The City of London Law Society

The Law Society

CITY OF LONDON LAW SOCIETY AND LAW SOCIETY RESPONSE: FCA CONSULTATION PAPER 24/12 – CONSULTATION ON THE NEW PUBLIC OFFERS AND ADMISSIONS TO TRADING REGULATIONS REGIME (POATRS)

18 OCTOBER 2024

Introduction

The views set out in this response have been prepared by a Joint Working Party of the Company Law Committees of the City of London Law Society (the **CLLS**) and the Law Society of England and Wales (the **Law Society**).

The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

The Law Society is the professional body for solicitors in England and Wales, representing over 170,000 registered legal practitioners. It represents the profession to Parliament, Government and regulatory bodies in both the domestic and European arena and has a public interest in the reform of the law.

The Joint Working Party is made up of senior and specialist corporate lawyers from both the CLLS and the Law Society who have a particular focus on issues relating to equity capital markets.

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Questions

Please also see the separate response relating to proposed sustainability-related disclosures which follows these questions.

Question 1: Do you agree with our proposed approach to the new Handbook as described above? Y/N. Please give your reasons.

Yes, we support the more integrated approach to the new Handbook.

Question 2: Do you agree with our proposed approach to maintaining the exemptions from the current regime in the future regime, as described above? Y/N. Please give your reasons.

Yes, we broadly agree with the proposed approach. However, we would note that the existing exemptions are useful specifically where option exchange (roll-over) offers are made to share plan participants on takeovers. Not all share plan participants are already shareholders, and the employee offer exemption may not assist if the roll-over offer is being made by the bidder (as it usually is). To avoid having to issue a prospectus in these situations, we would suggest that a takeover-type exemption could be retained for roll-over offers for these types of arrangements.

It would also be helpful if a new exemption could be considered for holdco insertions – that is, where an existing listed group inserts a new holding company on top of the group, but the group remains essentially unchanged otherwise. We would be happy to discuss further details of such an exemption.

Question 3: Do you agree with our proposed approach to the takeover exemption as described above? Y/N. Please give your reasons.

We agree that the takeover exemption should be carried forward in the new regime. However, in our view there are certain areas where the drafting should be clarified – namely:

- The exemption should be available whether a takeover is structured as a contractual offer or a scheme – the reference to takeover "by means of an exchange offer" implies a contractual offer and should therefore be updated.

- The reference to "exchange" offer could also (although we do not believe this is the intention) be read as referring only to takeovers where the consideration is solely in the form of securities and not those where a mix of consideration is offered. It would be helpful for the language to be updated to clarify this.

More generally, we note that there are a number of differences in language/approach between the takeovers exemption and the mergers/divisions exemption; we think it would be helpful to consider whether the two should be more closely aligned. However, any changes should not have the effect of narrowing these exemptions, as that could result in a takeover requiring a UK prospectus when no EU prospectus is required.

We would be happy to provide suggested drafting changes if that would be helpful.

Question 4: Do you consider that we should publish guidance on what we consider should be the contents of exemption documents as described above in a Technical Note?

Yes, we think a Technical Note setting out guidance on the contents of an exemption document would be helpful and would provide greater clarity to the market. The contents requirements should be no more onerous than Commission Delegated Regulation (EU) 2021/528 (and we think less should be sufficient as if the contents requirements are based on Commission Delegated Regulation (EU) 2021/528, the disclosure requirements are not significantly reduced compared to a prospectus).

Question 5: Do you agree with our proposed approach to the exemption for transfers between regulated markets as described above? Y/N. Please give your reasons.

Yes, we agree.

Question 6: Do you agree with our proposed approach to Public International Bodies as described above? Y/N. Please give your reasons.

N/A. We are not responding to this question as it does not fall within our area of expertise.

Question 7: Do you agree with our proposed approach to the scope of transferable securities as described above? Y/N. Please give your reasons.

N/A. We are not responding to this question as it does not fall within our area of expertise.

Question 8: Do you agree with our proposed approach to expand the currently exempted securities from UK PR Art 1(2) to include instruments of Islamic finance where an appropriate credit support arrangement exists? Y/N. Please give your reasons.

N/A. We are not responding to this question as it does not fall within our area of expertise.

Question 9: Do you agree with our proposed approach of removing the exception for not-for-profit bodies? Y/N. Please give your reasons.

N/A. We are not responding to this question as it does not fall within our area of expertise.

Question 10: Do you agree with our proposed approach to revising the requirements for a summary as described above? Y/N. Please give your reasons.

Yes, we think that a less prescriptive approach to the summary requirements is sensible, as is the increased mandatory page limit. In respect of the increased page limit, we note that the corresponding EU limit introduced via the EU Listing Act is 11 pages and we would query whether guidance as to the suggested length, rather than an absolute maximum, could be considered as an alternative.

Question 11: Do you agree with our proposed approach to incorporation by reference? Y/N. Please give your reasons.

Yes, we agree that incorporation by reference should not be mandatory.

Question 12: Do you agree with our proposed approach to carry forward financial information requirements as described above? Y/N. Please give your reasons.

Yes, we agree, subject to the comments set out below.

Question 13: Do you agree with our proposal to clarify requirements relating to material uncertainty regarding going concern and other matters reported on by exception? Y/N. Please give your reasons.

Yes, we agree that this would be helpful disclosure for investors.

Question 14: Do you agree that we should retain the current requirement for a working capital statement in a prospectus? Y/N. Please give your reasons.

Yes, we agree that the requirement should be retained for all types of equity prospectus – for example, on an IPO, a secondary fundraising that involves the issue of 75% or more of the company's existing issued share capital (whether a simplified or full prospectus is used), a rescue fundraising involving the issue of less than 75% of the company's existing issued share capital or where an issuer applies to re-admit its securities to a regulated market following a reverse takeover.

Question 15: Do you consider that we should allow issuers to disclose significant judgements made in preparing the working capital statement, including the assumptions the statement is based on and the sensitivity analysis which has been performed? Y/N. Please give your reasons.

Yes, we are broadly supportive of a move away from a binary working capital statement, in line with the recommendations of the UK Secondary Capital Raising Review (the **UKSCRR**). However, we would highlight that if a revised approach is adopted, it will be important to ensure that the simplicity and readability of the statement is preserved.

We consider that, in the context of a clean working capital statement, an issuer should, in principle, be allowed to disclose significant judgements made in preparing the working capital statement, along similar lines to the disclosure of significant judgements made in reaching the conclusion that the going concern basis of accounting is appropriate, as required by IAS 1. This should include allowing an issuer to disclose the assumptions the statement is based on and the sensitivity analysis which has been performed (although an issuer should not be required to disclose the sensitivity analysis it has performed). Whilst we would welcome the additional flexibility offered by the proposed approach, allowing for a more informative and nuanced statement and potentially more meaningful disclosure for investors, we think investors will not want to see working capital statements becoming complex, heavily caveated or subject to large numbers of judgements or assumptions such that the disclosures are not meaningful. In line with this, it would be helpful if additional guidance could be produced in respect of the types of judgements and assumptions which would be acceptable as well as the types of broader, disclaimer-like language which would not be considered to be appropriate.

The UKSCRR noted that an FCA and FRC working group had already been discussing the overlap between work required for a prospectus working capital statement and an annual

report going concern statement, and recommended that work should be progressed in this area as soon as possible. We understand that such discussions are continuing, and we would welcome the opportunity to participate or provide other input if helpful.

Question 16: Do you agree that we should allow issuers to base the working capital statement on the underlying due diligence performed for the purposes of viability and going concern disclosures in its annual financial statements? Y/N. Please give your reasons.

In principle, we agree that it would be desirable to align the wording of the working capital statement and related disclosures (relating to assumptions, significant judgements etc.), together with the work carried out to support them, more closely with the going concern and viability disclosures in annual financial statements, together with the work carried out to support them, appreciating the potential cost savings if this approach were to be adopted. As the UKSCRR noted, both types of disclosure are designed to serve a similar purpose, and we agree with the UKSCRR that the approach taken to prospectus working capital disclosure should be updated to better reflect the expectations of investors accustomed to annual report-style information, as well as providing a fuller picture of a company's financial position. However, we would stress that this alignment should not be at the expense of clarity.

In order to achieve greater alignment, however, a number of issues will need to be considered. In particular:

- A precondition would be to bring the distinct statements more into line. Even if aligned, however, we do think it would be necessary for additional work to be carried out, primarily because the liability position for accountants would be different for the separate workstreams.

- Greater clarity would be helpful in relation to what is meant by "basing the working capital statement on" the separate due diligence workstream, to ensure that uncertain and complex disclosure is avoided. In this respect, we do not think that the working capital statement should be caveated by reference to the underlying due diligence performed for the purposes of viability and going concern disclosures – a distinct workstream carried out for a different purpose.

- Guidance to sponsors on what is required of them in terms of carrying out due diligence on the basis for any working capital statement and when submitting a declaration to the FCA in connection with a prospectus would presumably need to be modified to reflect the new form of working capital statement and related disclosures, together with the extent to which directors can rely on the going concern and viability exercise (see also "Role of sponsors" below.)

More broadly, we note this proposal is at a preliminary stage and we would be very happy to discuss this further once it is more developed.

Role of sponsors

Under UKLR 4.2.1R, an issuer with a listing of equity shares in, or applying for admission of its equity shares to, the ESCC category, the closed-ended investment funds category or the equity shares (shell companies) category must appoint a sponsor if, among other things, it is required to submit a prospectus to the FCA in connection with an application for admission of equity shares to one of those categories.

Under UKLR 24.3.6R, where a sponsor is appointed by a company that already has equity shares listed in one of those categories, it must not submit an application to the FCA unless it has come to a reasonable opinion, after having made due and careful enquiry, that (i) the issuer has satisfied all requirements of the UKLRs relevant to an application for admission; (ii) the issuer has satisfied all applicable requirements set out in the Prospectus Rules; and (iii) the directors of the issuer have a reasonable basis on which to make any working capital statement included in the document referred to in UKLR 4.2.1R(1). We note that these confirmations, amongst others, also need to be made under UKLR 24.3.2R in respect of new applicants. Item (iii) is supported by guidance for sponsors in Technical Note 704.4 which, following a recent update, clarifies that, although "third party work can be used to help a sponsor come to a reasonable opinion that the directors of the issuer have a reasonable basis on which to make the working capital statement […], a sponsor need not presume that a working capital report, prepared by a reporting accountant, is required in all cases. The decision as to the nature, scope and extent of any additional procedures or reporting required to enable the sponsor to come to its opinion is an important aspect of the sponsor's judgement."

In practice, we would anticipate that, where a prospectus is published in connection with a secondary fundraising - either on a mandatory or voluntary basis - sponsors may continue to require working capital reports to be prepared by independent accountants. As noted above, the guidance in Technical Note 704.4 will presumably need to be updated to reflect the outcome of the consultation process relating to aligning the working capital statement and going concern/viability disclosures more closely. At that time, we suggest the FCA also considers whether it would be appropriate for the guidance to refer to the guidance on statements of sufficiency of working capital in capital markets transactions in Part III of the ICAEW's Guidance for Preparers of Prospective Financial Information – for example, to provide that, depending on the circumstances, it may be sufficient for a sponsor to satisfy itself that the directors have followed such guidance.

Question 17: Do you agree with our proposed approach to give additional guidance for companies with a complex financial history? Y/N.

Yes, we support the proposal to provide additional guidance where the issuer has a complex financial history, particularly in light of the removal of the financial information eligibility criteria under the UKLRs, which will result in the complex financial history rules being of greater relevance for certain issuers.

Question 18: How far do you consider the draft guidance attached to this CP would be useful for companies and their advisors? Y/N. Please give your reasons including any proposals you may have to change the draft guidance.

Whist we welcome the proposal for additional guidance, we think it would be of greater assistance to issuers and advisers if the guidance were to be more specific such that the form of financial information which would be required to be prepared and the diligence required to be undertaken is clear to issuers in advance. In particular, it would be helpful to include a more challenging scenario in the guidance, rather than the proposed scenarios which are extreme, and to indicate some of the factors that would need to be considered. This would reduce uncertainty for issuers during the application stage.

Question 19: Do you consider that we should include requirements related to the age of financial information in prospectus requirements? Y/N. Please give your reasons.

We note that, in the absence of specific disclosure obligations that replicate the former premium listing rule requirements on the recency of financial information, other requirements dictate that financial information is disclosed at a more recent date than that currently proposed, namely the necessary information test. Our view is that market practice is also likely to bring the information forward to a more recent date. However, we think that there is merit in introducing similar disclosure requirements in the new public offers and admissions to trading regime on the basis that the 16 and 18 month periods set out in item 18.1.7 of Annex 1 to the PRM are excessive and unaligned with European jurisdictions.

Question 20: Do you agree with our proposal to largely retain the responsibility regime from the existing provisions? Y/N. Please give your reasons including any proposals.

Yes, we agree.

Question 21: Do you agree with our proposal to change the requirement that a prospectus be made available to the public for 6 working days for admissions of securities at IPO to 3 working days? Y/N. Please give your reasons.

Yes, we agree.

Question 22: Do you agree with our proposal to raise the threshold for triggering the requirement to publish a prospectus for further issuances of securities already admitted to trading on a regulated market to 75% of existing share capital? Y/N. Please give your reasons.

Yes, we agree (but please see our response below).

Question 23: Do you agree with our proposal to retain the requirement to use a simplified or full prospectus for further issuances of securities already admitted to trading on a regulated market, where not exempt or if issuers wish to produce a voluntary prospectus? Y/N. Please give your reasons.

Yes, we agree.

In practice, many secondary fundraisings that involve a pre-emptive offer are likely to include a US element and therefore, in order to satisfy US disclosure requirements and the expectations of US investors, the issuer is likely to opt to publish a voluntary prospectus. Separately, the option to produce a voluntary prospectus which is approved by the FCA will allow the issuer to benefit from the revised liability standard for PFLS - of which we are strongly supportive. Further, a prospectus which is approved in accordance with Part VI of FSMA falls within the scope of article 70 of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 and therefore does not need to be communicated or approved by an authorised person for the purposes of section 21 FSMA. For these reasons, we believe that it is likely that issuers will opt to produce a prospectus on a voluntary basis for a pre-emptive issuance above 20% but below the 75% threshold.

Disclosure required in connection with a secondary fundraising where no prospectus is published

There may, however, be instances where an issuer does not choose to publish a voluntary prospectus. In those instances, the question arises as to what information the issuer should publish, or be required to publish. (For convenience, we refer below to such information being published in a "disclosure document".) A number of different approaches could be taken:

- Market practice could be left to determine the information that is published and in what format, taking into account the circumstances of the issuer, the nature of the fundraise and its impact on the company. In practice, it is likely that issuers would use as a starting point the information that is currently published in the launch announcement for a placing. Typically this includes sections on the background to and rationale for the fundraising; how the proceeds will be used; how the fundraise will affect the company's financial position and prospects; details of the shares to be issued; details of any investors that have committed to subscribe; and the terms and conditions of the offer. However, if the offer is to be extended to retail investors, we expect an issuer would also need to publish and send to shareholders an offer document (or offer booklet). Under this approach, neither the Prospectus Rules nor FCA guidance would prescribe what an issuer should publish, though it would be open to a trade body (such as the Investment Association or AFME) to produce best practice guidance on the expectations of investors and/or banks. In the absence of any particular guidance, we would query whether consistent market practice as to the form and content of any document would evolve.

- The FCA could publish guidance on the form of documentation it considers should be published as well as the minimum content requirements. We appreciate that, as this guidance would not be binding, it would be open to an issuer to depart from it in light of its circumstances, the nature of the fundraise and its impact on the company.

- The Prospectus Rules could prescribe the minimum items of information the issuer should publish and/or the format. Essentially this is the approach that will be taken under the EU prospectus regime following its amendment by the EU Listing Act (see further below).

- Guidance could be published which suggests that issuers should consider the use of a simplified prospectus, in accordance with PRM 7, as an alternative.

If the Prospectus Rules or FCA guidance were to specify the minimum items of information that should be included, what information should be specified?

One potential model, as an alternative to producing a voluntary prospectus, would be a short-form offer document such as that which will be required under the EU Prospectus Regulation, following its amendment by the EU Listing Act. Under the amended Regulation, where an issuer takes advantage of the exemption for secondary fundraisings that involve less than 30% of the issuer's existing share capital, it will have to publish a short-form document, no longer than 11 sides of A4-sized paper when printed, containing the information specified in Annex IX to the EU Prospectus Regulation. This short-form document will have to be filed with the relevant competent authority, but it will not have to be approved by a competent authority.

The main items of information required by Annex IX are: confirmation that, while the issuer has been listed, it has complied with all its reporting and disclosure obligations, including under EU MAR, rules made to implement the EU Transparency Directive and, where relevant, disclosure requirements applicable to investment firms; where there is an offer of securities to the public, a statement that at the time of the offer the issuer is not delaying the disclosure of inside information; the reason for the issue and how the proceeds will be used; how existing shareholdings will be diluted; where there is an offer of securities to the public, the terms and conditions of the offer; risk factors specific to the issuer; and a responsibility statement.

Broadly speaking, this model seems sensible. It is relatively similar to the approach currently taken on UK placings, where the launch announcement is used to cleanse any previous undisclosed information that could be of interest to investors. The first and second items are also similar to the Australian concept of a “cleansing notice” that is published under the “low doc” regime. We note that the UKSCRR recommended that the cleansing notice approach should be adopted in the UK where a secondary issue involving a public offer does not require a prospectus.

Even if the Prospectus Rules were to prescribe the minimum items of information the issuer should publish and/or the format, in our view it should not be necessary for the FCA to approve the disclosure document.

Overall, we think issuers and banks assisting them with a fundraising would welcome guidance on the expected minimum content requirements in addition to the format of the disclosure document. In our view, a form of prescribed document would be necessary in the context of the financial promotion regime in any event, such that the content of the communication could be approved by an authorised person. It may be that informal consultation with market participants should be considered as to the most appropriate way for guidance on the content and format to be given. We would be happy to discuss these issues further with the FCA.

Question 24: Do you agree with a potential proposal to require issuers to notify us if the further issuance relates to rescue financing even if below the 75% threshold, based on which we may also require a prospectus? Y/N. Please give your reasons or provide any alternative approaches we could consider.

We believe that equity rescue financings can be seen as analogous, to an extent, to IPOs and reverse takeovers, in that, despite the issuer having been listed for some time, investors are being invited to purchase new equity on the basis of a new or heavily revised strategy and to accept the issuer’s explanation of how it came to need the rescue financing. It would therefore be appropriate for such an issuer to be required to publish a prospectus, even if the amount to be raised is below the 75% threshold.

We agree that it would be appropriate for issuers to notify the FCA (early) in such circumstances. However, a difficult aspect of such financings is how issuers and boards should recognise that a financing they are looking to undertake may be a rescue financing. We think it would be important for the FCA to provide guidance as to what circumstances are likely to indicate that an equity financing is a rescue financing. Such circumstances might include:

- The issuer's auditors having advised that they might not be able to opine as to the issuer's status as a going concern in the absence of a significant inflow of cash.

- The issuer needs to raise equity finance in order to avoid defaulting on a financing facility, to meet the conditions for waiver of a default or renewal or extension of a new financing facility.

- If the issuer is unable to raise new finance within a limited time frame, it will have to sell a significant proportion of its assets.

Given the sensitivity and complexity of such situations, we believe consideration should be given to requiring appointment of a sponsor.

A view was expressed, however, that the 75% threshold should apply to all capital raises and therefore equally to issuers in financial difficulty, given (i) the difficulty inherent in defining "financial difficulty" in general terms; (ii) the time and cost burden of the prospectus process at a point of urgency for the issuer; and (iii) the application of UK MAR, UKLR 1.3.3R and Listing Principle 6 which already require an issuer in this situation to keep the market adequately informed.

Question 25: Do you agree with our proposal to retain the requirement to publish a prospectus for further issuances of funds already admitted to trading on a regulated market? Y/N. Please give your reasons.

Yes, subject to our response below, we agree with the proposal to retain the requirement to publish a prospectus for further issuances of funds already admitted to trading on a regulated market. Where a substantial (that is, +75% of issued share capital) issuance is carried out at any one time, the deployment of the capital raised is likely to involve either greater timelines to deploy the capital or a change of focus of the manager/management, and the corresponding risks (together with the impact on the existing portfolio construction) should be explained in detail in a prospectus. Whilst it is less of a concern in relation to a large cap listed equities fund, typically the cash received from such a substantial issue of equity would be a drag on investment returns while it is awaiting deployment.

Question 26: Do you agree with our proposal to raise the threshold for triggering the requirement to publish a prospectus for further issuances of securities by closed-ended investment funds already admitted to trading on a regulated market to 75% of existing share capital and to allow these funds the options to publish a voluntary prospectus? Y/N. Please give your reasons.

Yes, we agree with the proposal to raise the threshold for triggering the requirement to publish a prospectus for further issuances of securities by closed-ended investment funds already admitted to trading on a regulated market to 75% of existing share capital, but we have one significant improvement to suggest.

Whilst we agree that issuances of less than 75% of issued share capital should not require a prospectus, we do not see any particular logic to this being tested over a 12 month period, as this 12 month period does not have any particular bearing on the issue in our view. What is important, however, is that the rule cannot be circumvented to permit a series of smaller issues without a prospectus having been produced. In the context of closed-ended investment

funds already admitted to trading on a regulated market, the primary reason for not wanting too many share issuances in a short space of time without detailed disclosure is that one would not want to facilitate a regulatory structure which leads to the cash received from such substantial issues of equity being a drag on investment returns while it is awaiting deployment. We think, however, that six months is an adequate period for funds to deploy such proceeds, typically. We would therefore recommend that the relevant test becomes the issuance of 75% of existing share capital within any six month period. This reflects existing market practice where, currently, closed-ended investment funds already admitted to trading on a regulated market will typically issue a placing programme prospectus which is valid for 12 months, but carry out one share issue upon its publication and then (once the capital from that issue has been invested) carry out a further share issue, typically just before the prospectus expires. As the proposal would exempt the requirement for a prospectus to be issued on the first share issue, we do not see a logic for the second share issue (which would typically be of a similar size to the first) triggering a prospectus.

We would also note that if investors were concerned about a particular fund being able to grow too quickly, they could request for the board of directors to cap, on a voluntary basis, the share issuance (or influence it through votes on share capital resolutions at AGMs).

We also agree that such funds should be able to publish a voluntary prospectus. This ability may be crucial to allow for the prospectus to be used for marketing into the EU or United States, subject to appropriate disclosures required to meet the requirements of such markets (see also our response to question 23 above).

Question 27: Do you agree with our proposed approach to permit issuers to use future incorporation by reference of financial information, including the option for issuers to use supplementary prospectuses for this purpose? Y/N. Please give your reasons.

Yes. We believe that this would be welcomed by issuers of base prospectuses who currently generally take a cautious view and supplement their base prospectuses every time they publish interim or annual financial information during the validity of the prospectus on the basis that it is simpler to do this than try to form a judgement on each occasion as to whether the new financial information contains any significant new facts in the context of the base prospectus. For regular issuers of securities under base prospectuses, this means that withdrawal rights are regularly triggered with consequent notification requirements whether or not any significant information is being published.

However, this proposal will only be significantly helpful if it is accompanied by a clear provision to the effect that the incorporation by reference of regular interim or annual financial information will not by itself amount to a significant new factor or correction of a material mistake or material inaccuracy for the purposes of PRM 10.1.1R. Otherwise, out of a similar abundance of caution, we would expect issuers to continue to publish supplements to their base prospectuses, thus defeating the FCA's stated objective of minimising costs for issuers.

Question 28: Do you agree with our proposed approach to give issuers of non-equity securities more flexibility in relation to supplementary prospectuses? Y/N. Please give your reasons.

N/A. We are not responding to this question as it does not fall within our area of expertise.

Question 29: Do you agree with us not carrying over the option to produce a simplified prospectus for further issuance of non-equity securities? Y/N. Please give your reasons.

N/A. We are not responding to this question as it does not fall within our area of expertise.

Question 30: Do you agree with our proposed approach raise the threshold to 75% for further issuances of non-equity securities already admitted to trading? Y/N. Please give your reasons.

N/A. We are not responding to this question as it does not fall within our area of expertise.

Question 31: Do you agree with the proposed climate disclosure rule to prompt relevant and financially material information to be included in prospectuses? Y/N. Please give your reasons. If not, what should be done differently?

Please see our separate response below.

Question 32: How do you consider our proposed requirements on sustainability-related disclosures could affect the cost of producing a prospectus?

Please see our separate response below.

Question 33: Do you have any views on the importance that investors and other readers of prospectuses would place on the additional climate-related information disclosed under the proposed climate disclosure rule?

Please see our separate response below.

Question 34: Do you agree that our proposed climate disclosure rule should apply to issuers of equity securities and issuers of depositary receipts only, with other securities addressed through the Technical Note? Y/N. Please give your reasons.

Please see our separate response below.

Question 35: Do you agree with the proposed minimum climate-related disclosures in the prospectus annexes? Y/N. Please give your reasons. If not, what should be changed?

Please see our separate response below.

Question 36: Do you agree with our proposed approach to transition plans? Y/N. Please give your reasons. If your reasons relate to cost or other concerns, please provide further detail.

Please see our separate response below.

Question 37: Do you have any other comments on the design of our proposed climate disclosure rule?

Please see our separate response below.

Question 38: Do you agree with our proposed approach to addressing sustainability-related information beyond climate through the Technical Note?

Please see our separate response below.

Question 39: Do you agree with the proposed areas for revision of the Technical Note in relation to sustainability-related disclosures? Y/N. Are there any other areas that we should seek to address?

Please see our separate response below.

Question 40: Should we provide additional guidance relating to climate disclosures for mineral companies (including mining and oil and gas)? Please give your reasoning, and if so, how should we do so?

Please see our separate response below.

Question 41: Do you agree with the proposed new disclosure requirement and set of voluntary additional disclosures we are proposing to mitigate information gaps between bond frameworks (or similar documents) and prospectuses? Are there other disclosures that you think we should consider?

N/A. We are not responding to this question as it does not fall within our area of expertise.

Question 42: Do you agree with the additional voluntary disclosures we are proposing to introduce in prospectuses for UoP bonds? Are there other disclosures that you think we should consider?

N/A. We are not responding to this question as it does not fall within our area of expertise.

Question 43: Do you agree with the additional voluntary disclosures we are proposing to introduce in prospectuses for SLBs? Are there other disclosures that you think we should consider?

N/A. We are not responding to this question as it does not fall within our area of expertise.

Question 44: Do you agree with our overall approach to specifying the kinds of statements that can be protected forward-looking statements? Y/N. Please give your reasons.

It is important to provide a clear and consistent framework for identifying which statements can be protected as PFLS such that issuers are encouraged to disclose such information. Subject to the comments below, we agree with the general approach taken.

Question 45: Do you agree with our proposed general definition for protected forward looking statements? Y/N. Please give your reasons.

We generally agree with the requirement that information should need to be verifiable at a future date in order to be protected. We note that the phrase “truth, correctness and

completeness” is intended to reflect the basis for liability under Regulation 30 of the POATR (which is based on untrue or misleading statements or omissions), and we suggest “accuracy” might be better understood in this context than “correctness”.

Whilst we appreciate that market participants will be familiar with the "reasonable investor" test, we are concerned that its use may be too limiting as it may preclude the inclusion of information which is useful, or relates to information that is useful, to investors without necessarily meeting the “reasonable investor” test.

The linkage with the market abuse regime in this way also raises questions about the extent, nature and timing of announcements that companies may subsequently be required to make. For example, in light of the statements in paragraph 7.24 of the CP it would be helpful to understand whether the making of a PFLS on financial performance would mean that an announcement was required ahead of the publication of financial information in accordance with the company’s normal calendar of announcements where financial performance is continuing to be in line with expectations as set out in the PFLS. For UK MAR purposes, in general, financial performance in line with market expectations is not treated as inside information which requires immediate announcement.

In general, we expect that trading or other updates after publication of the prospectus may supersede the information in the prospectus; we assume that where they relate to information in the prospectus this should be made clear in at least the first of such announcements, but that later announcements would not always have to refer back to the prospectus. This may be an area where more guidance from the FCA could be helpful.

Question 46: Do you agree with our proposed criteria for financial information that can be considered to be protected forward looking statements? Y/N. Please give your reasons.

We generally agree with the criteria for financial information to be PFLS. In relation to the requirement that it be prepared in a manner that is “comparable with the actual future result” we assume that there should be flexibility to disclose and reconcile differences if there are changes in the manner of preparation resulting from changes in reporting standards or other circumstances outside the company’s control.

We look forward to the opportunity to consider and comment on the draft Technical Note on PRM 8.1.6R.

Question 47: Do you agree with our proposed criteria for operational information that can be protected forward looking statements? Y/N. Please give your reasons.

As regards the types of information that would fall in the “operational” category, the examples given in paragraph 7.25 of the CP (“relating to a company’s activities, which could include information about its products, services, and the facilities that support the company’s business”) appear relatively narrow. For example, it is not clear whether this is intended to include forward-looking information regarding supply chain and workforce issues, market developments, climate change impacts etc. We think it should be clear that statements relating to these matters can be covered and it would be helpful to have more guidance on this.

In the context of PRM 8.1.8R, we consider that the word “faithfully” could be omitted. We think the meaning of this word is not sufficiently clear, and the rule would still carry essentially the same meaning without the inclusion of this word. We note that the ICAEW guidance on Prospective Financial Information (Tech 04/20) does describe reliable PFI as being information which “faithfully represent[s] factually-based strategies, plans and risk analysis” but, in the context of FCA rules, we do not feel that “faithfully” is necessary or helpful, particularly alongside “actual and expected performance” (PRM 8.1.8R(1)).

In this connection we note the commentary in paragraph 7.31 of the CP that the intention is “to ensure that the PFLS represents the actual expectations and assumptions of the business and are not created purely for the purpose of a PFLS disclosure”. We do not think that “faithfully” helps to convey the point that PFLS should not be specially created for the purpose of a prospectus disclosure. In addition, we do not think it is realistic to say that PFLS, and/or information underlying it, should not be created specifically for the purpose of a prospectus. In the context of companies that are in relatively early stages of business or are fast-growing, or of a business that is being demerged from another listed company, business and strategic planning processes are likely to take place alongside the process of drafting the prospectus that will market the business to investors. In these circumstances, the suggestion that the disclosure cannot be drawn up in tandem with the development of the business’s assumptions and expectations is unhelpful.

Question 48: Do you agree with our proposed exclusions for the type of information that can be considered as protected forward looking statements linked to existing required prospectus disclosures for regulated markets? Y/N. Please give your reasons.

Yes, although we do not agree with the rationale for excluding profit estimates. However, these are relatively rare and given the short period for which a profit estimate is normally outstanding and the fact that fewer secondary issue prospectuses will be published under the new regime, this does not seem a major issue.

Question 49: Do you agree with our proposal to include profit forecasts in the definition of PFLS even where our rules require an issuer to include a profit forecast in their prospectus? Y/N. Please give your reasons.

Yes, we believe that including profit forecasts in the definition of PFLS will be helpful to issuers and benefit investors by encouraging the inclusion of more detailed prospective information in prospectuses.

Question 50: Do you agree with our proposed approach to exclusions to protected forward looking statements for MTF admission prospectuses? Y/N. Please give your reasons.

Under the proposed approach, any specific disclosures required by MTFs would not be able to benefit from the PFLS regime. This could have unintended consequences, such as making MTFs require less mandatory information in their admission prospectuses, which could result in a wider divergence in the quality of disclosure with some issuers taking advantage of the PFLS regime but others disclosing less information. Alternatively, it could be a disincentive for

smaller companies to join MTFs because they might not be able to benefit from the PFLS regime to the same extent as regulated market issuers.

Question 51: Do you agree with our overall approach to the presentation of PFLS in a prospectus? Y/N. Please give your reasons.

Yes, we agree with the approach which seeks to ensure that PFLS are clearly identifiable to investors. We also note the discretion afforded to issuers in terms of identifying PFLS, which would allow the information to be grouped in a separate section of the prospectus or footnoted, for example, thereby enabling issuers to ensure that the narrative flow of the text is not interrupted.

Question 52: Do you agree with our proposed requirements for the general accompanying statement for protected forward looking statements? Y/N. Please give your reasons.

Yes, we think it is important that the risks which are inherent to statements of this type are highlighted to investors.

Question 53: Do you agree with our proposed requirements for the specific accompanying statement? Y/N. Please give your reasons.

Yes, we agree that investors should have sufficient contextual information to inform any investment decision based on PFLS.

Question 54: Do you agree with our proposal to require an MTF admission prospectus for all initial admissions to trading and admissions of enlarged entities resulting from reverse takeovers? Y/N. Please give your reasons.

Yes, we agree with this approach and would note that MTF operators would also have the discretion to include in their rules a requirement to publish an MTF admission prospectuses in other circumstances.

Question 55: Do you agree with the proposed exceptions to requiring an MTF prospectus on admission for AQSE fast-track and AIM designated market admissions? Y/N. Please give your reasons.

Yes, we agree.

Question 56: Should we consider any additional exceptions to the requirement to produce an MTF admission prospectus? Y/N. Please give your reasons.

We do not think there are any additional exceptions which should be considered.

Question 57: Do you agree with our proposal for further issuances by Primary MTF issuers? Y/N. Please give your reasons.

Whilst we appreciate the flexibility in allowing Primary MTF operators the discretion to decide whether an MTF admission prospectus should be required in the case of further issuances, we believe there is merit in exploring the possibility of aligning the approaches to further issuances adopted on regulated markets and Primary MTFs. In this way, an MTF admission

prospectus would be required for further issuances of 75% or more of existing share capital and Primary MTF issuers would be permitted to publish a voluntary MTF admission prospectus for issuances below such threshold.

A view was expressed, however, that such an approach would make it more difficult for AIM companies to raise capital, thereby running contrary to a key policy intention, given that such companies can currently structure a capital raise exceeding 75% of their existing share capital without triggering the need for an AIM admission document (unless it is in connection with a transaction that constitutes a reverse takeover or a fundamental change of business) or an FCA approved prospectus.

Question 58: Do you agree with our proposal to not take forward in our rules the concept of a UK Growth prospectus? Y/N. Please give your reasons.

Yes, we agree.

Question 59: Do you agree with our proposed requirements for supplementary prospectuses that relate to MTF admission prospectuses? Y/N. Please give your reasons.

Yes, we believe it would be helpful for there to be a regime in place which governs the publication of a supplementary prospectus in context of Primary MTFs.

Question 60: Do you agree with our proposed requirements for the circumstances and manner in which withdrawal rights may be exercised in relation to offers by Primary MTF issuers? Y/N. Please give your reasons.

Yes, we agree with the proposal to base the application of withdrawal rights on the availability of a supplementary prospectus.

Question 61: Do you agree with our proposal for who should be responsible for an MTF admission prospectus and supplementary prospectus? Y/N. Please give your reasons.

Yes, we agree with the aligned approach between regulated markets and Primary MTFs in this respect.

Question 62: Do you agree with our proposed requirements for advertisements in relation to the admission of transferable securities to trading on a Primary MTF? Y/N. Please give your reasons.

Yes, we agree with the proposed extension of the advertisements regime to the admission pf transferable securities to trading on a Primary MTF.

Question 63: Do you have any comments on our cost benefit analysis?

N/A.

The response below also reflects the views *of the Environmental Law Committee of the CLLS.*

Our general comments on the proposals in the CP relating to sustainability-related disclosures are as follows:

- As the FCA notes in the CP, the reporting landscape for sustainability disclosures is continuing to evolve. In particular, the ISSB standards (IFRS S1 and S2) are expected to be endorsed by the Government in Q1 2025. We note that the FCA wishes to consult in 2025 on referencing any endorsed ISSB standards in the UKLRs. Given the proposed timing of implementation of the POATRs in H2 2025 we agree that the FCA should factor in the outcome of the ISSB endorsement in Q1 2025 to the final POATRs to ensure as much consistency as possible. This consistency may also be beneficial when the FCA comes to consult on Technical Note 801.2 at a later stage because it may allow the FCA to be more specific than saying that issuers may wish to refer to the endorsed ISSB standards in identifying relevant climate-related risks and opportunities, as well as related disclosures.

- Generally we are keen to avoid a patchwork of differing sustainability-related standards between the prospectus regime and other UK requirements, for example, UK periodic reporting requirements and the UKLRs in addition to variations in international requirements.

- We believe that the proposed prospectus disclosure obligations in Item 5.8 of Annex 1 to the PRM could drive a new applicant to bring forward the preparation of the systems, controls and procedures to comply or explain against TCFD in accordance with UKLR 6.6.6R(8) earlier than if it could wait until its first reporting cycle as a listed company. In order to reduce potentially sunk costs for issuers ahead of an IPO, we would welcome the FCA clarifying in its guidance that if a new applicant does not have governance arrangements or metrics and targets in place at the time of the IPO, it should include a description of its plan to put such matters in place before its first annual report and accounts.

Question 31: Do you agree with the proposed climate disclosure rule to prompt relevant and financially material information to be included in prospectuses? Y/N. Please give your reasons. If not, what should be done differently?

We agree that it would be helpful to have a specific requirement in the PRM for the disclosure of climate-related information in a prospectus in order to encourage more transparency and more consistency from new applicants and existing issuers when they publish a prospectus.

We also agree that the TCFD framework is the correct standard for a specific disclosure obligation on climate-related information in the Prospectus Rules, as adopted in ISSB standards, since it is what the listed company will have to comply or explain against going forward under UKLR 6.6.6R(8).

As a minor drafting comment, we think that the cross reference in PRM 4.6.2R(2) should be to PRM 4.5.1R and not to PRM 4.6.1R, that is, to the risk factor content requirement.

There also seems to be an inconsistency between the stated policy intention and the drafting of the PRM. The policy intention is to require an issuer to make the additional climate-related disclosures only if the issuer identifies climate-related risks or opportunities as material. However, this policy intention does not seem to be reflected in the wording of PRM 4.6.2 or Item 5.8 of Annex 1. In particular:

- The last part of PRM 4.6.2 states that issuers must "……provide further supporting information regarding the risk or opportunity" rather than referring specifically to the disclosures set out in Item 5.8 of Annex 1.

- The guidance in PRM 4.6.3G(1) is perhaps better drafted as "In complying with PRM 4.6.2R, the materials in (2) may be of assistance in: (a) identifying the risks and opportunities that are material to an investor; and (b) making the disclosures required by Item 5.8 of PRM Annex 1".

- There is nothing in the wording of Item 5.8 of Annex 1 to indicate that it applies only to issuers who identify climate-related risks or opportunities as material.

Finally, in order to reduce potentially sunk costs for issuers ahead of an IPO, we would welcome the FCA clarifying in its guidance that if a new applicant does not have governance arrangements or metrics and targets in place at the time of the IPO, it should include a description of its plan to put such matters in place before its first annual report and accounts.

Question 32: How do you consider our proposed requirements on sustainability-related disclosures could affect the cost of producing a prospectus?

We do not consider that that costs will be material in the overall context of the prospectus disclosure exercise per se. However, as outlined in our response to question 31 above, the proposed prospectus disclosure obligations in Item 5.8 of Annex 1 to the PRM could drive a new applicant to bring forward the preparation of the systems, controls and procedures to comply or explain against TCFD in accordance with UKLR 6.6.6R(8) earlier than if it could wait until its first reporting cycle as a listed company, so we would welcome the FCA clarifying in its guidance that if a new applicant does not have governance arrangements or metrics and targets in place at the time of the IPO, it should include a description of its plan to put such matters in place before its first annual report and accounts.

Question 33: Do you have any views on the importance that investors and other readers of prospectuses would place on the additional climate-related information disclosed under the proposed climate disclosure rule?

This really depends on the sector and geographies in which the issuer operates and the importance of climate change to its business model.

It also depends on the nature and investment mandates of the investors, the jurisdictions they are located in and the rules and regulations to which they are subject – for example, the extent to which they are required to take into account climate change factors in their investment decisions.

That said, we have noticed a trend for issuers, driven partly but not wholly by existing Technical Note 801.2, to wish to include more fulsome disclosures on climate and sustainability-related matters because they expect it to be important to investors and hence to their "equity story".

Question 34: Do you agree that our proposed climate disclosure rule should apply to issuers of equity securities and issuers of depositary receipts only, with other securities addressed through the Technical Note? Y/N. Please give your reasons.

Since it is only such issuers who are required to include a statement in their annual financial reports setting out whether their disclosures meet the recommendations of TCFD, this proposal is logical.

Question 35: Do you agree with the proposed minimum climate-related disclosures in the prospectus annexes? Y/N. Please give your reasons. If not, what should be changed?

At the engagement paper stage, we said we were against adopting an overly prescriptive approach but, having reviewed the draft proposals in the CP, we are supportive of the proposed minimum climate-related disclosures as they track the four principles of the TCFD, namely governance, strategy, risk management and metrics and targets. We also support the proposed guidance to this rule cross referring to the ISSB standards and the TCFD Recommendations and Recommended Disclosures.

Question 36: Do you agree with our proposed approach to transition plans? Y/N. Please give your reasons. If your reasons relate to cost or other concerns, please provide further detail.

If a company has published a transition plan and where the contents are material to the issuer, we think it is appropriate for a summary to be included in a prospectus.

We support the proposal not to require the full inclusion, or incorporation by reference, of the transition plan into a prospectus and that a summary of the transition plan would be sufficient.

Please could the FCA consider providing some more specific guidance as to what might be included in such a summary – for example, the wording in paragraph 6.33 of the CP is helpful: "Any prospectus disclosures should [……] remain focused on financial materiality and what is necessary for investors to make an informed decision. Issuers would continue to have the option to reference or link to a more detailed transition plan published elsewhere." It would also be helpful if any such guidance could make it clear that the issuer is not required to incorporate the contents of the transition plan by reference.

The current proposed draft guidance on transition plans cross referring to the Transition Plan Taskforce Disclosure Framework does not strike us as particularly helpful to issuers because it is a 45 page document and it does not go into the subject of summaries.

We note the FCA has not mentioned ESG ratings; we would like it to remain at the discretion of the issuer whether to obtain one and whether to disclose it in the prospectus.

Question 37: Do you have any other comments on the design of our proposed climate disclosure rule?

We support the proposal that climate-related disclosures relating to strategy (Item 5.8.2), transition plans (5.8.3) and metrics and targets (5.8.5) should be eligible to be counted as PFLS, subject to the criteria for PFLS for financial or operational information as appropriate to the type of disclosure. We also agree with the proposal that disclosures on governance (Item 5.8.1) and risk management (Item 5.8.4) should not be eligible to be designated as PFLS.

However, the proposals in relation to PFLS and climate-related disclosures could lead to issuers facing different liability standards for their climate-related disclosures, depending on whether these disclosures are included in the annual report and accounts or in a prospectus.

This difference arises because climate-related disclosures in a prospectus which do not count as PFLS (such as governance (Item 5.8.1) and risk management (Item 5.8.4)) would be subject to a negligence standard (with a reverse burden of proof), while that same information in an annual report and accounts would be subject to a reckless, fraudulent, or dishonest standard.

In the case of existing listed issuers who go on to publish a further prospectus, there may be a disincentive to include certain climate-related disclosures from the annual report and accounts if the company is concerned about the different liability standard in the prospectus for climate-related disclosures which do not count as PFLS.

Question 38: Do you agree with our proposed approach to addressing sustainability-related information beyond climate through the Technical Note?

We agree that it is premature to introduce any minimum content requirements for issuers on sustainability-related information beyond climate at this time. We support the proposal to update the content on sustainability-related information beyond climate in the revised Technical Note and reference the ISSB standards as a source of guidance to which issuers may refer, subject to seeing the revised Technical Note during the future consultation process.

Question 39: Do you agree with the proposed areas for revision of the Technical Note in relation to sustainability-related disclosures? Y/N. Are there any other areas that we should seek to address?

We agree that the Technical Note needs updating to refer to the previous EU Prospectus Rules and ESMA materials as adopted in the UK.

We think that the section on prospectuses in Technical Note 801.2 could be trimmed in relation to issuers of equity securities and depositary interests as the new climate-related disclosure obligations will apply to them. This section was drafted at a time when there were no specific climate-related disclosure obligations on UK listed issuers. Perhaps this section could be repurposed for issuers of non-equity securities as suggested in paragraph 6.42 of the CP together with a reminder for all issuers about the general overriding disclosure obligation in prospectuses (all information necessary to make an informed decision etc.).

We agree that the revised Technical Note should refer to industry standards, in particular the SASB standards, which will be helpful in directing issuers and their advisers to disclosures for specific industries.

Question 40: Should we provide additional guidance relating to climate disclosures for mineral companies (including mining and oil and gas)? Please give your reasoning, and if so, how should we do so?

We do not believe that additional disclosures relating to climate-related matters for mining and/or oil and gas companies are needed because a combination of the new specific PRM climate-related disclosure obligations in Item 5.8 of Annex 1 to the PRM and updated Technical Note 801.2 referring to the SASB standards (which address different industries) would be sufficient. We do not think that the contents requirements for Competent Persons Reports should be widened to encompass climate-related matters listed in paragraph 6.50 of the CP; these are reports prepared by specialist metallurgical or hydrocarbon reserves reporting companies and so cover essentially what, based on a common set of industry standards, is contained “in the ground” by way of the issuer’s reserves. The climate impact of an issuer’s business model and risks relating to the business model from climate transition are better covered in the prospectus by the issuer itself, driven by the enhanced PRM. We think that additional reporting obligations in this area could be costly for issuers, potentially require a separate climate expert report and put the UK disclosure regime out of line with our major competitor listing venues.