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Email: PISCES@hmtreasury.gov.uk

Dear Sir / Madam,

Private Intermittent Securities and Capital Exchange System (PISCES): Consultation

Introduction to response

The City of London 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, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its specialist committees.

The views set out in this response have been prepared by:

- The CLLS Regulatory Law Committee, a list of whose members can be found on the CLLS website. The Committee not only responds to consultations but also proactively raises concerns where it becomes aware of issues which it considers to be of importance in a regulatory context; and

- A Joint Working Party of the Company Law Committees of the CLLS and the Law Society of England and Wales (the **"Law Society"**). 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,

(together, the **"Committees"** or **"we"**).

The Committees have jointly considered HM Treasury's consultation, "Private Intermittent Securities and Capital Exchange System (PISCES)" of 6 March 2024 (the **"Consultation"**). The Committees are grateful to HM Treasury for the consultation and their work in putting together such a detailed and wide ranging consultation.

We wish to set out first some initial comments on the proposed structure and operation of PISCES. We then respond to individual questions raised in the Consultation.

We anticipate that the PISCES Sandbox will also necessitate additional guidance or rule changes from the FCA in order to make the PISCES framework operational, whether for PISCES operators, intermediary firms (for those PISCES following an intermediated model) or other firms providing services in relation to a PISCES. Whilst we appreciate that some of our comments in the following response are better directed to the FCA at the relevant time, we believe it is helpful to make some points here so that HM Treasury can

understand the context in which we make our other comments and to ensure that the PISCES operating model is not designed in a way that does not accommodate or allow those later changes to be implemented at FCA-level. Similarly HM Treasury may decide that some suggestions for changes to legislation through the Sandbox may sit better in Handbook Guidance or rule changes. Examples of this are discussed in response to questions 3 and 6 below.

We agree with HM Treasury's observation (in paragraph 1.11 of the Consultation) that PISCES could allow companies to scale up and grow and would increase the competitiveness of the UK financial market infrastructure. The convergence between private and public markets is critical to strengthening the UK's position as a leading financial centre. However, in order to ensure that the model is operationally less frictional than existing alternatives such that it is adopted by companies, investors and market participants, we believe it is vital to ensure that regulation is indeed proportionate as is acknowledged by HM Treasury in paragraph 1.13. Key to this will be ensuring that not only is the PISCES Sandbox itself framed in a proportionate way, but also the application of the FCA Handbook to firms that participate in, and provide intermediated services to, PISCES. However, there must also be sufficient clarity and certainty in the drafting of the PISCES Sandbox legislation and FCA Rules applied to it such that participants can be comfortable adopting the model. If there is a lack of clarity, or divergences in views in how the model will operate (and how the FCA or operators may seek to enforce and implement it), this could become a significant block to the adoption and success of the model.

Specific responses to individual Consultation questions

In this section, we set out responses from the Committees to particular questions that were raised in the Consultation.

1	**Do you have any comments on this arrangement? Do you think five years is an appropriate timeline for the PISCES Sandbox?**
	We note that the Digital Securities Sandbox has been provided with a 5 year timeline. We agree that a similar time period would be necessary for a PISCES Sandbox to be fully tested. We anticipate that a wide variety of models will be developed by participants (for example, depending on whether a PISCES is intermediated or not) and that it will therefore take time for the full potential and operationality of PISCES to become apparent. Given the innovative nature of the model, members also anticipate that it will take time for companies and investors to get comfortable and this may therefore lead to a longer period before there is significant usage of the model compared to other Sandbox models being considered. Furthermore, we anticipate there being significant costs for operators and intermediaries in establishing PISCES, and for companies looking to become participant companies. For these reasons, the Committees agree that a time period of at least five years is appropriate, and that anything shorter will risk a low adoption level by operators and companies alike.
2	**Do you agree that this should be a market targeted at wholesale market participants, namely professional investors?**
	Yes, the members agree that PISCES should be targeted at wholesale and professional market participants.

	We do not comment on commercial matters in this response. Nonetheless, in response to questions 3, 4 and 26 below, we have included some suggestions for how current legislation could be adapted to allow for participation by sophisticated and/or high net-worth investors and employees of PISCES companies if a policy decision was taken to allow this.
3	**Do you have views on whether sophisticated and/or high net-worth investors should be allowed access to shares traded on PISCES?**
	The members consider that sophisticated and high net-worth investors should be allowed access to trade in shares on PISCES. However, this should be a something that operators and companies are able to determine themselves. We note here that allowing retail investors to participate in PISCES would be in line with the recommendations of the Secondary Capital Raising Review report of July 2022 (the **"SCRR"**). Assuming such retail participation will be permitted (albeit limited to employees, sophisticated investors and high-net worth investors), members anticipate that consequential amendments may be needed to the FPO (as is discussed in response to question 26 below) and also to provisions of the FCA Handbook. In particular, we anticipate that operators and intermediaries may face additional compliance burdens (and thereby hurdles to entry) unless such persons are capable of being deemed to be elective professional clients when participating. This will be relevant, for example, in the context of the suitability rules and COBS 9A.2.5 to the extent PISCES models allow advised or discretionary participation. Similarly, given the intermittent nature of a PISCES, it would be helpful for the FCA in due course to clarify that PISCES shares will constitute non-complex investments for the purposes of COBS 10A.4.2. If these changes are not also made, we anticipate that some operators may find it impracticable to allow non-professional clients to participate in a PISCES due to prohibitive costs and time delays in designing and implementing bespoke systems and controls.
4	**Should employees have the opportunity to purchase shares in their company on PISCES? If so, could this be facilitated by the company?**
	We believe that employee participation will be crucial to the success and adoption of the PISCES model. It should be for companies to determine whether employees are permitted to acquire, as well as dispose of, shares. However, provided clear disclosure is provided, we see no legal reason why employees should not also be permitted to buy shares in their employer (or employer group). In our view, the rationale for allowing employees to sell shares in their company on PISCES applies equally to giving employees the opportunity to buy shares, noting of course that the risk profile will vary according to the employee's role and level of seniority. This optionality would also align with the approach to employee share schemes under the FPO and offers of securities to employees under the POAT Regulations. In this regard, HM Treasury could consider making use of the employee share scheme concept in article 60(2) of the FPO as a template. We do not comment on tax planning in this response but anticipate that employees will often hold their shares through family members or trusts rather than directly by the individual employees, and similarly that employees would not be automatically required to sell or relinquish their rights when they leave the company.

	If this approach is adopted, it may be necessary only to switch-on "former employees" in article 60(2) of the FPO in respect of a sale of such shares. To the extent HM Treasury decides to distinguish between buying and selling, it should be made clear that any restriction on employees or former employees buying shares would not extend to persons who are permitted to participate by other means of qualification (for example by being a sophisticated and/or high net-worth investor in their own capacity).
5	**Are there any aspects of the model set out here that as a potential operator would act as a barrier to operating PISCES, or as a potential participant company or investor to participating in PISCES?**
	We note, and fully endorse, HM Treasury's stated intention that a PISCES should not constitute a regulated market, MTF or OTF (paragraph 1.9, footnote 5 and again in paragraph 3.1 of the Consultation). Please see our further comment in response to question 23 in this regard. In the second bullet to paragraph 1.10 (page 9 of the Consultation) it is stated that only shares in companies whose shares are not admitted to trading on a public market in the UK or abroad can be traded on PISCES. Whilst this is essentially a commercial point (and therefore outside the remit of the Committees), we have two questions that arise from this statement. First, we assume that this would apply to shares of any category such that a company could not (for example) have a restricted share class traded on a restricted MTF or regulated market but also then allow holders of other classes of shares to be traded through a PISCES. Secondly, can HM Treasury confirm whether a company could allow its shares to be available on more than one different PISCES simultaneously (we do not comment here on any restrictions that operators may choose to put in place). Please also note our point in response to question 30 below on risks of a disproportionate outcome on stamp duty treatment of shares traded on a PISCES platform.
6	**In particular, do you have any views on the examples of where a PISCES operators might have flexibility to run their platform in Table 3.A?**
	We agree that there are many ways in which a PISCES may be structured and operated. Consequently, we propose that sufficient flexibility should be provided within the PISCES Sandbox legislation for innovation and for models to develop during the life of the Sandbox. As we have noted previously, it is difficult to comment in detail on all of HM Treasury's proposals without also understanding how the FCA envisages applying its rulebook to regulated operators and intermediaries. In the context of the intermediated model in particular, consideration will need to be given to how the Conduct of Business and CASS rules will apply. For example, as noted above, we envisage it being necessary to clarify how the rules on appropriateness and suitability will apply to PISCES company shares. Similarly, we anticipate that it may be necessary to amend the application of the delivery versus payment transaction exemption in CASS 6.1 and 7.11 to make it clear that this is available for PISCES. In respect of the final bullet in Table 3.A we agree that operators and companies should be given flexibility to determine the frequency of trading windows. We also agree that the frequency should not have to be uniform across a particular PISCES operator and that instead

	companies should be able to choose different frequencies to other companies on the same PISCES. Nonetheless, we would suggest that weekly trading for any particular company may be too frequent and result in: (i) auction opening statements lacking sufficient rigour; and (ii) PISCES not being sufficiently distinguished from existing markets and MTF offerings in the UK.
7	**Under what circumstances should it be possible for companies to restrict access to trading events, noting that this is not possible in public markets (see paragraph on permissioned auctions in Table 3.A)?**
	Please see our response to question 9 below.
8	**Are there any further matters that should be considered in the design of PISCES, either to make the PISCES a more attractive proposition, or to mitigate any particular risks that may arise?**
	Please see our other responses, and in particular those to questions 4, 5, 9, 25 and 30.
9	**Do you agree that PISCES operator should be able to establish a private perimeter where disclosures are only accessible to those eligible to participate on PISCES? Do you have views on the requirements that should be placed on PISCES operators related to this?**
	Yes. We agree that this should be a key feature of the model and have responded to subsequent questions on the basis that this approach will be taken in the PISCES Sandbox model. However, we would note the following points in this respect. In order for the new regime to succeed, we think that companies will need to have the ability to know and control to whom they will be disclosing sensitive information by way of the private perimeter. PISCES operators may therefore wish to enable companies to select within the operator's platform which investors are eligible to participate in a trading window and allow only those filtered investors to have access to the relevant disclosure, for example, to safeguard against the improper use of information by competitors. We believe that market competition between PISCES operators should be allowed to set those requirements, rather than rules. We would highlight that, to implement a filtering option, given the anticipated intermediated nature of the model, it will be necessary to devise a system under which companies and/or PISCES operators are able to establish the identity of the underlying investor. Please also see our response to question 17 below. Equally critical to the success of the new regime will be the ability to ensure that company disclosures in the private perimeter remain confidential. We would therefore question whether it is appropriate to place responsibility for pursuing breaches of the confidentiality of disclosed materials and the perimeter on operators. In an intermediated model, the operator may not have visibility of (or a direct contractual nexus with) the persons who have accessed the information or sought to participate. Similarly, it is the company (rather than the operator or any intermediary) who would be best placed to determine whether a breach has caused it harm and whether to pursue the breach. With this approach, participants who access information relating to a company through a platform would owe a duty of confidentiality to the relevant company which could be directly enforced by the company. This appears to the Committees to be an area that is better addressed by the chain of contractual documentation to be put in place rather than through specific allocation of responsibility in legislation.

10	**Do you agree PISCES operators should be required to ensure full pre- and post-trade transparency to investors within the private perimeter?**
	We are of the view that specific requirements should not be imposed on PISCES operators in this regard. The need for updates prior to each auction window will give sufficient transparency on trading volumes and pricing and the absence of continuous trading means that this seems an unnecessary requirement. Instead, operators and intermediaries should be allowed the flexibility to design an auction trading system that is appropriate to their individual operating model. We appreciate that the FCA may wish to have access to trading information in order to enforce and investigate the PISCES UK Market Abuse Regulation (**"MAR"**) regime. However, given the intermittent nature of trading and likely volumes in individual auctions, it would appear to be disproportionate to impose full pre- and post-trade transparency. Instead, the FCA would be able to make use of its powers in s.122B of FSMA. That said, we appreciate that many of the operators and intermediaries are likely to be firms that also provide similar functionality in respect of regulated markets and MTFs. As such, the PISCES Sandbox should allow, but not require, firms to apply similar standards and use similar operational systems to those they use for regulated markets and MTFs. Otherwise, there is a risk that they could be required to design and build bespoke technical systems. This would be disproportionate in terms of both cost and timing for those firms.
11	**Should any pre and post trade data or price data be made available publicly outside the private perimeter?**
	No. See our response to question 10.
12	**Are you content with the proposed model for transaction reporting?**
	For similar reasons to those discussed in response to question 10 above, we consider it disproportionate to impose transaction reporting to a PISCES platform. Between the information to be contained in disclosure statements and the professional and/or experienced nature of participants, we consider formalised transaction reporting to be unnecessary. To the extent the FCA was concerned about trading in a particular company, they could request information from the company, operator or intermediary directly. As with our response to question 10, we appreciate that some operators and intermediaries may already have mechanisms to report their on-market transactions under MiFIR. The PISCES Sandbox should allow, but not require, firms to make use of those systems where operationally it would be preferable to run a single system. Certainly, to the extent HM Treasury decides that transaction reporting is required on PISCES, it should as closely track the existing regime as possible to reduce the risk that firms have to develop bespoke systems and infrastructure.
13	**Are you content that PISCES operator or regulated intermediaries could check that potential investors meet the eligibility criteria (see chapter 2)?**
	In our view, a PISCES operator (particularly if participation is limited only to eligible counterparties and professional clients) or a regulated intermediary would be able to ensure that potential investors meet the applicable eligibility criteria. In practice, we consider it likely

	that most (if not all) PISCES operators will mandate the use of intermediated access models (assuming participation on PISCES is open to a wider pool of potential investors, for example, self-certified sophisticated and high-net worth investors) on the basis that this reflects current practice by UK trading venue operators. In these circumstances, it would fall to the regulated intermediaries as direct members of PISCES to check that potential underlying investors are eligible to participate on PISCES in accordance with the operator's eligibility criteria and applicable regulatory standards. In turn, the PISCES operator will be responsible for checking that direct members, either regulated intermediaries or institutional investors trading on own account, meet the applicable eligibility criteria. Regulated intermediaries are accustomed to carrying out client categorisation under COBS as well as KYC checks on their clients when providing investment services and activities, including executing orders on behalf of clients on trading venues. Moreover, we would expect these regulated intermediaries to be well placed to apply the standards set out in the FPO, such as self-certified sophisticated investor and high-net worth investor, to determine the eligibility of particular investors to trade on PISCES. We believe that, in line with current practice, the PISCES operator will mandate in its rules that direct members, which will include regulated intermediaries, are responsible for ensuring that underlying investors satisfy the applicable eligibility criteria. Please also see our response to question 14 below.
14	**Do you have any views on how a PISCES operator or regulated intermediary will ensure that ineligible investors do not trade on PISCES?**
	We envisage this being effected through the chain of contractual arrangements put in place by the PISCES operators and the intermediaries. In addition, the FCA could include a bespoke provision into COBS requiring firms that either operate or provide intermediation services in respect of PISCES to use reasonable steps to ensure that only eligible persons participate in the PISCES. As we have previously noted in response to question 9, there may be intermediated PISCES where the operator has no direct nexus with the end sellers and buyers of shares. In those situations, it would be disproportionate to impose a direct burden (whether through the PISCES Sandbox legislation or FCA rules) to individually check the status of each participant. It should instead be made clear that an operator can rely on checks taken by its approved intermediaries. Contractual provisions and terms of business between the operator and the intermediary can stipulate that the intermediary should only allow eligible participants onto the platform.
15	**Do you agree that any additional corporate governance related requirements on private companies beyond those required by the 2006 Act should be at the discretion of the PISCES operator?**
	We agree with HM Treasury's approach in this regard. Similarly, companies and their shareholders should be able to determine how inclusion in a PISCES will affect rights attributable to other share classes or to purely internal matters (such as drag and tag rights).
16	**Would you be content with the proposed requirements placed on companies whose shares are admitted to trading on PISCES?**

	Yes – we agree with the proposals, subject to the following and the responses below. In relation to the shares being "freely transferable", it would be helpful to clarify that this would not preclude restrictions on transfers outside PISCES or shares being subject to drag-along/tag-along provisions.
17	**Do have any comments on the proposed modifications to the 2006 Act described in paragraphs 4.7-4.11?**
	Subject to our comments below, we broadly agree with the approach proposed by HM Treasury in the Consultation. <u>*Section 793*</u> We agree in principle that it is desirable for private companies which participate in a PISCES to have a mechanism available to them that would enable them to identify the ultimate owners of their shares - particularly as they will not be able control who purchases shares via the PISCES platform in the same way as they do when shares are purchased "off-platform". However, for the reasons set out below, we would query whether the most appropriate way to achieve this is by extending s.793 to all UK-incorporated private companies whose shares are traded on a PISCES. Instead, we suggest below some alternative ways in which this aim could be achieved. <u>Problems with s.793</u> As noted in the Law Commission's *Scoping Paper on Intermediated Securities*, "At first glance, section 793 provides a method of discovering the identities of the ultimate investors of a company." However, various problems with the existing s.793 regime were identified by the Law Commission and, subsequently, by the SCRR. These can be summarised as follows: • It provides only a snapshot of ownership at a given time. • The process is slow, cumbersome and costly to administer. This is particularly because the UK's existing largely intermediated system of shareholder ownership means that requests to identify an ultimate beneficial owner may have to go through a number of intermediaries. As a result, companies often outsource the s.793 process to their registrars or other agents. • Responses to s.793 notices are often slow and incomplete. The SCRR provided as follows: "Responses can be received in varying formats or with incomplete information"; and "s.793 does not require the provision of contact details for ultimate investors, meaning that companies may have immediate access to names of ultimate investors only." • It often produces only an imperfect picture of the persons who are interested in the company's shares and those who make decisions on how voting and other rights attached to shares should be exercised. For example, according to the SCRR "Whilst many platforms do hold electronic details for underlying investors, these are not required to be supplied on the response to the s793 notice. Similarly, responses received to a UK request do not always provide the level of specificity that is useful to

	the requester – particularly in the case of large institutional investors who may have holdings spread across multiple funds run from different jurisdictions. The response may highlight that an institutional investor holds the shares, but will only provide generic contact details meaning it is difficult to isolate the decision maker within the investment firm who would have responsibility for making a decision in respect of pre-emptive rights in the required timeframes." • It can be difficult to enforce the regime. In our experience, even the threat of criminal sanctions or having restrictions imposed on relevant shares by the board under powers in the company's articles (described further below) is sometimes insufficient to compel intermediaries to provide full details of underlying investors, or the latter to provide their own details. Fear of legal challenge and/or reputational damage can also make boards reluctant to use their powers under the articles to impose restrictions on a defaulter. • As a result of these problems, even after conducting a s.793 exercise a company will often still have "blind spots" on its register. Many of these problems would continue even if the s.793 regime were to be amended as the SCRR recommended. In addition, we would note that, if s.793 were to be extended to all private companies whose shares are traded on a PISCES, the regime would apply only to those private companies that are incorporated in the UK. It would not apply to non-UK-incorporated companies whose shares are traded on a PISCES. If the local law of a non-UK-incorporated company does not provide an equivalent regime to s.793, this may be a factor that deters the company from participating in a PISCES. However, the alternative suggestions we set out below would, in principle, be capable of applying to and/or being used by all companies, wherever they are incorporated. <u>Ability for shareholders to require company to exercise its s.793 powers</u> If, notwithstanding the points made above, the Government is minded to extend the s.793 regime to UK-incorporated private companies that participate in a PISCES, we agree that shareholders of such companies should not be given the same powers that are afforded to shareholders of public companies who hold at least 10% of the paid-up share capital to require the company to exercise its powers under s.793 (nor should companies be required to make a register of this information available for inspection, as under s.809). <u>Alternative ways for a PISCES company to identify persons interested in its shares</u> We would suggest the following: • A PISCES operator could be required to: (i) obtain the name and contact details of each investor who buys shares directly via the platform; and (ii) where an investor accesses the platform indirectly, via an intermediary, impose a requirement on the intermediary to obtain the names and contact details of each underlying investor client who buys shares via the platform. In each case, the operator or intermediary could be required to provide such names and contact details to the company either on request or within a specified period of the auction or trading event closing. Any such requirements would

	probably need to be enshrined in FCA Rules in order to ensure that, for GDPR purposes, platform operators and intermediaries have a lawful basis for passing such data to the company. We would suspect that the operator and intermediaries would obtain this information in any event as part of their KYC or client onboarding process and/or when checking an investor's eligibility, such that the suggested requirements should not add a significant burden. • Companies that participate in a PISCES could, if they wish, insert provisions into their articles that broadly replicate s.793 and other rules in Part 22 of the CA 2006. For example, such provisions could authorise the board at any time to send out a notice to any person the board believes is currently, or was recently, interested in the company's shares, requiring them to provide details of such interest to the company; and, if the person fails to comply with such a notice within a reasonable period of time, could authorise the board to impose certain restrictions on the relevant shares (such as declining to register a transfer of the relevant shares, stipulating that the shareholders have no right to attend or vote (either personally or by proxy) at a general meeting, stipulating that no other right conferred by the shares can be exercised and/or withholding dividends or other moneys payable on the shares). Most listed company articles of association give the board power to impose such restrictions on a person who fails properly to comply with a statutory s.793 notice. • Alternatively, or in addition, a company could, if it wished, insert provisions into its articles that broadly replicate or incorporate by reference (with any appropriate modifications) the major shareholder notification rules in DTR 5. In effect, the articles could require every person who holds a specified percentage of the voting rights or shares in the company to notify the company, within a specified number of days of reaching that percentage, of their name and contact details and other relevant particulars relating to their interest; and, if a person fails to comply with these requirements, could empower the board to apply restrictions to the relevant shares. It is relatively common for non-UK-incorporated companies with shares listed on the UK Main Market to include such provisions in their articles, and LSE guidance advises all non-UK-incorporated companies with shares admitted to AIM to include such provisions in their articles (see paragraph (d) of the guidance notes on Rule 17 in Part Two of the AIM Rules for Companies). However, we do not think DTR 5 should be extended to apply to all companies that participate in a PISCES - in our view, this would impose a disproportionate burden on both companies and investors and might deter some companies from participating in a PISCES. *Investor protections* In addition, if HM Treasury is to permit participation in PISCES by employees and sophisticated and high-net worth investors, we query whether certain of the protections for shareholders in PLCs should be extended to private companies admitted to a PISCES. For example, it may be a proportionate investor protection to: (i) require that there be at least two directors (s.154 CA 2006) and a company secretary (s.271 CA 2006); and (ii) set aside the audit exemption for small companies that are included on a PISCES (s.477 CA 2006).

18	**Are there any other modifications to 2006 Act that would in your view be needed to facilitate the operation of PISCES? If so, please provide details.**
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19	**Do you agree that share buy-backs should not be permitted on PISCES, given the risks set out above?**
	On balance, we agree. As noted in the Consultation, some companies that participate, or would consider participating, in a PISCES platform would probably welcome the ability to buy their own shares back through the platform. However, we agree that there would be risks to the price discovery process if the company were to be a potential buyer of shares and also to set parameters around the price that can be paid. We therefore agree that, initially at least, companies should not be permitted to buy back their own shares via a PISCES. However, we suggest that this issue should be reviewed during the PISCES Sandbox period – for example, after a year or two – taking into account feedback from companies and others involved in the PISCES market. It may be possible to mitigate the risks around price formation, for example, by stipulating in the PISCES rules - or allowing a platform to stipulate - that the company can buy no more than a specified percentage (for example, 25%) of the shares offered for sale during an auction or trading event. Such a restriction would be broadly similar to the condition in the safe harbour for on-market buyback programmes under MAR that on each trading day of the programme the company cannot buy more than 25% of the average daily volume of its shares on the trading venue on which the purchase is carried out (Article 3(3) of the UK version of Commission Delegated Regulation (EU) 2016/1052). Separately, if - as we suggest in response to question 4 - employees are permitted to purchase shares via a PISCES platform, it would be helpful to make clear that a company can purchase shares via the platform on their behalf (i.e. as their agent).
20	**Do you have any views on the proposed disclosure requirements? Are there other disclosures that should be mandated to help investors make informed investment decisions, for example corporate governance, major shareholdings, or financial information?**
	Subject to our comments below, we support the principle that MAR should apply to PISCES, and think it is important that, so far as possible, the key concepts in MAR should apply in their existing form, for the purposes of simplicity and consistency (and we note that, on occasion, terminology from the criminal insider dealing regime, such as "insider dealing", is used, and we assume that the broader civil regime terminology is HM Treasury's intention where that is the case). We agree with the proposed model for disclosure prior to a trading event and that basing the regime on the MAR definition of "inside information" would be a sensible approach. However, we would note what falls within this definition needs to be considered in the context of a market where a price is much less predictable and only determined once in each trading window, rather than being continuously transparent as is the case in the public market context. *Inside information*

	Whilst the MAR definition of inside information, which is fundamental to the operation of MAR, may be well-understood by participants in public markets, we would highlight that this might not in fact be the case for many private companies. Central to the concept of the market abuse offences of unlawful disclosure and insider dealing is the predicted effect of specified information on the price of relevant securities. In the public domain, this is established by reference to a continuously publicly available market price. Where information is disclosed, its effect on the share price can be seen in real time. The question of its price sensitive nature thus substantially settled, the question becomes whether this information was disclosed when it should have been or was illegitimately delayed. In respect of PISCES, price discovery will be determined in accordance with a complex process within potentially wide parameters specified by the company. There will be no consensus on valuation methodology. In these circumstances, it will be more challenging to establish with certainty the impact of any piece of information on the price. Equally, it will be more difficult for a company to apply a price-based test to determine with certainty which information it does or does not need to disclose. In addition, we would note that a key constituent of the test is "information that has not been made public". As it is envisaged that disclosures will be made within the private perimeter rather than being disseminated publicly, we would suggest that further thought be given to this element of the definition. As MAR will be less familiar to private companies, the FCA should provide additional guidance on what it anticipates will constitute inside information for these purposes. This will also be useful in understanding the application of the article 67 FPO exclusion (in respect of which see the response to question 26 below). In our view, additional clarity on the proposed disclosure regime is likely to encourage and support the use of PISCES. *Model disclosure* Further, appreciating the need to calibrate investor protections against a frictionless and proportionate regime, we consider that there would be value in an overarching materiality metric being supplemented by guidance on a model form of expected pre-trading disclosure, in terms of form and content. In our view, guidance on this point would help to achieve a degree of consistency across PISCES operators, which in turn would arguably act as an incentive to use the platform, particularly at the outset of the new regime. At a minimum, in addition to the proposed content set out at paragraph 4.16 of the Consultation, the disclosure package could include: • A summary of the key provisions of the articles of association; • Details of related governance arrangements, for example, shareholder agreements and a summary of any other arrangements that could impact a shareholder's economic and other rights; • Financial information covering the previous two year period;

	• Current trading; • Information relating to any significant changes since the date of the latest financials; and • Key risk factors. These should only be required, however, to the extent that the information has changed since any previous disclosure. We would query whether forward-looking information should also be included in any model form of disclosure. The liability regime attaching to such forward-looking information would therefore need to be considered. <u>*Information asymmetries*</u> Further, it would seem that under the proposed disclosure regime, there is the potential for challenges to arise in relation to information asymmetries given the restricted and intermittent nature of trading events. We appreciate that the intention is that a company's disclosures ahead of each trading window should contain all inside information. However, ahead of each trading window, where the universe of investors may be different each time, in order to protect against an information asymmetry, it will be necessary for the company to disclose to new investors historic information which has previously been made available within the private perimeter. Whilst we do not think this is insurmountable on an operational level (for example, historic company disclosures could be archived and made accessible within the private perimeter), in this context, we would assume that a company would be required to review and filter this information to determine whether it continues to be material and relevant or to highlight its historic nature. This process would be overly burdensome, particularly for smaller companies that perhaps have less experience with public-style disclosures, and would run contrary to a key policy objective. <u>*Preventing an auction*</u> We agree that, in the event of information arising between publication of the disclosure document and the trading window opening, the company should prevent the relevant auction from taking place or suspend trading if trading has begun. Consequently, we agree that it will not be necessary to switch on article 17 of MAR for PISCES companies.
21	**How long before the trading window opens should disclosures need to be published? Should this be determined by the operator or participant companies?**
	We agree with HM Treasury that investors will need sufficient time to analyse and consider the disclosure document in advance of an auction window opening. Given the restricted and experienced nature of participants, and technological innovations on access to and distribution of documentation, we would not expect this to be a significant period, for example two or three days.

	Subject to the imposition of an absolute minimum time, we would expect that companies and operators should be able to set longer periods for disclosure. Companies will have a clearer understanding of the complexity of their business model and likely investor base and so be able to assess whether a longer period is required. Similarly, we can see an investor protection benefit in allowing companies to upload draft disclosure documents at an earlier stage (provided they are clearly signposted as draft with changes in the final version also clearly marked).
22	**What market abuse risks do you foresee in the context of PISCES? To what extent do you think they would be mitigated by the proposed market abuse regime?**
	Members agree that a market abuse regime should be adopted for PISCES to protect investors and companies alike. We also agree that the way in which to achieve this should be to selectively apply relevant provisions of MAR. Creating a fully bespoke model, or significantly altering the MAR regime to fit PISCES would risk causing confusion and a disproportionately increased compliance burden on firms were they to have to design and implement different compliance systems and controls. We also agree that there should be a clear distinction between what happens on the PISCES market (which should be subject to an adapted MAR) and what happens completely outside the PISCES market (which should not be subject to any provisions of MAR). Whilst it will be imperative to the viability of the PISCES framework that there is a sufficient level of investor protection and market integrity, imposing MAR requirements on private actions outside the PISCES trading windows could risk companies (and their shareholders) choosing not to make use of PISCES. Similarly, we agree that imposing transparency on off-PISCES trading would be disproportionately costly and should be avoided. We agree that the primary tool for application and enforcement of PISCES MAR should be the opening disclosure statement issued by companies. By setting clear obligations to include all relevant information in the disclosure statement, and ensuring that participant investors are aware that they should only rely on the information in that statement, this should reduce the risk that companies (or their shareholders) will find themselves constrained in making promotions or statements outside the PISCES trading windows. Although the focus of regulation will be activity on the PISCES market, we note the proposal at paragraph 5.7 of the Consultation that the modified MAR regime "should include the dissemination of false and misleading information outside trading windows where it impacts on the trading of shares during the PISCES trading window" and would agree that, where activity which takes place outside the trading window is designed to influence the trading window, it would seem odd if no appropriate recourse would be available in such circumstances (see also our response to question 24 below). Please also see our response to question 25 below.
23	**Do you agree with the proposed scope for the PISCES market abuse regime? Are there material market abuse risks that would not be captured by this scope?**
	In drafting the PISCES Sandbox legislation, members request that HM Treasury includes a clear statement expressly signposting that PISCES are not regulated markets and neither are they to

	be treated as MTFs. We are concerned that the very application of provisions within MAR could lead third parties in the EEA or elsewhere to conclude that a PISCES should be treated as a regulated market or MTF (given the application provisions in article 2(1) of MAR), which could result in PISCES company shares being admitted to trading on markets in the EEA without the consent or awareness of the company and a broader MAR regime being applied to it in the EEA. This risk can be somewhat mitigated by not treating PISCES as a regulated market or MTF in the UK.
24	**Do you agree with the proposed PISCES market abuse offences?**
	As with previous responses on MAR, we broadly agree with the overall approach proposed by HM Treasury in respect of a proportionate and restricted application of MAR to PISCES. We agree that having a limited offence for unlawful disclosure of inside information and of insider dealing will be necessary provided that it is applied in a sufficiently narrow way that it does not risk applying to actions that are not related to PISCES activity. An example of where this regime may be appropriate is if an employee at a PISCES company receives information of a significant new contract (or cancellation of a major contract) and fails to disclose that to the team preparing the disclosure statement. Where that employee subsequently buys or sells shares through a PISCES auction on the basis of the information that had not been disclosed, we agree that it would be proportionate to apply a bespoke MAR regime. In respect of the proposed insider dealing offence, we note that the Consultation provides that "The arrangements would focus on persons involved in producing the disclosures using inside information that has not been included in the company's disclosures to, trade, or recommend that others trade on PISCES". Whilst we appreciate that the intention is for a company to disclose all inside information ahead of each trading window, it is not clear whether an offence would be committed if a third party that has no connection with the company were to be provided with inside information (which is not included in the company's disclosures) and were to trade on the basis of such inside information, which would be the case under MAR. We believe that any such behaviour should fall within the parameters of the modified regime. We agree that there will be scope for market manipulation within a PISCES and that this offence should therefore apply in a proportionate manner. In particular, it should be made clear that third parties seeking to manipulate the price or operation of a PISCES auction is prohibited. We agree with HM Treasury's statements in paragraphs 4.21 and 5.11 that it will not be necessary to switch-on article 17(4) for PISCES MAR.
25	**Do you agree with the proposed arrangements for monitoring and enforcement against market abuse on PISCES?**
	We agree with the approach to enforcement and monitoring. As we have previously stated, ensuring the integrity of the PISCES framework will depend upon a robust, albeit proportionate, MAR regime. We also agree that the appropriate way to investigate and enforce PISCES MAR will be through the FCA exercising its powers, adapted to extend to PISCES. Given the wide range of firms that will be permitted to operate a PISCES, and the expected ability of having fully intermediated

	models, it is not appropriate to outsource enforcement to the operators or the companies themselves. To underline this approach, it may be helpful to adapt ss.122B and 123 of FSMA (for example) to make it clear that these powers extend to the supervision of PISCES MAR. We note the commentary in paragraph 5.12, footnote 26 of the Consultation. We agree that ss.89 and 90 of the Financial Services Act 2012 will apply to PISCES companies and activities in the same manner as it applies to both listed and unlisted issuers. These sections would continue to apply to both on- and off-PISCES activities without amendment or alteration. However, we think the application of s.90A or Schedule 10A of FSMA to PISCES companies requires further consideration and a balancing of the advantages against the potential disadvantages. In particular, while it clarifies the basis on which liability can arise, it also enables litigation by a broader range of investors than under the common law bases of contractual and negligent misstatement, which could be seen as disproportionate in a professionals only market and discourage companies from using PISCES. The Committees would be happy to discuss this further with HM Treasury.
26	**Do you agree that the existing exemptions in the FPO are sufficient to allow the promotion of shares traded on PISCES to eligible investors as described in this paper?**
	No. We agree that article 67 of the FPO is the appropriate vehicle through which to allow the promotion of PISCES shares to eligible participants. However, we would strongly request that HM Treasury includes amendments to article 67 FPO to ensure that it is capable of being used in practice. In members' experience, there is a reticence amongst practitioners and issuers to rely on the article 67 exemption on the basis that it is unclear whether information is "expressly permitted" to be communicated and also given the limitations on this exemption where the materials contain additional promotional information beyond the permitted information. In practice, therefore, it is an exemption that is only rarely relied on. The limitations of this exemption are noted by the FCA in paragraphs 8.21.13 to 8.21.15 of the Perimeter Guidance Manual (**"PERG"**). In order for the article 67 exemption to be comfortably adopted and relied on by PISCES participants, it will be necessary to make it clear that a PISCES is a "relevant market" for these purposes. It would also be necessary to include clear guidance (whether in the PISCES Sandbox legislation or through adapted PISCES bespoke PERG provisions) that the disclosure statement will be eligible and its full contents "required or permitted" provided it meets the requirements of the Sandbox legislation. If HM Treasury agrees with our proposal in response to question 21 for draft disclosure statements to also be made available, these should also fall within the scope of this amended exemption together with other promotional materials that extract information from the disclosure statement (or draft statement). Other changes that may be necessary include allowing article 67 to apply to shares of PISCES companies that are being admitted at their first auction (otherwise article 68 would also require similar changes to be adopted). With care, it may not be necessary to make further changes to the FPO. However, if HM Treasury disagrees with our proposal to include draft disclosure statements and also items derived from that information, it may also be necessary to amend article 60 to make it clear that this applies to PISCES companies and promotions made in relation to them through the platform. Conversely, if HM Treasury concludes that only employees who are existing

	shareholders can participate in an auction (whether as buyer or as seller), this may not be relevant and reliance could instead be placed on the article 43 exemption. Similarly, if HM Treasury allows sophisticated and high-net worth investors to participate in PISCES trading, we would hope that the changes and clarifications we have proposed above for article 67 will be sufficient to mean that it is not also necessary to make use of the article 48, 50 and 50A exemptions for PISCES companies. If those articles are required, significant changes will be needed to make it clear that a PISCES company is "unlisted" for these purposes and recognise that the PISCES companies would not themselves receive the certificates or other confirmations.
27	**Are there particular features of PISCES that require the FPO to be modified in the sandbox to clarify how it applies to the promotions of shares that are traded on PISCES?**
	Please see our comments in response to question 26 above.
28	**Do you agree that it should be up to the PISCES market operators to decide whether a company should have their shares placed on a CSD in order to participate on their platform?**
	Yes, we agree. In the interest of supporting a flexible approach for companies and shareholders, it should be for market operators to decide whether a company should have its shares placed on a CSD in order to participate on the platform, noting that many private company shares are held in certificated form.
29	**Are there any aspects of the model that would dissuade you from investing through PISCES?**
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30	**Are there any further matters that should be considered in the design of the PISCES to encourage investors to use such a platform?**
	We understand that there is concern that shares traded through a PISCES platform could suffer disadvantageous stamp duty treatment through the unavailability of intermediary relief. We appreciate that tax legislation is not included in the list of relevant enactments under s.17 of FSMA 2023, however we anticipate that a thorough review of the tax implications for PISCES participants will be crucial to the design of the model.

If you would like to discuss any of these comments then we would be happy to do so. Please contact Hannah Meakin (by telephone on +44 (0)20 7444 2102 or by email at hannah.meakin@nortonrosefulbright.com) or Nicholas Holmes (by telephone on +44 (0)20 7859 2058 or by email at nicholas.holmes@ashurst.com) in the first instance.

Yours faithfully

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