consultation papers (CP 24/12 and CP 24/13) with proposed rules for (i) companies seeking to admit securities to a UK regulated market or multilateral trading facility (“MTF”) and (ii) a new public offer platform regime allowing firms to facilitate companies making public offers of shares to investors outside public markets when raising more than £5m. Responses are requested on both consultations by 18 October 2024.

The overall aim of these proposals, alongside the recent changes to the UK listing rules, is to reduce the costs of listing on UK markets, make capital raising easier on UK listed markets and remove barriers to retail participation.

BACKGROUND AND CONSULTATION ON THE NEW PUBLIC OFFERS AND ADMISSIONS TO TRADING REGIME

Following on from Lord Hill’s recommendations from his review of the UK listing regime in 2021, HM Treasury conducted a review of the prospectus regime and tasked the UK Secondary Capital Raising Review with making recommendations to improve the efficiency of secondary capital raising processes. In July 2021 HM Treasury published a consultation on the UK prospectus regime and in January 2024 the new Public Offers and Admissions to Trading Regulations 2024 (“POATRs”) were published.

This consultation sets out proposed rules for companies seeking to admit securities on a UK regulated market or MTF under the new POATR framework. The FCA propose to make rules regarding admissions to UK regulated markets by creating a new ‘Prospectus Rules: Admission to Trading on a Regulated Market’ sourcebook (“PRM”).

Key changes to the existing prospectus regime include:

- raising the existing 20% threshold of existing share capital for triggering the requirement for a prospectus to 75% but to continue to allow issuers to publish a voluntary prospectus, recognising the needs of different issuers, including those with a more global shareholder base;

- for a prospectus to include certain climate-related disclosures, where the issuer has identified climate-related risks as risk factors, or climate-related opportunities as material to the issuer's prospects;
- to provide a clear framework to give issuers legal certainty on what information can be deemed protected forward looking statements. Such statements will be subject to a different liability standard (the 'recklessness' standard as opposed to 'negligence') in order to encourage companies to include forward-looking statements in prospectuses; and
- to require an MTF admission prospectus for all initial admissions to trading and admissions of enlarged entities resulting from a reverse takeover and to set rules on certain rights and responsibility attaching to the production of an MTF admission prospectus. The detailed content requirements and the process for reviewing and approving MTF admissions will continue to be set by the relevant MTF operator. There will be exceptions where the issuer uses the fast-track route for an admission to trading on the AQSE Growth Market or the AIM Designated Market Route. The FCA propose that the operators of the MTF should have discretion to decide whether to include a requirement in their rules for an MTF admission prospectus for further issuances.

The FCA is specifically seeking views on the requirement to retain a working capital statement in a prospectus and in particular on whether or not issuers should be allowed to disclose significant judgements made in preparing the working capital statement including the assumptions the statement is based on and the sensitivity analysis which has been performed. The FCA is also seeking views on whether issuers should be able to base the working capital statement on the underlying due diligence performed for the purposes of viability and going concern disclosures in the annual financial statements.

CONSULTATION ON THE NEW PUBLIC OFFER PLATFORM

At present, it is a criminal offence to make a public offer or to request admission of transferable securities to trading on a regulated market without an FCA-approved prospectus, unless a relevant exemption applies. There are a number of exemptions available to companies including offers of transferable securities to less than 150 investors, offers to qualified investors (ie. institutional investors) and offers for up to a total consideration of €8million over a 12-month period. The last exemption allows companies to make offers of transferable securities directly to retail investors without an FCA-approved prospectus and is often combined with an institutional placing. The FCA comment in this consultation paper that "*the EUR 8m prospectus threshold has also acted as a 'cap' beyond which companies wishing to raise capital face a cliff edge of costs due to having to produce a full prospectus*".

The POATRs create a new regulated activity of operating an electronic system for public offers of relevant securities (a 'public offer platform' or 'POP'). Companies seeking to make public offers of

securities outside a public market, to a broad investor base, and where the value of the offer is more than £5m, will need to do so via a POP. The FCA see this platform being used by early-stage and smaller companies for capital raising and from an investor's perspective, such companies will generally be characterised as having more uncertain prospects than established companies with securities admitted to trading on public markets.

This consultation paper sets out proposed rules for firms operating a POP and will supplement existing regulation such as existing investment-based crowd funding. The proposals focus on three key areas:

- information gathering and due diligence carried out by POPs on prospective issuers and the securities being offered;
- the specific disclosures provided to investors on an issuer and the security being offered; and
- the application of liability and redress in relation to the content of offers facilitated by POPs.

WHAT WILL THE FTSE INDEX INCLUDE AFTER THE LISTING RULES REFORM?

FTSE Russell has outlined changes to the future composition of the FTSE UK Index Series, following the FCA's update to the UK Listing Rules. The eligible index has shifted from the premium segment to Equity Shares (Commercial Companies).

In the short term, FTSE Russell predicts minimal impact on the index. Premium-listed companies will have automatically transitioned to the new category and will have maintained their index eligibility. Similarly, closed-ended investment funds which previously had a premium listing will have moved to the new closed-ended investment fund category.

Companies with a standard listing may join the FTSE UK Index Series if they transition to the new category, but initially, they will have been placed in the new "transition category".

FTSE Russel have published an FAQs document to address the impact of the changes on the FTSE Index.

DRAFT AUDIT REFORM AND CORPORATE GOVERNANCE BILL

The King's Speech announced that this Bill will be brought forward to strengthen audit and corporate governance and will bring into force some of the reforms previously proposed by the Conservatives but which were not subsequently taken forward.

The draft Bill will replace the Financial Reporting Council ("FRC") with a new regulator – the Audit, Reporting and Governance Authority ("ARGA") with powers to tackle bad financial reporting and to

build trust. The briefing notes state that ARGA will form a platform for other important changes including:

- a wider remit through extending Public Interest Entity (“PIE”) status to the largest private companies and thus making sure the audits of those important businesses are high quality and giving early warning of financial problems;
- removing unnecessary rules on smaller PIEs, making life easier for important smaller businesses by cutting requirements that are disproportionate;
- powers to investigate and sanction company directors for serious failures in relation to their financial reporting and audit responsibilities; and
- a regime to oversee the audit market, protect against conflicts of interest at audit firms, and build resilience so quality audit is available to all companies that need it.

The FRC has welcomed this announcement.

A RECENT CASE HIGHLIGHTS THE IMPORTANCE OF CLEAR DRAFTING

Cantor Fitzgerald & Co. v YES Bank Ltd [2024] EWCA 695

YES Bank had engaged Cantor Fitzgerald to act in connection with a "Financing", in return for a retainer of US$500,000 plus 2% of funds raised from certain investors (who were listed in a schedule to the engagement letter). Three of those investors subsequently invested c$373.4 million as part of a public offer by YES Bank (which was already listed in India). Cantor Fitzgerald claimed it was entitled to the 2% fee (c$7.5m), but YES Bank disagreed – on the basis that the funds were raised by a public offer, whereas “Financing” was defined in the engagement letter as a “private placement, offering or other sale of equity”. The issue to be determined by the court was whether “private” referred just to the first item - “placement” - or all three.

The court held that it applied to all three – and so the 2% fee did not apply – on the basis that: whilst there is no grammatical rule that determines whether an adjective at the beginning of a list qualifies all the items that follow, a reader will naturally tend to assume that it does (unless something in the content of the list or another adjective or determiner within the list suggests otherwise); although “private placement” was a term of art – so that “private” naturally couples with “placement” – that did not prevent “private” also being applied to “offering” and “other sale”; and, on the facts – having regard to the other terms of the engagement letter and the ‘factual matrix’ (ie. the context at the time it was entered into) – it did apply to them all. But those facts are specific to this case: the key takeaway is to ensure that your drafting makes the position clear.

BHS DIRECTORS LIABLE FOR WRONGFUL TRADING AND MISFEASANCE

Wright & Ors v Chappell & Ors [2024] EWHC 1417 (Ch)

Two former directors of BHS have been held liable for wrongful trading and misfeasance (under section 214 and 212 of the Insolvency Act 1986). This high profile case was brought by the joint liquidators of the BHS Group and there are a number of key takeaways:

- Although the test for wrongful trading requires that the director "knew or ought to have known that there was no prospect that the company would avoid going into insolvent liquidation/administration", there is no need to show that the insolvent liquidation/administration will occur by a specified date or within a very short time.
- Whilst a director will not be liable for wrongful trading if he or she took "every step with a view to minimising the potential loss to the company's creditors", this is a high hurdle to overcome and requires a director to show not only that trading continued in order to reduce the net deficit, but also that it was designed appropriately so as to minimise risk of loss to individual creditors (ie. it matters how different creditors may be affected).

A director may be liable for misfeasance (under s212) before he or she is liable for wrongful trading (ie. at an earlier point of time). This is because 'misfeasance' includes "breach of any fiduciary duty or other duty in relation to the company" – and a director will be in breach of duty to promote the success of the company if he or she fails to consider the interests of creditors when the 'creditor duty' has been engaged - that is, when the company is insolvent or bordering on insolvency, or an insolvent liquidation or administration is probable (which may be earlier than the date he or she knew or ought to have known that there was no prospect that the company would avoid going into insolvent liquidation/administration).

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