12 April 2013

Corporate Aspects of the UK Financial Services Act 2012

Long-heralded reform of the UK financial services regulation architecture impacts the listed company regime.

On 1 April, a new financial regulation architecture became operative in the UK through the Financial Services Act 2012 (the 2012 Act). In this new architecture, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) have replaced the Financial Services Authority (FSA), the Bank of England is to have overall responsibility for financial stability, and a new Financial Policy Committee (FPC) of the Bank of England has been created to assist the bank in achieving its financial stability objective. However, the 2012 Act does more than just give effect to those reforms. In this LawFlash, we build upon our previous analysis of the new architecture,[1] summarising the main areas of change regarding listed companies, including the role of the FCA as the authority responsible for the Official List, the law relating to market manipulation, the supervision of sponsors, and the Bank of England's special resolution regime.

FCA as the Authority Responsible for Listing

In addition to the regulatory functions described in our prior LawFlash, the FCA took over from the FSA the role of the UK Listing Authority, the body responsible for the Official List. In this role, the FCA supervises and monitors UK-listed issuers' compliance with the Listing Rules and the Disclosure and Transparency Rules (DTRs) and takes action for any breach of those rules. For prospective issuers, the main change is that the FCA has responsibility for the Prospectus Rules and, as such, is the regulator responsible for reviewing and approving prospectuses. The Listing Rules, DTRs, and Prospectus Rules now form part of the new FCA Handbook.[2]

Listing Rules, DTRs, and Prospectus Rules

The FCA has made consequential changes to the Listing Rules, DTRs, and Prospectus Rules to reflect the fact that it is now the regulator responsible for them. Substantive changes to the Listing Rules have so far been limited to the implementation of the new disciplinary regime applicable to sponsors (see below) and the introduction of notices regarding the cancellation/suspension of an issuer's securities at the issuer's request. The FCA has also indicated that further changes will be made to the DTRs at a later date in relation to the approval of regulated information services, their continuing obligations, and their supervision by the FCA, including powers of limitation, restriction, and suspension. The Prospectus Rules remain unchanged in substance.

Issuers are reminded that they will need to amend terminology in their documentation from "FSA" to "FCA" going forward.

Misleading Statements and Misleading Impressions

The 2012 Act has repealed section 397 of FSMA and replaced the criminal offence relating to misleading statements and practices with the following three new criminal offences: (1) making false or misleading statements (section 89 of the 2012 Act); (2) creating false or misleading impressions (section 90 of the 2012 Act);

1. For more information on the new UK financial regulation architecture, see our 8 April 2013 LawFlash, "New UK Financial Regulation Architecture Takes Effect," available at http://www.morganlewis.com/pubs/IM-PIF_LF_NewUKRegulatoryArchitecture_08apr13.

2. View the Listing, Prospectus, and Disclosure and Transparency Rules at http://www.fshandbook.info/FS/html/FCA/D85.

and (3) making false or misleading statements or creating false or misleading impressions in relation to specified benchmarks (section 91 of the 2012 Act).

The first two offences together largely replicate the now-repealed FSMA section 397 offence and the defences available under it. However, the misleading impressions offence is now wider in scope and covers recklessly created misleading impressions as well as those created intentionally. The new section 91 offence has been introduced as a result of the recommendations made in the final report of the Wheatley Review of the London Interbank Offered Rate (LIBOR). The only benchmark to which this new offence currently applies is LIBOR.

The offences under sections 89 to 91 of the 2012 Act are punishable by imprisonment of up to seven years and/or an unlimited fine (on conviction on indictment) and by imprisonment of up to six months and/or a fine up to the statutory maximum of £5,000 (on summary conviction). The level of penalties therefore remains the same as was applicable under FSMA.

In addition, the FCA has assumed the FSA's role of monitoring market conduct and taking action where it suspects market abuse or market manipulation has occurred and, accordingly, the Code of Market Abuse (MAR) now forms part of the FCA Handbook. The market abuse regime set out in section 118 of FSMA is otherwise unaffected by the 2012 Act.

Impact on Approval, Supervision, and Discipline of Sponsors

Prior to 1 April, the FSA had the power to refuse a person's application for approval as a sponsor and the power to cancel a person's approval as a sponsor. It could also publish a statement censuring a sponsor.

The 2012 Act has introduced amendments to Part VI of FSMA, which gives the FCA the following additional powers in respect of sponsors:

- Imposing limitations or restrictions on services performed by sponsors, both on approval and after a firm is approved as a sponsor
- Refusing an application for the withdrawal or variation of such limitations or restrictions
- Imposing a fine; suspending, limiting, or restricting a sponsor's range of services for a maximum period of 12 months; and/or publicly censuring a sponsor if it has contravened the Listing Rules
- Suspending a sponsor's approval or limiting or restricting the services a sponsor may perform if the FCA considers such action desirable in order to advance one or more of the FCA's operational objectives (e.g., protecting and enhancing the integrity of the UK financial system)

In relation to the rights of sponsors, the Listing Rules previously allowed a sponsor to request a cancellation of its approval. Under the new regime, sponsors have the right to request a suspension of their approval instead of an irrevocable cancellation where a sponsor may consider this preferable, e.g., if it is undergoing a reorganisation or other corporate event that introduces an element of uncertainty around its future. A suspension at the sponsor's request may enable a sponsor to take remedial steps to ensure that it can comply with the sponsor approval criteria on an ongoing basis.

The FCA has updated Listing Rules 8.6 and 8.7,[3] the Enforcement Guide,[4] and the Decision Procedure and Penalties Manual[5] to reflect these changes.

Changes to the Banking Act 2009

The 2012 Act makes changes to the Banking Act 2009, including the extension of the special resolution regime

3. View the updated Listing Rules at http://fshandbook.info/FS/html/FCA/LR/8.
4. View the Enforcement Guide at http://media.fshandbook.info/Handbook/EG_FCA_20130401.pdf.
5. View the Decision Procedure and Penalties Manual at http://fshandbook.info/FS/html/FCA/DEPP.

(SRR). Under the current SRR, actions may be taken by the Treasury and the Bank of England to address a situation where a UK-incorporated bank or building society has encountered, or is likely to encounter, financial difficulties. The 2012 Act extends the scope of the SRR to include (in addition to UK-incorporated banks and building societies) certain systemically important UK investment firms, certain group companies of UK banks and UK investment firms, and UK-incorporated clearing houses (i.e., central counterparties). It is not yet clear when the extension of the SRR to these other entities will be effective, but it is understood from the Bank of England's March 2013 *Quarterly Bulletin* that it may be as early as summer 2013. As a practical matter, parties to transaction documentation containing provisions addressing potential risks of the application of the SRR measures to entities involved in the transaction should be prepared to include the additional types of entities referred to above when negotiating and drafting such provisions.

The 2012 Act made other changes to the SRR, including setting out the roles played by the FCA and the PRA in the SRR, giving PRA the FSA's former responsibility for triggering the SRR for all firms except clearing houses, and making certain technical amendments to the SRR.

Contacts

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis lawyers:

London

William Yonge	+44 (0)20 3201 5646	wyonge@morganlewis.com
Iain Wright	+44 (0)20 3201 5630	iwright@morganlewis.com
Sergey Kvitkin	+44 (0)20 3201 5605	skvitkin@morganlewis.com

About Morgan, Lewis & Bockius

With 24 offices across Europe, the United States, and Asia, Morgan Lewis provides comprehensive litigation, corporate, transactional, regulatory, intellectual property, and labour and employment legal services to clients of all sizes—from globally established industry leaders to just-conceived start-ups. Our international team of lawyers, patent agents, benefits advisers, regulatory scientists, and other specialists—more than 1,600 legal professionals total—serves clients from locations in Almaty, Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Moscow, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.