The City of London Law Society

The Law Society

Response to FCA Primary Market Bulletin 48

24 May 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 (**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 21 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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Response

We would like to give the following feedback on the draft Application for listing: procedures, systems and controls confirmation form published alongside Primary Market Bulletin 48.

1. In our Tranche 2 rules response to CP23/31 dated 2 April 2024 we raised a number of concerns with draft UKLR 20.3.1R, mainly relating to the increased liability of directors arising from such a confirmation and the practical steps that would need to be taken in order for them to be able to give the confirmation. These concerns are reinforced and increased by the proposed wording of the confirmation.

2. As noted in our Tranche 2 rules response to CP23/31, the confirmation goes beyond the issuer's obligations under Listing Principle 1 and the sponsor's obligation under UKLR 24.3.2R(4), and exposes directors to legal liability for matters outside their knowledge. We suggested that the confirmation should be given, if at all, by the issuer and not by the board.

3. In view of the proposed form of the confirmation we reiterate the comments made in our Tranche 2 rules response to CP23/31. We also have the following additional points.

4. Draft UKLR 20.3.1R(1) only requires an issuer to give a confirmation in the form of the second bullet in the proposed new form. Draft UKLR 20.3.1R(2) requires that "the board confirmation in (1) must be provided using the [prescribed] form". However, UKLR 20.3.1R(2) does not refer to the possibility that the prescribed form will require any additional confirmations. Nor do any other provisions of the UKLRs expressly oblige an issuer to provide the FCA with – or oblige directors to give – the confirmations set out in the first and third bullets in the proposed form. While Listing Principles 1, 2 and 3, UKLR 2.2.2G, UKLR 2.2.4G, UKLR 2.2.5G and UKLR 2.2.6G impose certain related obligations on **issuers**, they do not (with the possible exception of UKLR 2.2.6G(2)) impose any obligations on **directors**, nor oblige issuers to provide a confirmation that their directors

understand or are satisfied regarding these matters.

5. Requiring confirmations in the form of the first and third bullets also seems inconsistent with the FCA's approach to its existing sponsor declaration forms (which address some similar matters). Each confirmation in the existing sponsor declaration forms exactly mirrors a sponsor obligation set out in an existing Listing Rule. For example, the sponsor's declaration on an application for listing replicates the sponsor's obligations set out in LR 8.3.3R, LR 8.3.4R, LR 8.4.2R (for a new applicant), LR 8.6.16AR, LR 8.4.3R(3) (for a new applicant) and LR 8.3.1AR. The sponsor declaration forms do not require sponsors to confirm compliance with any guidance provisions in the rules or Technical Notes. Using the proposed new form to impose obligations which go beyond the express wording of the underlying rules raises various concerns:

   - Obligations imposed via a form could be amended or supplemented without consultation or even adequate advance notice. As the FCA notes in Primary Market Bulletin 48, it is "not formally consulting on the content of [the proposed new] form, as it doesn't form part of the Handbook and does not constitute guidance".

   - Obligations could potentially be imposed via a form which the FCA could not impose via a rule (allowing the FCA to side-step the carefully calibrated statutory limits on its rule-making powers).

   - Regulatory transparency would be reduced, as market participants could no longer rely on the rules to set out all relevant obligations.

   We would encourage the FCA to follow the same approach as for the sponsor declaration forms, and not seek confirmations which go beyond what UKLR 20.3.1R expressly requires.

6. The wording of the third bullet in the proposed confirmation tracks certain guidance provided on the issuer's obligations under the Listing Principles set out in UKLR 2.2. From the perspective of a person giving the confirmation, this turns guidance for issuers into rules for directors since in order to give the confirmation they must have reasonable certainty that the company's procedures, systems and controls are adequate to fulfil the requirements set out in UKLR 2.2.2G (1), (2), (3), UKLR 2.2.4G, UKLR 2.2.5G and UKLR 2.2.6G. We do not consider this is appropriate and it increases the potential liability concerns for directors if the board gives the confirmation. The directors would have to be satisfied as to each of the specific points in the confirmation. This is different from the position of the issuer, which is able to merely take these points into account as guidance on the Listing Principles.

7. In particular, the obligation under the third bullet, sub-paragraph e (tracking UKLR 2.2.5G) effectively introduces a new obligation to be able to disclose where information is held and how it can be accessed. To be able to give this confirmation it would appear that new processes would need to be introduced: it would not be enough for companies to have procedures and protocols to be able to produce information where requested by the FCA. The company has to be able to state the whereabouts of, and means of access to, information. If the board gives the confirmation, the directors would wish to be satisfied as to this ability. This could create an entirely new layer of due diligence, compliance and administrative processes. We note the statement in CP23/31 (para 14.19) that it is not the FCA's intention to impose prescriptive and onerous record-keeping requirements on issuers. This follows the proposal in CP23/10, which was not taken forward in CP23/31, to impose a new eligibility requirement and continuing obligation relating to adequate arrangements for storage of relevant information (including explaining where relevant information is held and where it is accessed). The FCA notes in CP23/31 that responses to CP23/10 indicated that such provisions would be too prescriptive and unduly burdensome. However, the proposed form of confirmation would in effect re-introduce these provisions by another route, contradicting the FCA's stated position. While we

believe this limb of the confirmation should be removed, we note that the scope of "information" for these purposes is very broad and, if any provision along these lines is retained, it would be helpful if the FCA could provide greater clarity as to what sort of information is covered and what kind of arrangements would be needed to comply. For example:

a. Information will not always be "held" in the form of written or electronic records. Issuer personnel may also "hold" recollections which may be relevant to a request for information under related UKLR 1.3.1R or UKLR 4.5.1R. We encourage the FCA to remain realistic in its expectations regarding record-keeping by issuers, and to remain open to receiving information based on non-documentary sources, to avoid creating unduly burdensome and disproportionate requirements.

b. We presume the obligation to "explain to the FCA where information is held" will not require issuers to provide a list of all software applications, mobile apps and hardware devices used anywhere in the issuer's business which might contain relevant written or electronic information, including electronic traces of transitory or deleted information. Likewise, we presume the obligation to explain "how [information] can be accessed" will not require issuers to provide a list of all possible access methods for each such software application, mobile app or hardware device, persons with access rights, etc. Instead, we assume that the FCA will be satisfied with explanations in general terms, knowing these are backed by procedures, systems and controls which satisfy Listing Principle 1 and the FCA's powers to request information. However, it would be helpful if the FCA confirmed this.

c. We question what it means for issuers to be able to access non-UK information "easily". Depending, for example, on the areas of the business involved and how long it has been since the relevant events occurred it may take time to access information, even if it is held in the UK. We think the important point is that information held outside the UK should be accessible as easily as information held inside the UK.

8. The third bullet, sub-paragraph f cites UKLR 2.2.6R but goes well beyond it. UKLR 2.2.6G relates to the issuer's obligation under Listing Principle 2 (not Listing Principle 1, which is the focus of UKLR 20.3.1R). UKLR 2.2.6G states that the issuer should take reasonable steps to ensure that its directors deal with the FCA in an open and co-operative manner, and that the FCA expects this will extend to responding to requests for information and attending interviews. UKLR 2.2.6G does not mention the issuer's procedures, systems and controls or impose any requirements relating to them. The issuer could satisfy UKLR 2.2.6G by e.g. ensuring that communications with the FCA, responses to FCA requests etc. are handled appropriately as the need arises. However, the third bullet, sub-paragraph f requires the directors to confirm they are satisfied that the issuer's procedures, systems and controls will enable it and the directors to deal with the FCA in an open and co-operative manner. From the directors' perspective this effectively turns guidance for issuers on Listing Principle 2 into an additional rule for directors supplementing Listing Principle 1. Directors will need to ensure that the issuer's procedures, systems and controls specifically address this matter, despite the fact that UKLR 2.2.6G does not expressly place an equivalent obligation on the issuer. It does not seem right to impose obligations on the directors which exceed those of the issuer regarding the issuer's systems and procedures.

9. There is considerable duplication in other matters covered by the confirmation. The general provision about adequate procedures, systems and controls to comply with the listed company's obligations (2nd bullet in the draft confirmation) encompasses the more specific provisions regarding information to be disclosed to the market (3rd bullet, sub-paragraph b), or to the FCA (3rd bullet, sub-paragraph c) and other information disclosure requirements (3rd bullet, sub-paragraph d). These duplicative, more specific confirmations seem unnecessary and could be deleted.

10. The second bullet in the proposed confirmation goes beyond the requirement in Listing Principle 1 which is that “a **listed company** must take **reasonable steps** to establish and maintain adequate procedures to enable it to comply” [emphasis added]. The form of confirmation goes further and requires an absolute confirmation that “the **directors** … **have established procedures** which enable the applicant to comply” [emphasis added]. This places the burden on the directors, not the company. Indeed this is a greater responsibility than the company has and does not allow the directors to rely on a defence of having taken reasonable steps. Our Tranche 2 rules response to CP23/31 suggested amendments to UKLR 20.3.1R(1) to address these concerns.

11. Draft UKLR 20.2.2R(1)(a) requires that all applicants must give the board confirmation on the occasion of each application for listing. It is difficult to see why, for frequent issuers, a confirmation should be required on the occasion of every listing application. This could be a deterrent to listing in London, particularly for debt issuances, because of liability concerns and because of the additional administrative burden of obtaining a board confirmation on every listing application. For example, applications for listing of shares in connection with employee incentive schemes or scrip dividend schemes or drawdowns under MTN facilities may be carried out by non-directors under delegated authorities and it would create practical and logistical difficulties to require a director to sign a confirmation (and obtain related comfort) in relation to every new issue or drawdown.

12. As suggested in our Tranche 2 rules response to CP23/31, because of the above concerns we think that the board confirmation should be reconsidered. We would suggest that, if given at all, it should be only given by the issuer and that the limbs that repeat the guidance in UKLR 2.2 should be removed. The form of confirmation should also be aligned to Listing Principle 1. The confirmation would therefore read (in its entirety):

    "*The issuer confirms that it has taken reasonable steps to establish adequate procedures, systems and controls to enable it to comply with the listing rules, the disclosure requirements, the transparency rules and the corporate governance rules.*"

13. We note that companies that apply the UK Corporate Governance Code are subject to the FRC's guidance in relation to internal controls. Accordingly, any guidance developed by the FCA in relation to systems and controls should take into account this existing guidance in order not to create conflicts for listed issuers.

14. Finally, we attach as an appendix some minor drafting and typographical comments on the Technical Notes published for consultation alongside PMB 48.

APPENDIX – MINOR COMMENTS ON DRAFT TECHNICAL NOTES	
TN/721.1 – Sponsor's confirmation in relation to modified transfer of listing category NEW	Typo para 1, last full line should read: "relating **to** transfers" ("to" is missing)
TN/704.4 – The sponsor's role on working capital confirmations (amendment)	Typo para 1, penultimate full line, no "s" needed on "issuer"
TN/302.3 – Classification tests (amendment)	For greater clarity, amend the first two sentences of the penultimate paragraph to read as follows (note the reference to B's year end is removed as this does not appear relevant). "Listed issuer A is considering acquiring company B. A's latest published annual audited accounts are to 31 December 2022. After its year end, in February 2023, A completed an acquisition of target C where one of the percentage ratios was 5% or more but less than 25%. [rest of paragraph as drafted]"
TN/307.2 – Aggregating transactions (amendment)	Typo "tin" instead of "in" in the penultimate line of the 3rd para. Final words of the penultimate para. should be "the two tests" rather than "the three tests".
TN/308.4– Related party transactions – Modified requirements for smaller related party transactions (amendment)	In 2nd para. "its investment policy" should be "their investment policy".
TN/312.2 – Shareholder votes in relation to hypothetical transactions (amendment)	First sentence of 2nd para might be clearer if it read: "We acknowledge that there will rarely be absolute certainty, when an issuer proposes a resolution to approve, or a resolution otherwise directly related to or connected with, a proposed transaction, that the issuer will go through with the transaction."
TN/340.4 – Profit forecasts and estimates (amendment)	p.4 in para on "Change in accounting framework" amend typo "citied" to "cited"