The City of London Law Society

The Law Society

FCA: CP15/19: Quarterly Consultation Paper No. 9

Law Society and City of London Law Society joint response

August 2015

JOINT WORKING PARTY RESPONSE TO FCA QUARTERLY CONSULTATION NO. 9 (CHAPTER 2)

Introduction

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.

The Law Society of England and Wales is the representative body of over 160,000 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 15,000 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 19 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 and the UK Listing Regime.

We welcome the opportunity to respond to FCA Quarterly Consultation No.9 dated 5 June 2015.

Our comments relate solely to Chapter 2 of CP15/19.

2.1 Do you agree with our proposal to update the definition of the Code so that it applies across all sections of the Handbook?

We agree with this.

2.2 Do you agree with the proposal to modify the LR requirements on going concern so as to refer to the reformulated requirements under the UK Corporate Governance Code and the associated FRC guidance?

We believe that even if the Listing Rules are not changed to require premium listed companies to make the viability statement in C2.2 of the Code, in practical terms such companies would be likely to comply with this provision rather than explain why they are not making the statement. There might, however, be circumstances

where they might choose not to comply. These circumstances may be rare, for example, where a company was about to delist but, nevertheless, we do not think it is helpful to make this a mandatory requirement in all circumstances. It is not clear what the justification is for moving away from the 'comply or explain' principle in the Code in relation to the statement particularly given that Listing Rule 9.8.6R(3) applies only to UK incorporated companies.

In addition, the viability statement was acknowledged by the FRC in its Feedback Statement as having been the subject of much debate and disagreement. There was a considerable process of consultation by the FRC to meet companies' concerns, amongst other things, regarding the liability that they might incur in having to make forward looking statements of this kind, and the FRC has explicitly set the statement in the context of the UK liability regime which includes a safe harbour under the Companies Act 2006 (see paragraphs 61 to 65 of the FRC's Guidance on Risk Management, Internal Control and Related Financial and Business Reporting). Following that lengthy consultation, and the FRC's guidance it does not seem appropriate to have an additional liability regime under the Listing Rules imposed in relation to the viability statement.

In this context, it is a particular concern that the draft rule requires the statement to be made in accordance with the FRC's Guidance on Risk Management, Internal Control and Related Financial and Business Reporting. This in effect turns the FRC Guidance from non-binding guidance about a comply or explain regime into a Listing Rule requirement, as companies, or directors knowingly involved, could be in breach of LR 9.8.6(3) if they do not follow the guidance. Although this follows the same approach as the existing Listing Rules take to going concern reporting and the FRC's 2009 guidance, the going concern statement is a well tested concept that has its basis in an accounting standard. We think it would be more appropriate for companies only to have to take account of the FRC's guidance, and for the reference to this guidance to be contained in a 'G' listing rule rather than an 'R' rule.

In addition, for consistency, we suggest that reference should also be made to the FRC's additional Guidance for Banks on Solvency and Liquidity Risk Management and the Going Concern Basis of Accounting, with a statement that this should be taken into account 'if applicable'.

Also, it would be helpful if the UKLA could confirm its approach to the interaction between viability statements and working capital statements. Will the UKLA accept that qualifications and assumptions in a viability statement that is reproduced in, or incorporated by reference in, a prospectus or Class 1 circular is not inconsistent with a clean working capital statement in that document? Those qualifications and assumptions may include, for example, a sensitivity analysis.

Finally, the proposed new LR 9.8.6R(3)(a) closely tracks the wording of provision C.1.1 of the Code). However, new LR 9.8.6R(3)(b) does not closely track the

wording of provision C.2.2 of the Code. It may be better if it did so, to avoid any suggestion that LR 9.8.6R(3)(b) requires anything additional to provision C.2.2. We therefore suggest amending LR 9.8.6R(3) to read as follows (new/amended wording underlined):

> '(3) statements by the *directors* on:
>
> (a) the appropriateness of adopting the going concern basis accounting (containing the information set out in provision C.1.3 of the *UK Corporate Governance Code*); and
>
> (b) their assessment of the prospects of the *company* (containing the information set out in provision C.2.2 of the *UK Corporate Governance Code*).'

2.3 Do you agree with our proposed amendments to LR and DTR to reflect these other Code changes? Do you agree with our proposed transitional provisions in LR and DTR?

We have no comments on the proposed amendments to LR and DTR.

As a matter of technical drafting we think that the transitional provisions in all cases should be amended to make clear that the transitional provision applies *in respect of the reports* on years ending before 30 September 2015, rather than *if* a company or firm etc has such an accounting year (as nearly all companies etc will have had a financial year ending before 30 September 2015).

We therefore suggest that in each of the transitional provisions the words 'Where a […] has an accounting period ending before 30 September 2015' should be replaced by:

'In the case of the annual financial report of a […] for an accounting period ending before 30 September 2015…..'

2.4 Do you have any comments on the proposed changes to the Code references in APER and SYSC, including the transitional arrangements?

We have no comments on these amendments.

2.5 Do you agree that the changes proposed to LR 6.1.11R and LR 6.1.12R provide appropriate clarification of the eligibility for premium listing requirements for scientific research based companies?

We have no comments on these amendments.

2.6 Do you agree with our proposed amendments to the headline codes (and associated headline categories and descriptions) in DTR 8 Annex 2?

We note the change to the description of the 'BOA' headline, which clarifies that this covers changes to board committee composition. In our experience, issuers are sometimes unclear whether a change to a board committee is notifiable under LR 9.6.11(3), for example, where an existing NED joins or leaves the remuneration committee or nomination committee without leaving the board. Issuers are not clear whether such changes are 'important' for the purposes of LR 9.6.11R(3). The new description implies that this kind of change is regarded as important by the FCA. If this is the case, it would be helpful if LR 9.6.11R(3) was more explicit, or if the FCA could publish formal guidance to make clear which board committee changes it regards as important, rather than leaving this to be inferred from the headline description. In addition, should the 'BOA' headline description also refer to nomination committees for the avoidance of doubt?

2.7 Do you agree with our proposal to delete the requirements regarding electronic settlement for premium-listed companies (LR 6.1.23R, LR 6.1.24G, LR 6.1.24AG and LR 9.2.3R)?

We agree with this.

It is proposed to delete LR 6.1.23R and LR 6.1.24G, but not the cross-reference to those provisions in LR 16.2.1R(2). If the deletions proceed, then LR 16.2.1R(2) should be amended to read:

'(2) only LR 6.1.22R of LR 6 (Additional requirements for premium listed commercial company).'

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