CLEARY GOTTLIEB

Alert Memo

LONDON MARCH 12, 2010

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Extension Of UK Issuer Liability Regime For Ongoing Disclosure

Overview. On March 9, 2010, the UK Treasury published final details of its proposed extension of the existing statutory information liability regime for ongoing disclosure for listed issuers. The changes are of interest to all issuers and potential issuers of listed securities with a UK nexus. The extensions to the regime concern issuer liability to security holders for losses suffered:

- in reliance on untrue and misleading statements and/or the dishonest omission of required information in certain published information, and
- as a result of dishonest delays in publishing information to the market.

The new regulations will come into force for information first published on or after October 1, 2010.

In short, the changes:

- extend the scope of information in respect of which issuers may be liable,
- capture issuers on a broader range of markets, and
- give persons other than just purchasers of securities a right of action.

The current statutory liability regime imposes liability for losses suffered by purchasers of securities in reliance on misleading statements or omissions in periodic financial information published by issuers with securities admitted to trading on regulated markets in the United Kingdom.[1] From October, these provisions will be repealed and replaced.[2] The new rules contain significantly extended provisions imposing liability beyond periodic financial disclosures to capture misleading statements and omissions in, and delays in the publication of, all information formally published by issuers, and in materials referred to in such publications. The revised regime also catches a broader range of issuers and markets, as discussed below.

[1] See section 90A of the Financial Services and Markets Act 2000 (“FSMA”).

[2] The new rules will form schedule 10A to the Financial Services and Markets Act 2000. The existing regime imposing liability for errors and omissions in prospectuses and listing particulars in section 90 of the FSMA is unaffected by the changes.

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This memorandum was prepared as a service to clients and other friends of Cleary Gottlieb to report on recent developments that may be of interest to them. The information in it is therefore general, and should not be considered or relied on as legal advice.

The differences between the current and new regimes are summarised in the following table:

	Current regime	***Revised regime***
Standard of liability	Fraud	Fraud
Who is liable?	Issuer	Issuer
Scope of liability	Required periodic financial disclosures	All information published to the market or referred to in market publications
Which issuers/markets are covered?	Issuers with securities on UK regulated markets (or non-UK regulated markets where UK is home member state)	Issuers listed on any regulated markets or unregulated markets or any other multilateral trading facilities if any of the following is the case: • the issuer is incorporated in the UK • the issuer otherwise has the UK as its Transparency Directive home member state or • the market is in the UK
Who can bring an action?	Purchaser of securities in reliance who has suffered loss	Purchaser, seller or someone who has continued to hold securities in reliance and who has suffered loss

Key points to note. The key characteristics of the revised regime are set out below, with comparisons to the current position where relevant:

a. Basis of liability. The revised regime maintains the existing "fraud" standard for the expanded heads of liability: An issuer is only liable to compensate a security holder where a person discharging managerial responsibilities at the issuer knew a relevant statement to be untrue or misleading (or was reckless as to whether it was), or knew that the omission of information required to be published was a dishonest concealment of a material fact. In respect of delayed publication of information, an issuer is only liable if a person discharging managerial responsibilities acted dishonestly in delaying the publication of the information. The UK Government's view is that to be successful, a claimant would have to show that a particular statement should have been made at a previous point in time and in fact was not, and the act of so doing was as a result of dishonest behaviour intended to enable a gain to be made or to cause loss to another or expose another to the risk of loss. The statutory test is not written this way, but turns on whether the conduct is regarded as dishonest by persons who regularly trade on the relevant securities market and the person at the issuer was aware or must be taken to have been aware that it was so regarded.

The regime does not capture directors and officers, although issuers should note that its directors and officers might be liable under other heads of law.

b. Scope of liability. Unlike the current regime, which applies only to securities admitted to trading on regulated markets in the United Kingdom (or on regulated markets outside of the United Kingdom where the United Kingdom is the applicable home member state under the EU Transparency Obligations Directive), the revised regime expands the scope of liability to include securities that are, with the consent of the issuer,[3] admitted to trading on any securities market (i) situated or operating in the United Kingdom, or (ii) where the United Kingdom is the issuer's "home state". An issuer's home state will be the United Kingdom if it is its home member state under the relevant implementation of the EU Transparency Obligations Directive or, in any other case, its registered office is in the United Kingdom. As such, the regime covers unregulated markets and other multi-lateral trading facilities, both in and outside of the UK and covers UK domiciled issuers on any worldwide market. By way of example, the following table compares the scope under the current and revised regimes:

	Current	***Revised***
UK issuer of securities trading on Main Market of the London Stock Exchange (LSE)	Yes	Yes
Non-UK issuer of securities trading on regulated market segment of Euronext (France home state)	No	No
Non-UK issuer of securities trading on regulated market segment of Euronext (UK home state)[4]	Yes	Yes
UK or non-UK issuer of securities trading on Professional Securities Market of the LSE	No	Yes
UK issuer of securities trading on New York Stock Exchange or Singapore Stock Exchange	No	Yes

In addition, the new regime extends compensation to cover losses suffered by sellers and those who continue to hold securities, in addition to purchasers. However, an issuer is only liable where the person relied on the relevant information in circumstances in which it was reasonable for him to do so.[5]

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3 An issuer is taken to have consented where it has taken responsibility for any part of an offering document, such as a prospectus, published in connection with the admission.

4 It is likely to be a rare situation that the UK would be the Transparency Directive home state for an issuer which no longer has securities admitted to trading in the UK.

5 For example, a holder of securities could bring a claim if it suffered losses after cancelling a sell order in reliance on a misleading statement, but could not claim if it simply continued to hold the relevant securities and would have done so in any event.

c. **Subject of liability**. The most fundamental change is to the information in respect of which an issuer may face liability. The revised regime applies to any information published by a relevant issuer by a recognised means (i.e. a relevant information service for the market in question or any other means required or authorised to be used to communicate information to the market, or to the public, when the information service in question is not available), and to other information where the availability and source of the information has been published by a recognised means. Liability attaches to information actually disclosed, whether it is required to be published or not, provided reliance is placed upon it and loss is suffered. Liability only attaches to omissions in respect of matters required to be included in announcements.

The new regime now also explicitly catches acquisitions or disposals of *interests* in the relevant securities (to ensure that holders through intermediaries are able to bring actions for losses). In respect of financial instruments representing underlying securities, such as depositary receipts and certain derivatives, the issuer of the underlying instrument is only liable where it has consented to the admission of the representative instrument (as would, for example, be the case for listed GDRs where the issuer of underlying shares has prepared a prospectus). In other situations, the issuer of the derivative instrument would be subject to the liability regime.

Although the new regime will be seen by most as a development of already sophisticated heads of liability for disclosures to the market, including listing rules and civil and criminal market abuse regimes, these developments should refocus the minds of issuers on their systems and controls to ensure both accurate and timely disclosure of information to the market.

Please feel free to be in touch with any of your regular contacts at the firm or any of our partners or counsel listed under "United Kingdom" in the "Practices" section of our website (http://www.clearygottlieb.com) if you have any questions, in particular on how the risk of liability under the new and existing regimes can be mitigated.

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