The City of London Law Society

The Law Society

Comments on the consultation versions of the proposed new technical guidance announced in Primary Market Bulletin No.8

Law Society and City of London Law Society joint response

October 2014

Introduction

1. The comments set out in this paper have been prepared jointly by the Listing Rules Joint Working Party of the Company Law Committees of the Law Society of England and Wales and the City of London Law Society.

2. 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.

3. 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.

4. The Listing Rules Joint Working Party is made up of senior and specialist corporate lawyers from both the Law Society and the CLLS who have a particular focus on the Listing Rules and the UK Listing Regime.

5. We set out below our comments on certain draft technical notes under consultation which were announced in Primary Market Bulletin No.8.[1]

Share buybacks – novel/complex approaches and Premium Listing Principle 5 (UKLA/TN/310.1)

Equality of treatment in share buybacks

6. We note that the draft technical note provides that examples of approaches to share buybacks which offend the equality of treatment principle are those that seek to offer different terms to different shareholders '*without apparent good reason for such shareholders to be viewed as being in a different position*'. We think that it would be helpful if the FCA could provide some specific examples of where an issuer may, and may not, have '*good reason*' to offer different terms to different shareholders.

7. Additionally, it would be helpful if the FCA would confirm whether an issuer has '*sound reason*' to exclude certain shareholders, or groups of shareholders, from a share buyback proposal if the extension of the offer to shareholders in certain jurisdictions would seem unduly burdensome. Furthermore, would the FCA consider an issuer to have sound reasons for excluding shareholders where the test set out in the note to Rule 23.2 of the City Code on Takeovers and Mergers would appear to be met in the context of a share buyback proposal? We would welcome further guidance on this aspect.

8. As a point of drafting, we assume that the phrases '*good reason*' set out in the first bullet point of the draft note and '*sound rationale*' set out in the second bullet point, are intended to convey the same meaning – if so, it might avoid confusion if the same term were used in both instances.

Disclosure of 'lock-up' agreements (UKLA/TN/522.1)

9. The FCA states that it is concerned that disclosures of lock-up agreements which omit disclosing the existence of a provision which allows the broker to modify, cancel or waive

[1] Available on the FCA's website, http://www.fca.org.uk/news/guidance-consultations/gc14-5-primary-market-bulletin-no-8.

the lock-up commitment, may lead the market to conclude that the lock-up agreements are irrevocable or unconditional. In our experience, however, it is standard practice for issuers to disclose the terms of the lock-up commitment (for example, the number of shares subject to, and the duration of, the lock-up) to be 'subject to customary exceptions', one of which is typically the ability of the broker to waive, cancel or modify the commitment. By disclosing that the lock-up commitment is subject to standard exceptions, the market is being informed that the lock-up is not irrevocable or unconditional. Consequently, there may be some merit in permitting listed companies to be allowed to continue to disclose that the lock-up commitments are subject to 'customary exceptions' (when applicable), rather than having to disclose each exception in the announcement.

Related party transactions by closed-ended investment funds – amendment of an existing investment management agreement to cover new money (UKLA/TN/404.1)

10. We welcome the FCA's clarification that an amendment to an existing investment management agreement to cover new money is not a related party transaction under LR11. We would also welcome confirmation from the FCA that other 'non-material' amendments to an existing investment management agreement (for example, minor drafting amendments which do not confer benefits upon the investment manager) would not constitute a related party transaction for which the small or smaller related party transaction exemptions cannot be easily applied.

General

We have a couple of general points that we would like to raise with the FCA.

11. First, we note that the FCA, in its Primary Market Bulletins, will usually confirm the status of draft technical and procedural notes which remain under its consideration. However, certain draft technical notes have been subject to consultation some time ago and yet their status has not since been confirmed. For example, a technical note was published for consultation in Primary Market Bulletin No. 5 in February 2013 entitled 'Indemnities, guarantees and similar arrangements (UKLA/TN/310.1)'. In July 2013, the FCA noted that the draft technical note remained under its consideration. However, we have not had any further feedback on the status of the note. Furthermore, it appears that the reference number of the technical note, that is TN/310.1, is now the reference number of the new draft technical note on share buybacks (referred to above). Does this mean that the draft note on indemnities, guarantees and similar arrangements will no longer be published? It would be helpful if the FCA would keep the market informed where notes that have been subject to consultation are not going to be taken further.

12. Additionally, in May this year, the FCA published its Feedback Statement 14/8 in relation to the Listing Rules relating to the new controlling shareholder regime which came into force that month. The feedback statement set out some helpful commentary on the application of the new Listing Rules. For example, in its feedback statement, the FCA clarified that the concept of 'control of voting rights', as used in the definition of a controlling shareholder, would include situations where the shares are held on a person's behalf by a nominee or, in the case of shares held by a company, 'de-facto control', that is where the control of more than 50% of the company that holds the shares is traced through a chain of controlled companies. Consequently, such persons would be caught by the definition of a controlling shareholder, even where they do not hold shares in the company directly. This commentary is an important point to note, particularly as it is not spelt out in the actual rules. It would be helpful if the FCA would include this point and other helpful guidance on the application of the Listing Rules relating to the controlling shareholder regime (whether or not such guidance is contained in the feedback statement) in new technical notes so that such guidance is captured in the Knowledge

Base and readily available for stakeholders who are interpreting and applying the new rules.

Contact Details

If you have any queries or would like to discuss any aspect of this response, please contact Richard Ufland.

1 October 2014