IN BRIEF

The taping of conversations arranging transactions by regulated firms is to become a rule (rather than guidance) under the FSA conduct of business regime if FSA proposals get the go-ahead. Firms will be required to retain such records for three years from the date of creation. The rule would cover dealers and brokers but not other investment managers, research analysts or corporate finance advisers.

One share, one vote systems have no benefit on governance or performance, according to a report from the European Corporate Governance Institute (ECGI) and others on behalf of the European Commission. This was probably not the answer Charlie McCreevy, Commissioner for the Internal Market, was expecting. The study confirmed that control-enhancing mechanisms were not popular with investors, with 80% reacting negatively. The expectation now is that more transparency and explanation around special voting mechanisms may be on the agenda.

Practical guidelines around the **listing rules and the disclosure and transparency rules** have been issued by the GC100 (the Association of General Counsel and Company Secretaries of the FTSE 100). These take in the maintenance of insider lists and share dealings by directors and senior executives.

The UK's Tripartite Authorities (the Treasury, the Bank of England and the Financial Services Authority) are undertaking work on **financial sector continuity planning**. They have recently published a list of issues that financial sector firms and others should consider in addressing major systems disruptions, especially those due to illness pandemics. Such issues include determining critical functions, human resource policies, systems management, supply chain, operations testing and recovery procedures. Should a disruptive event occur, the authorities' primary objective would be to keep the financial markets open, in so far as this was feasible, and otherwise to restore operations as quickly as possible. See **www.fsc.gov.uk** for more information.

The Committee of European Securities Regulators (CESR) has published a Q&A on **MiFID best execution** to answer common questions on the practicalities and to ensure a degree of regulatory consistency in the directive's implementation in member states. See **www.cesr-eu.org/popup2.php?id=4606**

INTRODUCTION

By Martin O'Donovan
ACT Assistant Director, Policy and Technical

Defining the role of the treasurer can be quite tricky since treasury potentially covers a wide range of skills from corporate finance, funding and risk, through to cash management and operations.

But whatever definition you agree, and whatever your own job description is, all treasurers have to operate within the wider financial markets – with businesses subject to company law and taxation, using accepted accounting standards, and cognisant of the general environment.

As explained on the page opposite, the ACT policy and technical team is active in looking forward as to how that environment is going to be shaped and trying to influence its development. We are but one voice among many but we do have the advantage that because so few others represent the interests of the non-financial sector corporate, we get a good hearing and we can make progress.

The HMRC interest in reviewing the effects of functional currency reported here is a move in the right direction, prompted in part by the ACT, while the views of the Davies report are not quite what we had hoped for, but we can still be effective in damage limitation.

Davies disclosure report disappoints

The Davies review into issuers' liability for false or misleading statements has reported, raising the prospect of more onerous burdens being placed on company disclosures.

In March the government launched a review into issuers' liability for false or misleading statements (see *The Treasurer*, page 10, May 2007). The ACT submitted its response in April and with amazing speed Professor Paul Davies, who was commissioned to conduct the review, published his findings in June.

The ACT fully accepts the importance of not misleading the market but does not believe that there is any overall requirement to extend or 'gold-plate' the current liability regime for issuer misstatements. The intention of any disclosure regime should not be to place the regulatory requirements for senior markets onto companies resourced to manage junior market disclosures, where they could be considered burdensome. It would be counterproductive if fears over liability prompted a reduction in information flow.

In the event of any move towards extending liability, we argued strongly that any such extension for corporate statements should be appropriate to the market investors to whom they were directed. A 'one size fits all' solution should not become the prevailing position.

In the same way as there are clear differences in the general requirements for listing between regulated and unregulated markets, the ACT would hope to see proportionate treatment in respect of company disclosures.

But the Davies recommendations have ended up making the case for extending the liability regime and in particular propose:

- extending the statutory liability regime to cover ad hoc as well as periodic disclosures;
- extending the statutory liability regime to apply to disclosures by issuers with securities traded on exchange-regulated markets, including AIM and Plus Markets;
- identifying relevant disclosures to be covered by the statutory regime as all Regulatory Information Services (RIS) announcements, but without prejudice to the rights of shareholders and others arising out of company circulars addressed to them;
- ensuring that the statutory regime encompasses liability for dishonest delay in making RIS announcements; and
- extending the statutory regime to confer rights on both buyers and sellers of shares, but to exclude those who continue to hold (or not buy) shares from suing in respect of misstatements in RIS announcements.

The pace of progress will probably slow down now as the government considers the implications and practicalities, and will in due course put forward specific proposals for public consultation.

Given the outcome of the US Sarbanes-Oxley Act and excessive caution around internal controls and the financial statements (see SEC Deregistration feature, page 31 of this issue), it would be bad news if the UK made excessive burdens of care and verification on issuer statements.

Issuers can take comfort from the further Davies recommendation that the basis for liability should be fraud rather than simple negligence, with fraud in this context meaning intentional or reckless misstatement or dishonest omission. ■

Tax on imaginary FX gains and losses

There is welcome news that HMRC is considering whether to recommend changes in the law that will address the problem of imaginary foreign exchange (FX) gains and losses that can arise from accounts being forced to adopt the IFRS rules on functional currency and the tax derived from those accounts. The ACT was one of the organisations that wrote to the Treasury last February to flag the issue and propose a solution.

An example that illustrates the problem is where a UK parent is funding a foreign subsidiary with loans denominated in euros. It has for many years been common practice for treasurers to capitalise an intermediate holding company in euros and to use that vehicle to on-lend to the foreign subsidiary. The currency of the loan and the equity base and the accounting currency for the subsidiary are all the same to ensure that no FX gains or losses appear in the group accounts solely due to an internal intra-group transaction.

Unfortunately, the application of IFRS (IAS 21) means the functional currency of the intermediate holding company will now be determined by its parent, where the holding company is heavily dependent on its ultimate parent and does not operate with a significant degree of autonomy.

In our example, instead of using the euro as its functional currency, the finance company will have to use its parent's sterling functional currency and FX differences will then appear in its accounts. UK GAAP (FRS 23) is changing to come in line with IFRS; as this will become mandatory in January 2009, the point is relevant for all UK companies. It will similarly affect foreign-parented groups with UK subsidiaries preparing accounts in sterling under old UK GAAP.

A solution would be to allow an election that the tax return be based on the statutory accounts but with a revised functional currency as if the company were a singleton and not part of a group. To avoid abuse, this election would need to be made in advance, before FX outcomes were known.

HMRC is now keen to know how widespread the issue actually is, so if readers are able to give feedback to **modonovan@treasurers.org** this would be much appreciated. Alternatively, PwC partner Mohammed Amin, who is a member of the ACT Policy and Technical Committee, provides a full explanation of the issue and provides a short questionnaire via his blog at **pwc.blogs.com/mohammed_amin/2007/06/re_you_adversel.html** ■

Policy and Technical explained

The ACT's Policy and Technical (P&T) team seeks to represent non-financial-sector corporates; to influence relevant law, regulation and market practices by liaising with governments, regulators and standard setters; and to support the professional standards of members by providing information and guidance.

Its scope of work and general approach is set out in its manifesto (available on the ACT website) and is overseen by the P&T committee, which consists of the ACT team, corporate treasurers and other finance professionals who provide their time and expertise on a *pro bono* basis. During the past few months we have been active in many areas, of which the following is a representative selection.

Credit ratings Moody's recent withdrawal of plans to pre-empt corporate actions with ratings actions was in part due to the submission made by the P&T team and Moody's reliance on our position as a voice for corporate borrowers.

Guidance notes The ACT publishes briefing notes and guidance documents on a variety of topics of which the best known is the *ACT Guide to the Loan Market Association Documentation for Borrowers* and the most recent a briefing note dealing with letters of comfort.

Corporate governance The ACT responded to the Davies review of issuer liability for misstatements to the market by broadly supporting any attempt to clarify statutory responsibilities for market statements. We argued, however, that an extension of the current liability regime was unnecessary.

Accounting We have voiced concerns over the specific ideas of the IASB for determining fair values, and indeed its general enthusiasm for greater use of fair values.

We welcome the involvement of the wider membership and others with a professional interest in areas of concern, using formal or informal working groups where appropriate. Members' contributions are especially valuable when formulating our approach in responding to governments, regulators and standard setters.

The P&T team also offers a limited technical query service to ACT members and other treasury professionals, which can be accessed via the website. ■

IN BRIEF

▸ **Mechanisms for determining equivalence of third countries' GAAP** for Prospectus and Transparency Directive purposes have been proposed by CESR. Its advice is that a third country's GAAP can be treated as equivalent to IFRS if the differences can be rectified by non-complex disclosures. In other words, starting on a programme of convergence is not in itself sufficient.

▸ **Shareholder activism** gets a mention in the May edition of *Market Watch* from the FSA. The FSA explains its views on buying shares with a view to exercising shareholder rights and a corporate restructuring. The purchaser's knowledge of an intention to restructure might have been regarded as inside information so that dealing on that basis would be an abusive practice. However, the FSA is of the view that market professionals should be able to take advantage of their own expert analysis of otherwise publicly available information.

▸ The **Pension Protection Fund (PPF)** risk-based levy will not include investment strategy as a separate risk factor, the PPF has confirmed. This is in line with the findings of its earlier consultation, when most respondents agreed that the impact of investment risk was limited. This is in line with the recommendations from the ACT, which made the further point that such a levy could alter behaviour across the entire market to create an undue concentration of risk for the PPF itself.

▸ The FSA says that the feedback it received on its **private equity** discussion paper confirmed it had correctly identified and prioritised the risks and that the proposed regulatory approach to dealing with them was appropriate and effective. However, the FSA will strengthen its oversight of private equity by improving its collection of data on this market.

▸ **Customer mobility in relation to bank accounts** is the subject of a recent Expert Group study for the European Commission. It identifies several obstacles for retail customers wishing to open or switch accounts in a country or cross-border, including bundling and tieing, charges and information barriers.

▸ The SEC has completed its final rule-making under the **US Credit Agency Reform Act of 2006**. This defines a nationally recognised statistical rating organisation (NRSRO) and gives the SEC authority to implement certain oversight rules for credit rating agencies.