



Staying Afloat In Turbulent Times: What Should You Be Disclosing?

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Are market expectations of your company's results not going to be met?

Are previously announced deadlines not going to be hit?

Has a major contract been lost?

If so, and you have not informed the market, then you may well be in breach of the AIM Rules for Companies.

The current regulatory regime

Under the current regime a company must comply with the AIM Rules for Companies including the following:

- Rule 10 – the company must take reasonable care to ensure that any information it notifies is not misleading, false or deceptive and does not omit anything likely to affect the import of such information.
- Rule 11 – the company must issue notification without delay of any new developments which are not public knowledge concerning a change in:
 - its financial condition;
 - its sphere of activity;
 - the performance of its business; or
 - its expectation of its performance;

which, if made public, would be likely to lead to a substantial movement in the price of its AIM securities.

- Rule 31 – the company must:
 - have in place sufficient procedures, resources and controls to enable it to comply with the AIM Rules for Companies;
 - seek advice from its nominated adviser regarding its compliance with the AIM Rules for Companies whenever appropriate and take that advice into account;
 - provide its nominated adviser with any information it reasonably requests or requires in order for that nominated adviser to carry out its responsibilities under the AIM Rules for Companies and the AIM Rules for Nominated Advisers.

With the financial markets suffering almost unprecedented volatility and the world-wide economy in, or falling into, recession, the inevitable impact this will have and is having makes it

ever more important for AIM companies to keep the market informed, on a timely basis, of developments in their business and financial performance.

“AIM is a disclosure based market, so it is crucial that AIM companies accurately disclose price sensitive information to the market without delay and seek advice from the Nomad” (Martin Graham – LSE Director of Markets).

The Case of Meridian Petroleum plc

Meridian was admitted to trading on the AIM Market on 20 July 2004. It included amongst its principal assets the Calvin Oil Well and the Orion Oil Well both of which were in the US. On 19 June 2008 the London Stock Exchange announced that it had publicly censured and fined Meridian for breaches of AIM Rules, 10, 11 and 31 during a 2½ year period from August 2004 to February 2007. Meridian is the most clear example yet of failure, on a repeated basis, to comply with the ongoing disclosure obligations under the AIM Rules. In relation to both wells the disciplinary notice focused on the failure to make a full and accurate statement regarding issues relating to the wells, that the company had produced misleading announcements and/or omitted to include material information in those announcements and failed to update the market without delay, in particular in relation to the achievability of deadlines previously announced by the company.

The public censure of Meridian and, in the latter half of 2008, Minmet plc, is the latest in the trend of the London Stock Exchange towards censure and fines as the LSE actively monitors compliance with the AIM Rules for Companies and AIM Rules for Nominated Advisers. In 2004 Incite Holdings was publicly censured. In 2005 Durlacher Limited became the first Nomad to be publicly censured by the Exchange. In 2007 an unnamed company was privately censured and fined for breach of Rule 31 whilst its nominated adviser was fined £30,000 for breach of Rule 39. In 2008 Subsea Resources, Meridian and Minmet were all publicly censured. By July 2008

four AIM companies had been privately censured and fined.

So what lessons can be learnt?

The recent censures emphasise lessons for both directors of AIM companies and for Nomads.

Directors:

- consult your Nomad. Give the Nomad sufficient time to consider the matter in question. The LSE particularly focused on failure to consult the Nomad in the Meridian case.
- heed the Nomad's advice. The advice might not always be right but it is difficult to criticise the board of an AIM company if it relies on it. Prestbury Holdings Plc acted in breach of the AIM rules in failing to disclose price sensitive information to the market without delay but escaped censure as it had relied on incorrect advice from its Nomad. Censure was limited to the Nomad.
- don't hide bad news. The desire to temper bad news with good is understandable but the LSE has stated it is not acceptable to postpone disclosure of a negative trading update because a company will shortly be in a position to announce other positive news at the same time.
- be realistic. Misleading and unrealistically optimistic statements about prospects and actual results of operations could lead to sanction; in one recent case, a fine of £75,000.
- don't be constrained by the language of AIM Rule 11. There is a temptation to take a strict view of Rule 11 and state that if something does not fall within one of the four named areas, then it is not disclosable. This is likely to lead to breach.

What can Nomads do to ensure their client companies comply?

- make sure you have the right board. Quality of non-executive directors is paramount,

especially in relation to overseas companies where cultural differences and language difficulties may impede orderly compliance and the executive directors may be thousands of miles away.

- attend board meetings. It is standard practice for Nomads to have the right to attend board meetings; make sure that you do so. Quiz the directors on material matters, question their claims and test their timescales. It will not be a guarantee – in Meridian the company gave its Nomad unjustified assurances that the operational deadlines for the wells referred to in its announcements were reasonable. However it will help to protect you.
- maintain accurate records. Make sure you keep a full and accurate record of questions asked and the company's responses.
- establish an Announcements Committee. A mitigating factor in the Meridian case was the establishment of a committee comprising senior management (including technical personnel) and non-executive directors with the sole remit of reviewing announcements prior to them being notified to the market. Where overseas companies are involved, bringing with it all the problems of communication, look to establish an Announcements Committee centred around UK representatives whose job it is to manage the announcements process.
- Visit the company's assets. It is now standard practice for Nomad's to visit the overseas operations of companies coming to market in order to ensure compliance with their obligations under the AIM Rules for Nomads. The Guidance Note for Mining, Oil and Gas Companies states that it is expected that the Nomad will undertake a site visit and inspection of the physical assets of the company seeking

Admission. However the Guidance Note does not state that Nomads are expected to conduct site visits post Admission. We would recommend regular visits to the company's overseas assets (particularly of natural resources companies) to enable you to verify claims.

Conclusion

Directors and Nomads cannot sit on their laurels. The Government is looking to extend issuer liability to all public announcements issued through a Regulatory Information Service. Whilst this deals only with the liability of the company issuing the announcement, investors who have lost money on the back of incorrect announcements are likely to target those who they see as being at fault rather than the company in which they have their investment. As directors are responsible for the announcements being issued and the Nomad responsible for ensuring the company's compliance with the AIM Rules, expect to see more cases being brought against them.

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