IN BRIEF

The Prospectus Directive and the FSA's new **Listing and Prospectus Rules** became effective from 1 July 2005. On 28 June the FSA published its newsletter *LIST!* issue no 10, providing further clarifications and answers to common questions. Under the Prospectus Rules the requirement to publish a document listing all the regulated information published in the last 12 months applies from 1 July, and takes in information arising prior to 1 July. Companies publishing annual financial statements shortly after 1 July must be ready to issue an annual information update within 20 days of publication of such statements.

A supplement has been issued to the **ACT's Guide to the Loan Market Association Documentation**, providing additional commentary on new clauses in the LMA loan facility agreements. The clauses cover major operational disruption to markets or payments or communications systems, for example due to terrorism, and increased costs from Basel II. The supplement is available on the ACT website.

The Chartered Institute of Management Accountants has published a legal opinion from Allen & Overy, addressing **directors' liability for statements in the Operating and Financial Review (OFR)**. It advises on minimising the risks of criminal and civil liability when making forward-looking statements.

The implications of IFRS for distributable profits is covered in draft technical guidance recently issued by the Institute of Chartered Accountants in England & Wales. It covers the application of fair value and hedge accounting, IAS 32 *Financial Instruments: Disclosure and Presentation* on the classification of financial instruments in the balance sheet, and contracts involving own equity. See www.icaew.co.uk/viewer/index.cfm?AUB=TB2I_81950

The Spectrum Plus case has finally been concluded in the **House of Lords**. This landmark ruling found that a charge over book debts was a floating charge where the chargor was able to draw on the bank account that received the proceeds of those book debts. Even if the charge was described on paper as a fixed charge its nature really depended on how much control the borrower had over the charged assets. This ruling will be of critical interest to banks since the holder of a floating charge ranks behind the preferential creditors in a liquidation.

INTRODUCTION

By MARTIN O'DONOVAN
ACT Technical Officer

Business Law is one of the four core Foundation Papers in the AMCT syllabus and there is no escaping the fact that law impinges very heavily on all treasury activities, even if it is just contract law governing your commercial agreements. As in many of the previous months we find that this month's technical update is dominated by legal developments. Company law in relation to shareholders rights and the ICAEW guidance on distributable profits; securities law on market disclosure and prospectuses; and accounting law on reporting disclosures and the fair value option.

EC seeks to protect beneficial owners

The European Commission is considering whether measures are required to strengthen the rights of the 'ultimate investor', or beneficial owners as we would describe them in the UK, where shares are held across borders or via intermediaries. With UK shares mainly held in non-certificated form via an account in CREST, this is a very real issue where, for example, a nominee holds shares in their CREST account for the account of a financial institution, which in turn holds the shares for an intermediary which holds the shares for an individual. In this sort of case the individual is so distant from the entity in whose name the shares are recorded in the company's share register that they may very well not be offered the chance to appoint a proxy to vote for them or to direct the registered holder how to vote.

The Commission has been seeking views as to whether the ultimate investor should be given an enforceable legal right to direct how his/her shares should be voted. The ACT in its response has supported the idea that it is the ultimate shareholder who is entitled to determine how to vote, but that the mechanism to achieve this should not be yet more law and regulation. Rather the ultimate investor should seek through contractual arrangements up the chain to be able to direct the registered holder how to vote, or to be given a proxy form so that he/she can attend in person or appoint his/her own representative to vote. This could be supported by Codes of Best Practice to provide added encouragement to the parties involved.

The situation can become very complicated in transactions like stock lending or where a depositary holds shares and issues depositary receipts against that holding. Rather than further regulation these complexities could be better covered by education and information as to the nature of the holdings and the resulting rights. Extra contractual rights could be built in through specific agreements if wished. Another idea was that companies should themselves keep a record of the ultimate investor where a holder is holding shares for the account of another person. This would just not be practical. Nonetheless, it is important that companies have the ability to obtain details of material interests in shares as under UK law (section 212 notices).

As with consideration of any new law or guidance the devil is in the detail and the ACT's response goes on to cover how best to set notice periods to allow due time for communications through long chains, but without delaying the meetings of the company. We supported publishing notices on a website and the concept of using a record date very near to the meeting date to act as a cut-off in determining who is on the register at the time of the meeting. This seems preferable to the system of share blocking or the immobilisation of any share to be voted, just prior to a meeting, as is often the case in Europe.

The procedures for attendance at meetings, voting and asking questions are all part of this debate, but again these can best be dealt with by developing best practice rather than compulsion. A legal requirement to answer written questions, for proxies to speak at meetings and to add resolutions with no minimum percentage holding, for example, could easily be open to abuse by pressure groups and troublemakers. ■

New Disclosure Rules target inside information

From 1 July 2005 new UK Disclosure Rules came into force for all companies with securities admitted to trading on a regulated market. This is the UK's implementation of the Market Abuse Directive. The previous regime dealing with the handling of Price Sensitive Information (PSI) is replaced with rules around 'inside information'. The scope of 'inside information' was discussed in *Technical Update* in March 2005. Inside information should be disclosed via a Regulatory Information Service 'as soon as possible' with just limited circumstances when this can be delayed. Selective disclosure to certain categories of people such as advisers and banks may be made where the recipient owes a duty of confidentiality to the company.

This means that giving a rating agency warning of a major acquisition, for example, the evening before it is officially announced may only be done where there is a duty of confidentiality. The ACT has clarified with the main rating agencies that they will be prepared to document confidentiality obligations.

The Disclosure Rules require companies to maintain lists of those with inside information, including the principal contact at advising firms. An issuer must ensure that their advisers themselves keep insider lists – letters of engagement should include an obligation on the advisers to do this. Also covered are insider dealing or other abusive behaviours and dealing with market rumours.

The Rules include certain guidance. The FSA has published two newsletters giving advice and answering frequently asked questions (FAQs). See the June edition of *LIST!* (issue no 9) and *Market Watch* (issue no 12), available on the FSA website. The ACT has published a far more extensive briefing note on this whole subject, written by Linklaters, and available on the ACT web site. We will be providing a summarised version in the October edition of *The Treasurer*. ■

Alternative reporting performance measures

The Committee of European Securities Regulators (CESR) has identified a plethora of performance measures, often given significant prominence in the report and accounts of listed companies, such as 'operating earnings', 'earnings before interest taxes depreciation and amortisation', 'adjusted earnings' and the like. CESR has issued draft guidance on the ways to use and present these alternative measures. The idea is that the securities regulators in Member States will recommend their local listed companies to follow the guidance.

The proposals are not complex nor, we hope, controversial. If these alternatives are not defined through International Accounting Standards (IAS 1 Presentation of Financial Statements, and IAS 33, Earnings per share), issuers should define all terminology used, explain any differences from defined measures and explain why the alternatives are relevant. The alternatives used should be applied consistently over time and comparatives provided. The most significant recommendation is that the alternative performance measures should not be presented with a greater prominence than that given to the defined measures. ■

Next step on fair value option

Following the International Accounting Standards Board's (IASB's) amendment to IAS 39 *Financial Instruments: Recognition and Measurement* in relation to the Fair Value Option, the European Commission is to remove the fair value carve out in the EU adopted accounting standards. This was approved by the Accounting Regulatory Committee (ARC) in July and formalities should be completed by the end of September. Adoption will be retroactive to 1 January 2005, so that companies can apply the amended standard for their 2005 financial statements.

The newly amended fair value option permits the fair valuation of own liabilities, in particular own debt instruments, whereas this is prohibited under Article 42(a) of the Fourth Company Law Directive. However, this was not an insurmountable problem for the Commission because the IAS Regulation explicitly states that subject to the application of a standard resulting in a "true and fair view of the financial position and performance of an enterprise", there does not need to be "a strict conformity with each and every provision of the accounting directives." ■

IN BRIEF

- **The Quoted Companies Alliance** (QCA) has published corporate governance guidelines for AIM companies. These are intended as minimum standards for AIM companies for whom the Combined Code does not apply.

- *In Brief* has previously reported (November 2004) the Court of Appeal case of **Concord Trust v Law Debenture Trust Corporation** where a bond trustee refused to act without an indemnity from the bondholders. This has now been overturned in the House of Lords. It was found that a prejudicial event of default had occurred so that the trustee came under a mandatory obligation to call an acceleration. It clarifies that a trustee, acting in accordance with its contractual obligations, is not liable to issuers for the commercial consequences of serving notices of default in UK bond issues when directed to do so by bondholders.

- The implementation of the **Markets in Financial Instruments Directive (MiFID)** is to be delayed under proposals from the European Commission. The transposition into national law is delayed six months to October 2006 and firms will be given a further six months to adapt their systems so as to comply.

- The impact of the **IAS Regulation on the true and fair requirement** has been clarified through a legal opinion published by the Financial Reporting Council (FRC). Companies using international accounting standards under the IAS Regulation will not be subject to the true and fair requirement in ss226A and 227A of the Companies Act 1985. A similar end result is obtained through the IAS Regulation and the IAS 1 *Presentation of Financial Statements* requirement to 'present fairly' the accounts.

- The German Bundestag has implemented the **European Prospectus Directive**, effective from 1 July. Prospectuses once approved by the German regulator BaFin will be recognised in every Member State, making pan-European offerings much simpler.

- The Government has approved the **Regulatory Reform (Execution of Deeds and Documents) Order 2005, effective September** clarifiying the law and procedures on Deeds. For example, merely executing a document under seal will not make it a deed; directors and secretaries of more than one company entering into a deed will have to sign separately for each company they represent.