FSA CP12/2 – AMENDMENTS TO THE LISTING RULES, PROSPECTUS RULES, DISCLOSURE RULES AND TRANSPARENCY RULES

RESPONSE OF THE LAW SOCIETY OF ENGLAND AND WALES AND THE CITY OF LONDON LAW SOCIETY

26 APRIL 2012

This response has been prepared jointly by the Company Law Committee of the Law Society of England and Wales and by the City of London Law Society Company Law Committee.

The Law Society of England and Wales is the representative body of over 120,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and makes representations to regulators and Government in both the domestic and European arena. This response has been prepared on behalf of the Law Society by members of the Company Law Committee. The committee is made up of senior and specialist corporate lawyers.

The City of London Law Society (**CLLS**) represents approximately 13,000 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 17 specialist committees and in this case the response has been prepared by the CLLS Company Law Committee.

We set out below our comments on the specific questions asked in the consultation paper, using the same headings and numbering.

Premium listing: wider issues

Q1: What, if any, changes to the Listing Rules do you believe may be necessary to provide additional protection to investors?

We believe that any attempts to strengthen the premium listing standard should be balanced with the need to maintain the holding of a premium listing in the UK as an attractive option for issuers. Should the regime become too rigid or inflexible (in particular in setting higher corporate governance standards) it may be off-putting to some issuers who may decide that other markets cater for a wider range of organisational structures than the London premium market permits. Leaving aside the competition from overseas exchanges, if the premium listing standard is deemed too onerous or inflexible it may push issuers who want to list in the UK to seek a standard listing, or a listing of GDRs or AIM admission instead. Ultimately, this might be detrimental for investors, as fewer companies will be listed with the higher standard that premium listing provides. A balance therefore needs to be struck between affording high standards for investors and remaining an attractive option for issuers.

An issue that has arisen in this context is the concern that governance problems could arise in listed companies with a controlling shareholder. On the other hand, a shareholder with a significant stake in the company's long-term prosperity can often be advantageous to all the company's stakeholders. One response to the possible governance problems (which in our view is likely to be more effective than, for example, a change in the free-float requirement) would be for the company to demonstrate that it is sufficiently independent (in the sense that the controlling shareholder cannot improperly exploit its control to the detriment of other shareholders) by entering into a relationship agreement with the controlling shareholder, as a pre-condition to listing. However, we think that it is important that appropriate guidelines or guidance are developed as to the minimum content of a relationship agreement as the reason why the requirement for relationship agreements was previously not effective was the lack of certainty as to their ambit or contents. We

encourage the FSA to give further consideration to this, as we believe that it may assist the aim of securing responsible, long-term corporate ownership.

As regards other protections for minority shareholders, it may be useful to impose an obligation in the case of a non-UK applicant to summarise the rights that such shareholders have at law in the issuer's country of incorporation so that potential minority investors have a better idea of what they are investing into.

As regards the suggestions made to enhance the premium standard, we would note that it may not be easy to implement these in practice. For example, weighting the voting rights of minority shareholders in certain circumstances would cut across fundamental shareholder rights and the Companies Act 2006 and serve to negate the power associated with ownership. In relation to the related party rules, it is notable that recent amendments to these rules have tended to relax rather than strengthen them (for example, removing 50/50 joint venture parties from the definition of a related party). To impose requirements, for instance, in relation to the appointment or removal of directors that differ from those in the Companies Act would not be appropriate.

We believe that improved investor protection may be better achieved by changes to those areas outside the FSA's ambit such as making changes to the FTSE criteria for entry to the FTSE 100 so as to introduce governance requirements where appropriate.

Reverse Takeovers

Q2: Do you agree with the proposal to amend the Listing Rules (LR 5.6.2R) to narrow the reverse takeover exemption so that it only applies to listed issuers acquiring another listed issuer listed within the same listing category?

Whilst we have no particular issue with the proposal to amend the Listing Rules (LR 6.6.2R) to narrow the reverse takeover exemption so that it only applies to listed issuers acquiring another listed issuer in the same listing category, we note that the proposed LR 5.6.1R catches companies with standard listings and GDRs, although such companies are not currently subject to the provisions relating to reverse takeovers. Although we appreciate that standard listed companies are subject to suspension under LR 5.1.2G(4), this is a significant change to the GDR listing regime and is likely to prejudice holders of GDRs in cases where the shares underlying the GDRs are listed on another market and not subject to suspension. The consultation paper makes it clear that in the FSA's view this is only a clarification of the scope of the reverse takeover rules rather than a change in the rules. While it is obviously the FSA's intention (evidenced by the move of the reverse takeover rules into Chapter 5 of the Listing Rules) that the new rules should apply to such issuers, the current reverse takeover rules in Chapter 10 apply only to companies with a premium listing (see LR10.11), and we would query what the policy reason behind this change is, particularly as regards issuers of GDRs. In particular, we are unclear as to why the reverse takeover rules should apply where a company with a standard listing acquires a company with a premium listing.

On a more minor drafting point, in proposed LR 5.6.2R, we think this should state that “LR 5.6 and LR 5.2.3G do not apply, etc.”

Q3: Do you agree that the proposed guidance on a fundamental change (LR5.6.5G) contains the key indicators? Do you think there are other factors that should be considered and if so what are they?

We consider that paragraph (1) is too wide and that it would be more appropriate to focus solely on a material change in the nature of the business in question and not on a change in

"strategic direction" which is a concept with a very broad range of potential meanings. As regards paragraph (3), we are unsure whether this is meant to refer to suppliers and end users in different markets, rather than simply different suppliers/end users within the same market. In the context of additional guidance being given on the meaning of these provisions, we also wonder whether it would be useful to provide guidance as to what would amount to a "change in the board or voting control of the issuer" (LR 5.6.4R(2)). Does this require the enlarged entity to have a significant new shareholder that the issuer did not have before? Is there a difference between board composition and "board control"?

Q4: Do you agree with the proposed changes to codify within the Listing Rules (LR5.6) the existing practice to contact the FSA as soon as possible once a takeover is agreed or details of the transaction have leaked, to discuss whether a suspension is appropriate?

In proposed LR 5.6.6R we feel that the language "as early as possible" is too vague in relation to the situation where a reverse takeover is in contemplation in that a transaction being "in contemplation" may be very different to there being any likelihood of its occurring. Such an obligation would also cut across an issuer's ability under DTR 2.5.1R and 2.5.3R to delay disclosure where there are "negotiations in course".

We believe that, whether or not the issuer is premium listed, the obligation to contact the FSA should remain with the issuer and not be a sponsor obligation, particularly if the proposed language is to remain, as the sponsor's ability to comply will generally depend on the issuer advising the sponsor of its intentions. We accept that, in practice, it may well be the sponsor who contacts the FSA, but the primary obligation to inform the FSA should remain with the issuer.

Q5: Do you agree with the proposal to amend the Listing Rules (at LR5.6) to require an issuer to make an RIS announcement in relation to disclosure requirements, in addition to confirmation from the issuer?

On the particular issue raised by this question, we consider that it is unnecessary to require public announcement of the equivalence of relevant disclosure standards with UK standards in every relevant reverse takeover announcement. This could theoretically lead to different issuers/sponsors coming to different opinions about the equivalence of standards of a particular regulated market. As an alternative, continuation of the practice of private discussion with the FSA would potentially allow agreement of a list of regulated markets that are generally considered to have equivalent standards, and reasoned discussion of whether any market not previously considered by the FSA should join that list.

We note that there are no specific questions in the Consultation Paper relating to the other statements that an issuer is required to make in an announcement made to avoid suspension. However, we are particularly troubled by the new requirement being placed on an issuer to confirm target compliance with disclosure standards, with no awareness qualification, on an on-going basis and looking back indefinitely. This will place a heavy burden on the issuer even where the target is co-operative and could be a major impediment for the exemption from suspension to apply. It seems particularly excessive where the target concerned is listed on a regulated market; for example, this could require a standard listed issuer to make such a statement about a premium listed target, while a premium listed issuer making the same acquisition would not even be subject to the reverse takeover rules.

In addition, the requirement, in certain circumstances, for the issuer to disclose information to the market as if the target was already part of its group will continue to present considerable challenges, especially where there is a lengthy gap between announcement

and completion. It will require the issuer to secure full co-operation from the target, which may have to disclose information that would otherwise remain confidential, at a time when conditions to the transaction remain unsatisfied. Where there are regulatory hurdles to overcome, there could be additional sensitivity over the sharing of some information between issuer and target.

The net result of these difficulties may be that in some cases an issuer may have no alternative to suspension. However, in many cases, the threat of a suspension of listing prevents a deal from coming to fruition and we therefore wonder if from this perspective it would be sensible for the requirements to be softened.

We also think it would be useful to clarify in the new Rules that any suspension will in any case be lifted on the publication of a prospectus for the enlarged group. In this context, it would also be useful to identify whether a company that has made an announcement in accordance with new LR 5.6.14 will be required to comply with new LR 5.6.17 even after publication of an enlarged group prospectus, as well as complying with the supplementary prospectus requirements.

Q6: Do you agree with the proposal to amend the Listing Rules (at LR 5.6) to allow a premium listed issuer to have a modification within its track record when undertaking a reverse takeover, without rendering the enlarged group ineligible?

We agree with this proposal.

Q7: Do you agree with the proposal to amend the Listing Rules (LR 5.6) to follow the principles of our transfer provisions in the case of issuers acquiring targets which are also listed but in another category?

We consider the requirement for an eligibility letter to be provided to the FSA 20 business days prior to announcement where the acquisition is of a listed company in a different UK listing category is unduly onerous, given that there would generally be ample opportunity to deal with this at a later point. We note that timing could be a particular problem where the announcement is required as a result of a leak. By contrast, a reverse takeover of an unlisted company, involving a re-listing of the issuer, would only require submission of an eligibility letter when the draft prospectus is first submitted to the FSA.

In proposed LR 5.6.22 G (3)(b), we believe it would be helpful to refer to "material" changes.

In proposed LR 5.6.22 G (3)(c), we think this should refer to any effect on the issuer's ability to discharge its obligations under the Listing Rules, rather than simply to any change in its obligations, given that the latter will remain the same.

Q8: Do you agree with the proposal to delete LR 10.2.3R allowing an issuer with a premium listing undertaking a reverse takeover, to be treated in certain circumstances as a class 1 transaction?

We consider LR 10.2.3R to be a useful tool under the Listing Rules. It provides flexibility for the FSA to deal only with transactions that are genuine reverse takeovers. However, we have found, in practice, that the rule has been applied by the UKLA in a rigid manner with the result that it has not been as useful as it might have been. We consider that it is the approach to its application that has led to its not being widely used. We, therefore, wonder whether the definition of a reverse takeover needs careful consideration to ensure that it only captures those transactions that are genuinely reverse takeovers, and not smaller, anomalous transactions for which flexibility in how they are treated is essential. Given the significant additional regulatory process and practical execution risk attached to a

transaction classified as a reverse takeover as opposed to a Class 1 transaction, we would argue for a slight narrowing of the definition of reverse takeover; for example, the criteria this exception could be changed to one where the consideration test does not exceed 125% and none of the other tests exceeds 100%.

Sponsors

Generally, we would observe that, the new duties proposed to be imposed on sponsors as regards the FSA could potentially cause tension in the relationship between sponsors and issuers, and increase (from an already high level) the level of verification and due diligence a sponsor will require to an impractical and inappropriate extent, without necessarily providing any corresponding benefit. The widening of the role and the obligations of sponsors will almost certainly increase the effective cost of a premium listing for issuers and may be significant to small cap companies.

Q9: Do you support the proposal to amend the Listing Rules (LR8.2.1R(6)) so that for smaller related party transactions a premium listed company is required to appoint a sponsor for the purpose of providing the FSA with confirmation that the terms of the proposed transaction are 'fair and reasonable' as far as shareholders are concerned?

The appointment of a sponsor could increase costs, and, on smaller transactions, we wonder if this additional cost will be proportionate to the benefit gained - in particular, we wonder if the FSA has any evidence that the current regime is inadequate. The question of cost is even more important where, as acknowledged in the consultation paper, it may, notwithstanding the appointment of a sponsor, be appropriate to appoint an independent adviser to give the advice required by the sponsor to enable it to give its confirmation. In such circumstances, there would be a dual layer of costs.

Q10: Do you support the proposal to amend the Listing Rules (LR 8.2.1R(7)) so that for Related Party Circulars a premium listed company is required to appoint a sponsor for the purpose of providing the FSA with confirmation that the terms of the proposed transaction are 'fair and reasonable' as far as shareholders are concerned?

We can see the logic in this proposal.

Q11: Do you support the proposal to amend the Listing Rules (LR 8.2.1(9)) to require a premium listed company to appoint a sponsor to discuss with the FSA whether a suspension of the listing is appropriate, before announcing a reverse takeover (that has been agreed or is in contemplation or where details of the reverse takeover have been leaked)?

We have no comments on LR8.2.1(9) itself. However, we are unsure about the interrelation of proposed LR 8.2.1 R (9) and LR 5.6.6 R and in particular, as regards timing. LR8.2.1 R (9) appears to be a simple obligation with no timing requirement, whereas proposed LR 5.6.6 R refers to the need to contact the FSA *"as early as possible before announcing a reverse takeover which has been agreed or is in contemplation*". See also our response to question 4 for our reservations on the use of that language.

Q12: Do you support the proposal to amend the Listing Rules (LR 8.2.1R(10) and LR8.2.1R(11)) so that where the target of a reverse takeover is not subject to a public disclosure regime, the premium listed company is required to appoint a sponsor in order to make a confirmation regarding the issuer's declarations, to the FSA?

We have no particular comment to make about the requirement to appoint a sponsor, but see our response to question 5 for our reservations about the proposed disclosure obligations.

Q13: Do you support the proposal to amend the Listing Rules (LR8.2.1R(12)) to require a premium listed company to appoint a sponsor for the purpose of submitting the eligibility letter required as a result of a reverse takeover?

No comment.

Q14: Do you support the proposal to amend the Listing Rules (LR8.2.1R (13)) to require a sponsor to be appointed in relation to severe financial difficulty letters?

We are happy with this proposal, as, in practice, a sponsor tends to be appointed in relation to severe financial difficulty letters.

Q15: Do you support the proposal to amend the Listing Rules (LR8.2.1R(14)) to require a sponsor to be appointed in relation to the acquisition of a publicly traded company?

Sponsors will need to take advice and obtain comfort in order to give this confirmation, which will add to the cost and complexity of transactions.

Q16: Do you support the proposal to amend the Listing Rules in respect of the definition of sponsor services to include all sponsor communications with the FSA in connection with the sponsor service?

We believe that the definition of sponsor service could be improved to clarify that, where a sponsor also provides other services to an issuer, for example where it also acts as broker and/or financial adviser, communications made in its non-sponsor capacity do not fall within the definition.

We are not sure why the last sentence of the definition has been deleted and think that it should be reinstated.

Q17: Do you support the proposal to amend the Listing Rules (LR8.3.1R(1A)) so that a sponsor is required to provide any explanation or confirmation as the FSA reasonably requires for the purposes of ensuring that the Listing Rules are being complied with by an applicant or listed company?

No comment. The proposal generally restates current practice and, in any event, should be covered by the general principles.

Q18: Do you support the proposed amendments to the Listing Rules (LR8.3.1AR) in relation to sponsor communications and standard of care?

We wonder whether the wording of proposed LR 8.3.1 A R could be clearer. In particular, the words "take all reasonable steps" seem unduly onerous, for example, when a sponsor is relying on third party expertise. Paragraph 3.24 of the consultation paper is helpful in that it clarifies what action might, in such circumstances, amount to reasonable steps, and we wonder if similar clarification could be incorporated in proposed LR 8.3.1 A R.

Similarly, we believe that the requirement to produce information "immediately" may be one which is difficult to implement in practice and wonder whether this should be replaced with "as soon as reasonably practicable".

Q19: Do you support the proposed amendments to the Listing Rules (LR 8.3.2AG) in relation to sponsor communications that seek to reinforce the responsibility of the sponsor for communications with the UKLA, in instances where a sponsor relies on representations made by the listed company or applicant or a third party?

We wonder whether the emphasis on sponsor responsibility, notwithstanding the reliance of sponsors on third party assurances, could lead to an increased requirement from sponsors for separate advice and possible increased costs for issuers, without necessarily giving rise to any corresponding benefit.

Q20: Do you support the proposal to amend the Listing Rules (LR 8.3.5BR) to introduce a Principle of Integrity for sponsors?

No comment.

Q21: Do you support the proposal to amend the Listing Rules (LR8.3) to clarify that a sponsor must, as part of its ongoing conflicts checking procedures, take all reasonable steps to identify conflicts that could adversely affect its ability to perform its functions under LR8?

We are puzzled by some of the statements made in paragraphs 3.29 and 3.30 of the consultation paper and would suggest that these be clarified and perhaps included as guidance in the amended LR8.3 rules. In particular, we wonder what the FSA has in mind when saying that a sponsor will need to ensure it "refreshes its conflicts checks" for the duration of the relevant sponsor service and when saying that sponsors will be required to extend their conflicts checking procedures so that they consider "regulatory" as well as client conflicts.

Q22: Do you support the proposal to amend the Listing Rules (LR8.6.16) so that sponsors are required to retain accessible records which are sufficient to demonstrate the basis on which sponsor services have been provided?

Whilst we agree with the intentions behind proposed LR 8.6.16AR, we believe there is a need to balance the principles of best practice record keeping with the practical constraints. Whilst it is possible to contemplate what should be in theory maintained, the practicalities of putting in place measures to ensure such an outcome can be difficult to achieve. For example, there can often be frank and robust discussion of a topic in a meeting, but accurately reflecting that in records can be a challenge. We believe that the rules, and any associated guidance, need to be flexible enough to acknowledge such practical issues.

Additionally, we wonder if there is merit in trying to introduce a concept of materiality so that the same level of compliance does not attach to every step, and in particular, the minutiae involved in providing a sponsor service.

If the points raised above are not taken into account, and the rules have to be taken account of literally by sponsors, we have concerns that this will lead to an unduly onerous compliance burden which is disproportionate to the overall objective that is trying to be achieved.

Q23: Do you agree with the proposal to amend the Listing Rules (LR 8.7.8) so that sponsors are required to notify the FSA of matters that would be relevant to the FSA in respect to: market confidence; reorganisations; and, ongoing approval as sponsor?

We think that the use of the word "could" in proposed LR 8.7.8 R (1)(b) and LR 8.7.8 R (10) is too low a threshold, and that wording such as "would be likely to", or similar, would be more appropriate.

Q24: Do you support the proposal to amend the Listing Rules (LR 8.7.21AG) so that sponsors are required to submit a cancellation request in the event that they are unable to provide the requisite assurance of ongoing eligibility?

No comment.

Q25: Do you support the proposal to amend the Listing Rules (LR8.7 and LR 8.3.13G) so that sponsors are no longer required to submit Conflicts Declarations?

Yes we do, but we would note that it will not be possible in all circumstances for sponsors to take "all reasonable steps" to identify conflicts as required by LR8.3.7BR, such as, for instance when a sponsor receives a call from an issuer requiring immediate advice to be given and the obligation imposed by LR8.3.12A takes no account of such circumstances. In such a case, a sponsor will take whatever steps it can reasonably take in the time available while endeavouring to advise its issuer client as quickly as required.

Q26: Do you support the proposal to amend the Listing Rules (LR8.6.17R and LR 8.7.8R(9)) so that sponsors are no longer required to carry out regular reviews?

Yes we do.

Q27: Do you support the proposal to amend the Listing Rules (LR 8.5.6R) to introduce a specific obligation on premium listed companies and applicants to co-operate with their sponsor to enable the sponsor to discharge its obligations to the FSA?

We consider that it may be useful to include guidance about what this might entail. For example, would it require issuers to inform sponsors of breaches, even where a sponsor is not currently engaged in sponsor work for the issuer and/or the breach does not relate to the work being undertaken? Also, in practice, will such an obligation on issuers mean that they need a thorough understanding of a sponsor's obligations under the Listing Rules in order to comply and, if so, how would this be achieved? We wonder if deleting most of the second line of the proposed rule so that it reads as follows would provide a sufficient level of obligation for an issuer:

> "A company with or applying for a premium listing must cooperate with its sponsor, including by providing to the sponsor all information reasonably requested by the sponsor, for the purpose of carrying out the sponsor service in accordance with LR 8".

We also believe that LR8 is not the correct place for this Listing Rule, given that is applies to issuers, not sponsors. LR9 would be appropriate.

Q28: Do you agree with the proposed amendments set out in paragraph 3.45?

In relation to the amendment in 3.45(b), we believe that the removal of the materiality threshold from the requirement to notify information concerning rule breaches (in proposed new LR 8.3.5AR) may lead to an increase in potentially unnecessary notifications to the FSA and may cause tension in the relationship between sponsors and issuers. We would therefore suggest reinstating the materiality threshold.

Transactions

Q29: Do you support the proposal to remove reference to 'revenue nature' from LR 10.1.3R(3) and LR 11.1.5R of the Listing Rules?

We agree with this proposal.

Q30: Do you support the proposal to amend the Listing Rules to dispense with the notification requirements for class 3 transactions by deleting LR 10.3 from the Listing rules?

We agree with this proposal.

In a similar vein, we note that LR10.4.2 contains an open-ended requirement on an issuer to make a supplementary announcement if there are significant changes/new matters following a Class 2 (or Class 1) announcement. We suggest that it would provide certainty for issuers if this were subject to an end date (e.g. completion of the transaction), after which DTR 2 would apply.

Q31: Do you agree that the proposed guidance on operation of our proposed new definition of break fee arrangements (LR10.2.6 and LR10.2.7) provides sufficient direction?

We agree with the proposal.

Q32: Do you support the proposal to amend the Listing Rules (LR 10.5.2, LR10.5.4 and LR 11.1.7) to require premium listed companies to send a supplementary circular to shareholders in the event a significant change or a significant new matter is considered to constitute necessary information?

We believe that conforming the wording in respect of the class rules (LR 10.5.4) and the related party rules (LR 11.1.7) as proposed is useful in ensuring a consistent approach in both.

However, we believe that, whilst it is useful for issuers to have the ability to issue a supplementary circular (as is currently the case), there is no need for the rules to specify when, and within what deadlines, an issuer must do so. Listing Principles 3 and 4 already require issuers to ensure that the information they send to shareholders is not misleading. In addition, directors already have a duty to shareholders to provide enough information to enable them to make an informed decision at a shareholders' meeting, and shareholders can vote in favour of an adjournment of the meeting if they believe they need more time to consider any new information made available shortly before, or at, the meeting.

In this context, we think that the requirement for supplemental circulars for class 1 and related party transactions where there is a significant change or new significant matter, and for a seven-day adjournment to shareholder meetings, could lead to significant delays in closing transactions, with a questionable benefit to the investor community, as compared to existing requirements under which a new class 1 circular is only required where the terms of the transaction are changing materially. The proposed wording in LR 10.5.4R requires a company to send a supplementary circular to shareholders if there is a material change affecting **any matter** (our emphasis) the listed company is required to disclose, or **any matter** (our emphasis) the listed company would have been required to disclose if it had arisen at the time of publication of the circular. There is no requirement for the change or new matter to be one that would materially affect the decision shareholders are being asked to make. For example, there might be a change to a material contract, where the change is

a material change to that contract but not material in the context of the particular acquisition or disposal shareholders are being asked to approve.

LR 10.5.5G also suggests that it may be necessary to adjourn a shareholders' meeting if a supplementary circular cannot be sent to shareholders at least 7 days prior to the convened shareholder meeting. It does not explain the basis for this reference to 7 days or the circumstances in which it would not be necessary for the meeting to be adjourned. As explained above, we do not think this is a matter that should be dealt with by the Listing Rules.

Q33: Do you support the proposal to remove the reference to 'revenue nature' from LR 11.1.5R of the Listing Rules?

We support these changes (including those in LR11.1.5(2)R), which we believe will be very welcome to issuers.

Aggregation of transactions in any 12 month period

Whilst not specifically raised by the consultation questions, we believe that the proposed changes do not fully clarify the position on the aggregation of related party transactions over a 12 month period. While the proposed changes provide that the transactions to be aggregated within a 12 month period "include" transactions and arrangements falling under LR 11.1.10R (the rule relating to transactions with ratios of less than 5%) and paragraph 1 of Annex 1 to LR 11 (the exception relating to transactions with ratios of 0.25% or less), they do not address whether transactions (other than small transactions) which are exempted from the related party rules by Annex 1 to LR 11 (for example, take up of rights issues, loans to directors, transactions agreed before the counterparty was a related party) should or should not be aggregated with later transactions with the same related party, when deciding how to classify those later transactions. We consider that such other exempted transactions should not be included in any later aggregation, as their exempt nature is not related to their size.

Definition of Associate

Whilst not specifically raised by the consultation questions, we feel that the new "partnership" definition of a related party associate may be difficult to apply as currently framed; for example, the reference to "voting rights" does not translate very well to a partnership context. In a limited partnership, there are few matters on which a limited partner has a vote, but equally the general partner would control the running of the partnership without having any "voting" rights as such. In addition, economic rights may also be difficult to quantify where different partners have different profit rights.

Q34: Do you support our proposals in relation to directors' indemnities and similar arrangements (LR10 and LR11)?

The manner in which the Listing Rules distinguish between a company's advances to its directors under section 205 of the Companies Act 2006 on the one hand and under section 206 of that Act on the other is confusing. We submit that all Defence Funding Loans should be included within the exemptions from the related party regime.

If it is accepted that Defence Funding Loans should be so exempted, we would also submit that the same logic should be applied to the class test regime such that a similar exemption to that set out in LR11Annex1R5(1)(c) (to include s206 loans or advances) should be included within LR10. We suggest that, to achieve this, the FSA needs to: (a) amend the definition of "transaction" in LR 10.1.3R to specifically exclude Defence Funding Loans; and

(b) also add Defence Funding Loans to the list of exempt indemnities in LR 10.2.5G. We note the FSA's comment that a cap could be included in director loans to prevent them falling foul of the Class 1 requirements, but we do not think that this gives shareholders much additional comfort from a practical perspective, while causing potential worry and uncertainty for directors.

We also believe that the guidance in LR10.2.5G is too narrow. It only allows an indemnity that is specifically permitted to be given to a director or auditor under the Companies Act 2006. Many listed groups include non-UK companies and indemnities and loans given to directors and officers of those non-UK companies in accordance with the laws of the relevant jurisdiction should also be treated as not being exceptional. We therefore think that the exemption should be extended to cover non-UK companies, in the same way as is done in paragraph 5 of Annex 1 to LR11.

Q35: Do you agree with the proposed amendments to the Listing Rules (LR12.2, LR12.4 and LR13.7) in relation to the purchase of own equity shares?

We agree with the proposed amendments.

Q36: Do you agree with the 0.5% threshold proposal (LR12.6.4R) requiring companies to announce any issue, sale or cancellation of treasury shares under an employee share scheme over 0.5% of a company's issued share capital (excluding treasury shares)?

We agree.

Q37: Do you support the proposal to amend the Listing Rules (LR13.1 and LR13.2) so that the circular must be posted to shareholders as soon as it has been approved and our proposals to require circulars to be sent to shareholders no later than seven days before the date of a meeting?

We do not consider the proposed changes helpful. The proposed language requiring a circular to be sent to shareholders "as soon as practicable after it has been approved" could mean a period greater than that required under the Companies Act 2006 and we see no basis for that. Similarly, the requirement in proposed LR 13.1.9 R that circulars must be sent to holders of listed equity shares to allow sufficient time for review and consideration is not, we believe, helpful, although we note that this is at least stipulated as being no later than 7 days before the date of a meeting. Despite the qualification, we consider the wording is too vague to be helpful, and may lead to shareholders expecting a longer period to review documents than is currently prescribed by statute.

Whilst we would prefer the proposed rule to be amended for the reasons given above, it is unclear to us how, as currently drafted, the requirement to send a circular as soon as practicable after it has been approved, as in proposed LR 13.2.10 R, sits with the requirement to send it in time to allow sufficient time for review and, in any event, no later than 7 days before a meeting, as required by proposed LR 13.1.9 R.

We also do not think the addition of the proposed words to LR13.1.3 are helpful. There are cases where a listed company may want to refer to an approved prospectus of another company, for example, where it has acquired another listed company which has published a prospectus, or where a new holding company has been inserted on top of a group and it wishes to refer to a prospectus issued by the previous holding company.

More generally on LR13, we note that there continue to be some routine shareholder matters that are not covered by LR 13.8; for example, sub-divisions and consolidations of

share capital. As these are generally viewed as routine, it would be useful to include them within the scope of matters not requiring UKLA review.

Q38: Do you support the proposal to amend the Listing Rules (LR13.4.1R(4)) so that both the issuer and its directors will be referred to as taking responsibility for the contents of a class 1 circular?

No comment.

Q39: Do you support the proposal to remove the requirement (LR13.6.1R(7)) for listed issuers to include class 1 disclosures within a related party circular, in the event a transaction has a percentage ratio greater than 25%?

We agree with the proposal.

However, we wonder whether certain of the "transactions" that are referred to in the FSA commentary, such as amendments to investment management agreements, should also be specifically exempted from LR 10 as well, in order to ensure that there is no continuing obligation to comply with any Class 1 provisions in respect of such matters.

Financial Information

Q40: Do you support the proposal to amend the Listing Rules (LR6.1.1R and LR6.1.1A) to reflect the FSA's current approach of not applying Chapter 6 where an existing premium listed company sets up a new holding company, provided that no transaction is being undertaken that would increase the assets or liabilities of the group?

We support this proposal.

Q41: Do you support the proposal to amend the Listing Rules (LR6.1.3R(1)(b)) to limit the date of admission of the securities to listing to a date not more than 3 months after the date of the prospectus?

No. We note that the proposed listing rules require a new issuer to have published a balance sheet which is not more than nine months before the date of admission to listing – they do not, as the consultation paper suggests, limit the validity of a prospectus to three months after its date of issue. The new requirement for audited accounts of the issuer to be no more than nine months old at re-admission may leave an issuer with a requirement to procure and publish a new set of audited target accounts. We expect this requirement could prove to be particularly problematic in takeovers, if the satisfaction of conditions to closing in a merger or takeover context or reverse takeover context (for example, anti-trust or other regulatory conditions) takes longer than expected, as updated audited accounts of the target may not be easily available.

Q42: Do you agree with the proposal to amend the Listing Rules (LR6.1.3R(2)) to remove the reference to auditors and focus on the independence of the person providing the opinion?

Yes, although we question whether the rules should specify or refer to the qualifications required of the independent person.

Q43: Do you agree with the proposal to amend the Listing Rules (LR6.1.3AG) to include new guidance describing the types of modification to the opinion on audited accounts which may be acceptable to the FSA based on our current practice?

Yes, this is helpful.

Q44: Do you support our proposals in the related rules and guidance on the sufficiency of the historical financial information (LR6.1)?

The inclusion of such guidance is helpful.

Q45: Do you agree with the proposed clarification of our approach in the Listing Rules (LR6.1.8R and LR6.1.11R) that if a mineral or scientific research company has not been operating for the required period of three years, it must have published or filed accounts since the inception of its business activities?

This would appear to prevent a mineral company or scientific research company obtaining a premium listing until after it has produced audited financial statements. We would question whether this is sensible.

Q46: Do you agree with the proposed clarification in the Listing Rules (LR6.1.12R) that a scientific research company must have proved its ability to attract funds from sophisticated investors prior to the marketing at the listing date?

Yes.

Q47: Do you agree with the proposed consequential amendments to the guidance (LR6.1.13G and LR6.1.14G) relating to the cases where the FSA can modify accounts and track record and the amendment to clarify that the guidance is only relevant to the accounts and track record requirements?

No comment.

Q48: Do you agree with the proposed new guidance in the Listing Rules (LR 6.1.20AG) clarifying that holdings of individual fund managers in an organisation will be treated separately, provided investment decisions with regard to the acquisition of shares are made independently?

Yes, although if decisions need to be 100% "unfettered", this may make this relaxation redundant. The views of investment management groups in this regard would be informative.

Q49: Do you agree with the proposed new guidance in the Listing Rules (LR6.1.20BG) explaining that we consider that financial instruments that give a long economic exposure to shares, but do not control the buy/sell decision in respect of the shares, should not normally count as an interest for the purpose of the public hands threshold?

We broadly agree with the proposal. Whilst it does not fit with the general treatment of CFDs, for example in the DTRs, where they are treated as equity, we can see that there would be difficulties in permitting CFDs to count towards the free float.

Also, LR 6.1.20BG appears to contain a typo. The first line refers to “a financial instrument that provides a long-term economic exposure to shares”. We think this should instead refer to financial instruments providing “a long economic exposure to shares”. That would be consistent with paragraph 5.20 of the consultation paper, and also LR 6.1.20BG's subsequent reference to a “long position in shares”.

Q50: Do you agree with the proposal to amend the Listing Rules (LR6.1.23R) so that a company’s constitution and the terms of its shares must be compatible with

electronic settlement, rather than requiring the shares to be settled electronically, or do you think we should delete the requirement altogether?

Whilst we agree with the comment that the requirement is more a matter for the markets upon which the listed shares are traded, we would suggest that the provision should only be deleted from the Listing Rules, if the point is definitely covered by the relevant markets' rules. Alternatively, we would suggest leaving the requirement in, but adding guidance covering the points made in paragraph 5.21 of the consultation paper on overseas companies/depositary interests.

Q51: Do you agree with the proposed amendments (LR13.4.7G) to the requirements for class 1 acquisitions of mineral assets?

The inclusion of such guidance is useful.

Q52: Do you agree with the proposed amendments to the Listing Rules (LR 13.5), which detail the acceptable treatment for entities that have been or will be equity accounted or treated as an investment in the accounts of the listed issuer?

No comment.

Q53: Do you support the proposal to amend the Listing Rules (LR 13.5.3CR) so that, where financial information is required but cannot be provided in the appropriate form, a valuation report should be included in the class 1 circular?

Yes.

Q54: Do you find helpful the proposal to clarify in the Listing Rules (LR13.5.4R(2)) the exceptions to the rule that financial information in a class 1 circular must be prepared according to the accounting policies adopted in the issuer's latest annual consolidated accounts?

No comment.

Q55: Do you support the proposal to amend the Listing Rules (LR13.5.9AR) so that listed issuers are required to make specific disclosures in respect of synergy benefits?

We do not believe that a requirement to provide the details set out in the proposed LR 13.5.9AR will add anything meaningful. In particular, we have concerns about what the requirements really mean and how issuers would realistically be expected to comply with the obligation.

The Takeover Code only imposes additional requirements in relation to paper offers which are not recommended and we do not believe that it will be helpful to impose additional requirements outside these situations.

If, however, it is felt that more is required, we think that the issues raised in paragraphs 5.37 to 5.40 of the consultation paper would be better dealt with by guidance rather than a rule. In practice, we believe that issuers will give the level of information they believe investors need to make an informed decision. If investors feel there is insufficient information they will seek clarification or not invest. It is, therefore, in the interests of issuers to ensure investors are given the information they need. However, we accept that guidance on the factors that issuers should consider or take into account may be useful. We would be happy to assist in formulating this.

Q56: Do you agree with the proposal to amend the Listing Rules (LR13.5.17) to clarify that the financial information on companies acquired by targets should represent at least 75% of the enlarged target, or in the case of a reverse takeover 75% of the enlarged group?

This appears logical, but there may be a concern where target's financial records are, for reasons outside the listed company's control, insufficient to enable compliance.

Q57: Do you support the proposed amendments to the Listing Rules (LR13.5.21R) to require financial information tables to detail the accounting policies used and that the accountant's opinion need only state that the table gives a true and fair view?

This seems helpful.

Q58: Do you support the proposal to amend the Listing Rules (LR 13.5.27R) relating to acquisitions of companies traded on 'overseas' investment exchanges to allow the concession to apply where the FSA is satisfied as to the appropriateness of a particular investment exchange or MTF?

Yes, we support this. It would be helpful if AIM and certain other relevant exchanges and facilities having appropriate standards were specified.

Q59: Do you agree with the proposal to include in the Listing Rules (LR 13.5.27AG) guidance as to the matters the FSA will consider and the timetable, when reviewing the appropriateness of a particular investment exchange or MTF?

No comment.

Q60: Do you support the proposal to amend the Listing Rules (LR13.5.27) to allow certain modified opinions in financial information tables and require a positive assertion that the accounting policies are consistent?

We support the proposal to allow certain modified opinions. We express no view regarding the proposed requirement for a positive assertion.

Q61: Do you support the proposal to amend the Listing Rules (LR13.5.27) to allow the issuer to choose whether to include interim and quarterly financials in a circular and the proposed amendments to LR 13.5.30R?

We support the proposal to increase choice in terms of the inclusion of quarterly and interim figures, but express no view on the proposed requirements as to presentation.

Q62: Do you support the proposal to amend the Listing Rules (LR13.5.30) to amend the order of preference for the sourcing of disposal entity financial information and to allow the limited use of allocated financial information where such allocation is necessary and appropriately explained?

This seems logical, but we express no views on the detailed proposed requirements.

Q63: Do you agree with the proposal to amend the Listing Rules (LR13.5.30CR) so that in circumstances where accounting policies (or GAAP) may have changed, the FSA will require issuers to disclose the required financial information under both the old and new bases? As before, we would be interested to know how often the 75% rule above would be applied in practice.

No comment.

Q64: Do you agree with the proposal to amend the Listing Rules (LR13.5.30DG) in relation to the allocation of central costs to disposal entities to clarify that the concession applies only to non-operating costs such as interest and tax?

No comment.

Q65: Do you agree with the proposal to amend the Listing Rules (LR13.5) relating to profit forecasts to clarify that the fact the profit forecast or estimate was prepared for a reason other than the class 1 circular does not itself indicate invalidity and that the phrase 'a significant part of the listed company group' in LR 13.5.33(1)R should be interpreted as at least 75% of that entity?

No comment.

Q66: Do you agree with our proposal to delete LR 13.5.35G so that the requirements for profit forecasts are extended to class 1 disposals?

No comment.

Externally managed companies

Q67: Do you support the proposals to amend the Prospectus rules (PR 5.5.3) and the Disclosure rules and Transparency rules (DTR 3.1) to ensure the principals of the advisory firm are responsible (in addition to the company and its directors) for any prospectus the company publishes in the UK and to clarify that they are subject to transparency rules in their share dealings?

We consider that there are existing tools that the FSA could use when considering whether a company utilising an "external management" structure is suitable for premium listing (e.g. LR 6.1.4(2) and (3)R), without the need for the completely new set of rules proposed.

We also believe that there are existing protections at law that are useful to disgruntled investors and which might mean the proposals are not required or, at least, not required in their current form. For example, shareholders always have the right to remove directors which they could do if they were not happy with the relationship between the issuer and the managing company.

We also think that there is a risk that, in seeking to draft new rules for a type of structure that is still very unusual, the FSA may find itself catching companies and arrangements that are nothing to do with the targeted structure, and it may be necessary to expend considerable effort in refining the wording and/or in providing guidance on application of the new rules, for what may be seen as little real gain.

Q68: Do you support the proposals to amend the Listing Rules (LR6.1) so that commercial companies featuring this structure do not qualify for the premium listing accreditation?

See comments above.

On a smaller point, we note that the suggested amendments currently do not exempt Chapter 15 or 16 companies from compliance with the new provision in LR6, as paragraph 6.17 of the consultation paper suggests would be the case. (This is because, unless LR 15.4.1R and 16.4.1R(1) are amended, they will have the effect of applying LR 9.2.20R to such companies.) In this context, we also wondered whether any thought had been given to how the amended guidance on PDMRs in DTR 3.1.2A(2) would apply to investment managers and/or advisers.

A further drafting question arises in relation to the wording of the new proposed rule (new LR6.1.26R) and guidance (new LR6.1.27R) which would mean that companies featuring an external management structure cannot be premium listed. This is explained below.

In giving an example of an unacceptable structure, LR 6.1.27R refers to strategic decision-making taking place "outside the issuer's group, for example with an external management company". However, the other references which would effect the change (LR6.1.26R, and 9.2.20: definition of "external management company") do not refer to persons outside the group but instead to "another person", ie, this language would widen unacceptable structures to include those managed by a person within the group, not solely those managed an external company. Presumably this is unintentional.

If this is unintentional, we would suggest all the references in the above provisions should be referring to persons outside the group.

Additional points

In addition to the specific comments raised above, we think, given the nature of the consultation, that this is an opportune time to raise the following points:

1. While this point is not addressed in CP12/2, we would ask that the FSA considers amending LR 11.1.6R to recognise that in practice LR 11 is not applied to intra-group transactions (ie, transactions between a listed company and its wholly-owned subsidiary undertaking, or between its wholly-owned subsidiary undertakings). Whilst we are aware that the FSA has confirmed this on several occasions, the current lack of an express carve-out (similar to LR 10.1.3R(5)) has confused some parties. Currently, LR 11.1.3R(1) says that LR 11 applies to transactions by subsidiary undertakings. A subsidiary undertaking will be transacting with a related party if it deals with the listed company (which is a "substantial shareholder") or any of the listed company's other subsidiary undertakings (which are "associates" of a "substantial shareholder").

2. We have noticed that there are a number of items in the consolidated Technical Notes that have not been carried through from List! and there does not appear to be any obvious reason for their omission. We set out the relevant items in the Schedule to this response.

26 April 2012

Schedule

List! issue	Section of List! omitted / brief details
22 (Aug 2009)	7. Schemes of arrangement – Companies House comfort letters/ procedures issuers should follow to avoid having their own shares suspended when undertaking a scheme of arrangement (a continuation of entry in List! 16, which has also been omitted).
21 (May 2009)	1. Property valuation reports – relates to how up-to-date a property valuation report in a property company's share prospectus should be.
Update (Jun 2008)	Electronic communication update. In relation to e-coms letters to shareholders, UKLA agrees that because of the sensitive and confidential nature of some of the details in the letter, it may not be appropriate to include the disclosure required by LR13.3.1(6) (that requires the letter to be passed on to the transferee when shares are sold).
18 (Mar 2008)	3.7 Rescues, refinancings and reconstructions. Section on "What is a rescue?" not included – para 3.7.1 of the List! issue
18 (Mar 2008)	4.2 Requests for transfer to another Competent Authority under PR 3.1.12 – clarification on what the UKLA expects to see in a request for transfer but states "we will deal with each request on a case-by-case basis."
18 (Mar 2008)	5.1. Letters relating to amendments to the Official List resulting from reclassifications/ redenominations; confirms "If an issuer confirms it has obtained legal advice that a Prospectus is not required, it does not need to apply for reclassified or redenominated securities. Instead, the issuer can submit a letter to the UKLA …".
16 (July 2007)	2.2 - regards disclosure in limited access situations. Statement that the principles relating to prospectuses would also be relevant to a listed issuer producing a Class 1 circular has been omitted.
16 (July 2007)	3.5 Targets/forecasts being construed as profit forecasts – UKLA views on circumstances when an investment entity's target/forecast might reasonably be treated as a 'reportable' profit forecast.
16 (July 2007)	5.4 Comfort letters for schemes of arrangement (supplemented in List! 22)
13 (Sep 2006)	6.2. Transactions with sponsors who are part of the investment manager's group. Part of the paragraph on whom the UKLA views as an acceptable independent adviser to provide a fair and reasonable advice.
11 (Sep 2005)	10.1 Loss numbers in class tests. States that where the target or listed company selling or purchasing it has produced a loss in the most recent year, the UKLA will no longer treat the result as necessarily being anomalous. In the first instance, UKLA will disregard the negatives and perform the class test in the normal way, although they can still decide that this produces an anomalous result.

List! issue	Section of List! omitted / brief details
11 (Sep 2005)	10.2 Investment entities. Although an investment entity or VCT need not have a clean working capital statement to be eligible for listing, any prospectus they produce must nevertheless include a working capital statement.
10 (June 2005)	Employee share schemes and options. Unlikely that exercising an employee share option would amount to a public offer.
10 (June 2005)	Exemptions from the requirement to produce a prospectus: c) takeover documents. UKLA inclined to agree that takeover involving a scheme does not fall within definition of public offer.
8 (Dec 2004)	Listing Rule 9.4 and when to disclose. The matter of the need to separate "cause" and "effect" for the purposes of the relevant disclosures is not addressed expressly in the technical notes.