The City of London Law Society

The Law Society

Response to FCA Consultation Paper CP 14/2: Proposed amendments to the Listing Rules in relation to sponsor competence and other amendments to the Listing Rules and Prospectus Rules

30 April 2014

Introduction

This response has 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.

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 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.

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 (LR) and the UK Listing Regime.

We set out below our responses to the questions set out in Annex 4 of the Financial Conduct Authority (FCA) consultation paper 'CP 14/2: Proposed amendments to the Listing Rules in relation to sponsor competence and other amendments to the Listing Rules and Prospectus Rules'.

Annex 4

List of Questions

DETAILS OF THE SPONSOR COMPETENCE PROPOSALS

Q1: Do you agree that prior relevant sponsor experience (evidenced by a sponsor declaration submitted to the FCA) should be a measure of sponsor competence (LR8.6.7R(1))?

Yes.

Q2: Do you agree that a timeframe of three years is appropriate (LR 8.6.7 R(1))?

Yes.

As a general observation, we note that the consultation paper does not state when the proposed new competency regime will come into effect. We suggest that the implementation date should be set so as to give sponsors an appropriate transitional period to put in place the necessary arrangements to comply with the new competency requirements. Sponsors will be best placed to comment on the period needed.

Q3: Do you agree with the approach for new applicants as set out in LR 8.6.7AG taking into account the guidance set out in the Procedural Note in Annex 1?

Yes.

Q4: Do you agree with the proposed new guidance in LR8.7.26AG?

Yes.

Q5: Do you agree that as part of the assessment of sponsor competence, a sponsor should have to satisfy the five 'competency sets', as set out in proposed LR8.6.7R(2)?

Yes.

Q6: Does the proposed approach in LR 8.6.12(19)R and the Technical Note as set out in Annex 1 provide sufficient flexibility for sponsors?

Yes.

Q7: Do you agree that, as part of the assessment of competence, a sponsor should have a sufficient number of staff who meet, as a minimum, the competency sets within LR 8.6.7R 2(b)?

Yes.

Q8: Do you agree that the adequacy of resources obligation (LR 8.6.7R (2) (a) and (b) should apply on an ongoing basis?

Yes.

Q9: Do you agree with our overall proposal to make the systems and controls provisions in LR 8.6.12G into a Rule (LR 8.6.12R)?

Yes.

Q10: Do you agree that the additional provisions to LR 8.6.12R will ensure that a sponsor assesses staff against an adopted competence framework?

Yes.

Q11: Do you agree with our proposals for key contacts as set out in LR 8.6.7R(2)(c), LR8.6.7 DG, LR8.6.19R and LR8.6.20G?

We note the FCA's concerns relating to the quality of its interactions with key contacts at sponsor firms and can understand the requirement for discussions on key issues concerning premium listed companies to be conducted with technically competent and experienced members of sponsor firms. However, we assume that the FCA is not intending that *all* communications with the FCA should need to be made by the designated key contacts. For example, it would generally be more practical for junior members of the sponsor service team to liaise with the FCA in relation to administrative queries and for 'key contacts' who may often be more senior members of the relevant firm to be the contacts for key issues or technical points. It would be helpful if the FCA would clarify this point in the proposed procedural note.

Q12: Do you agree with the FCA's proposal to consider applications for sponsor approval for the provision of sponsor services to premium investment companies only?

Yes.

Q13: Do you agree with the proposal to assess competence to provide sponsor services to premium investment companies against a different competency framework?

Yes.

Q14: Do you agree that the proposed Technical Note provides sufficient guidance to support the proposed amendments to LR8.6R?

Yes.

Q15: Do you agree that the proposed Procedural Note provides sufficient guidance to support the proposed amendments to LR8.6R?

Overall, yes, but it would be helpful if the FCA could clarify the extent to which sponsors should keep records of their compliance with the competency requirements. In paragraph b of the Procedural Note ('*Does the UKLA Department require us to submit a competence framework for comment or approval?*'), the FCA acknowledges that a sponsor will assess its staff against its competency framework and that the conclusions will be acknowledged in its annual notification. The FCA also notes that it would expect sponsors to keep records of this assessment to allow the FCA to assess compliance with the regime. It would be helpful if the FCA would clarify in its procedural note what records it has in mind and whether this will necessitate conducting regular assessments and completing checklists throughout the year or whether it will be sufficient for records to be made at the time that the sponsor conducts its review of competency before completing and submitting its annual notification. Clearly, the former approach will be more costly and time consuming for firms and we suggest that, provided that sponsors are complying with their competency framework, records should only be required to evidence the 'competency confirmations' provided in the annual notification to the FCA.

Please also refer to our response to Q11 for further comments on the procedural note.

Q16: Do you agree with the proposed amendment to the definition of a class 1 circular?

Yes.

Q17: Do you agree with the proposed change to LR5.6.15 G (4) so that it refers to a 'declaration' rather than a 'statement'?

Yes.

Q18: Do you have any comments on the minor changes to LR 8.1.1R, LR 8.1.1AR, LR 8.6.12R, LR 8.7.1AR and LR 8.7.8R?

No.

Q19: Do you agree with the proposed changes to LR 11 Annex 1 8 (1) (b) and LR8.2.1R (15)?

Yes.

Q20: Do you agree with the proposal to include the LR 10.5.4R supplementary circular within LR 8.2.1R(2) and LR 8.4.11R?

Yes.

Q21: Do you have any comments on the minor changes we have proposed in relation to the above rules?

No.

Q22: Do you agree with the proposed amendments to LR 8.6.12 R(6) and (7)?

Yes.

Q23: Do you agree with the proposed amendment to LR8.7.16R and the deletion of LR 8.7.17R and LR 8.7.18R?

We do not feel strongly that the ability for a sponsor to delegate its functions should be removed. Whilst sponsors may have not made use of this power to date, a sponsor might consider delegating its functions where it does not have capacity to carry out a sponsor service (for example, during a busy period where it does not have sufficient number of competent employees to act on certain transactions). However, equally, we do not see any problem with removing this ability if the general view from those providing feedback to the consultation supports this.

DISCUSSION ON JOINT SPONSORS

Q24: Are you in favour of retaining the joint sponsor regime? Please give reasons for your answer (whether 'yes' or 'no'), detailing the main advantages or disadvantages to sponsors, issuers and the market generally.

Yes, we think that there is merit in retaining the joint sponsor regime. As the FCA notes in its consultation paper, issuers or applicants may choose to appoint multiple sponsors in order to benefit from a range of their individual sector expertise and/or geographical presence for a particular transaction. As indicated by the FCA's informal market soundings, we believe that issuers would welcome retaining these arrangements so that they can continue to enjoy this flexibility. We also consider that these arrangements enhance the UK market's competitive position amongst the global markets by allowing issuers to obtain the combined expertise of a wider range of experienced and diverse advisers.

Additionally, the retention of joint sponsor arrangements would allow more firms to take on the sponsor role. Consequently, there are increased opportunities for sponsors to gain more experience, which would in turn, contribute towards their fulfilling their competency requirements.

Q25: If you are in favour of retaining the joint sponsor regime, what refinements or amendments would you suggest making to the rules or guidance to improve the regime?

In its consultation paper, the FCA identifies several issues with the joint sponsor regime. These include the perception that the sponsor which takes on the primary responsibility for contact with the FCA is the 'lead contact'. The FCA notes that this perception may deter some firms from taking on a sponsor role where they would not have primary contact with the FCA but where they would be required to comply with all of a sponsor's obligations set out in Chapter 8 of the Listing Rules. If consultation feedback confirms that this is a genuine concern for sponsors, perhaps the FCA should consider amending LR 8.5.3R so that the concept of only one sponsor having primary contact with the FCA is removed. Instead, joint sponsors may wish to share the responsibility with liaising with the FCA. This should avoid any disparity of information between sponsors, for example, where the 'lead sponsor' fails to pass on information arising from its liaison with the FCA to the 'non-lead' sponsor, or where issuers choose only to share information with the 'lead sponsor' due to its regular liaison with the FCA.

We also note that there may be concerns regarding the agreement (or lack of agreement) between the sponsors on how they are to conduct the joint sponsor arrangement on a transaction. In our view, provided that sponsors are meeting their obligations under Chapter 8, we suggest that they are best placed to decide how to manage the arrangement as between themselves.

Q26: If the use of joint sponsors is no longer permitted, do you think the proposals in this consultation paper on the requirement for prior sponsor experience (in the form of having submitted sponsor declarations to the FCA) need to be amended? If 'yes', please explain in what way.

No.

Q27: Can you identify any need to retain the provisions of LR8.7.16R – 18R and LR8.3.13R relating to delegation of functions? If so, please explain your reasons.

See our answer to question 23.

OTHER PROPOSED CHANGES TO THE LISTING RULES AND PROSPECTUS RULES

Q28: Do you agree with the proposed amendment to LR 13.4.3R which will remove the obligation for premium listed companies from having to prepare a 28-day circular?

Yes.

Q29: Do you agree with the proposed new PR 3.1.2AR and PR 3.1.2BR which place explicit obligations on an applicant to submit a compliant and factually accurate prospectus?

We understand the reason for the FCA's proposal to place explicit obligations on an applicant to submit a compliant and factually accurate prospectus. We consider however, that the civil liability regime for prospectuses under FSMA is a long existing and well-established regime and, consequently, the introduction of any new administrative sanctions needs to be carefully considered in light of this regime, and in our view would merit a separate consultation.

There was a lengthy consultation process prior to the introduction of the statutory compensatory regime in 2007, in respect of section 90A and Schedule 10 of FSMA, which imposed liability on issuers in respect of loss suffered as a consequence of misleading statements or dishonest omission in certain published information disclosed by issuers. In particular, the Government commissioned Lord Davies QC to conduct a review of issuer's liability for misstatements in published information (the "**Davies Review**"). One of the conclusions of the Davies Review was that a 'fraud' test for civil liability under section 90A of FSMA would be more appropriate, rather than the lesser standard of negligence, on the basis that there is already an extensive administrative regime in place for the FCA to enforce penalties against the regime (that is, the Disclosure and Transparency Rules impose explicit obligations on issuers not to publish misleading information to the market).

Consequently, it would make sense for a similar extensive review of the test for civil liability arising from statements in prospectuses (which arises from the application of a stricter 'negligent' standard, rather than a 'fraud' standard, on the basis that it is a 'selling document') to be considered in light of whether there are suitable administrative sanctions to complement the regime. In addition, the review should also consider who should be subject to the civil and administrative sanctions (for example, the offeror or issuer).

In light of the above considerations, the FCA's rationale of aligning itself with European market practice does not appear to be a sufficient justification for proposing new rules which may have far wider implications for the existing liability regime. If the FCA wishes to explore its proposals further, we would be very happy to discuss this with you in more detail.

If the additional Prospectus Rules were to be adopted, we suggest that PR 3.1.2AR is amended to read '*an applicant must **take all reasonable care** to ensure*' rather than '*an applicant must ensure*' so that it is aligned with the same standard required in PR 3.1.2BR.

COST BENEFIT ANALYSIS

Q30: Do you have any comments on the CBA?

No.

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

Direct dial: +44 (0)20 7296 5712
Fax: +44 (0)20 7296 2001
Switchboard: +44 (0)20 7296 2000
Email: richard.ufland@hoganlovells.com

30 April 2014