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DISCLOSURE OF CFDS — CONCERNS FOR CORPORATE ISSUERS

1. Introduction

On 15 November 2007 the FSA issued a consultation paper on additional disclosure obligations relating to economic interests in listed shares held through derivatives such as contracts for difference (CFDs).

CFDs fall outside the current disclosure framework as the Disclosure and Transparency Rules (DTRs) reference direct and indirect control of voting rights and the investigative regime under CA 2006 s793 generally does not apply to derivatives. However, since 2005, the Takeover Code has required disclosure during an offer period of dealings by holders of economic interests in 1% or more of the securities of a target company.

The FSA reports that issuers and investors have raised concerns regarding the lack of general disclosure of holdings of CFDs. It has concluded that there have been some specific ‘failures’ of the current regime and that additional measures should be adopted to cover CFDs. The FSA has put forward two options to meet this objective – further details of each option are set out below.

This paper examines the FSA’s proposals from the standpoint of corporate issuers, questions whether either option would adequately address the failings of the current regime and sets out the case for an alternative approach.

2. The failings of the current regime

The CFD market in the UK has grown significantly in the last five years. Between 20% and 40% of turnover in the cash equities market is now thought to be driven by activity in related derivative products, including CFDs. However, these products fall outside the scope of the DTRs and CA 2006 s793 unless they explicitly give access to voting rights attached to underlying shares or to the shares themselves on expiry of the contract.

It is arguable that this technical distinction for disclosure purposes does not bear close scrutiny in the context of the practical operation of the market. CFD writers will usually hedge some or all of their positions with underlying shares. Whilst it may be the stated policy of these institutions not to close out a CFD by selling the underlying shares to the holder and not to accept voting instructions from a holder on how to vote underlying shares, it is accepted that both of these things happen in certain circumstances. As the Takeover Panel stated when consulting on its 2005 rule changes "it is frequently the expectation of a holder of a long CFD that the counterparty will ensure the shares to which the CFD is referenced are available to be voted by the counterparty and/or sold to the holder of the CFD on closing out of the contract". Indeed, in relation to the sale of underlying shares, it should be noted that a large equity holding may be difficult to unwind in the short term absent a sale to the CFD holder.
The FSA has identified three broad areas of concern arising from non-disclosure of CfDs, namely: asymmetry of information, exercise of influence on management, and undisclosed stakebuilding. Each of these is likely to be of concern to corporate issuers.

- **Asymmetry of information** arises because for the duration of a CfD it is only the parties to the CfD that know the holder’s identity, level of interest, intentions and time-horizon. Although CfD writers’ aggregate hedging positions may fall to be disclosed under the DTRs, these disclosures do not enable a judgement to be made as to whether they have been taken for hedging purposes or proprietary investment and therefore do not provide reliable information as to the identity of the real investor.

- It is becoming increasingly common for corporate issuers to be approached by CfD holders who expect to be treated as if they were holders of the underlying shares. Absent any disclosure of the CfD position, corporate issuers are often not able to verify the level of economic interest held or whether the CfD holder has access to voting rights. Given that the majority of these approaches are, to a degree, confrontational, this leaves the corporate issuer in the unenviable position of having to decide whether or not to enter into discussions without knowledge of the CfD holder’s true position. Even if the position is disclosed to the corporate, it can then be faced with a difficult decision whether it should publicly disclose the information that it has been given.

- **CfDs** can also be used to build up large economic positions prior to a takeover. If the CfD holder has an informal arrangement to take delivery of the underlying shares, or simply knows that it is in a good position to acquire those shares, the DTRs are effectively circumvented. Whilst the insider dealing and market abuse regimes make it difficult for a prospective bidder to conclude that it is able safely to stakebuild in this manner ahead of launching a takeover offer, there remains the potential for a CfD holder to ‘surprise’ a corporate and the market when it acquires the hedge shares when closing out a CfD.

In light of these concerns, it is unsurprising that the FSA has concluded that changes should be made to the current regime. However, the FSA’s analysis of market failure and its assessment of how far to go in addressing that failure seem to concentrate more on the interests of CfD holders and CfD writers (and, in particular, their respective compliance costs) and less on the position of corporate issuers.

3. **The FSA Options**

The two options put forward by the FSA (having discounted Option 1, namely making no change to the current regime) are as follows:

- **Option 2**: Require disclosure of substantial economic interests unless the holder has taken steps to preclude itself from exercising influence over the underlying shares.

- **Option 3**: Introduce a comprehensive disclosure regime which would require disclosure by all holders of substantial economic interests in shares.
The FSA is consulting on the basis of a clear choice between Options 2 and 3 as it believes that a combination of the two would be of limited value. The consultation closes on 12 February 2008. The FSA aims to implement new rules in September 2008.

It is noticeable that the consultation does not seem to have considered whether CfDs should simply be treated for disclosure purposes as if they were shares. Even though this might be thought of as risking “over disclosure”, it remains surprising given the concerns regarding the operation of Options 2 and 3 discussed below and the approach adopted in the Takeover Code. The case for a wider disclosure regime – identified as Option 4 in this paper – is set out below.

4. **Option 2**

Under Option 2, CfDs would be deemed to have access to voting rights unless they meet three safe harbour requirements. These are that:

- the relevant agreement explicitly precludes the holder from exercising or seeking to exercise voting rights,
- the relevant agreement excludes further arrangements or understandings relating to the sale of underlying shares, and
- there is an explicit statement by the CfD holder to the CfD writer that it does not intend to acquire or obtain access to the underlying shares held by the CfD writer.

CfDs that do not fall within this safe harbour would be aggregated with other interests in voting rights and the combined total, if above 3%, would be disclosable in line with the current DTRs regime.

There would also be a separate investigative regime under the DTRs, similar to CA 2006 s793, to enable a corporate issuer to ‘flush out’ holders of safe harbour CfDs and other economic interests above 5%. This threshold would operate separately to that for interests in voting rights. A corporate would need to demonstrate that it had had reasonable cause to believe that a person had an economic interest in its shares in order to issue a request (with reasonable cause including an attempt by the person to influence management or significant speculation regarding the interests of the person). Positive responses to requests (i.e., interests above 5%) would fall to be announced by corporate issuers under the DTRs.

The FSA believes that Option 2 represents a ‘targeted and effective’ response to the issues raised by CfDs.

5. **Concerns with Option 2**

The rationale underlying Option 2 is clear – in circumstances where CfDs are not being used as a stepping stone to the acquisition of underlying shares or to access voting rights they do not give rise to perceived market failures and therefore disclosure is not required.
Whilst perhaps addressing the majority of the failings identified above (although not that relating to asymmetry of information), Option 2 gives rise to a number of concerns:

> The safe harbour requirements are likely quickly to become part of the CfD ‘boilerplate’ with little or no actual thought being given to them by the parties to the CfD.

> A CfD holder could remain within the safe harbour and yet still approach a corporate issuer with a view to exerting influence on management – there is a risk that the threat (real or imagined) of the CfD being used to access underlying shares and/or voting rights would remain.

> In the context of activity that, with the benefit of hindsight, may be viewed as stakebuilding, a CfD holder could also remain within the safe harbour until a change of intention was crystallised (quite possibly due to an external development) – disclosure would only be required at that point and the element of surprise would be preserved.

> The practical question of whether the real intentions of the parties to a CfD could ever be effectively policed by the FSA.

> Option 2 is put forward in the context of a simple CfD holder/writer relationship. The FSA acknowledges that some CfD writers hedge their positions with other CfDs (which may themselves be hedged by third party holdings of underlying shares), but does not consider the consequences of this. For example, the issue of CfD holders influencing holders of hedging shares other than the CfD writer itself is not addressed.

> The FSA’s rationale for setting the threshold for the investigative regime at 5% is consistency with the Transparency Directive (TD). There seems little objective justification for this given the decision to gold plate the TD requirement and the existing CA 2006 investigative regime which facilitates disclosure of any interest in shares.

Whilst Option 2 increases the current disclosure requirements, it should be noted that it would still enable a person to hold significant interests in a corporate issuer without triggering disclosure. It is also possible to suggest ways in which CfD holders might seek to avoid disclosure under Option 2 (such as through the use of CfDs referenced to futures). Although any regime would provide scope for avoidance, the complicated nature of Option 2 would seem to increase the opportunities for this.

However, it seems clear that the FSA currently favours Option 2 and if a wider disclosure regime such as Option 4 is not accepted, the concerns outlined above should be addressed. In particular:

> Safe harbour status should be lost following any direct or indirect attempt by a CfD holder to influence management.

> If the terms of a safe harbour CfD are amended to include arrangements or understandings as regards influence over, or acquisition of, underlying shares thereby resulting in the loss of safe harbour status, the CfD holder and the CfD writer should be obliged to document
the basis for the amendment with this being disseminated to the market. In these circumstances it should be for the CfD holder and the CfD writer to satisfy the FSA that the initial safe harbour categorisation of the CfD was correct.

> Similarly, following a change of intention on the part of the CfD holder leading to the loss of safe harbour status the CfD holder should be obliged to document the basis for the change with this being disseminated to the market. Again, in these circumstances it should be for the CfD holder to satisfy the FSA that the initial safe harbour categorisation of the CfD was correct.

> The regime should address the issue of hedging through the use of other CfDs leading to underlying shares being held by a party other than the CfD writer.

> The proposed investigative regime should be harmonised with the CA 2006 investigation regime and require disclosure by a holder of any level of safe harbour CfDs or other economic interests in response to a corporate issuer’s request. The obligation on corporate issuers to announce positive responses to requests should, however, be limited (without excluding any general disclosure obligation) to interests in safe harbour of CfDs of 3% or more.

Whilst the FSA’s task is undoubtedly challenging, Option 2 is arguably an over complicated response to the identified concerns that is vulnerable to avoidance techniques that will undoubtedly be investigated by sophisticated market participants. From the standpoint of a corporate issuer, the logical response to this is to consider a wider, but simple regime such as Option 4.

6. Option 3

The FSA states that it has proposed Option 3 in response to the preference of some stakeholders for a general disclosure regime along the lines of that under the Takeover Code. As discussed above, the Takeover Code requires disclosure of dealings during an offer period by holders of economic interests in 1% or more of the securities of a target company.

Under Option 3, there would be a separate general disclosure requirement in relation to all economic interests above 5% which did not provide the holder with the entitlement to acquire underlying shares. There would therefore be two separate categories for disclosure with two separate disclosure thresholds and no aggregation between the two categories.

There would not be a separate investigative regime.

7. Concerns with Option 3

Whilst the FSA’s preference seems to be for Option 2, it refers to a recent survey of 70 UK quoted companies which found that there was 96% support for a disclosure regime based on the Takeover Code. It also refers to a consultation document issued by the Hedge Fund Working Group that recommends the introduction of a general disclosure regime similar to that under the Takeover Code.
Although based on the Takeover Code, Option 3 does not, however, provide the same level of disclosure as the Takeover Code and gives rise to a number of concerns:

> The Takeover Code aggregates all interests in shares for the purposes of disclosure and does not create separate regimes for shares and economic interests.

> The creation of a separate disclosure regime for economic interests and the absence of any investigative regime would seem to ignore the concern that in practice the CfD market may operate so as to facilitate the delivery of underlying shares and/or the control of voting rights thereby blurring the distinction between economic interests and physical holdings.

> The disclosure threshold has been set at 5%, again by reference to the TD. Whilst the FSA states that it wishes to catch only ‘significant’ positions there again seems little objective justification for this given the decision to gold plate the TD requirement in the context of the DTRs bites at 3%.

As with Option 2, Option 3 would still enable a person to hold significant interests in a corporate issuer without triggering disclosure. For example, a 2.9% holding of shares and a 4.9% economic interest held by the same entity would not trigger disclosure. If the FSA wishes to introduce a general disclosure regime along the lines of the Takeover Code then a wider disclosure regime such as Option 4 would be more appropriate.

8. **Option 4 – a wider disclosure regime**

Given the concerns outlined above, there would seem to be a case for the adoption of a wider disclosure regime. This would apply Takeover Code principle that economic interests in shares such as CfDs should be treated as shares. These interests would therefore be aggregated with interests in voting rights for disclosure purposes and the aggregated total, if above 3%, would be disclosable in line with the current DTRs regime.

There also seems to be a case for introducing an investigative regime along the lines suggested by Option 2 (and subject to the safeguards proposed by the FSA), but harmonising this with the CA 2006 s793 regime to require disclosure by a holder of any level of economic interests in response to a corporate issuer’s request.

The benefits of this wider regime would be:

> transparency for all market participants,

> simplicity – it is straightforward and based on, and in line with, an existing regulatory framework, and

> reduced scope for cynical manipulation of categorisation principles to avoid or delay disclosure.
Market participants are likely to cite increased compliance costs and the possibility of duplicative and confusing disclosures. However, it should be noted that a similar regime operates during offer periods without obvious confusion in the market and therefore compliance functions should already be familiar with the requirements.

9. Conclusion

It is generally accepted that the current regime requires amendment. However, in seeking to balance the interests of all market participants, the FSA seems to have concentrated on limiting the costs of compliance at the expense of producing simple and transparent disclosure proposals that clearly address the failings of the current regime. In particular, the proposals do not seem to address the concerns of corporate issuers regarding the increased use of undisclosed economic holdings to influence management. Whilst Option 2 seems to be preferable to Option 3 in this regard, it does invite avoidance techniques due to its complicated nature.

As stated above, the FSA’s task here is not straightforward, but its proposals do not seem to represent a move towards principles-based regulation. The consultation period provides an opportunity for corporate issuers to encourage the FSA to address the identified concerns in a more appropriate manner, possibly by the introduction of a wider regime such as Option 4.
OLDER AND WISER: AGE DISCRIMINATION ONE YEAR ON

Eighteen months after the age discrimination legislation came into force, and following the first of the cases coming through from the Employment Tribunal, this paper summarises some of the developments in this area on the basis of the decided cases coming from both the European and the national courts and Tribunals.

1. Background


The Age Regulations prohibit age discrimination in employment and vocational training and apply to individuals in work or seeking work or access to training, to all employers and to all providers of vocational training and vocational guidance. They allow for a retirement age of 65, although this is subject to a challenge in the courts. They include a number of exemptions, in particular in relation to retirement and service related benefits and occupational pensions, and permit other differences of treatment if they can be objectively justified.

The Age Regulations apply to those of all ages, young, old and middle-aged, and to officers and partners as well as to employees.

2. Compulsory retirement ages

The most significant court case since the introduction of the Age Regulations remains, for the moment, unresolved. The claim brought by Heyday, backed by Age Concern, has been referred to the ECJ (see below). Meanwhile, a case on relatively similar facts has been decided in the ECJ (see Palacios below) and may be significant to the eventual determination of the issues in Heyday.

_Palacios de la Villa v Cortefiel Servicios (Case C - 411/05) [2007] All ER (D) 207 (16 October 2007; ECJ)_

The ECJ decided that, although the principle of non-discrimination on the ground of age, set out in Art 2(1) of the Framework Directive, was capable of applying to national laws which set retirement ages, in this case setting a retirement age was objectively justified under Art 6(1).

P was an employee of Cortefiel. His employment was governed by the terms of a collective agreement that provided for retirement at age 65 unless the employee had not completed the qualifying period to permit him to draw a retirement pension, in which case he could remain until he had done so. P was dismissed on the ground that he had reached age 65 (having completed the qualifying period). He challenged his dismissal on the basis that he had been discriminated against on the ground of age.
The Spanish court referred two questions to the ECJ for a preliminary ruling:

> Does the principle of equal treatment, provided by Art 2(1) of the Framework Directive, preclude a national law providing for compulsory retirement where the only criterion is that workers must have reached normal retirement age, having fulfilled the conditions necessary to draw a retirement pension?

> If so, is the national court required to disapply the law in question?

In addition to the submissions of the parties, the ECJ heard submissions from the Governments of Spain, Ireland, the Netherlands and the UK.

The Advocate General had earlier concluded that Recital 14 of the Framework Directive made it clear that rules setting retirement ages were outside its scope:

> (14) This Directive shall be without prejudice to national provisions laying down retirement ages.

However, even if that was not the case, he concluded on the facts that setting a retirement age was "objectively and reasonably justified by a legitimate aim" under Art 6(1).

The ECJ has adopted a narrower interpretation of Recital 14 than did the Advocate General, taking the view that legislation such as that in issue in this case, which affects the duration of the employment relationship and a worker’s access to the labour market, must be interpreted as rules relating to "employment and working conditions, including dismissals and pay" within the meaning of Art 3(1)(c). Mandatory retirement is direct age discrimination within the meaning of the Framework Directive.

However, although the ECJ was of the view that the Directive did apply to the Spanish law in question, it went on to agree with the Advocate General that, since the law was introduced with the aim of promoting employment and applies only where a worker has satisfied the requirements to draw a full pension, it was objectively justified. As a result, it was not precluded by the Directive.

*R (on the application of The Incorporated Trustees of the National Council on Aging (Age Concern)) v Secretary of State for Business, Enterprise and Regulatory Reform (CO/5485/2006)*

BAILII citation number: [2007] EWHC B8 (Admin) (24 July 2007; Davis J) (known as the Heyday case)

The High Court has referred a number of questions to the ECJ. The Heyday Group (an organisation backed by Age Concern to support those approaching or in early retirement) argues that the provisions dealing with mandatory retirement ages in the Age Regulations are incompatible with the Directive.
The questions referred to the ECJ are:

In relation to the Framework Directive:

1. National retirement ages and the scope of the Framework Directive
   
   i) Does the scope of the Framework Directive extend to national rules which permit employers to dismiss employees aged 65 or over by reason of retirement?

   ii) Does the scope of the Framework Directive extend to national rules which permit employers to dismiss employees aged 65 or over by reason of retirement where they were introduced after the Framework Directive was made?

   iii) In the light of the answers to (i) and (ii) above (1) were section 109 and/or 156 of the Employment Rights Act 1996, and/or (2) are Regulations 30 and 7 of the Employment Equality (Age) Regulations 2007, when read with Schedules 8 and 6 to the Age Regulations, national provisions laying down retirement ages within the meaning of Recital 14?

2. The definition of direct age discrimination: justification defence

   iv) Does article 6(1) of the Framework Directive permit Member States to introduce legislation providing that a difference of treatment on the ground of age does not constitute discrimination if it is determined to be a proportionate means of achieving a legitimate aim, or does Article 6(1) require Member States to define the kinds of differences of treatment which may be so justified, by a list or other measure which is similar in form and content to Article 6(1)?

3. The test for justification of direct and indirect discrimination

   v) Is there any, and if so what, significant practical difference between the test for justification set out in Article 2(2) of the Framework Directive in relation to indirect discrimination, and the test for justification set out in relation to direct age discrimination at Article 6(1) of the Framework Directive?

The key part of this challenge is the challenge to mandatory retirement ages. To some extent, the answer in Palacios appears to mean that the mandatory retirement age will be confirmed by the ECJ as direct discrimination on the grounds of age, but that it was objectively justified. The Spanish government succeeded in showing objective justification: whether the same will be true for the UK government remains to be seen, and there are enough differences between the cases for this to be an issue for the courts when the case is finally heard either later this year or possibly into 2009. Moreover, the ECJ may decide to give guidance on what constitutes objective justification, or it may simply remit the case to the High Court to consider that point.
**Johns v Solent SD Limited [2008] IRLR 88 (8 November 2007; EAT)**

In this case the Employment Tribunal refused to stay a claim of age discrimination and unfair dismissal pending the result of Heyday. In dismissing the application, the Tribunal noted the Advocate General’s opinion in Palacios, which recommended that the ECJ find that the Framework Directive did not preclude national laws setting retirement ages (which it subsequently did: see above). The Tribunal took the view that Heyday and Palacios contained sufficiently similar issues that the result was likely to be the same so that the prospects of success for the claimant in this case were remote.

The EAT overturned the Employment Tribunal’s decision, ruling that it should not have prejudged the decision in Heyday; there would be substantial prejudice to the appellant if her claim were to be struck out. The Chairman should not have prejudged the decision in Heyday. This sort of exercise is one of speculation, an exercise on which the Chairman should not have embarked. The Chairman was therefore in error.

Even if it is likely that Palacios is followed, the task of assessing the likelihood of Heyday following this decision is fraught with difficulty. Heyday is arguable; otherwise it would not have been referred to the ECJ, nor has the Secretary of State appealed against the decision to refer. Further, the differences between Palacios and Heyday have not been argued before the ET or the EAT, and therefore have not been examined. As a result, one cannot guess the outcome of Heyday. Instead the claim was stayed pending the ECJ decision in Heyday. The respondent employer was given permission to appeal to the Court of Appeal on the basis that the matter raises important points as to procedure, in particular whether a reference to the ECJ can give rise to a grant of a stay of proceedings. We understand that it has done so.

The President of the EAT has now directed that all claims testing the legality of the default retirement age be stayed pending the ECJ decision in Heyday. The direction will be reviewed when the Court of Appeal has given judgment in Johns v. Solent.

3. Partnership pension scheme and retirement of partners or officers, rather than employees

**Bloxham v Freshfields Bruckhaus Deringer [2007] Pensions LR 375 (9 October 2007; ET)**

In a closely watched, high profile and significant case, the London Central Employment Tribunal has rejected a former partner’s claim that changes to Freshfields’ partners’ pension scheme amounted to unlawful age discrimination.

**Background**

Although the partners’ pension scheme was similar in concept and structure to an occupational pension scheme in that it provided for a lifetime pension with a two thirds pension for a surviving spouse, there were material differences, mainly that pensions were not paid out of funds set aside by the partners in the course of their careers but were secured by way of participation by
the retired partners in the annual profits of the firm owned by the active partners. The scheme was closed in 2006 because younger partners felt they were having to contribute more than older partners had previously contributed, as the number of pensioners was growing due to the expansion of the firm so that a larger proportion of the profits of the younger partners was going to pay retired partners.

The value of the pension payment depended not only on a partner’s length of service but also upon his age at retirement. Partners who retired at 55 received a full pension. Partners who retired at the age of 54 with the consent of the other partners would receive 80% of their full pension, at age 53 75%, at age 52 70%. There was no suggestion that these discounts were economically necessary for actuarial reasons.

A new scheme was introduced with effect from 1 May 2006. Under transitional arrangements, all partners aged over 50 were given the option until 31 October 2006 to retire with their old scheme benefits as at 30 April 2006 but subject to the requirement for consent and the early retirement discounts. Some such partners were offered consultancies in order to continue to work.

Peter Bloxham requested consent to retire under the transitional provisions. He subsequently claimed that his forced retirement on a reduced pension was contrary to the Age Regulations.

Decision

Discrimination. The key issue was whether the application of the 20% reduction to his pension by virtue of the transitional provisions amounted to less favourable treatment of Bloxham on the grounds of age as compared with London based partners aged 55 or over at 30 April 2006. On this point, Bloxham referred to the High Court decision of Unison [2006] EWCA 2373, relating to the “85 year rule” under the local government pension scheme, which the court found amounted to age discrimination. The Tribunal did not consider itself bound by this decision, which related to the Framework Directive, while it was considering the domestic regulations.

However it considered that the decision provided strong support for its conclusion that the 20% reduction amounted to age discrimination. The Tribunal acknowledged Freshfields’ point that for employers this may mean that they must consider the effect on employees of different age groups whenever a change to a pension scheme or an employment policy is concerned. The Tribunal accepted that this may require employers to undertake even more by way of research, evaluation and reflection than hitherto. However that did not entitle it to adopt an interpretation of the Age Regulations which was contrary to reason, stating:

If an act or event occurs by reference to a specific date which by reason of their age at that date affects some employees (or partners) but not others to their disadvantage the employer may have to justify the disadvantage to avoid a finding of discrimination. He cannot do so by ignoring the age of the employee.
Justification. On the issue of justification, the Tribunal found that Freshfields’ general aim in the reform of its pension arrangements was to reduce the effect of the inter-generational unfairness whereby younger partners would contribute more and more as active partners against the prospect of receiving smaller and smaller pensions themselves when in due course they came to retire. Within that context, the aim of the transitional arrangements for those aged 50 and over was to ameliorate the effect that those who were at or near retirement age would suffer if on the date chosen for implementation of the arrangements they lost all their old pension rights and only had rights under the new scheme which represented a discount of 35% in relation to their rights.

The Tribunal noted that Freshfields had to prove on the balance of probabilities that the treatment was a proportionate means of achieving a legitimate end. It was an error of law to focus solely upon the treatment and not consider the context in which the treatment occurred. This will be particularly necessary in cases of age discrimination because of the need to recognise that changes to the treatment of persons of one age or age group may directly affect to some extent the treatment of persons in a different age group.

Freshfields’ aim in introducing the new scheme was a legitimate aim, as was the 20% discount for those aged 54. Bloxham had argued that, even if the aims were legitimate, Freshfields could not show that the treatment was proportionate because it had not attempted to quantify the cost. The Tribunal did not accept this argument; it found that “the argument in favour of a conclusion that this was a proportionate means of achieving a legitimate aim was not merely met but was comfortably passed” by Freshfields.

The Tribunal considered the following factors to be of particular importance in reaching its decision:

- The reforms themselves were aimed at addressing an issue, whereby, apart from any issues of discrimination, there had been recognition that younger age groups were becoming increasingly disadvantaged.

- In such a process maintaining the status quo for those most proximately affected is acceptable.

- Maintaining the status quo does not absolve the employer from considering other steps.

- Further improving the position of those aged between 50 and 55, already protected by the transitional provisions, in the context of the aim of the reforms would be both unfair and perverse.

- Even at the conclusion of the lengthy and thorough consultation period leading to the reform no less discriminatory alternative could be put forward.
The decision in Bloxham is a significant one, but one factor that is often ignored is the sheer scale of the case. The case involved hundreds of hours of preparation by the firm’s senior management who had to commit endless resources to the matter. There were 17 bundles of documents. No one, but no one, wants to have to go through that sort of trial.

Seldon v. Clarkson Wright and Jakes ET/1100275/07 (4 December 2007; ET)

An employment tribunal held that the compulsory retirement at age 65 of a partner in a law firm was a proportionate means of achieving a legitimate aim and therefore justified discrimination on the ground of age.

The mandatory retirement age of 65 does not apply to partners, directors or officers. In this case the partnership deed provided for retirement at 65. Seldon brought a claim when he was compulsorily retired, though he had initially expected to retire and then do consultancy work.

The Tribunal thought that the discrimination involved in a compulsory retirement term was objectively justified in this particular case. It considered the following aims to be legitimate:

> Ensuring that associates are given the opportunity of partnership after a reasonable period as an associate thereby ensuring that associates do not leave the Firm.

> Facilitating the planning of the Partnership and workforce across individual departments by having a realistic long-term expectation as to when vacancies will arise.

> Limiting the need to expel partners by way of performance management thus contributing to the congenial and supportive culture of the Partnership.

However, the following were not legitimate aims:

> Ensuring that the turnover of partners would be such that each one could expect to become the senior partner in due course.

> That employees and partners should be enabled and encouraged to make adequate financial provision for their retirement.

> The protection of the partnership model of the Firm. If equity partners could not be forced to retire at 65 but employees (including salaried partners) could be, it would be preferable to keep lawyers in the Firm as employee or salaried partners rather than equity partners.

The only legitimate aim accepted by the Tribunal on which the issue of proportionality was raised was the third, namely the need for a congenial atmosphere in the firm. Mr. Seldon suggested that the firm could have kept underperforming partners on a reduced share of the profits but monitored performance. However, the Tribunal rejected this argument because it could be difficult and divisive and might lead to a breach of the terms of the partnership and the fiduciary duty that the partners owed to one another.
The case considers in detail the sorts of factors which may constitute objective justification, a key concept now for most age related claims and which will become increasingly critical if Heyday is successful. Note however that the Tribunal stressed that its determination as to the objective justification defence in this case did not lay down any general rule in relation to partnerships; different considerations apply in every case.

Seldon is, we understand, being appealed.

**Hampton v The Lord Chancellor and The Ministry of Justice ET/2300835/07 (2 January 2008; ET)**

However, the difficulties with which the Tribunals are battling on objective justification are illustrated by another case involving a mandatory retirement of an officer.

In this case a part-time judge was retired from the role of recorder on reaching the age of 65. The Ministry of Justice argued that the discrimination was objectively justified because new blood was needed in the judiciary and it was necessary to provide sufficient experience to younger recorders.

The Tribunal rejected these arguments for several reasons. It noted that around 3% of recorders were promoted to the judiciary each year which created new vacancies and that it was likely that many recorders would not choose to sit beyond 65. Also, the whole “new blood” argument was undermined by existing government plans to reduce the number of recorders by 10% over a 15 year period. In addition, steps could be taken to ensure that junior recorders were allocated cases which would assist them in gaining experience. There was no mention of the need to encourage diversity justifying compulsory retirement.

The cases of Seldon and Hampton demonstrate the extent to which each case turns on its own facts, although judicial guidance would be helpful.

4. **Inferring Age Discrimination**

**Court v Dennis Publishing Limited ET/2200327/07 (31 July 2007; ET)**

As usual, the burden of proof will shift to the defendant once the claimant can show that there are facts from which the Tribunal could conclude, in the absence of any other explanation, that there was discrimination on the grounds of age.

In this case the company decided to streamline its “creative solutions” teams and create a centralised creative solutions team. It decided to dismiss the claimant after the streamlining process on the ground of redundancy. In addition, a new director of creative solutions was also appointed. The claimant argued that he had been discriminated against on the ground of his age because the other five younger employees who had been involved in creative solutions were kept on.
Mr Court could show that five younger members of his team had been retained, and he dismissed but he had to show something more than that there was a difference in age and a difference in treatment in order to shift the burden of proof. Looking closely at the facts, the Tribunal found a number of factors that indicated that the dismissal was on the grounds of age. First, the owner of the company had written a book entitled “How to get rich” which advised getting rid of older employees because they were usually more expensive. (“Youth is a further factor. By the time talent is in its mid to late forties or early fifties it will have become very very expensive . . . that is when you part company with it”.) The Tribunal thought that such an attitude had infected the firm, particularly given that key managers had been given a free signed copy by the author, and had indeed read the book. Second, the five other members of the creative solutions team who had been kept on were substantially younger than the claimant and the probability that out of the six employees the claimant would have been chosen for redundancy led the Tribunal to believe an inference could be drawn that the treatment had been on the grounds of age. Third, the new director of creative solutions was 20 years younger than the claimant which reinforced the Tribunal’s impression that “a clearing out of the old guard” was taking place. As the company did not adduce any evidence to rebut these inferences the Tribunal held that age discrimination had taken place.

Statistics and probabilities feature in cases where the age profile suggests discrimination.

**Rains v The Commission for Racial Equality ET/2306496/06 (23 July 2007; ET)**

There was some concern when the Age Regulations were introduced that the use of qualifications, seniority and experience might prove to be difficult measures to apply in the future, since they are likely to be linked to age. Words like “junior” and “senior” were felt to be too close to “young” and “old”. An interesting case looks at such words in this context.

The Commission for Racial Equality sought to recruit a new HR manager to deal with employee relations work. As the post needed to be filled quickly it was decided to contact employment agencies. A consultant at one of the employment agencies called the Commission to recommend the claimant for the post. The consultant emphasised that he considered the claimant a suitable candidate even though he might appear “more senior” than was required for the post. The Commission decided not to shortlist the claimant and wrote to the consultant stating that this was because the claimant was overqualified and did not have the relevant casework experience. The consultant relayed this to the claimant as being “too senior” for the post.

With regard to direct discrimination, the Tribunal considered that as the term “senior” had only come from the consultant there was no direct discrimination as “senior” could not be equated with “over-qualified”. The shortlist was not, the Tribunal concluded, drawn up on the basis of age; someone in the same age bracket was selected for interview. The Tribunal did not consider that facts had been provided from which it could conclude direct age discrimination.

On the indirect discrimination claim, the Tribunal was split. The minority thought that there had been a provision, criterion or practice (PCP) in which qualifications, including experience, were taken into account. Therefore, people in the 50+ age bracket were at a substantial disadvantage.
as they were proportionately more likely to have qualifications and experience. However, the majority considered that the PCP applied by the Commission was “recent case work experience and the ability to hit the ground running” and it was unanimously agreed that such a PCP did not disproportionately affect any particular age group. As a result the indirect discrimination claim was also rejected.

5. Failure to follow mandatory retirement procedure

It is critical that the mandatory retirement procedures are adhered to carefully. Whilst retirement is a potentially fair reason for dismissal, this is only the case if the detailed procedures are closely followed and it is all too easy to face a claim if the timeframes or the mandatory considerations are not adopted. This is the case for both employer and employee, and although Tribunals are employee friendly in the main, they can, as in *Holmes* below, apply the requirements strictly.

*Hodgetts v Middlesbrough Council ET/2516138/06 (1 August 2007; ET)*

The claimant worked for the Council as a minibus driver, taking disabled children to and from school. She loved her job and wished to continue working after the age of 65. As she was aware of the age discrimination legislation she told her manager that she wanted to carry on working after 65. The manager was unaware of the new legislation but, after receiving little guidance from the union representative and the HR department, eventually found some information on the Council’s intranet site. The manager gave the claimant a form to complete which was a request to continue working after retirement. On reviewing the completed form, the manager, following the policy on the intranet, decided that the claimant did not meet the criteria to carry on working and told her that her employment would be terminated with effect from her 65th birthday. The claimant claimed unfair dismissal and age discrimination.

The Tribunal set out the relevant law. It noted that under Schedule 6 paragraph 2 of the Age Regulations an employer must give between six and 12 months’ notice of the intended date of retirement for an employee. Under paragraph 4, if the employer has failed to give at least six months’ notice, the duty to give notice continues up to the 14th day before the date of termination. The employer must also notify the employee of their right to apply to continue working after the retirement date.

The Employment Rights Act 1996 has now been amended so that retirement is a potentially fair reason for dismissal. Section 98Z says that where no reasons are given for the dismissal of an employee who has reached normal retirement age (and that age is 65 or above) a tribunal must determine the reason for the dismissal. Relevant factors are compliance with the notification requirements, amount of advance notice of the retirement date and whether or not the employer sought to comply with the procedures set out in the Regulations. In this case, the Tribunal held that, as the Council had failed to comply with the procedure, given no notification to the claimant and made no attempt to comply with the Regulations, the Council had not been able to show that the reason for the dismissal was retirement. This was because the only way it could have done so would have been to follow the procedures. Therefore the claimant’s dismissal was automatically unfair.
As the dismissal was not on the ground of retirement, the Tribunal held that the claimant had been treated less favourably on the ground of her age and thus been discriminated against. The Tribunal was critical of the Council for not having the proper procedures in place and not having anyone in charge of applying the Regulations. However, it took a more lenient approach to the fact that the claimant’s request to continue working did not make reference to the relevant paragraph of the Regulations, as required by paragraph 5(3) of Schedule 6. The Tribunal did not have to make a decision on this point but considered it unclear if specific reference to paragraph 5 of Schedule 6 was needed, or whether mere indication of intention to continue working would suffice.

*Holmes v Active Sensors Limited ET/100214/07 (12 July 2007; ET)*

The claimant, an assembly technician, was told that his employment would be terminated due to retirement when he reached the age of 65. This was confirmed in writing one month before his retirement date. The claimant wrote to ask if he could work for at least one or two months longer. The claimant met twice with his manager to discuss this request but was informed by letter that his request was denied. He claimed unfair dismissal and age discrimination.

The Tribunal held that the employer had complied with the necessary notification requirements because it had given four weeks’ notice of termination on the ground of retirement and met the deadlines in the transitional provisions of the Age Regulations (Schedule 7 paragraph 4). However, the employee had not: he had put his request in writing but had failed to state that it was under Schedule 6, paragraph 5 of the Age Regulations. He had therefore failed to meet his statutory obligations, which state clearly “A request must be in writing and state that it is made under this paragraph.”. It considered that the drafting was very clear and that the intention was clearly that employees serving a request not to retire should comply with the obligation. The Tribunal thus held that the employer has not breached any obligations because of the claimant’s failure to serve a valid request not to retire.

*Sharma and others v Millbrook Beds Limited ET/3100922/07 (25 October 2007; ET)*

The respondent company operated an age-related bonus scheme under which employees were given a 5% increase in earnings when they reached age 50 and a 10% increase when they reached age 55. All employees were contractually entitled to the bonus. The company recognised that the bonus was discriminatory on the ground of age but could not reach agreement with the recognised union representative on removing the bonus from the employees’ contracts. It therefore decided to remove the clause from the contracts of staff aged 50 and over by terminating their contracts and re-employing them on new contracts that did not contain the bonus clause.

Three employees and one ex-employee, all aged over 50, brought claims for age discrimination. All four had accepted the revised contracts. They argued that the clause had not been removed from the contracts of younger employees and so they had been treated less favourably. The company argued that the bonus clause would be removed from the contracts of younger employees when they reached 50 so the younger employees were in the same position as the
older ones. It further argued that it wouldn’t have been practical to deal with the contracts of all its 92 staff at once.

The Tribunal held that a contractual right to a future payment was a benefit. Therefore as the claimants had been denied that benefit on the ground of their age they had suffered direct age discrimination. The Tribunal then proceeded to consider whether or not the discrimination could be justified. It decided that the employer had not seriously considered other ways of dealing with the problem. Whilst the Tribunal thought that removing the bonus scheme might have been a proportionate response to the aim of complying with the age discrimination legislation, it considered that varying the contracts of employment without trying to attain the agreement of employees through consultation was not proportionate.

6. Making mistakes: how not to behave as an employer

**Kessell v Passion for Perfume Limited ET/1700345/07 (24 October 2007; ET)**

The claimant began working for the respondent company in October 2006. At her job interview she had made it clear that she could not work on Saturdays due to other commitments. However, only a few weeks after she had started work, she was asked by her manager to work on Saturdays. The claimant offered to work different hours on the Saturday to fit in with her prior commitments but was dismissed by her manager for refusing to work the Saturday hours requested. The claimant brought a claim for age discrimination. She argued that her manager had treated her less favourably on the ground of her age throughout her job and had kept a record of incidents in which her manager had made negative comments about her age, including that she was deaf and needed glasses because of her age.

The Tribunal held that as the claimant had not raised a grievance under the statutory grievance procedure she could not bring her complaints of direct age discrimination and harassment. However, the Tribunal did consider that the claimant was dismissed for her age (taking into account the age-related comments) and not because she refused to work flexibly. It therefore awarded the claimant £11,108 compensation, including £4,000 for injury to feelings.

**Martin v SS Photay & Associates ET/1100242/07 (12 June 2007; ET)**

The claimant was a cleaner in a dental surgery. The employer had some concerns about the standard of her cleaning but these had never been raised with the claimant. Two days after the claimant had held a 70th birthday party, she found a note in her cleaning cupboard informing her of “some bad news”. She was told that she was dismissed because due to her age and health problems she had fallen into the “high risk category” for health and safety.

The employer argued that it was concerned for the claimant’s health and worried about the standard of her cleaning. However, the employer had not obtained any medical information and held no formal discussion with the claimant about her cleaning. Therefore, the Tribunal held that although the employer had a legitimate aim in ensuring the dental surgery was properly cleaned, it was not proportionate to dismiss the employee without any formal discussion of her health or
assumptions about an employee’s capabilities based on their age are always risky; assuming that Mrs Martin was incapable of carrying out her job because of her age was, without any investigation or attempt to verify that conclusion, inevitably going to be both unfair and age discriminatory.

**Thomas v (1) Eight Members Club (2) A Killip ET/2202603/07 (22 November 2007; ET)**

The claimant was dismissed from her job at a private members’ club. The second respondent, Mr. Killip, told her it was because she was “too young”. The respondents did not appear at the Tribunal and in the absence of any contrary evidence the Tribunal held that the claimant had been unlawfully discriminated against by being dismissed on the ground of her age. She was awarded £1,500 compensation for injury to feelings.

### 7. Consultations

In June 2007 the Department of Communities and Local Government published a consultation paper entitled *A framework for fairness: proposals for a Single Equality Bill for Great Britain*, (www.communities.gov.uk/documents/corporate/doc/325335.doc), which included a chapter on age discrimination, seeking views on the possibility of implementing age legislation in the area of goods, facilities and services. This would bring within the ambit of the age discrimination legislation all aspects of group personal pensions, personal pensions and insurance products.

On 1 October 2007 the Department for Work and Pensions (DWP) published a consultation document on two issues arising out of the pensions exemptions to the Age Regulations, namely:

- the interaction between the Age Regulations and the increasing desire to allow older workers flexibility in how they work as they approach retirement;

- the provision of death benefits beyond a scheme’s normal pension age.

According to the DWP, it has been looking in depth at the issues and has had meetings with pensions experts, employers and pensions lawyers. It has concluded that it is not possible for the Government to offer any solutions or exemptions at this time. Nor is the DWP minded to offer legislation or guidance without a fuller understanding of how the issues are affecting those in practice. Accordingly it is seeking further views, both on what the difficulties are, and how they might be overcome.
MISCELLANEOUS HEADLINES

1. Commercial

Notice of warranty claims under sale and purchase agreement

The Court of Appeal has considered whether notice of a warranty claim under a sale and purchase agreement was properly given in accordance with the terms of that agreement (Von Essen Hotels 5 Ltd v Roy Vaughan and Daphine Vaughan [2007] EWCA Civ 1349). The agreement stated that notices under the agreement may be delivered by first class post to the party to be served. Details of the sellers were provided with a copy also to be delivered to the “sellers’ solicitors” (this term being defined in the agreement). The facts of the case are that notice was posted to the sellers (but this copy was not received by them) and a copy was also posted to a different firm of solicitors who were acting for the sellers on a different matter. The purchaser argued that the deemed service provisions meant that the sellers were deemed to have received notice. The Court of Appeal did not accept this submission, instead finding that notice must have been served on both the sellers and the sellers’ solicitors for the deemed notice provisions to apply. The Court further rejected the argument that provision regarding notice to the sellers’ solicitors was permissive rather than mandatory. Consideration was given to the meaning of the term “sellers’ solicitors” but it could not be construed to include the different firm of solicitors to whom the notice had been sent. The final argument of the purchaser was that the sellers had actual notice because the different firm of solicitors who received the notice had implied actual authority to receive the notice on behalf of the sellers. However, the Court of Appeal had no difficulty in finding there was no case for the implied authority argument. It was accepted that the different firm of solicitors who received the notice would be under a duty to pass the letter onto the sellers but that was not enough to establish an implied authority to accept service.

Guarantees and indemnities

The Court of Appeal has considered whether an oral undertaking given in the context of the sale of a company was enforceable (Anthony Pitt and Ors v Andrew Jones [2007] EWCA Civ 1301). The respondent was the majority shareholder of the company. He had found a buyer for his shares in the company and was in negotiations with the minority shareholders for them to also sell their shares to the buyer. The arrangement involved the buyer paying the minority shareholders by way of instalments. There were concerns expressed regarding the credit risk of the buyer. The respondent undertook to pay any outstanding instalments and following this undertaking the minority shareholders agreed to sell their shares. The buyer did default on the instalments and the minority shareholders looked to the respondent to satisfy the undertaking he had given.

The first instance decision found that the undertaking had not been supported by consideration and therefore was not enforceable. The Court of Appeal reached a different decision finding that the undertaking was supported by consideration and therefore was a contractual agreement. LJ Smith commented that the first instance decision was wrong to place so much emphasis on the conscious thought processes of the minority shareholders. It was sufficient that there was a clear chronological link between the undertaking and the willingness of the minority shareholders to sell their shares that the natural inference was that the two were directly connected. It was not necessary for the minority shareholders to consciously realise that they were providing consideration.
At first instance the Recorder held that, even if the respondent’s undertaking was supported by consideration and was therefore a contractual agreement, it was unenforceable because it was a contract of guarantee. Under section 4 of the Statute of Frauds 1677, a contract of guarantee is not enforceable unless it is in writing signed by or on behalf of the guarantor.

The Court of Appeal considered the argument that the undertaking was in fact an indemnity rather than a guarantee. It was accepted as common ground that a contract of guarantee is a specific type of indemnity. It considered the case law distinguishing a guarantee from an indemnity and concluded that the undertaking did amount to a guarantee. LJ Smith reached this decision with some reluctance as she thought there was much general merit in the appellants case. She also expressed her regret that the appellants had not accepted the original offer from the respondent to share his proceeds with the appellants on a pro rata basis.

2. Company

Amendment to articles of association

The Privy Council considered the validity of amendments made to the articles of association of a British Virgin Islands company in the case of Citco Banking Corp NV v Pusser’s Ltd and another [2007] UKPC 13. The effect of the amendment was to entrench for life the control of the chairman. The relevant resolutions were passed by a majority of 86%. The dissenting shares were all held by the appellant, which challenged the amendments in court. Citco alleged that the resolutions were invalid because they were passed in the interests of the chairman, to give him indisputable control, and not bona fide in the interests of the company. The majority who voted in favour of the special resolutions accepted the reasons advanced by the chairman as to why it would be in the interests of the company as a whole for his control to be entrenched.

The Privy Council upheld the amendment. Lord Hoffman delivered the judgment of the Board. Having reviewed the authority (BVI law being the same as English law for these purposes), Lord Hoffman confirmed that the principles laid down, together with the proposition that the burden of proof is upon the person who challenges the validity of the amendment, appeared to be clearly settled and sufficient for the purpose of deciding the case.

The proper test was whether, in the opinion of the shareholders, the alteration of the articles was for the benefit of the company and whether there were grounds on which reasonable men could come to the same decision. Since reasonable shareholders could have accepted in good faith the reasons put forward by the chairman as to why the amendment of the articles was in the interests of the company even though the amendment had the effect of vesting voting control in him, and since there was no dispute as whether the chairman had acted bona fide, Citco’s challenge to the special resolutions failed.

The Privy Council added that it was not necessary to show that the resolutions would have been passed even without the votes controlled by the chairman. This was on the basis that it is “not necessary to require that a person voting for a special resolution should, so to speak, dissociate themselves altogether from their own prospects ….” However, the evidence showed the resolutions would in fact have been passed by the requisite majority.
Financial assistance and foreign companies

The High Court has considered whether the giving of financial assistance by a foreign subsidiary in respect of an English parent company involved that English parent company in the provision of unlawful financial assistance (AMG Global Nominees (Private) Ltd v SMM Holdings Ltd and another [2008] EWHC 221 (Ch)).

The target company was English and the foreign subsidiary agreed to pay the purchase price to the seller. The foreign subsidiary was subject to the Zimbabwe Companies Act and had complied with the relevant provisions which rendered the giving of financial assistance by the foreign subsidiary to the seller lawful. This required the participation of the English parent company to pass a resolution of the foreign subsidiary authorising the financial assistance.

The case of Arab Bank plc v Mercantile Holdings Limited [1994] Ch 71 was considered. It was acknowledged that the mere giving of financial assistance by the subsidiary does not ipso facto constitute the giving of such assistance by the parent company. However, it was submitted by the claimant that the participation by the parent in the passing of the shareholder resolution of the foreign subsidiary constituted the giving of financial assistance by the parent. Evans–Lombe J rejected this submission stating that anything done in the course of the transaction by the parent did not constitute “financial assistance” by the parent. A distinction was drawn with the example given by Millet J in Arab Bank where a parent company hived down assets to a foreign subsidiary to provide financial assistance.

Fifth Commencement Order

The Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007 (SI2007/3495) was laid before Parliament on 17 December 2007 and brings into force provisions of Companies Act 2006 that are coming into force on 6 April 2008, 29 June 2008 and 1 October 2008. Of particular note are the following points:

- **Company secretary**: a private company will no longer have to have a company secretary from 6 April 2008. A private company whose articles immediately before 6 April 2008 expressly required it to have a secretary is a company “with a secretary” for the purposes of section 270(2) (and it must therefore have a secretary) until its articles are amended to remove the requirement. There had previously been concern that regulation 99 of Table A (appointment and removal of a secretary) would amount to such a provision. It would appear that this is no longer the case as the Fifth Commencement Order states that a provision (a) requiring or authorising matters to be done by or in relation to a secretary, or (b) as to the manner in which, or terms on which, a secretary is to be appointed or removed, is not a provision expressly requiring the company to have a secretary.

- **Directors’ duties and conflicts of interest**: for the directors of an existing private company to utilise the authorisation procedure set out in section 175(5)(a) the members of the company must have resolved (before, on or after 1 October 2008) that authorisation may be given by the directors in accordance with section 175.
Financial assistance: Article 5(2) of the Order repeals sections 151-153 and 155-158 of Companies Act 1985 in relation to private companies from 1 October 2008. Sections 151-154 of Companies Act 1985 continue to apply to public companies. It appears that the sections of Companies Act 2006 prohibiting public companies from giving financial assistance will not be commenced until 1 October 2009.

The Fifth Commencement Order also introduced a couple of amendments to the Third Commencement Order:

Chairman's casting vote: The effect of section 282 Companies Act 2006 is that it is no longer possible for a chairman to have a casting vote. The Government was consulted about this with the result that a saving provision has been introduced with effect from 14 January 2008. If before 1 October 2007 the articles of a company provided for the chairman to have a casting vote, this provision will continue to have effect notwithstanding section 282. Accordingly, companies which have such a provision in their articles should not remove it. The saving provision will not validate casting vote provisions inserted after 1 October 2007 unless such provisions were contained in the articles immediately before 1 October 2007, subsequently removed and then restored at some later date.

Elective resolutions: A saving provision was introduced which relates to any private company which has passed an elective resolution under Companies Act 1985 not to hold AGMs but whose articles of association still contained provisions requiring it to hold an AGM. The effect of the saving provision, which came into force on 31 December 2007, has the result that elective resolutions which were in place immediately before 1 October 2007 will continue to have effect.

3. Corporate Finance

Amendments to the Takeover Code

The amendments to the Takeover Code in relation to schemes of arrangement and announcements in relation to companies admitted to trading on the PLUS primary markets came into effect on 14 January 2008. As a result of the changes made in relation to schemes of arrangement the Panel Executive has withdrawn a number of Practice Statements.

On 14 January 2008, the Panel Executive published Practice Statement No 19 (Rule 19.3 - unacceptable statements). The Executive states that parties to an offer and their advisers should be aware that, during the course of an offer, and especially in competitive or hostile situations, any suggestion of the possibility of an improvement or changes to an offer will be of particular sensitivity since it could lead to a false market being created in the securities of the offeree company. However, if an offeror wishes to publicise its initial reaction to a development (the example given is an increase in a competing offer), it may make a holding statement, for example that it is “considering its position” or “its options”, but no language can be used which implies that it may improve or change the terms of its offer.
4. Financial Regulation

Review of listing regime

On 4 January 2008 the FSA published a consultation paper inviting comments on various proposed changes, including a proposal to amend LR 18 to prevent investment entities from circumventing the new prohibition on investment entities obtaining a secondary listing of equity securities under LR 14 by listing depositary receipts over an investment fund’s shares under LR 18 instead.

On 14 January 2008, the FSA published a Discussion Paper reviewing the UK Listing Regime. The review has been driven by concerns raised about the potential for confusion between Primary Listings, Secondary Listings and GDRs. The Discussion Paper sets out two basic options as to how the Listing Regime may be segmented and labelled:

> a single Listing segment for equity securities with super-equivalent standards (as per the current Primary Listing regime). Secondary Listing and GDRs would be removed from the Official List but could still be admitted to trading on a “regulated market” on a directive-minimum basis and the FSA would continue to have regulatory oversight; and

> retaining the existing two-tier structure for equity securities.

Hedge Fund Standards

On 23 January 2008 the Hedge Fund Working Group (HFWG) published a report following their October 2007 consultation paper on best practice standards for hedge funds. The report presents the outcome of the consultation together with final best practice standards (Standards) for hedge fund managers. It contains guidance and examples to illustrate and to aid compliance with the Standards. The Hedge Fund Standards Board (HFSB) is to act as custodian of the Standards and the fourteen members of HFWG have become initial signatories to the Standards. The Alternative Investment Management Association is to work closely with HFSB to develop the Standards and to ensure effective industry consultation.

SEC and disclosure by foreign companies

On 13 February 2008 the SEC proposed amendments to modernise its disclosure requirements for foreign companies. The Foreign Issuer Reporting Enhancement Proposals, will update the US Exchange Act filing requirements and enhance disclosure required by foreign private issuers in response to changes in foreign filing requirements. A proposal that is likely to cause concern to UK companies with a US listing is the one which will accelerate the reporting deadline for annual reports filed on Form 20-F by foreign private issuers from six months to 90 days after the issuer’s financial year end.
5. Financial Reporting

Preliminary announcements

In February 2008 the Auditing Practices Board (APB) issued its Bulletin 2008/2 (The Auditor’s Association with Preliminary Announcements made in Accordance with the Requirements of the UK and Irish Listing Rules). This Bulletin provides updated guidance for auditors concerning their responsibilities with regard to preliminary announcements. The updated Bulletin:

> reflects the change in the Listing Rules to move from a mandatory to a permissive regime for the publication of preliminary announcements (for financial periods starting on or after 20 January 2007);

> reflects the change in the Listing Rules to require preliminary announcements to give details of any likely modification (rather than qualification) of the auditor’s report required to be included with the annual financial report.

Regulations

The Department for Business, Enterprise & Regulatory Reform has announced that the following regulations were made on 19 February 2008:

> Small Companies and Groups (Accounts and Directors’ Report) Regulations 2008
> Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008
> Companies Act 2006 (Amendment) (Accounts and Reports) Regulations 2008
> Companies (Revision of Defective Accounts and Reports) Regulations 2008
> Companies (Summary Financial Statement) Regulations 2008.

Auditor liability limitation agreements

The Financial Reporting Council has issued draft guidance on auditor liability limitation agreements, together with a consultation paper on the guidance. Currently, auditors are prohibited from entering into contractual arrangements to reduce or exclude their liability in relation to statutory audit work that they carry out for a company. Sections 534-538 Companies Act 2006, which come into force on 6 April 2008, permit auditors and companies to enter into liability limitation agreements (LLAs) to limit the auditor’s liability in relation to the audit of the accounts to an amount that is “fair and reasonable in all the circumstances”. The guidance sets out what is permissible under Companies Act 2006 in relation to LLAs and considers the areas which should be covered in LLAs.
6. Taxation

*Changes to the CGT regime*

In a ministerial statement made on 24 January 2008, the Chancellor announced the introduction of a new relief for entrepreneurs from 6 April 2008.

The new relief will apply for disposals or part disposals of:

- a trading business that an individual runs either alone or in partnership.

- shares in a trading company by officers and employees that hold at least 5% of the shares in the company and are able to exercise at least 5% of the voting rights in the company.

For qualifying gains of up to £1 million, the tax rate will be 10% with the balance taxed at the new flat rate of capital gains tax of 18%. The new relief will be a lifetime relief available on multiple occasions on a cumulative basis. The Government will keep the limit under review.
CONTACT ADDRESSES

London
One Bunhill Row
London EC1Y 8YY
United Kingdom
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Paris
130 rue du Faubourg Saint-Honoré
75008 Paris
France
T +33 (0)1 44 05 60 00
F +33 (0)1 44 05 60 60

Brussels
Square de Meeûs 40
1000 Brussels
Belgium
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
47th Floor
Jardine House
One Connaught Place
Central
Hong Kong
T +852 2521 0551
F +852 2845 2125

www.slaughterandmay.com