



BURGES SALMON BRIEFING

Disclosure and Transparency Rules

January/February 2007

Implementation of the EU Transparency Directive

Introduction

The EU Transparency Directive (TD) introduces a new regime for periodic financial reporting and the disclosure of major shareholdings. It also deals with the dissemination and storage of regulated information.

New rules published by the Financial Services Authority (FSA) have implemented the TD in the UK. The Listing Rules have been amended and new provisions have been added to the Disclosure Rules which have been renamed the Disclosure and Transparency Rules (DTR).

The DTR cover companies admitted to the main market of the London Stock Exchange (Listed Companies) and companies admitted to AIM or PLUS Market. The following table indicates how the DTR apply to these companies:

DTR	Listed Companies	AIM/PLUS Market	Public companies (Unquoted)
Major shareholding notifications	✓	✓	x
Periodic financial reporting	✓	x	x
Dissemination of regulated information	✓	x	x
Officially Appointed Mechanism for the central storage of regulated information	✓	x	x

Key issues for UK-incorporated quoted companies

All quoted companies (Listed Companies and companies admitted to trading on AIM/PLUS Market)

- new regime for disclosure of major shareholdings;
- repeal of old disclosure regime for major shareholdings in sections 198 to 211 of the Companies Act 1985;
- further review of disclosure of Contracts for Difference and other derivatives;
- no major changes to section 212 regime;

Listed Companies only

- introduction of interim management statements;
- introduction of responsibility statements by directors for annual and half-yearly reports;
- annual reports must be published within four months of the year end;
- half-yearly reports must be published within two months of the period end;
- preliminary statement of annual results now optional; and
- new statutory regime introduced by the Companies Act 2006 to protect investors who suffer loss as a result of any misleading statements in such reports and statements.

Timing

The new regime came into force on 20 January 2007.

However the provisions relating to periodic financial reporting take effect for financial years commencing on or after 20 January 2007. Therefore a Listed Company whose financial year started on 1 January 2007 will not be required to produce the new annual report, half-yearly report and interim management statements until 2008/9 for the 2008 reporting year. By contrast, a Listed Company whose financial year starts after 20 January 2007 (for example on 1 April 2007) must comply with these requirements from the beginning of that new financial year. For further details on the timing of the new reporting requirements see the table headed "Reporting Deadlines" which has been reproduced from LIST! (Issue 14).

Disclosure of Major Shareholdings (all quoted companies)

The new rules for the disclosure of major shareholdings replace the previous regime which was contained in the Companies Act 1985 (sections 198 to 211). The 3% disclosure threshold will be retained but disclosure will be in respect of shareholdings and voting rights rather than the previous concept of interest in shares. The new regime will take some time to bed in as in many areas the FSA has simply copied out the relevant requirements of the TD. We expect the FSA to issue more informal guidance in due course.

There is no change to the section 212 company investigation provisions which have been carried over into the Companies Act 2006 (section 793 (Notice by company requiring information about interests in its shares)). Please note that "interest in shares" remains as the basis for the disclosure obligations under the investigation provisions. Therefore shareholders and quoted companies will have to deal with two different concepts and ensure that their internal systems and processes reflect this dual regime. The first in relation to notifications to issuers is "*voting rights*" and the second in relation to section 793 notices from issuers is "*interest in shares*".

Issuer scope

The TD introduces a new regime for the disclosure of major holdings of shares. The disclosure requirements contained in DTR 5 (Vote Holder and Issuer Notification Rules) apply to:

- UK Listed Companies - UK companies with shares admitted to trading on a regulated market and their shareholders;
- Non-UK Listed companies - non-UK companies with shares admitted to trading on a regulated market and for which the UK is the home Member State and their shareholders; and
- UK public companies with shares admitted to AIM or PLUS Market and their shareholders. Non-UK issuers on these markets are not required to comply with DTR 5. The AIM Rules now refer to DTR companies and non-DTR companies to reflect this distinction.

Notification of acquisition/disposal of major shareholdings

The FSA has implemented the TD so that for UK-issuers the previous notification thresholds are retained (usually when a shareholding reaches 3% and at each percentage point thereafter).

A notification obligation can arise where there is a change in the total number of voting rights in issue even though the shareholder (direct or indirect) has not changed his position. This could arise either as a result of a purchase of own shares by an issuer (leading to an increase in the percentage of voting rights held) or as a result of the issue of new shares by an issuer (which would result in a lower percentage of voting rights held). Shareholders should therefore monitor the monthly statements of total voting rights made by issuers (for further details on monthly statements see the section headed "Total number of voting rights – monthly statement by issuers").

The notification requirement is set out in DTR 5.1.2R which states that:

A person must notify an issuer if the percentage of voting rights which he holds as shareholder:

- reaches, exceeds or falls below 3%, 4%, 5%, 6%, 7%, 8%, 9%, 10% and each 1% threshold thereafter up to 100%; or
- reaches, exceeds or falls below those thresholds as a result of events changing the breakdown of voting rights and on the basis of information disclosed by the issuer in accordance with DTR 5.6.1R (Disclosures by issuers of total number of voting rights).

Different notification requirements apply to voting rights which may be exercisable by qualifying asset managers, investment managers, operators of authorised unit trust schemes/UCITS schemes etc. These are to be disregarded except at the thresholds of 5% and 10% and above (DTR 5.1.5R).

This notification requirement also applies to a person in respect of any qualifying financial instruments which they hold, directly or indirectly, which result in an entitlement to acquire, on such holder's own initiative alone, under a formal agreement, shares to which voting rights are attached, already issued, of an issuer (DTR 5.3.1R).

Whilst the UK has retained the 3% threshold, the TD only requires notification when the proportion of voting rights held reaches, exceeds or falls below the thresholds of 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%. The thresholds set out in the TD apply to non-UK issuers (DTR 5.1.2R).

Notification – timing

Details of the procedures for the notification and disclosure of major holdings are set out in the box headed "Notification of major shareholdings - procedures and timing".

Acquisition or disposal of major proportions of voting rights

In certain specified situations, the notification requirement will also fall on persons who are entitled to acquire, to dispose of, or to exercise voting rights (DTR 5.2.1R). A person in any of these situations is treated as an indirect shareholder for the purposes of Chapter 5 of the DTR.

The situations include:

- voting rights held by a third party with whom that person has concluded an agreement, which obliges them to adopt by concerted exercise of the voting rights they hold, a lasting common policy towards the management of the issuer in question;
- voting rights held by a third party under an agreement concluded with that person providing for the temporary transfer for consideration of the voting rights in question;
- voting rights attaching to shares which are lodged as collateral with that person provided that person controls the voting rights and declares its intention of exercising them;
- voting rights attaching to shares in which that person has the life interest;
- voting rights which are held, or may be exercised, by an undertaking controlled by that person;
- voting rights attaching to shares deposited with that person which the person can exercise at its discretion in the absence of specific instructions from the shareholders;
- voting rights held by a third party in his own name on behalf of that person;
- voting rights which that person may exercise as a proxy where that person can exercise the voting rights at his discretion in the absence of specific instructions from the shareholders.

Proxies granted to the chairman

A proxy granted to the chairman in relation to a general meeting will be covered by the new rules if he has not been given specific voting instructions by the relevant shareholder. Previously there was an exemption where a person was appointed to act as a proxy or corporate representative at a specified meeting of a company (section 209(12) Companies Act 1985).

This means that the chairman will be treated as an indirect shareholder. If the 3% threshold is reached or exceeded the chairman will have to make a notification to the issuer under DTR 5.8.3R. Notification may be made by means of a single notification on or as soon as is reasonably practicable after the deadline for receiving proxies. In turn the issuer will be required to announce this to the market. DTR 5.8.5G makes it clear that a proxy which confers only minor and residual discretions (such as to vote on an adjournment) will not result in the proxy holder having a notification obligation.

A major shareholder may also have a separate notification obligation when he appoints a proxy. DTR 5.8.5G explains that if a direct holder of shares has a notifiable holding of voting rights and gives a proxy in respect of those rights (such that the recipient has discretion as to how such votes are cast) then for the purposes of DTR 5.2.1R this is a disposal of such rights giving rise to a notification obligation.

The guidance notes confirm that separate notifications will not be necessary provided a single notification (whether made by the direct holder of the shares or by the proxy holder) makes clear what the situation will be when the proxy has expired. If a proxy holder has received several proxies then the combined notification must disclose what the position will be in respect of each proxy after the proxies have expired if the shareholders are to be relieved of their notification obligations.

LIST! (Issue 14) contains guidance on how a proxy holder should fill out the major shareholder notification form (TR-1).

Exemptions from the notification requirements

Voting rights attached to certain shares can be disregarded for the purposes of determining whether a person has a notification obligation. Details of these are set out in DTR 5.1.3R and include:

- shares acquired for the sole purpose of clearing and settling within the usual short settlement cycle (T+3);
- shares held by a custodian in its capacity as a custodian provided that the custodian can only exercise the voting rights attached to those shares under instructions given in writing or by electronic means;
- shares held by a market maker subject to the percentage of such shares not being equal to or exceeding 10% and subject to the market maker satisfying certain additional criteria (see box headed "Market Maker Criteria");
- shares held in the trading book of an investment firm or credit institution provided that the voting rights held in the trading book do not exceed 5% and the credit institution or investment firm ensures that the voting rights attached to the shares are not exercised or otherwise used to intervene in the management of the issuer;
- shares held by a collateral taker under a collateral transaction which involves the outright transfer of securities provided the collateral taker does not declare any intention of exercising (and does not exercise) the voting rights attaching to such shares; and
- shares acquired by a borrower under a stock lending agreement provided certain conditions are satisfied.

Notification of major shareholdings - procedures and timing

Timing for notification to company

The deadline for notification to the issuer is two trading days (or four trading days for non-UK issuers) after the date on which the relevant person learns of the acquisition or disposal or of the possibility of exercising voting rights, or on which, having regard to the circumstances, should have learned of it (DTR 5.8.3R).

Copy to FSA if shares traded on regulated market

A person making a notification to a Listed Company under DTR 5 must file a copy of that notification with the FSA using electronic means (DTR 5.9.1R). The information filed with the FSA must include a contact address for the person making the notification. Copies are not required if the notification relates to shares admitted to trading on AIM or PLUS Market.

Form

A notification made in respect of shares admitted to trading on the LSE's main market must be made using form TR-1 (DTR 5.8.10). The DTR do not specify the form which should be used in relation to shares admitted to AIM/PLUS Market and this point was not covered in AIM Notice 26 issued in January 2007. We expect that form TR-1 will be used as the default option. The form is available at http://www.fsa.gov.uk/pubs/forms/LR_share_interests.doc.

Disclosure by Listed Company

UK Listed Companies must announce via a Regulated Information Service (RIS) all of the information contained in the notification as soon as possible and in any event by not later than the trading day following receipt of the notification. A non-UK issuer has up to three trading days (DTR 5.8.12R). We expect that issuers may simply add their contact details to section 14 of form TR-1 and then release the form to the market.

Disclosure by companies admitted to AIM/PLUS Market

Companies admitted to AIM/PLUS Market must make public all of the information contained in the notification as soon as possible and in any event by not later than the third trading day following receipt of the notification (DTR 5.8.12R). All AIM Companies must also comply with AIM Rule 17 (which, among other things, requires the disclosure of significant shareholdings). New guidance has been introduced to AIM Rule 17 to clarify the interaction between DTR 5 and AIM Rule 17.

Transitional arrangements

31 December 2006: See our briefing "Companies Act 2006 – Provisions coming into force in January 2007" published in December 2006 for an explanation of the transitional provisions which required an issuer to make an announcement by 31 December 2006 of the total number of voting rights in respect of each class of share admitted to trading on a regulated market or UK prescribed market and the number of voting rights attaching to any shares held by the issuer in treasury.

20 January 2007: Announce any subsequent alteration of that total number of voting rights occurring between the date of the first disclosure and 20 January 2007.

20 March 2007: A person who holds a notifiable percentage of voting rights must notify the issuer by not later than 20 March 2007 of the percentage of voting rights he holds unless he has already made a notification in accordance with DTR 5.1.2R before that date (TP7).

20 April 2007: An issuer must disclose the information received under TP 7 by not later than 20 April 2007 (TP8).

Total number of voting rights – monthly statement by issuers

An issuer must, at the end of each calendar month during which an increase or decrease has occurred, disclose to the public:

- the total number of voting rights and capital in respect of each class of share which it issues; and
- the total number of voting rights attaching to shares of the issuer which are held by it in treasury.

(DTR 5.6.1R)

This figure is then used when calculating whether a threshold is reached, exceeded or fallen below (DTR 5.8.8R).

An issuer must, in certain circumstances, announce any acquisition or disposal of its own shares (see DTR 5.5.1R).

Market Maker Criteria (DTR 5.1.4R)

The Market Maker must

- be authorised;
- not intervene in the management of the issuer concerned; and
- not exert any influence on the issuer to buy shares held by the market maker or back the share price.

This exemption only applies in respect of holdings of less than 10%. Under the previous regime the size of the market maker's holding was not limited. However the FSA "*does not anticipate that the difference will entail a greater number of disclosures by market makers as they would rarely be expected to breach the 10% threshold*" (Consultation Paper (CP) 06/4 Implementation of the Transparency Directive paragraph 3.16).

Disclosure of Major Shareholdings – frequently asked questions

LIST! (Issue 14) contains a number of worked examples which seek to illustrate the practical application of DTR 5.

What shares are covered? The notification requirement applies to all shares which:

- are issued;
- carry rights to vote in all circumstances at general meetings of the issuer. In addition, shares (such as preference shares) which become enfranchised following, for example, an event of default are also covered; and
- are admitted to trading on a regulated market (such as the LSE's main market) or a prescribed market (AIM/PLUS Market).

What is a financial instrument?

This term covers transferable securities and options, futures, swaps, forward rate agreements and any other derivative contracts referred to in Section C of Annex 1 of the Directive on Markets in Financial Instruments, provided that they result in an entitlement to acquire, on the holder's own initiative alone, under a formal agreement, shares to which voting rights are attached, already issued of an issuer whose shares are admitted to trading on a regulated market or a UK prescribed market. The instrument holder must enjoy, on maturity, either the unconditional right to acquire the underlying shares or the discretion as to his right to acquire such shares or not.

Which voting rights figures should be used to calculate whether a threshold has been reached?

Voting rights must be calculated on the basis of all the shares to which voting rights are attached even if the exercise of such rights is suspended. The number of voting rights to be considered when calculating the percentage of voting rights should be based on the issuer's most recent month end disclosure, disregarding any treasury shares held by the issuer (LIST! (Issue 14)).

Do we still need to keep a register of interests in shares and record the information notified to us by shareholders?

No. Section 211 of the Companies Act 1985 which required a public company to keep a register of interests in shares has been repealed. DTR 5 does not impose an equivalent obligation on the issuer.

Do the new rules cover contracts for difference (CFD) and other derivatives?

No. The FSA stated in CP06/4 that it had "*decided it would not be sensible to introduce rules dealing with the disclosure of such derivative holdings as part of the implementation of the Transparency Directive*". However in Policy Statement 06/11 (Implementation of the Transparency Directive) the FSA announced that it intended to undertake further analysis. The three options being considered by the FSA are to leave the regime unchanged, to strengthen the regime to cover situations in which CFD holders effectively have constructive options over shares held in hedge or where banks vote stock in accordance with the wishes of CFD holders or to introduce a regime would require the notification of economic interests in shares held via instruments such as CFDs.

What notifications are required if a pension fund appoints a fund manager to act on a discretionary basis?

The FSA considered this situation in LIST! (Issue 14) and explained that in this case the appointment (and the resulting transfer of voting rights) brings about a disposal by the pension fund trustees if the fund manager has been given discretion to vote the shares in the portfolio. Following the appointment the beneficial owner (the pension fund trustees) ceases to have a separate notifiable interest and the fund manager acting as an indirect holder of shares (see DTR 5.2.1R (h)) should make a notification if there are changes in the holdings of shares. Even if the client has retained power to give the fund manager instructions in respect of its assets, the client does not have a separate notifiable interest unless and until it exercises that power. It is also likely that the fund manager will only need to disclose when holdings breach 5% and 10% (DTR 5.1.5R). Similar situations are also likely to arise for some insurance companies who appoint a fund manager.

Is the parent company of a management company required to aggregate its holdings with those managed by the management company?

If the management company exercises its voting rights independently from the parent undertaking, then the parent undertaking is not required to aggregate its holdings with the holdings managed by the management company. Similar rules apply to investment firms. A parent undertaking which wishes to be exempt from aggregating its holdings must notify the FSA of the management companies and investment firms concerned and confirm that in each case the parent undertaking complies with independence criteria outlined in DTR 5.4.3R. Any parent undertakings notifying the FSA of their exemptions from aggregating holdings must also be able to demonstrate that the requirements of independence outlined in DTR 5.4.6R are respected. DTR 5.4.6R requires parent undertakings to demonstrate that organisational structures, mandates regarding the parent and management company or investment firm relationships, and written policies and procedures, support independence regarding the exercise of voting rights (See LIST! (Issue 14)).

Periodic Financial Reporting (Listed Companies)

Issuer Scope

DTR 4 (Periodic Financial Reporting) applies to issuers whose securities are admitted to trading on a regulated market and whose home state is the United Kingdom. Therefore DTR 4 applies to Listed Companies but not to companies admitted to AIM or PLUS Market (as those markets are not regulated markets). DTR 4.4R sets out certain exemptions from the periodic reporting requirements for, among others, public sector issuers, debt issuers, issuers of convertible securities and issuers of preference shares. DTR 4 requires an issuer to publish an annual financial report, a half-yearly management report and interim management statements.

The provisions relating to periodic financial reporting take effect for financial years commencing on or after 20 January 2007 and the following table illustrates how this will work in practice.

Reporting Deadlines			
	Example A: Accounting year start date before 20 Jan 2007		Example B: Accounting year start date after 20 Jan 2007
Accounting year start date	1 Jan 2007		1 April 2007
Accounting year	Year 1	Year 2	Year 1
1st Interim Management Statement	n/a	No sooner than 10 weeks after 1 Jan 2008 and no later than 6 weeks before end of June 2008.	No sooner than 10 weeks after 1 Apr 2007 and no later than 6 weeks before end of Sep 2007.
Half-yearly report	By end-Sep 2007 (within 90 days of half-year).	By end-Aug 2008 (within 2 months of half-year).	By end-Nov 2007 (within 2 months of half-year).
2nd Interim Management Statement	n/a	Between 10 weeks after 1 Jul 2008 and six weeks before end of 2008.	Between 10 weeks after 1 Oct 2007 and six weeks before end of March 2008.

Reporting Deadlines continued			
	Example A: Accounting year start date before 20 Jan 2007		Example B: Accounting year start date after 20 Jan 2007
Accounting year start date	1 Jan 2007		1 April 2007
Accounting year	Year 1	Year 2	Year 1
Preliminary statement	By end-April 2007 (within 120 days).	Optional.	Optional.
Annual report	By end-June 2007 (6 months after year end)	Before end-April 2009 (4 months after year end)	Before end-July 2008 (4 months after year end)

NOTE: For Example A, reporting types, contents and deadlines for accounting year one should be in accordance with existing rules. In particular, this means that producing a preliminary statement will still be mandatory. In essence, this will mean that during the transitional period, some issuers will be using the current regime while others will have switched over to the new rules. (Source: LIST! (Issue 14))

Annual Financial Report (DTR 4.1R)

Contents

The annual financial report must include:

- the audited financial statements;
- the audit report;
- a management report; and
- responsibility statements.

(DTR 4.1.5R and 4.1.7R(2))

The management report must contain a fair review of the issuer's business and a description of the principal risks and uncertainties facing the issuer. The review must be a balanced and comprehensive analysis of the development and performance of the issuer's business during the financial year and the position at the end of that year (consistent with the size and complexity of the business). To the extent necessary for an understanding of the development, performance or position of the issuer's business, the review must include analysis using financial and other key performance indicators (including information on environmental matters and employee matters) (DTR 4.1.9R). DTR 4.1.11R sets out a list of additional contents requirements.

Responsibility statements

Responsibility statements must be made by persons responsible within the issuer (usually the directors) (DTR 4.1.12R). The statement must "set out" that to the best of his or her knowledge:

- the financial statements give a true and fair view of the assets, liabilities, financial position and profit or loss of the issuer and its consolidated undertakings taken as a whole; and
- the management report includes a fair review of the development and performance of the business and the position of the issuer and its consolidated undertakings taken as a whole and a description of the principal risks and uncertainties that they face.

Timing

The annual financial report must be published within four months of the end of each financial year (DTR 4.1.3R).

Responsibility

DTR 4.1.13R states that the issuer is responsible for all information drawn up and made public in accordance with the section on annual financial reports. In LIST! (Issue 14) the FSA makes it clear that the issuer bears exclusive regulatory responsibility for compiling the annual report.

Half-Yearly Financial Report (DTR 4.2R)

Contents

The half-yearly financial report must include:

- a condensed set of financial statements;
- an interim management report; and
- responsibility statements.

(DTR 4.2.3R)

The interim management report must include at least an indication of important events that have occurred during the first six months of the financial year and their impact on the condensed set of financial statements and a description of the principal risks and uncertainties for the remaining six months of the financial year (DTR 4.2.7R). Additional information must (in the case of an issuer of shares) be included if any related parties' transactions have occurred in the relevant period (DTR 4.2.8R).

Responsibility Statements

Responsibility statements must be made by persons responsible within the issuer (usually the directors). The statement must "confirm" that to the best of his or her knowledge:

- the condensed set of financial statements give a true and fair view of the assets, liabilities, financial position and profit or loss of the issuer and its consolidated undertakings taken as a whole; and
- that the interim management report includes a fair review of the important events and other items required by DTR 4.2.7R and (in the case of an issuer of shares) the information required by DTR 4.2.8R (related parties' transactions).

Half-yearly Reports – "true and fair view"

The use of the "true and fair view" concept in the responsibility statement for half-yearly reports created some concern during the consultation process. However DTR 4.2.10(4)R now makes it clear that the requirement to confirm that the condensed financial statements give a true and fair view will be satisfied by including a statement that the condensed financial statements have been prepared in accordance with IAS 34 (Interim Financial Reporting). However the person making that statement must be satisfied that the condensed set of financial statements prepared in accordance with that standard is not misleading. In LIST! (Issue 14) the FSA notes that "It will not be necessary for the persons responsible within the issuer to include a further explicit statement confirming that the condensed set of financial statements gives a true and fair view".

Timing

The half-yearly financial report must be published as soon as possible and in any event within two months after the period end (DTR 4.2.2R).

Responsibility

DTR 4.2.11R states that the issuer is responsible for all information drawn up and made public in accordance with the section on half-yearly financial reports. In LIST! (Issue 14) the FSA makes it clear that the issuer bears exclusive regulatory responsibility for compiling the half-yearly financial report.

Interim Management Statement (DTR 4.3R)

An issuer whose shares are admitted to trading on a regulated market (Listed Companies only) must produce an interim management statement (IMS) during each half-year.

Contents

The IMS must provide:

- an explanation of material events and transactions that have taken place during the relevant period and their impact on the financial position of the issuer and its controlled undertakings; and
- a general description of the financial position and performance of the issuer and its controlled undertakings during the relevant period.

(DTR 4.3.5R)

The FSA believes that the content of an IMS will depend on the circumstances of each issuer and the markets in which it operates. During the consultation process the FSA expressed the view that *"these requirements are expected to be less onerous than producing quarterly reports"* (CP06/4 Implementation of the Transparency Directive – paragraph 1.17).

There is no need for an IMS to contain a responsibility statement equivalent to those required for the annual financial report and half-yearly report.

Timing

These statements must be made in a period between ten weeks after the beginning and six weeks before the end of each six-month period (DTR 4.3.2R and DTR 4.3.3R). Each statement must contain information covering the period between the beginning of the relevant six-month period and the date of publication of the statement.

Not required for issuers who produce a quarterly financial report

However if an issuer already produces quarterly financial reports then it will not be required to produce an IMS (DTR 4.3.6R).

Can we use a trading statement to comply with this new requirement?

Possibly. The Government has explained that *"the ... text allows the UK ... largely to continue to rely on its tried-and-tested forms of ad hoc disclosure, commonly referred to as trading statements"* with limited additional costs being placed on UK companies (see Government Response (from the Financial Secretary to the Treasury available at <http://www.parliament.the-stationery-office.com/pa/ld200304/ldselect/lda/com/89/89we03.htm>).

In LIST! (Issue 14) the FSA explained that *"We continue to believe that issuers may be able to meet the IMS requirements based on the content of performance reports, trading statements and other similar reporting formats with no additional information providing those statements or reports include the information required under DTR 4.3.5. This means that it must explain the material events and transactions that have taken place during the relevant period and their impact on the financial position of the issuer and provide a general description of the financial position of the issuer"*. The FSA also believes that IMS may not require financial data in certain circumstances.

Has the FSA published any guidance on the contents of an IMS?

Yes. LIST! (Issue 14) contains limited informal guidance on the contents of an IMS (see sections 2.22 to 2.29). The FSA intends to adopt a risk-based approach to enforcing the IMS regime and will take into account the high-level nature of the rules and their openness to interpretation. The FSA intends to review market practice in this area in 18 to 24 months.

Responsibility

In contrast to the position on annual and half-yearly reports there is no rule which states that the issuer is responsible for all information drawn up and made public in accordance with the section on IMS. A curious omission as it would have been helpful for this point to have been addressed.

Preliminary financial reporting – frequently asked questions

Will we still be required to publish a preliminary statement of annual results?

No. The Listing Rules have been amended so that an issuer will no longer be required to produce a preliminary statement of annual results. LR 9.7 has been deleted and replaced with LR9.7A. The contents requirements have not been changed.

The FSA expects *"that many issuers will continue to produce preliminary statements of annual results and do so well before they publish their full annual report"* (CPO6/4 paragraph 2.36). The FSA also notes in LIST! (Issue 14) that *"Issuers who elect not to produce prelims will still be required to publish inside information as soon as possible in line with their obligations under the Market Abuse Directive as set out in DTR 2"*.

Do the Listing Rules still require Listed Companies to send the half-yearly report to shareholders or to insert it in a national newspaper ?

No. The requirement that an issuer must send the half-yearly report to holders of its listed securities or publish it in at least one national newspaper has been deleted (LR 9.9.5R). Instead this information must be published by means of a RIS announcement.

How do we publish the annual financial statement and the interim management statement?

Again, these reports should be published by means of a RIS announcement. All announcements must include the address of a website where the relevant document (annual financial reports, half-yearly reports etc) are available. For further details see the section headed "Listed Companies – Dissemination of Regulated Information". UK companies will continue to be subject to the requirements contained in the Companies Act 1985 which relate to the publication and availability of the annual report and accounts.

Who should give the responsibility statements in annual and half-yearly reports?

Directors will usually give the responsibility statements although it is up to an issuer to decide who gives them. Issuers should consider whether an appropriate disclaimer should be included to mitigate the risk of liability to investors. Please note that the names and functions of the persons making the relevant prescribed statements must be clearly indicated.

How does this affect the Model Code?

The new deadlines for producing periodic reports and statements have resulted in some minor changes to the definition of "close period" set out in the Model Code. Note that in LIST! (Issue 14) the FSA stated that it would not extend the Model Code to cover the period prior to the publication of an IMS. The FSA requires issuers to use their discretion as to any price sensitive information contained within the IMS when making their trading decisions. However the amendments to the Model Code do introduce a 30 day close period prior to the publication of an IMS. We suggest issuers rely on the informal guidance given in LIST! (Issue 14) and expect the FSA to resolve this issue shortly.

Liability for periodic financial reports and interim management statements

There are frequent references in the TD to building "*investor confidence*", a "*regular flow of information to investors*" and a "*high level of investor protection*". These references gave rise to concerns that the implementation of the TD would increase the liability of a listed company and its directors for the accuracy of periodic financial reports. In response to these concerns the Government introduced a provision dealing with liability for periodic financial reports in the Companies Act 2006.

Liability for reports and statements published in response to a requirement imposed by the TD

Listed Companies are subject to a new statutory liability regime in respect of annual financial reports, half-yearly financial reports and interim managements statements published as a result of a requirement imposed by the TD. The same regime will also, subject to certain conditions, apply to preliminary announcements if published.

The Act introduces new provisions which make a Listed Company liable to pay compensation to a person who has acquired securities issued by it and suffered loss in respect of them as a result of any untrue or misleading statement in a relevant publication or the omission from any such publication of any matter required to be included in it (Section 1270 (Liability for false or misleading statements in certain publications)).

However a Listed Company will only be liable if a person discharging managerial responsibilities (PDMRs) within the Listed Company in relation to the relevant publication knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading, or knew the omission to be a dishonest concealment of a material fact. For the purposes of this section only directors of the Listed company will be PDMRs (which contrasts with the current use of that term in FSMA).

Only the Listed Company will be liable to a person who has acquired securities in these circumstances. Investors will not be able to bring claims against directors as a result of this new provision. The Act makes it clear that a person other than the Listed Company is not subject to any liability, other than to the Company, in respect of any such loss.

The Act makes it clear that this provision does not affect the powers conferred by section 382 and 384 of FSMA, liability for a civil penalty or liability for a criminal offence.

Liability for other announcements

The new regime does not apply to other announcements required under the DTR or under the Listing Rules such as the announcement of a Class 1 transaction or a profits warning. In 2006, the Government announced that it had decided to conduct a formal review of the liability of issuers in respect of damage or loss suffered as a consequence of inaccurate, false or misleading information disclosed by issuers or their managements to financial markets (including to their own shareholders or bondholders) or of failure to disclose relevant information promptly or at all. The review will take into account both existing regulatory obligations and penalties, including criminal penalties, and the potential for liability in damages under existing common law jurisprudence. Professor Paul Davies QC of the London School of Economics is conducting this review and the terms of reference were announced on 26 January 2007.

Liability in other EU Member States

During the negotiations on the form of the TD, the Government attempted to introduce a provision in the TD that would have required cross-border civil liability disputes to be resolved within the civil liability regime of the issuer's home Member State. However, other Member States and the Commission expressed strong opposition to such a provision on the grounds that it would reduce investor protection in the EU. The proposed amendment was not adopted into the final text of the TD.

The provision referred to above will not protect directors and issuers from claims brought against them in other EU Member States.

Listed Companies - Electronic communications

The TD states that issuers with shares admitted to trading on a regulated market must be allowed to use electronic means of communication for the purpose of conveying information to shareholders. Therefore DTR 6.1.7G states that an issuer of shares or debt securities may use electronic means to convey information to shareholders or debt securities holders. Electronic means is defined as any "*means of electronic equipment for the processing (including digital compression), storage and transmission of data, employing wires, radio optical technologies, or any other electromagnetic means*".

If an issuer wants to use electronic means it must comply with the following requirements set out in DTR 6.1.8R:

- the use of electronic means must be approved by shareholders or debt securities holders in a general meeting;
- the use of electronic means must not depend upon the location of the shareholder or persons entitled to control the manner in which voting rights are exercised. The FSA has explained that this means that issuers will not be able to use e-communication for any mailing that they need to restrict e.g. for US securities law reasons;
- identification arrangements must be put in place so that shareholders, debt security holders or other persons entitled to exercise or direct the exercise of voting rights are effectively informed; and
- shareholders, debt security holders or persons entitled to acquire, dispose of or exercise voting rights must be contacted in writing to request their consent for the use of electronic means for conveying information. If they do not object within a reasonable period of time they are deemed to have consented to the use of electronic means. They can at any time in the future request that information is sent to them in writing.

If an issuer could use electronic communications to communicate with shareholders before 20 January 2007 as a result of pre-existing arrangements relating to electronic communications, then the new rules do not require that issuer to seek shareholder approval in general meeting (TP12). Issuers can continue to rely upon such arrangements.

The FSA has confirmed that an issuer does not have to contact indirect shareholders described in TD Articles 10(a) to (e) in order to use electronic communications. Further guidance is contained in LIST! (Issue 14).

Listed Companies - Filing Regulated Information with the FSA

Whenever a Listed Company discloses regulated information it must, at the same time, file that information with the FSA (DTR 6.2.2R). Regulated information means all information which the issuer is required to disclose under the Transparency Directive, under Article 6 of the Market Abuse Directive or under the Listing Rules or the DTR.

During the consultation process the FSA explained that the issuer's use of a RIS to disseminate regulated information would comply with the requirement to file that information with the FSA (CP06/4 paragraph 4.5). This is now reflected in DTR 6.2.3G.

Listed Companies – Additional Disclosures under DTR 6

Listed Companies should also be aware of the following additional disclosure obligations contained in DTR 6:

- if a Listed Company proposes to amend its constitution it must communicate the draft amendment to the FSA and to the market without delay but at the latest on the date of calling the relevant general meeting (DTR 6.1.2R); and
- a Listed Company must also disclose to the public any change in the rights attaching to its various classes of shares (DTR 6.1.9R) and any new loan issues (DTR 6.1.11R).

Listed Companies - Dissemination of Regulated Information (DTR 6.3)

The TD requires Member States to ensure that issuers admitted to trading on a regulated market disclose regulated information in a manner ensuring fast access to such information on a non-discriminatory basis and make it available for central storage at an "*Officially Appointed Mechanism*". This reflects the view that the disclosure of accurate, comprehensive and timely information about security issuers builds sustained investor confidence and allows an informed assessment of their business performance and assets. The FSA believes that the PIP/SIP model meets the dissemination requirements of the TD and has proposed that issuers whose home Member State is the UK should continue to use it to disclose regulated information.

DTR 6.3 deals with the dissemination of regulated information by Listed Companies. It provides that:

- an issuer must entrust a RIS with the disclosure of regulated information to the public and must ensure that the RIS complies with the minimum standards contained in DTR 6.3.4R to DTR 6.3.8R;
- regulated information must be disseminated in a manner ensuring that it is capable of being disseminated to as wide a public as possible, and as close to simultaneously as possible in the Home Member State and in other EEA States (DTR 6.3.4R);

- regulated information, other than annual financial reports, must be communicated to the media in unedited full text (DTR 6.3.5R);
- regulated information must be communicated to the media in a manner which ensures the security of the communication, minimises the risk of data corruption and unauthorised access, and provides certainty as to the source of the regulated information. Security of receipt must be ensured by remedying as soon as possible any failure or disruption in the communication of regulated information (DTR 6.3.7R); and
- an issuer must not charge investors for providing regulated information (DTR 6.3.9R).

Upon request, an issuer must be able to communicate the following information to the FSA:

- the name of the person who communicated the regulated information to the RIS;
- the security validation details;
- the time and date on which the regulated information was communicated to the RIS;
- the medium in which the regulated information was communicated; and
- details of any embargo placed by the issuer on the regulated information, if applicable.

Listed Companies - Storage of Regulated Information

The TD requires Member States to ensure that there is at least one "*Officially Appointed Mechanism*" (OAM) for the central storage of regulated information. The TD states that this mechanism must comply with minimum quality standards of security, certainty as to the information source, time recording and easy access by end-users (Article 21(2)).

For the period between implementation of the TD and the formal implementation of measures to specify OAM standards, the FSA intends to make the links to the providers of information on its website more prominent and enhance the RIS section of the website generally. The FSA believes that these arrangements will satisfy the Commission requirement that investors have "*some kind of access*" to regulated information in the interim period.

AIM Companies - Electronic communications

The LSE has confirmed that companies that come within the Companies Act 2006 and which communicate with their shareholders electronically in accordance with those parts of the Act which came into effect on 20 January 2007, will be deemed to be complying with those AIM Rules that require documents to be sent to shareholders.

Further information

For further information please speak to your usual contact at Burges Salmon or contact:

Nick Graves, Partner on 0117 939 2200 or email him at nick.graves@burges-salmon.com or **Alyson Whale**, Professional Support Lawyer on 0117 939 2294 or email her at alyson.whale@burges-salmon.com