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A New Frontier – Amendments to the Listing Rules, Prospectus Rules and Disclosure and Transparency Rules

Feedback on FSA Consultation Paper 12/2 as set out in FSA Consultation Paper 12/25

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Further information

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FEEDBACK ON FSA CONSULTATION PAPER 12/2 AS SET OUT IN FSA CONSULTATION PAPER 12/25

On 28 September 2012, the FSA published new rules arising out of FSA consultation paper CP 12/2 (CP 12/2) and FSA quarterly consultation paper CP 12/11 (CP 12/11).

The new rules:

- update and clarify the existing framework of rules and practice by in some instances shifting material from Technical Notes into the listing rules; and
- introduce new protections to safeguard the integrity of the UK's regulated markets.

Click here for our previous summary of the amendments proposed by CP 12/2 and here for our summary of the amendments proposed by CP 12/11.

SO WHAT'S NEW?

Here is a brief reminder of the new rules, together with a summary of the key changes to the proposed amendments which were set out in CP 12/2 and CP 12/11.

EXTERNALLY MANAGED COMPANIES – IN FORCE ON 1 OCTOBER 2012

The new listing rules came into force on 1 October 2012 and consequently, externally managed companies can no longer obtain a premium listing. Externally managed companies are typically cash shells incorporated with the intention of acquiring, running and transforming target businesses to create value. Such companies generally outsource significant management functions to an offshore advisory firm. The FSA was concerned that outsourcing management

functions effectively puts management beyond the reach of the key controls and protections for shareholders in the listing regime. As such, the FSA has decided that externally managed companies are no longer eligible for a premium listing by including a new LR 9.9.20R which requires that an issuer at all times must ensure that its board retains full discretion to make strategic decisions on behalf of the issuer and that the board has the capability of acting on key strategic matters in the absence of a recommendation from a person outside of the issuer's group. Further, principals of the advisory firm are responsible for any prospectus published by the listed company and are subject to DTR requirements in relation to the disclosure of share dealings by persons discharging managerial responsibilities (PDMRs).

Transitional provisions are in force so that a company with a premium listing of equity shares that does not comply with the requirements of new LR 9.2.20R on 1 October 2012 will be exempt from the requirements up to and including 31 December 2013. The transitional period is aimed at giving existing externally managed companies the opportunity to give notice on current external management contracts and put new arrangements into place.

Key changes to amendments proposed in CP 12/2:

Strategic decisions. The new rules clarify that new LR 9.2.20R is intended to target those who may control the board of the issuer, rather than assume that control lies with the board itself.

PDMRs. The statutory definition of a PDMR is set out in section 96B of FSMA which, amongst other things, states that a PDMR can be a senior executive who is not a director if he or she has regular access to inside information relating to the issuer and has the power to make managerial decisions affecting the future development and business prospects of the issuer. The FSA has inserted additional guidance to state that this is irrespective of the nature of any formal contractual arrangements which may or may not exist between the individual and the issuer. The guidance does not alter the statutory definition but provides that no importance should be placed on the employment contract of the individual; rather the statutory tests in FSMA should be met.

Closed ended investments funds and collective investment undertakings. The FSA received feedback that investment trusts should be outside the scope of the new rules. The classic investment trust structure, in which an asset management house is contractually appointed by an appointed non-executive board to manage the portfolio, is well supported by stakeholders who see it as well adapted for the needs of that particular sector. As such, closed ended investments funds are not subject to the requirements of new LR 9.2.20R as the FSA has agreed that it is not helpful to bring such structures within the remit of these rules. Similarly, collective investment undertakings are excluded from the new provisions requiring that senior executives of externally managed companies take responsibility for a prospectus published by the issuer.

REVERSE TAKEOVERS – IN FORCE ON 1 OCTOBER 2012

The new rules amending the disapplication of the rules relating to reverse takeovers are now in force. There are transitional provisions up to and including 31 December 2012 which place obligations on the issuer, rather than the sponsor, until the reforms to the sponsor regime come into force on 31 December 2012 (for example, the issuer, rather than its sponsor, must notify the FSA as soon as possible where there is a reverse takeover in contemplation). In order to prevent reverse takeovers being used as a 'back-door' to listing, the reverse takeover exemption has been restricted to acquisitions of issuers within the same listing category. The FSA clarifies that the new rules in relation to reverse takeovers apply equally to issuers of premium and standard

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listed shares and issuers with a standard listing of certificates representing equity securities (that is, GDRs). Information requirements that need to be met in order for a suspension to be avoided and eligibility requirements following a cancellation of listing have been reduced to make the reverse takeover regime more proportionate.

Key changes to amendments proposed in CP 12/2:

Reverse takeover in contemplation. In response to some concern over what was meant by a reverse takeover being 'in contemplation', the FSA has inserted guidance which is based on the guidance given in UKLA technical notes as to when a potential transaction is sufficiently advanced to be a 'proposed transaction'. Examples are where the issuer:

- has approached the target's board;
- has entered into an exclusivity period; or
- has been given access to begin due diligence work (whether or not on a limited basis).

In such cases, the issuer must contact the FSA as soon as possible before making any announcement to discuss whether a suspension of listing is appropriate. Certain respondents queried whether it would be useful to bring in line these rules with the City Code on Takeovers and Mergers. The FSA declined to make amendments along these lines due to the differing regulatory objectives of the FSA and the Panel on Takeover and Mergers.

TRANSACTIONS – IN FORCE ON 1 OCTOBER 2012

The new rules relating to transactions largely codify existing market practice, most of which was already set out in various UKLA technical notes.

The main changes include a requirement to issue supplementary circulars where there has been a material change or material matter requiring disclosure which allow issuers to provide further information to shareholders so that they are better informed prior to exercising their votes; a clarification of approach to break fees and the removal of the provisions relating to class 3 transactions.

Key changes to amendments proposed in CP 12/2:

Takeover documents. The requirement for the offer document to make it clear when the notice period for cancellation of listing begins has been amended to refer only to when the offeror has announced that it has acquired or agreed to acquire shares representing 75% of the voting rights – and not that the offer has to be declared unconditional at that level as set out in CP 12/2.

Supplementary circular. The new rules require listed companies to issue a supplementary circular to shareholders in the event there is a material change or material new matter which it would have been required to disclose in a circular. The FSA has inserted guidance to clarify that when considering whether a supplementary circular is required, a listed company should consider if the information is material to shareholders to enable them to make a properly informed decision if voting or other action is required. A supplementary circular must be sent to shareholders no later than seven days prior to the relevant general meeting. The FSA believes that this is sufficient time to allow shareholders to consider the information in the supplementary circular without having a detrimental impact on the transaction, although the feedback to CP 12/2 revealed that there was not unity in the market as to whether this was an appropriate time period.

Share buybacks. The FSA will expect a circular containing an explanation of the potential impact of a proposed share buyback of over 15% in accordance with LR 12.4.2AR to include an explanation of the shareholdings of substantial shareholders before and after the transaction and the shareholdings of a shareholder who may become a substantial shareholder as a result of the buy-back.

SPONSORS – IN FORCE ON 31 DECEMBER 2012

The FSA has proposed a number of changes to the sponsor regime so that the UKLA can monitor and supervise sponsors effectively. The changes introduce additional circumstances where a sponsor will need to be appointed and reinforces certain compliance practices to ensure that sponsors are effectively meeting their duties required by the LRs.

In particular, sponsors are required to be appointed to provide confirmation that the terms of a smaller related party transaction are 'fair and reasonable' and to provide confirmation that the terms of a related party circular are 'fair and reasonable'. Certain respondents were concerned that the proposals would increase costs with no proportionate increase in benefits and that lawyers, accountants or investment banks may be more suitably placed to make such confirmations. However, the FSA states that as sponsors frequently provide such confirmations and are already subject to requirements that seek to ensure the objectivity of a sponsor's work, the alternative of establishing a separate process would be too costly and less efficient and no amendments to the proposals have been made.

Key changes to amendments proposed in CP 12/2:

Sponsor service definition. The new definition of a sponsor service includes all sponsor communications with the FSA in connection with a sponsor service. The UKLA attaches importance to all communications it has with sponsors and its intention behind extending the definition is to ensure that the Principles for Sponsors clearly apply to such communications. The amended definition of a "sponsor service" contains a clarification that nothing in the definition is to be taken as

requiring a sponsor to agree to act as a sponsor for a company or in relation to a transaction.

Premium listing. The LRs clarify that a sponsor is only required to be appointed when the relevant documents are submitted to the FSA in connection with an application for a premium, rather than a standard, listing. In addition, the FSA also notes that it is current practice for a premium listed company to appoint a sponsor when it is required to submit a supplementary prospectus or supplementary listing particulars in relation to the admission of equity shares to premium listing. The FSA intends to consult on making this a requirement in its Quarterly Consultation Paper to be released in October 2012.

Provision of information. A sponsor must provide to the FSA any information 'as soon as possible', rather than 'immediately' as proposed in CP 12/2. In addition, a sponsor must take 'such' rather than 'all' reasonable steps as are sufficient to ensure that any communication or information it provides are to the best of its knowledge and belief, accurate and complete in all material respects. In its response, the FSA considered a blanket obligation regarding the accuracy of all communications from the issuer to the sponsor to be excessive and not appropriate for the LRs. Contractual arrangements between issuers or applicants and sponsors should continue to deal with such issues.

Reliance on third party information. Where a sponsor provides information to the FSA which has been received or based on information from a third party when assessing whether a sponsor has complied with its obligations (that is, to take reasonable steps to ensure the information provided is to the best of its knowledge and belief, accurate and complete in material respects), the FSA will have regard to, amongst other things, whether the sponsor has used its own knowledge, judgement and expertise to review and challenge the information appropriately. The FSA would expect the sponsor to be the main point of contact but it recognises that, in some circumstances, it may be appropriate for the FSA to deal directly with the issuer, new applicant or third party advisers.

Conflicts of interest. The FSA recognises that a sponsor's overriding obligations to the UKLA (a 'regulatory conflict') may conflict with the terms of engagement or duties owed to its clients ('client conflicts'). Guidance has been inserted to clarify what is meant by a 'regulatory conflict'. The new guidance refers to a regulatory conflict which may arise where there are circumstances that could compromise the ability of the sponsor to fulfil its obligations to the FSA. The requirement for a sponsor to identify conflicts of interest has been amended to clarify that the requirements will apply only for so long as the sponsor provides a sponsor service, rather than also to the period before a sponsor is mandated as had been proposed in CP 12/2.

Duty of company to co-operate with sponsor. The FSA has clarified that the duty of the company to co-operate with a sponsor relates to the provision of a sponsor service to the company rather than only in connection with an application for a premium listing. Further, a specific rule has been inserted to require a company with a premium listing of its equity shares to co-operate with its sponsor and provide all information reasonably requested by the sponsor for the purposes of carrying out the sponsor service. This wording should seek to address concerns raised in the consultation that issuers would be required to comply with sponsor's instructions even where they do not agree with the sponsor's advice.

Record keeping. The FSA has inserted new guidance which provides that when assessing whether a sponsor has satisfied the record keeping requirements in the LRs, the FSA will consider whether a person with general knowledge of the sponsor regime but who has no specific knowledge of the actual sponsor service would be able to understand and verify the basis upon which material judgements have been made throughout the provision of the sponsor service based on the sponsor's records.

General notifications and sponsor cancellation requests. The FSA has clarified that an expected change in the trading, rather than the financial position of a sponsor, that would be likely to affect adversely the sponsors' abilities to perform the sponsor service would not need to be notified to the FSA. In addition, as regards the list of situations when a sponsor should submit a sponsor cancellation request, the FSA has clarified that such list is non-exhaustive. Finally, the FSA has also clarified that if a sponsor submits a notification to the FSA that it ceases to satisfy the approval criteria or becomes aware of anything relating to it or its employees relating to the provision of a sponsor service which in its reasonable opinion would be likely to adversely affect market confidence in the sponsor regime, it must submit a sponsor cancellation request if there are no on-going discussions with the FSA that could lead to the conclusion that the sponsor remains eligible. The FSA notes that in some instances, the UKLA will be able to work with a sponsor to identify ways in which it can rectify identified failings so that a cancellation request would not be necessary.

SPONSOR'S ANNUAL CONFIRMATION – IN FORCE ON 1 OCTOBER 2012

Sponsors must provide their annual sponsor confirmations in January each year, rather than on the anniversary of their approval as a sponsor. Confirmations will need to be made by submitting a completed "sponsor annual notification form".

Key changes to amendments proposed in CP 12/11:

Transitional provisions. Following feedback, the FSA has confirmed that the new rules will come into force on 1 October 2012, rather than 6 October 2012. Accordingly, sponsors with

'annual confirmation birthdays' on or after 1 October 2012 will not have to submit an annual notification until January 2013.

Annual notification form. The FSA has also made some amendments to the content of the sponsor annual notification form to reflect that the return period should relate to the period since the last notification by the sponsor, rather than for the twelve months preceding the notification in order to avoid any information gaps where a form is submitted in January.

CANCELLATION OF LISTING – IN FORCE ON 1 OCTOBER 2012

The new rules widen the circumstances in which an issuer can dispense with the requirements for shareholder approval and a 20 business days' notice period when cancelling a listing of securities in connection with schemes of arrangements and insolvency events. The amendments include extending the application of the exemption to cancellation of listings of standard shares as well as premium listed shares and include a wider range of insolvency and reconstruction measures. Furthermore, the new rules enable overseas issuers to rely on the exemptions where there is equivalent overseas legislation in place.

There were no material changes to the amendments proposed in CP 12/11.

REQUIREMENTS FOR LISTING AND CONTINUING OBLIGATIONS

Free float. The FSA has not inserted the new guidance proposed in CP 12/2 to reflect the FSA's existing approach of allowing holdings of individual fund managers in an organisation to be treated separately, provided investment decisions with regard to the acquisition of shares are made independently, for the purposes of the free float requirement. Instead, the FSA is considering free float requirements as part of its new consultation in Chapter 7 of CP 12/25.

Settlement. Whilst the LRs state that a company's equity shares must be eligible for electronic settlement, the FSA recognises that there may be practical matters preventing this. The LRs now require the constitution of a company and the terms of its equity shares to be compatible with electronic settlement. The FSA has inserted guidance which states that for some companies there may be external factors affecting the eligibility of an equity share for electronic settlement (for example, where there may be issues as to settlement in CREST for shares of overseas companies) and therefore the rule requiring that shares are eligible for electronic settlement has been amended to only provide that the constitution is compatible with electronic settlement.

Class 1 disposals. The FSA has modified the proposed amendments to the requirements for the financial information table for a class 1 disposal so that the target's last annual consolidated balance sheet and the consolidated income statements for the last three years do not have to be audited.

In addition, the rules have been amended so that if a change of accounting policies has occurred during the relevant financial period, there is no need to present on the basis of both the original and amended accounting policies where the change did not require a restatement of the comparative period.

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