City of London Law Society and Law Society response to FCA CP 21/21: Primary Markets Effectiveness Review

14 September 2021

1. **INTRODUCTION**

1.1 The views set out in this response have been prepared by a Joint Working Party of the Company Law Committees of the City of London Law Society (the **CLLS**) and the Law Society of England and Wales (the **Law Society**).

1.2 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, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

1.3 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.

1.4 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.

FOR FURTHER INFORMATION PLEASE CONTACT:

Nicholas Holmes
Ashurst LLP
nicholas.holmes@ashurst.com

2. **QUESTIONS**

Q1: Would a single segment for equity shares in commercial companies meet the needs of both issuers and investors?

Q2: Which elements of the existing listing regime would you consider it most difficult or least desirable for issuers and/or investors to operate without? Are there any particular elements you would reinstate? i.e. the controlling shareholder regime, or the free float requirements.

Q3: Would the role of the sponsor be a significant loss? Is their role under any specific element of existing requirements considered significantly beneficial to issuers or investors currently?

Q4: What would be the benefit of being admitted to the Official List rather than just admission to a trading venue?

Q5: Should we have a role in approving the admission criteria set by trading venues and/or indices? Could adequate investor protection be maintained if different trading venues compete on admission requirements?

Q6: What types of issuers would find it hard to comply with the standards within the existing premium listing segment and why?

Q7: Do unlisted markets provide a suitable alternative to listed markets? Would a gap emerge for any particular type of issuer? Do you consider there would be any particular benefits or drawbacks to this approach?

Q8: What types of companies or strategies should the 'alternative' segment be aimed at?

Q9: Do the existing provisions in the standard segment need to be changed to suit these companies, either through relaxation or to provide additional shareholder protections?

Q10: How important is our role in setting additional admission standards to listing in the 'alternative' segment? Are there any benefits to this role being performed by us rather than a trading venue, or market discipline?

Q11: Do you consider the alignment between admission to the index and admission to the 'senior' segment to be important? Should the indices consider setting more objective admission criteria?

In light of the significant overlap between a number of the questions in the Consultation Paper and also the Committees' preference for one of the proposed listing regime models, the Committees have elected on this occasion to group together a number of the questions in the Consultation Paper and to answer them thematically rather than individually.

The Committees believe that there is merit in creating a single segment for equity shares in commercial companies. This single segment would contain common standards that would apply to established and growth companies, incorporated in the UK as well as overseas, within an overarching legislative framework. The consensus view of the Committees is that the current division between the premium and standard listing segments can be confusing for market participants and results in one of the two segments inevitably, and regardless of branding, being perceived as a 'second choice' venue. As currently constituted, this second choice venue is the only available option for some types of company. This results in those companies that are not eligible for listing on the premium listing segment being more likely to opt to list in other countries, which weakens the overall strength of London as a market for equities. Further, the higher standards of the premium listing segment as currently constituted are in some respects excessively onerous and operate as a competitive disadvantage in what is an increasingly competitive market globally for IPOs, particularly in high growth sectors. The view of the Committees is that it would be preferable to introduce a single, unified segment with specific chapters within that segment applying tailored rules to companies in particular sectors (such as mineral, scientific research based, high growth etc.), along the lines of the separate chapters that were a feature of the original listing rules before the division into premium and standard. The Committees also believe that it would not be appropriate to distinguish between UK and non-UK issuers in this context. Creating additional hurdles to entry to listing for overseas companies would be contrary to the overall aim of making London a more competitive listing venue. In light of our preference for a single listing segment, we have not commented on all the different listing models proposed in the Consultation Paper.

Our preference for a single segment does not mean simply abandoning the requirements of the premium listing segment in their entirety and a wholesale adoption of the rules of the standard listing segment. We do believe however that there should be a careful review of the existing premium listing segment to retain only those elements that contribute significantly to investor protection, in line with the Government's stated aim to promote the UK as a well-run, prestigious listing venue with a reputation for establishing high standards in governance, sustainability and stewardship. The view of the Committees is, for example, that elements of both the controlling shareholder and the related party regimes are valuable and should be retained, in some form, as they provide important investor protection mechanisms. These regimes should however be overhauled and recast in simplified form as they are currently overly complex and in places difficult to interpret and apply.

In relation to other features of the premium listing segment that should be fundamentally reviewed and, at least, scaled back, the Committees would highlight the requirement for shareholder approval for class 1 transactions. As a result of the conditionality that is introduced into these transactions by this approval requirement, a competitive disadvantage is, in some instances, created for premium listed companies that is not seen in other markets, in particular in auction processes. Further, in the Committees' view, the class 1 transaction rules are currently too wide in scope, too complex and the contents of a class 1 circular too onerous, requiring significant time and cost to produce. The Committees consider that it will be important, as part of this listing review process, for the FCA to consult a wide range of stakeholders in respect of the class 1 transaction requirements.

With regard to the sponsor regime, a key feature of the premium listing segment, the Committees recognise that to date it has operated as an effective way for the FCA to outsource some of the policing of the Listing Rules. Whilst the Committees note that the regime is little understood or even known about by investors, who ascribe little or no value to it, the Committees recognise that the existence of the sponsor regime serves to drive the shape and scope of the comfort package on certain transactions. Accountants, for example, look carefully at the Listing Rule obligations of sponsors in determining what comfort they will provide and to whom. Previous changes to the sponsor regime have led to attempts by accountants to reduce the level of comfort they provide. The Committees believe however that the sponsor regime in its current form is overly onerous and prescriptive and note that as a consequence of both that and the pronounced liability regime there is an increasing reluctance among institutions to take on this role. Further, the sponsor regime is not a feature of nearly all competitor listing venues. The Committees would therefore be supportive of a more principles-based, proportionate and simplified sponsor regime, which would apply in the context of a single listing segment. In the event that a lighter touch sponsor regime is introduced, the view of the Committees is that, in order to ensure that appropriate levels of diligence standards are maintained, including for example with respect to working capital and financial position and prospects procedures, the FCA should publish guidance on its expectations in relation to these standards and the comfort that should be provided by advisers, including accountants. Ultimately, in deciding what form the regime should take going forward, the Committees recognise that – in particular, given investor agnosticism about it - it is for the FCA to assess what value it as a regulator derives from the regime and therefore what form it considers it should take.

We would envisage that the baseline standards which would be applicable within the single segment could be built on and further developed with the optionality to adopt higher governance standards on a voluntary basis in addition to employing additional disclosure, as is currently the case. We believe that the introduction of a single segment with more competitive standards would benefit London from an international standpoint, in keeping with the findings of the UK Listings Review Report and the current ethos of making London a more attractive, dynamic and effective market.

Going forward, rather than the regulation of listed companies being conducted solely through a combination of statutory requirements and the rules of individual trading venues, we would envisage a central role in this process being retained by the FCA, in terms of approving the rules of individual trading venues to ensure that they sufficiently maintain market integrity and investor protections, in line with the FCA's primary duty, assessing suitability for listing and reviewing and approving prospectuses. In relation to indices, the view of the Committees is that it will be important to adopt a holistic approach to the various regulations that have an impact on the suitability of London as a listing venue, and that this includes index eligibility. FTSE Russell should be encouraged to reconsider its index eligibility policies in this context upon the introduction of a single listing segment, granted that only premium listed issuers are eligible for FTSE UK index inclusion under current FTSE Russell policies.

Q12: How can the process for listing debt and debt-like securities be improved for issuers without jeopardising investor protection?

As debt securities are not a focus of the Committees, the Committees are not responding to this question.

Q13: Should there be a separate listing segment for debt and debt-like securities?

Please see above.

Q14: Which particular elements of the listing regime could be tailored to improve their effectiveness for other types of securities? In what way?

Please see above.

15: Do issuers consider the process of admitting further issues to both the FCA and the trading venue to be burdensome?

The Committees note that, whilst the process can be duplicative, we do not believe that it is particularly burdensome for issuers.

Q16: Would the existing procedures conducted by trading venues to ensure issuers comply with their disclosure obligations (production of a prospectus) need to be enhanced if we were to cease admitting further issues to the Official List? What costs would be associated with these, if any?

The Committees note that the response to this question is subject to further detail being provided in respect of the proposed regime for secondary issuances and the circumstances under which it is envisaged that a prospectus would be required. In any event, we would expect the FCA to continue to have a monitoring role to the extent a prospectus is required, but if it is envisaged that an alternative document can be produced for a secondary issuance, we consider that this process could instead be subject to the rules of the trading venues, which would be monitored by the FCA, as outlined above.

Q17: Are there any legal, regulatory or tax requirements that are connected with further issues being admitted to the Official List, that could not be maintained by further issues being admitted to a trading venue?

There may be issues caused by restrictive drafting in contract covenants or investment policies, or in tax legislation, that refer to 'listing'. It may therefore be helpful for any revised process to make reference to both listing and admission to trading in order to avoid any unintended consequences.

Q18: Do you agree with our rationale for introducing DCSS to the premium listing segment? Is there any additional evidence that we should consider?

Q19: Do you foresee any limitations to our proposal if the weighted voting shares are unlisted?

Whilst the Committees agree with the rationale for introducing the DCSS to the premium listing segment and believe that the proposal for the weighted voting shares to be unlisted is an elegant solution to allow this, as set out above, the Committees recommend the adoption of a single listing standard within which the DCSS would be permissible. Issuers would be able to decide on the particular structure of DCSS that suited their needs – which may go further than the proposed conditions to be applied to DCSS in the current premium listing segment, as issuers such as Deliveroo and Wise have done – with index providers then able to specify the criteria they may expect to see in order to permit index inclusion. On this basis, the Committees are supportive of the DCSS proposal for the interim period, pending the introduction of a single listing standard, following which the proposal would no longer be relevant.

Q20: Do you consider that a five year sunset period for DCSS in the premium listing segment is the correct length to protect companies from unwanted takeovers? Please provide evidence for your answer.

Q21: Do you consider that the mechanism proposed will be effective in providing a deterrent to unwanted takeovers? Please give reasons for your answer and any possible alternatives.

Although the Committees appreciate that there are precedents for longer periods, we think that the proposed period is appropriate and provides adequate protection from unwanted takeovers.

Q22: Do you agree with the proposed controls around DCSS in the premium listing segment? Are there any additional controls that would make the regime more effective?

Yes, we agree with the proposed controls.

Q23: Do you agree with our proposal to raise the minimum market capitalisation for companies seeking to list under standard and premium listing to £50m? If not, please state your reasons and indicate what alternative threshold may be more appropriate along with any supporting evidence. We also welcome views on whether we should consider setting out conditions under which we might modify the proposed rule on the new threshold, and if so what criteria stakeholders think we could usefully consider.

The Committees understand the rationale for increasing the minimum market capitalisation for companies seeking to list under standard and premium listing to £50 million and have no objection to the proposal from a legal perspective but note that setting the threshold is more a question for financial advisers and investors.

Q24: Do you consider that the current level of market capitalisation for listed debt remains appropriate? Please give reasons for your answer.

As debt securities are not a focus of the Committees, the Committees are not responding to this question.

Q25: Do you agree with our proposal to reduce free float to 10% and to remove current guidance on modifications? Please give your reasons.

Yes, we agree with the proposal to reduce the absolute requirement, granted the expressed purpose of free float is to achieve market liquidity and, for the reasons given by the FCA, we agree that 10% is the right level for issuers of shares, GDRs listed under LR 18 and sovereign-controlled companies listed under LR 21. We note that, in conjunction with this proposal and as set out above, it will be important that FTSE Russell amend their index criteria to bring them into line with the new FCA requirements.

Whilst we broadly also agree with the proposal to remove current guidance on modifications (i.e. the ability for an issuer to seek the FCA's agreement to a lower percentage), we would encourage the FCA to retain the ability to accept a lower percentage in exceptional circumstances. Such exceptional circumstances might include, for example, where as part of rescuing a listed financial institution the Government ends up owning a significant majority of the shares, as the Government did with RBS in 2009, or where a listed company implements a debt for equity restructuring that results in its lenders owning a significant majority of the shares. In such circumstances, it would not seem to be in the interests of the other shareholders for the listing to be suspended or cancelled.

In addition, the Committees would suggest that the FCA also considers making the following amendments to the current rules in relation to which shares count as being in public hands, as recommended in the UK Listings Review Report:

- Shares should not count towards the free float requirement where they are held by persons in the same group or acting in concert with each other who in aggregate hold 10% or more of the issued share capital (rather than 5% as at present); and

- Where blocks of shares are held by the same organisation (for example, a financial services group) but the holdings are managed separately from each other, they should be treated as being held by separate organisations, rather than having to be aggregated with each other as at present. The Committees note that this could perhaps be achieved most simply by broadening the current "exemption" in LR 6.14.4, and the equivalent rule in other chapters of the Listing Rules, under which holdings of investment managers in the same group are disregarded where investment decisions are made independently by the individual in control of the relevant fund and those decisions are unfettered by the group to which the investment manager belongs.

Q26: Would you find information about issuers' free float level useful to inform investment decision-making?

No. We think that investors already have easy access to information that provides a much better indication of the level of liquidity in a company's shares – for example, information on the LSE website in relation to daily, weekly and monthly volume of shares traded, prices for individual trades, bid/ask spreads, where trades were conducted etc. – and the burden on an issuer of publishing regular information about its free float (determined in accordance with the Listing Rules) would be disproportionate to the benefit.

If the event that such a requirement were to be introduced, we anticipate that there would be operational challenges for issuers in determining which registered holders are (i) members of the same group; or (ii) acting in concert with each other (i.e. which shareholders fall into the category in LR 6.14.3(e)). Whilst we appreciate that, in principle, an issuer may be able to obtain this information by sending out section 793 notices, this process can be cumbersome and expensive and, in any event, may not produce a full picture of the share register and/or of which shareholders are 'connected' to each other.

Q27: Do you agree with our proposal to leave track record requirements as they are now, based on our assessment that this would only affect a small number of stakeholders? If you disagree, please provide further evidence or examples of the wider impact this has on prospective listing applicants and proposed amendments.

We do not agree that the existing requirements affect only a small number of issuers. In our experience, the track record requirements have caused significant additional work in a large number of actual and abandoned premium listing segment IPOs in which we have been involved and do not, in any event, result in helpful disclosure for investors.

For many prospective issuers (particularly those mentioned in the examples below), determining whether the financial information that has already been published or will be published in the prospectus will satisfy the eligibility requirement is not straightforward, and the issuer and its advisers may need to discuss the issue with the FCA. This is particularly the case where the issuer has entered into one or more acquisitions in the three year period before listing whose size in aggregate is close to the 25% threshold, where applying one or more of the ratios used to assess the size of the acquisition(s) could produce an anomalous result, or where the value of the business or asset acquired has changed significantly since it was acquired. The process outlined above can deter and has deterred prospective issuers from listing on the premium listing segment or in London at all, particularly in the cases where the issuer is considering alternative listing venues that do not impose such an eligibility requirement.

We consider that investors are sufficiently protected by the prospectus requirements which, as set out in the Consultation Paper, include requirements in respect of (i) three years of audited financial statements; (ii) where the issuer has a 'complex financial history' or has made a 'significant financial commitment', financial statements relating to any entity that the issuer has acquired; and (iii) additional information investors need to make an informed assessment. The Committees therefore suggest that, to the extent that the track record requirements go further than the prospectus regime, they should be removed as soon as possible. If, as the Committees recommend above, the standard and premium listing segments were to be combined into a single, unified segment, the track record requirements - which currently apply only to the premium listing segment - should not, in the Committees' view, be retained.

In effect, removing the separate track record requirements would put the premium listing segment on a level playing field with EU markets and remove one of the deterrents to listing in London. Whether an issuer is proposing to list on the premium listing segment or an EU market, it will be advised that additional financial information may need to be prepared and included in the prospectus, and that it will be necessary to discuss with the FCA or other competent authority at an early stage the information required. The issuer would not however also face uncertainty about how to satisfy the track record requirements.

Further, if the track record requirements are removed as the Committees recommend, it will be important that, where an issuer has a complex financial history, the FCA does not automatically require the prospectus to include three years of financial information on recently acquired targets, as this would effectively result in the current track record requirements being re-applied via the prospectus regime. Instead, the Committees would encourage the FCA to adopt a more flexible and pragmatic approach that is designed to ensure that the prospectus includes financial information on recently acquired targets only to the extent that such information would be useful to investors.

If the FCA does not consider it appropriate to remove the track record requirements, the Committees would suggest that the FCA considers amending the requirements such that the 75% test would apply only to the most recent financial period within the three year track record, as recommended in the UK Listings Review Report. In addition, the Committees would welcome the FCA's suggestion for it to publish guidance on when it may be prepared to waive the track record requirements. In any event, the Committees would encourage the FCA not to wait until it conducts a wider review of the prospectus regime to reconsider the track record requirements on the basis that it could be several years before the changes to the prospectus regime take effect. In the meantime, for the reasons explained above, the Committees believe that the existing track record requirements are likely to deter some prospective issuers from listing on the premium listing segment.

Q28: What types of companies struggle to meet the existing requirement in the premium segment for a 3 year revenue track record covering 75% of the business? What alternatives could be considered for these companies?

Examples of companies that may struggle to meet the existing requirement include:

- Companies that are acquisitive. This may be particularly relevant to companies in the tech/fintech, pharma/biotech or media sectors, though companies in all sectors can be acquisitive.

- Companies owned by private equity firms that are pursuing a 'roll-up' strategy – i.e. a strategy of investing in one company in a sector and then acquiring others, typically over a period of months or a few years, to create a combined entity with more commercial weight, which is then sold or floated.

- Companies that are not property or mineral companies but that either have a lot of joint ventures at the time of listing (for example, where significant parts of their business are located in countries whose local law requires a majority stake to be locally-owned) or that have recently bought out their joint venture partners.

- Companies consisting of various discrete businesses that have been combined together so they can be spun out of a group.

In addition, the same issues potentially arise on a reverse takeover where the listed company seeks to have the shares in the combined entity re-admitted to the premium listing segment (LR 5.6.21). In such circumstances, it is necessary to assess whether financial information has been published that covers 75% of the combined entity.

In view of our response to question 27, and the different types of company that may struggle to meet the track record requirements, we do not think it would be helpful for alternative criteria to be considered for such companies. We would suggest instead that the proposed approach outlined in our response to question 27 should apply to all issuers – i.e. investors should be protected by the prospectus disclosures and, if necessary, the issuer and its advisers should discuss with the FCA whether the prospectus needs to include information that goes beyond that specifically listed in the PRR and relevant Annexes.

Q29: Do you foresee any unintended consequences of these changes intended to modernise the Listing Rules, Disclosure Guidance and Transparency Rules and the Prospectus Regulation Rules?

<u>Glossary changes</u>

Definition of "trading day" (Annex A to Appendix 4): instead of saying "*(in LR and DTR) any day of normal trading in a share on a regulated market or MTF in the United Kingdom for this share*", we suggest this definition should say "*(in LR and DTR) any day on which securities of the relevant type are capable of being traded on a regulated market or MTF in the United Kingdom*". The same amendment should be made to the definition of "trading day" in Appendix 1 to the Listing Rules (Annex B to Appendix 4).

(For comparison, we note that the Rules of the London Stock Exchange do not define "trading day", but they do define "business day" as "*any day on which the Exchange is open for dealing*".)

<u>Changes to Listing Rules</u>

Copies of documents in electronic form

LR 1.4.9A: It is proposed that new 1.4.9A R should say: "*A reference to a copy (or copies) of a document in the listing rules includes a copy (or copies) of a document produced or stored using electronic means*." To be consistent with the definition of "document" in Appendix 1 to the Listing

Rules and section 417 FSMA (which provides that a "document" includes information recorded in any form), we suggest this definition should refer also to a document being "recorded" – i.e. "*A reference to a copy (or copies) of a document in the listing rules includes a copy (or copies) of a document produced, recorded or stored using electronic means*."

A similar amendment should be made to DTR 1A.2.2 and 1C.2.2.

Cancellation of listing following a takeover

For context, the general rule in LR 5.2.5 is that if a premium segment issuer wants to cancel the listing of its shares, it must send a circular, obtain 75% shareholder approval and make certain announcements. However, this is subject to various exceptions in LR 5.2.10 (takeover where offeror was interested in 50% or less of the voting rights of an issuer before announcing its firm intention to make an offer), LR 5.2.11A (takeover where offeror was interested in more than 50% of the voting rights of an issuer before announcing its firm intention to make an offer) and LR 5.2.12 (takeover or restructuring of the issuer effected by a scheme of arrangement, and certain other circumstances).

It is proposed that amended LR 5.2.11R should say:

> "*Where LR 5.2.10R applies, the issuer must notify shareholders and, in the case of certificates representing shares, holders of certificates:*
>
> *(1) by stating:*
>
> > *(a) that the offeror has reached the threshold described in LR 5.2.10R(2);*
> >
> > *(b) that the notice period has therefore commenced; and*
> >
> > *(c) the anticipated date of cancellation, or"*

We suggest that for this purpose it should be sufficient for the issuer to make an RIS announcement - particularly as shareholders will by then have received a copy of the offer document in which, almost invariably, the bidder will state that, if the offer becomes or is declared unconditional in all respects, and provided it has acquired or agreed to acquire shares in the issuer representing at least 75% of the voting rights, it intends to apply for the listing to be cancelled with effect from a date falling no earlier than 20 business days after the offeror has acquired or agreed to acquire that 75%. We therefore suggest the rule should say:

> *"Where LR 5.2.10R applies, the issuer must notify a RIS:*
>
> *(1) that the offeror has reached the threshold described in LR 5.2.10R(2);*
>
> *(2) that the notice period has therefore commenced; and*
>
> *(3) of the anticipated date of cancellation, or"*

However, if the FCA considers that the issuer should send an individual notification to each holder of shares or DRs it would be helpful if the rule could make clear how the FCA expects such notification to be given (for example, by means of an individual notice sent electronically or in hard copy).

The same point applies to LR 5.2.11C.

References to disclosure or publication of documents, uploading to the NSM and filing documents with the FCA

We suggest that the FCA takes the opportunity to clarify in the Listing Rules, PRR and DTR (or perhaps by means of a Technical Note) what is meant by "filing a document with the FCA", as this term has slightly different implications in different circumstances. For example:

- **Prospectuses**: The final approved version of a prospectus must be filed with the FCA. However, under PRR 3.2.6G, the FCA itself will upload the final approved version of the prospectus to the NSM, and the issuer need do nothing further.

- **Circulars**: Under LR 9.6.1R, the final version of a circular to shareholders (meaning, where FCA approval is required, the final approved version) must be filed with the FCA by (the issuer) uploading it to the NSM.

- **Reports on payments to governments:** Under DTR 4.3A.10, such a report must similarly be filed with the FCA by (the issuer) uploading it to the NSM.

- **Disclosure of rights attached to equity shares**: Under LR 9.2.6F R, the prospectus, articles of association or other document setting out the rights and restrictions attached to shares must similarly be forwarded to the FCA for publication by (the issuer) uploading the document to the NSM.

- **Major shareholding notifications**: Under DTR 5.9.1R, a person making a notification to an issuer must, if the notification relates to shares admitted to trading on a regulated market, at the same time file a copy of such notification with the FCA. In this case, filing requires the person making the notification to complete a form TR-1 and submit it to the FCA via the major shareholdings notification portal on the ESS.

- **Other regulated information**: Under DTR 6.2.2, all (other) regulated information must be filed with the FCA. However, under DTR 6.2.3, an issuer can file regulated information with the FCA simply by making a RIS announcement - there is no need to follow a separate process to submit the information to the FCA (for example, via the ESS or by uploading a copy of the announcement to the NSM). Regulated information means information that an issuer is required to disclose under the DTR (such as annual and half-yearly financial results, reports on payments to governments, major shareholding notifications and details of general meetings), articles 17 to 19 of the UK Market Abuse Regulation (such as announcements of inside information and details of PDMR dealings) or the Listing Rules (such as announcements relating to share issues, changes of directors and transactions).

Such clarification would also help issuers understand which information can be incorporated in a circular or prospectus, as LR 13.1.3 and PRR 2.7.1 allow information to be incorporated if it is included in a document published by the company that has been "filed with the FCA".

It would also be helpful to ensure that the wording used in each of the rules referred to above – some of which the FCA is proposing to amend - is consistent as far as possible. There are similar rules in chapters 14, 17 and 21 of the Listing Rules.

Profit forecasts in class 1 circulars

We have no comments on the proposed amendments. However, we suggest that LR 13.5.32(1) should be amended to say *"comply with the requirements for a profit forecast or profit estimate set out in item 11.2 of Annex 1 of the PR Regulation"*.

Aggregation rules

Where LR 10.2.10(1) requires transactions to be aggregated, we believe the amended rule is intended to result in the following (adopting the type of example and format used in Technical Note 307; "T" = transaction):

	T1	T2	T3	T4	T5
Consideration to market cap	4%	11% = 15% in aggregate	1% = 16% in aggregate	15% = 31% in aggregate	3%
Profits test	3%	7% = 10% in aggregate	2% = 12% in aggregate	4% = 16% in aggregate	4%
Gross assets	3%	10 = 13% in aggregate	1% = 14% in aggregate	7% = 21% in aggregate	2%
	Below Class 2 - No announcement required	Class 2 - Announce details of T2 (but not T1)	T3 is below Class 2, but when aggregated with T1 and T2 it is Class 2 - Announce details of T3 (but see comments below)	Class 1 - Announce details of T4 (but not T1, T2 or T3) - Circular - Shareholder approval of T4	Below Class 2 - No announcement required (Obtaining shareholder approval for T4 "wipes the slate clean" for aggregation purposes: see comments below)

Comments

- **Announcing T3**: Under proposed new LR 10.2.10A, T3 must be treated as a class 2 transaction and therefore details of T3 must be announced. While we appreciate the policy rationale for this, we question whether such information would be useful for investors where T3 is a very small transaction – for example, where each percentage ratio is 0.25% or less (so that in the context of LR 11 it would be treated as a "small transaction"). We suggest that where T3 is "de minimis" (for example, 0.25% or below on each percentage ratio), it should count for aggregation purposes but details of the transaction should not have to be announced.

- **Wiping the slate clean**: There are two points here that we suggest should be clarified:

    - We do not think it should be necessary for a class 1 transaction to have completed before the "slate is wiped clean" for aggregation purposes (as we put it above). If shareholders have approved a class 1 transaction, in our view this should be sufficient even if the transaction does not in fact complete. This is consistent with the aggregation rule in LR 11.1.11(1), which says:

> *"If a listed company enters into transactions or arrangements with the same related party (and any of its associates) in any 12 month period and the transactions or arrangements <u>have not been approved by shareholders</u> the transactions or arrangements, including transactions or arrangements falling under LR 11.1.10 R, or small related party transactions under LR 11 Annex 1.1R (1), must be aggregated."*

- We question whether the proposed wording of new LR 10.2.10(4) makes it entirely clear that transactions 1, 2 and 3 (which preceded transaction 4 that requires shareholder approval) can thereafter be disregarded for aggregation purposes i.e. that obtaining shareholder approval for transaction 4 "wipes the slate clean" for aggregation purposes. LR 10.2.10(1) says "*Transactions completed during the 12 months before the date of the latest transaction must be aggregated with that transaction*……." Under proposed new LR 10.2.10(4), the obligation to aggregate such transactions will not apply to a transaction for which the company has obtained shareholder approval and that has completed. This could be read as saying that, when T5 occurs, although T4 need not be counted for aggregation purposes, T1, T2 and T3 do need to be counted.

To address both these points, we suggest that proposed LR 10.2.10(4) should say:

> *"Paragraph (1) does not apply to a transaction for which the listed company has obtained shareholder approval or to any transaction that completed during the 12 months before the transaction for which shareholder approval was obtained."*

- **Technical Note 307**: We also suggest that the FCA considers updating Technical Note 307 to reflect the new rule and the example given above.

Documents on display in City of London

We note that the proposed amendments will mean that:

- where an issuer seeks shareholder approval to amend its articles, it will have to either (i) include in the circular the full terms of the proposed amendments or (ii) upload a copy of the amended articles to the NSM when the circular is sent out (and also make the amended articles available for inspection at the place of the general meeting for at least 15 minutes before and during the meeting); and

- where an issuer seeks shareholder approval for an employee share scheme or long-term incentive scheme, it will have to either (i) send a copy of the proposed scheme to shareholders, along with the circular or (ii) upload a copy of the scheme to the NSM when the circular is sent out (and also make the scheme available for inspection at the place of the general meeting for at least 15 minutes before and during the meeting).

In relation to amendments to articles, we would expect that the option to upload a copy of the articles is likely to be taken where the amendments to the articles are numerous and/or relatively immaterial. In practice, companies will presumably need to upload to the NSM a copy of the articles marked-up to show the changes that are proposed. Given that the marked-up copy will continue to be available on the NSM even if shareholders do not approve the changes, as a practical matter, companies may therefore want to include a warning on the copy of the articles that is uploaded to the NSM to the effect that the document is designed simply to show proposed changes to the articles on which shareholders are asked to vote at a general meeting to be held on [date]; and that a copy of the company's current articles can be obtained from [its website] [Companies House]. The Committees would welcome confirmation from the FCA that it has no objection to the inclusion of such a warning.

In relation to employee share schemes and long-term incentive schemes, we would expect that many companies would prefer to take the option of uploading a copy of the scheme to the NSM, rather than sending a copy of the scheme along with the circular. However, some companies are likely to be concerned that publishing such documents online would have the effect not just of making them accessible to members but of putting their terms permanently into the public domain. The Committees therefore suggest that companies should be permitted, in the alternative, to make scheme rules available at the company's registered office: this would be similar to the requirements for directors' service contracts under Part 10 of the Companies Act 2006, pursuant to which service contracts must be made available for inspection by members at any time at the company's registered office, or an alternative inspection location, and members can obtain copies on request.

<u>Changes to the DTR</u>

Publication of regulated information in unedited full text

For convenience, we set out below what the amended rule would say:

> *DTR 6.3.5*
>
> *(1) Subject to (1A), an issuer or person must communicate regulated information to the media in unedited full text.*
>
> *(1A) An issuer or person who discloses regulated information is exempt from paragraph (1) if:*
>
> > *(a) the regulated information in unedited full text has been filed with the FCA by uploading it to the national storage mechanism;*
> >
> > *(b) the regulated information has been communicated to the media; and*
> >
> > *(c) the communication contains a statement that the regulated information is available in unedited full text on the national storage mechanism.*
>
> *Where (1A) applies, the announcement relating to the publication of the following regulated information must also include an indication of the website on which the relevant documents are available:*
>
> > *(a) an annual financial report that is required by DTR 4.1 to be made public;*
> >
> > *(b) a half-yearly financial report that is required by DTR 4.2 to be made public; and*
> >
> > *(d) a report on payments to governments that is required by DTR 4.3A to be made public.*

Our understanding is that the amended rule is intended to produce the following effect:

- ***Financial results:*** Instead of a company having to ensure that (i) its half-year results announcement includes the information specified in DTR 4.2 (key information) and (ii) its annual results announcement includes at least the key information that must be included in half-year results, in each case the announcement will be able simply to state that the full half-year results or annual results (in unedited full text, which can be in pdf format) have been uploaded to the NSM. As now, the announcement will also have to include details of the website (which is almost always the company's own website) on which the annual financial results or half-year financial results are available.

- ***Other regulated information:*** A company will in fact be able to publish any type of regulated information this way. For example, a company will be able to publish a report on payments to governments by making an announcement stating that the report has been uploaded to the NSM.

However, we suggest that the wording of the new rule should be amended to make clearer exactly what information must be included in an RIS announcement made in such circumstances. As currently drafted, the wording in DTR 6.3.5(1A)(b) requiring "the regulated information" to have been communicated to the media, when read literally, would seem to require the RIS announcement to include, in relation to annual financial results, all the items of information specified in DTR 4.1 (i.e. audited financial statements; a management report containing a fair review of the issuer's business and a description of the principal risks and uncertainties facing the issuer etc.; and a responsibility statement) and, in relation to half-year results, all the items of information specified in DTR 4.2. In each case, this seems inconsistent with the aim of the new rule.

We would therefore ask the FCA to clarify what information would need to be included in such an announcement. For example, whether it would be enough for the announcement simply to state that the "full" results (in unedited full text) have been uploaded to the NSM and that they can also be found on the company's website.