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25 April 2012

Ms Victoria Richardson
Primary Markets Policy
Financial Services Authority
25 The North Colonnade
Canary Wharf
London E14 5HS

FSA CP12-2: Listing, Prospectus, and Disclosure Rules

Dear Ms Richardson

Please find attached our responses to many of the questions posed in the referenced CP. Our concerns are centred on Chapters 2 and 3 and focus principally on the Sponsor Regime.

We are grateful to have had the opportunity to meet with a senior UKLA/FSA team recently to discuss the CP's proposals regarding the Sponsor Regime. We were able to note some of our concerns about some of the proposals and to discuss the UKLA/FSA team's expectations concerning the practical application of the proposed rules which we found quite helpful.

Our principal concerns are as follows:

1. We are concerned that the proposals taken together could tend to decrease collaboration between the UKLA team and sponsors (here we also reference proposals in CP 12-5 concerning usage of the help desk). Depending on the application of the proposals, sponsors may be discouraged from contacting the UKLA to discuss technical issues on a no-names basis and otherwise until all conflicts checks have been completed. We note the approach taken by the Takeover Panel which does have no-names discussions of Code provisions and is generally willing to discuss hypothetical application of Code provisions on a non-binding basis. In our view both the UKLA and the Takeover Panel have roles which involve them intricately and decisively in ongoing deals. Regulators who are not involved in ongoing transactions in the same way will have a different relationship with those they regulate and the transactions within their purview. In light of these proposed changes, we would also counsel the UKLA to have an eye to the possible unintended consequences as sponsors

may be disinclined, or more selective as to when, to undertake a sponsor role given the regulatory responsibilities associated with it.

2. Sponsors are asked to undertake onerous new responsibilities in relation to non-EEA exchanges, determining whether the terms of a related party transaction are fair and reasonable, and expert valuations of all sorts in order to make representations to the UKLA which hitherto have been handled by other experts and by the UKLA itself. Sponsors would have responsibility in many new areas where other parties may be more expert and/or more competitive. We accept that sponsors may retain experts to report on financial matters or other matters upon which they rely to be able to give required assurances to the UKLA and that in doing so they retain responsibility to understand the expert's report and to ensure that it does not conflict with its own due diligence and knowledge of the issuer. However, it must be clear that the sponsor is not the guarantor of an expert's report.

3. Proposed new requirements for record keeping will result in the need to keep voluminous written records regarding advice and assurances given by a sponsor which will constitute a very onerous burden which is unparalleled in any other business. This appears to reflect a determination to review every application of every listing rule by a sponsor, whether or not any problem has occurred. A further concern is that the proposed prescriptive record-keeping requirements may create a basis for litigation based on assertions of the inadequacy of records to be formally required. We hope that the UKLA will give some thought to reducing this potential litigation risk.

4. We perceive a lack of clarity developing regarding the differentiation of the sponsor's role from others (e.g. corporate broker, experts) as well as some imprecision regarding the beginning of a sponsor's relationship with an issuer. The proposals around conflicts reviews and reports are also potentially the source of confusion.

5. We are strongly supportive of the CP's proposal to establish that a Premium Listing Issuer or applicant has a responsibility to assist its sponsor in meeting its sponsor's obligations under LR 8. And we recommend that the proposed rule also require a written undertaking by each such issuer or applicant to fulfil this responsibility.

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We are very thankful for your consideration of our response and for your taking the time to meet with us recently. We would be happy to discuss our response or provide further input if that would be helpful.

Yours sincerely

William J Ferrari
Managing Director

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CP12-2: Listing, Prospectus, DTR's

Response to Questions 1-28 (Reverse Takeovers and Sponsor Regime)

Premium listing: wider issues

Q1. ***What, if any, changes to the Listing Rules do you believe may be necessary to provide additional protection to investors?***

We have no proposals to make at this time.

Reverse Takeovers

Q2. ***Do you agree with the proposal to amend the Listing Rules (LR 5.6.2R) to narrow the reverse takeover exemption so that it only applies to listed issuers acquiring another listed issuers listed within the same listing category?***

AFME considers that it would be more appropriate to limit the application of the proposed rule to the Premium Listing category. AFME believes that the Standard Listing rules should reflect the listing minimum standards provided by the European legislation and the proposed amendment would jeopardize this principle by imposing new requirements on the Standard Listing category.

Q3. ***Do you agree that the proposed guidance on a fundamental change (LR 5.6.5G) contains the key indicators? Do you think there are other factors that should be considered and if so what are they?***

Yes.

Q4. ***Do you agree with the proposed changes to codify within the Listing Rules (LR 5.6) the existing practice to contact the FSA as soon as possible once a takeover is agreed or details of the transaction have leaked, to discuss whether a suspension is appropriate?***

More clarity is necessary regarding the scope of the provision. AFME suggests to replace the wording in *LR 5.6.6R* '*as early as possible*' with '*as soon as reasonably practicable*', which is more realistic within the context of the sponsor activities'.

Furthermore, the reference to a reverse takeover that 'is in contemplation' makes the scope of application of this provision unclear. AFME suggests the deletion of the words 'or is in contemplation' or, at

least, requires that guidance is included which makes it clear that 'in contemplation' means the transaction has to be sufficiently advanced for the takeover to be reasonably likely.

More generally, the proposed change could result in regulatory duplication in situations where a discussion with the Panel on Takeovers and Mergers is already taking place. The issuer or the sponsor would have to deal at the same time with the FSA and the Panel. This could lead to an unnecessary and overlapping of burdens .

Suggested wording as follows:

LR 5.6.6 R

An *issuer*, or in the case of an issuer with a *premium listing*, its *sponsor*, must contact the *FSA* as soon as reasonably practicable:

(1) before announcing a *reverse takeover* to discuss whether a suspension of *listing* is appropriate; or

(2) where details of the *reverse takeover* have leaked, to request a suspension.

Q5. ***Do you agree with the proposal to amend the Listing Rules (at LR 5.6) to require an issuer to make an RIS announcement in relation to disclosure requirements, in addition to confirmation from the issuer?***

AFME considers that the proposed sponsor's confirmations in the case of a premium listing are not proportionate. The confirmation regarding the lack of material differences between the disclosure regimes of the target company and the premium listed company could be given by an appropriate law firm, recognising the essentially legal nature of any comparison. A sponsor's confirmation would not be necessary. With respect to a confirmation that the target has met all of its obligations under the applicable regime, it would require inordinate due diligence to go behind a target issuer's representations to give the proposed confirmation. The premium issuer is in the best position to assess the risks inherent in the takeover and to protect its shareholders.

Q6. ***Do you agree with the proposal to amend the Listing Rules (at LR 5.6) to allow a premium listed issuer to have a modification within its track record when undertaking a reverse takeover, without rendering the enlarged group ineligible?***

Yes.

Q7. ***Do you agree with the proposal to amend the Listing Rules (LR5.6) to follow the principles of our transfer provisions in the case of issuers acquiring targets which are also listed but in another category?***

AFME considers that it would be more appropriate to apply the proposed rule only to the Premium Listing category. (See *Question 2*)

Q8. ***Do you agree with the proposal to delete LR 10.2.3R allowing an issuer with a premium listing undertaking a reverse takeover, to be treated in certain circumstances as a class 1 transaction?***

Yes.

Sponsors

Q9. ***Do you support the proposal to amend the Listing Rules (LR 8.2.1R(6)) so that for smaller related party transactions a premium listed company is required to appoint a sponsor for the purpose of providing the FSA with confirmation that the terms of the proposed transaction are 'fair and reasonable' as far as shareholders are concerned?***

AFME considers that a sponsor may not always be in the best position to provide the proposed confirmation, both in terms of expertise and in terms of economic cost to issuers. Issuers should be able to select other entities (e.g. auditors, other banks) which are qualified for performing this obligation on the most competitive terms. In principle it is neither the sponsor's role nor the UKLA's to determine which terms may be considered "fair and reasonable". This is a commercial determination which is proposed by a board.

More generally, Members proposed to better specify the definition of '*sponsor service*' (Appendix 2, Annex A – Amendments to the Glossary of definitions) by adding the wording '*in its capacity as sponsor*'. The aim is to limit the scope of the definition to the services actually provided in the context of the sponsor's activities.

Suggested definition as follows:

Sponsor service

a service relating to a matter referred to in LR 8.2 that a *sponsor* provides or is requested or appointed to provide in its capacity as sponsor including preparatory work that a sponsor may undertake before a decision is taken as to whether or not it will act as *sponsor* for a *listed company* or *applicant* or in relation to a particular transaction, and including all the sponsor's communications with the FSA in connection with the service. But nothing in this 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.

Q10. ***Do you support the proposal to amend the Listing Rules (LR 8.2.1R(7)) so that for Related Party Circulars a premium listed company is required to appoint a sponsor for the purpose of providing the FSA with confirmation that the terms of the proposed transaction are 'fair and reasonable' as far as shareholders are concerned?***

AFME considers that the determination of what is fair and reasonable in a Related Party transaction is a commercial judgment and should not be considered a sponsor service.

Q11. ***Do you support the proposal to amend the Listing Rules (LR 8.2.1(9)) to require a premium listed company to appoint a sponsor to discuss with the FSA whether a suspension of the listing is appropriate, before announcing a reverse takeover (that has been agreed or is in contemplation or where details of the reverse takeover have been leaked)?***

AFME considers that the proposed provision should allow more flexibility by considering other roles that the same financial institution could have in the context of a transaction: as a corporate broker and/or a sponsor. We consider that this responsibility fits most properly within the expertise of a corporate broker which is likely to be involved on an ongoing basis in monitoring trading in an issuer's securities and to be in frequent contact with the relevant trading venues which also may offer advice regarding the appropriateness of suspension of trading of the relevant securities.

Q12. ***Do you support the proposal to amend the Listing Rules (LR 8.2.1R(10) and LR 8.2.1R(11)) so that where the target of a reverse takeover is not subject to a public disclosure regime, the premium listed company is required to appoint a sponsor in order to make a confirmations regarding the issuer's declarations, to the FSA?***

With respect to proposed 8.2.1(10), AFME considers that the main task in these cases is to map the differences between the disclosure regimes of the two countries. This is a matter for legal/regulatory analysis, which is more appropriately dealt with by experts in those fields. An issuer could directly commission a law/accounting firm to prepare a detailed legal/regulatory comparison between the public disclosure regimes in force in the target's country and the UK. Since the issue is one of regulatory policy, in our view the FSA will have to consider the gap analysis and determine whether material discrepancies exist between the two regimes in law or in practice in any event. The FSA will have to make the final determination which could inform future applications from other issuers from the same country. Adding an additional layer to this process by requiring a sponsor confirmation does not appear to provide any meaningful benefit and is likely to increase the costs further for issuers.

In respect of the more active markets, AFME suggests the FSA should establish a standing regime analysis which can be used in all cases involving the relevant market. Once the FSA has adopted an assessment comparing a particular state with the UK (e.g. Hong Kong or US), presumably sponsors could be allowed to rely on the accepted recognized assessment in making their confirmation i.e. sponsors would not have to re-analyze the pre-assessed relevant regime.

In relation to the less active markets, issuers should commission a law/accounting firm to prepare a detailed legal/regulatory comparison between the public disclosure regimes in force in the target's country and the UK. In these cases, the legislative regime regarding the sponsors' responsibilities should be calibrated by taking into account the necessity to involve the external law/accounting firm in the process.

With respect to 8.2.1 (11), AFME has no objection.

Q13. ***Do you support the proposal to amend the Listing Rules (LR 8.2.1R(12)) to require a premium listed company to appoint a sponsor for the purpose of submitting the eligibility letter required as a result of a reverse takeover?***

Yes.

Q14. ***Do you support the proposal to amend the Listing Rules (LR 8.2.1R (13)) to require a sponsor to be appointed in relation to severe financial difficulty letters?***

Yes.

Q15. ***Do you support the proposal to amend the Listing Rules (LR 8.2.1R(14)) to require a sponsor to be appointed in relation to the acquisition of a publicly traded company?*** AFME considers that it is not within the normal expertise of a sponsor to assess the appropriateness of an exchange or MTF, particularly in a third country. The FSA itself would appear better suited to make such a determination given its role as supervisor of exchanges and its relationships with other regulatory authorities. The criteria for assessing the relevant exchange or MTF to provide the confirmation appear to be largely accounting driven and it seems more appropriate therefore that this is dealt with in the same way as the UKLA assesses accounting standards. We note that the term "appropriate" is not defined and is not a current requirement in the listing rules.

Currently, companies with a premium listing are in most cases exempted from re-stating the *target*'s accounts in accordance with the listed company's accounting policies. Issuers therefore usually merely replicate the content of the *target*'s accounts in class 1 circulars. When this is not possible (e.g. because the sponsor does not have access to the *target*'s accounts), the exemption is warranted if the acquiring company can show that the *target* is based in a country where equivalent accounting standards are in place. If the company is unable to show the existence of equivalent accounting standards in the relevant country, then it should have to restate the content of the *target*'s accounts.

Again, it is suggested that the FSA should publish/update a list of countries/exchanges/MTFs where appropriate standards are considered to be in place and to seek further information with respect to others.

Q16. ***Do you support the proposal to amend the Listing Rules in respect of the definition of sponsor services to include all sponsor communications with the FSA in connection with the sponsor service?***

AFME has serious reservations regarding the proposed extension of the sponsor regime to all informal communications with the UKLA, including potentially those on a no-names basis where there is already an expectation in the sponsor community that the sponsor may not rely on the communication exchange as well as where the UKLA is not relying on the communication. General inquiries directed to the Help Desk (70-80% of all communications) concerning technical issues not associated with a particular deal and those occurring before the sponsor has agreed to serve as a sponsor should not require that full due diligence process, conflicts analysis, and regulatory discussions with the potential issuer have been completed before the communication. The proposed requirement that a sponsor take "all" reasonable steps to "ensure" that any communication to the UKLA is "to the best of a sponsor's knowledge and belief accurate and complete in all material respects" does not appear proportionate for all types of communications with the UKLA. As the FSA will appreciate this is a very high standard which in many cases would be unnecessary, especially in informal communications. Applied retrospectively, the standard would allow a very broad basis of review which would not be appropriate where the FSA has not required specific information. The UKLA is, of course, able to ask for specific information which it may use to assess

what it has been told, and in such cases sponsors should be required to use reasonable efforts to provide accurate and complete answers.

It also should be noted that the proposed extensions of the definition of sponsor services clouds the distinction between corporate broker services and sponsor services which may lead to anomalies.

More clarity is necessary in defining which kind of sponsor communications with the FSA fall within the sponsor service regime and which are exempted. Financial institutions do not always have expressly separate conversations as broker and as sponsor with the FSA, thus the appropriate regime to apply could be unclear at times. However, it is important to preserve the efficiency of communications and find the most appropriate standards, according to their content and function, without imposing excessive burdens and potential liabilities on the sponsors. The suggested solution is to apply the sponsor regime communications standards only to the communications with the FSA, which are considered and expected to be binding.

Currently, communications between financial institutions and the FSA are mainly of two types.

The first type is the most common one. Financial institutions ask the FSA for advice by phone at a quite general level: not providing specific details about the transaction. The communication need not be regulated by the enhanced sponsor service regime, since the response provided by the FSA is not binding.

The second type includes the communications (mostly written) during which financial institutions (acting as sponsors) disclose to the FSA details (type, client, etc.) of the transactions. These communications reasonably have to fulfill the higher standards established by the sponsor service regime (e.g. higher degree of accuracy and completeness) and the response provided by the FSA would be binding.

Q17. ***Do you support the proposal to amend the Listing Rules (LR 8.3.1R(1A)) so that a sponsor is required to provide any explanation or confirmation as the FSA reasonably requires for the purposes of ensuring that the Listing Rules are being complied with by an applicant or listed company?***

AFME has serious reservations concerning this proposal. There seems to be modest additional benefit arising from this proposal , considering that sponsors are already obliged to communicate with the FSA, if a firm is not in compliance with the listing rules. The proposed amendment could considerably increase the range of sponsor responsibilities, theoretically allowing the UKLA to deputize the sponsor to do the equivalent of a skilled person's report. We are concerned about the broad wording of the provision which suggest that the scope of explanations or confirmations that may be requested is not clearly defined and therefore may prove impossible to provide. The scope of the proposed provision should be limited to the period in which sponsor services are specifically being provided, without leaving excessively open the timeframe for the FSA to request an explanation or confirmation. Moreover, the scope should be limited to information that the sponsor can reasonably provide in its capacity as sponsor.

We note that a similar proposed power for the UKLA/FCA has been dropped from the proposed Financial Services Bill. In our view, there needs to be a clear qualification of this proposed change to the sponsor regime [in order to fit with the proposed statutory regime].

Q18. ***Do you support the proposed amendments to the Listing Rules (LR 8.3.1AR) in relation to sponsor communications and standard of care?***

We propose changes in the wording of the proposed provisions: *LR 8.3.1 AR*

A sponsor must, for so long as it provides a sponsor service:

(1) take reasonable steps to ensure that any communication or information it provides to the FSA in carrying out the sponsor service is, to the best of its knowledge and belief, accurate and complete in all material respects; and

(2) promptly provide to the FSA any information of which it becomes aware that materially affects the accuracy or completeness of information it has previously provided.

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Regarding the obligation of providing to the FSA information of which the sponsor becomes aware that materially affects the accuracy or completeness of information previously provided, the word '*promptly*', instead of the proposed '*immediately*', seems to be more realistic and feasible . In practice it would be very difficult to comply with the rule as proposed because sponsors need time to consider whether specific information has to be communicated or not.

Concerning the obligation of the sponsor to take "all reasonable steps to ensure … accurate and complete in all material respects", the deletion of the word 'all' is requested. This reflects what our members consider the more appropriate standard which case law defines as the obligation to take the steps that someone in the same position would reasonably be expected to take. The expression '*reasonable steps*' is also consistent with the wording used throughout the explanatory text (point 3.24 – p. 27) and it is also used in other points of the consultation paper.

Q19. *Do you support the proposed amendments to the Listing Rules (LR 8.3.2AG) in relation to sponsor communications that seek to reinforce the responsibility of the sponsor for communications with the UKLA, in instances where a sponsor relies on representations made by the listed company or applicant or a third party?*

AFME believes that the current regime of due diligence required of sponsors is appropriate. We note that the proposed *LR 8.3.1* already states the general obligation for sponsors to ensure that any communication or information they provide to the FSA is accurate and complete in all material respects. Currently, when communicating with the FSA, a sponsor may properly rely on representations made by the listed company or applicant or a third party such as an accounting firm or legal advisor, provided that there is no discrepancy with the information gleaned through its due diligence efforts. A sponsor must have an understanding of what has been provided, but it is not expected to assess the substance of the expert's opinion or the adequacy of its specialist methodology. We accept that a sponsor should be able to come to a view on whether the expert's opinion is based on information or assumptions which the sponsor knows or reasonably suspects is unsound from its own due diligence. It is the expert or advisor, however, who must stipulate which information must be provided by the issuer or other sources to enable it to provide the requested assurance, and the sponsor may rely on that stipulation.

AFME proposes that 8.3.2A G should be expanded to recognise that sponsors are not guarantors of the substance of experts' and advisers' assurances or confirmations and have a right to rely on them in their own confirmations and assurances. The guidance should also indicate that a sponsor is not responsible for any errors made by experts or advisors unless aware of information in its possession from its own due diligence which conflicts with that relied upon by the expert.

Q20. ***Do you support the proposal to amend the Listing Rules (LR 8.3.5BR) to introduce a Principle of Integrity for sponsors?***

AFME supports this proposal.

Q21. ***Do you support the proposal to amend the Listing Rules (LR 8.3) to clarify that a sponsor must, as part of its ongoing conflicts checking procedures, take all reasonable steps to identify conflicts that could adversely affect its ability to perform its functions under LR 8?***

More clarity would be helpful regarding the types of regulatory conflicts and other types of conflict which concern the FSA and the details regarding the proposed procedure that sponsors should go through for identifying conflicts before accepting a sponsor assignment. There is a need for flexibility in the timing of the finalisation of a sponsor's conflict checks which allows for urgency.

We propose that the FSA guidance allow a sponsor to provide negative assurance regarding the existence of regulatory conflicts where that is the case.

Also the FSA guidance should acknowledge that it would not be feasible for a sponsor to re-check the existence of conflicts on an ongoing basis, considering the process it has to follow to be in a position to issue one conflict declaration . The FSA guidance should establish a staggered schedule for conflict checks e.g. at the beginning of an assignment and then again at the first formal letter.

We agree that the sponsor engagement letter should make clear that the sponsor has a primary duty to the FSA which cannot be overridden, and an understanding of this duty should be confirmed in writing by all primary listed companies and applicants. See our response to Question 27

Q22. ***Do you support the proposal to amend the Listing Rules (LR 8.6.16) so that sponsors are required to retain accessible records***

which are sufficient to demonstrate the basis on which sponsor services have been provided?

We understand that the proposals are intended to assist the UKLA in its supervision of sponsors providing sponsor services. However, we are very concerned that the proposal may impose an unnecessary and disproportionate burden on sponsors to create a vast paper trail for each aspect of sponsor services such as does not exist in any relevant commercial or financial field. It is important to note that sponsors will not have any legal privilege when giving advice to issuers. The rule could well be used by claimant litigators in the future to buttress legal suits on transactions by asserting that the records kept do not meet the regulatory requirement for records which-in turn- will be asserted as establishing a negligent approach by the sponsor. This is especially dangerous where hindsight is being used to determine what is adequate recordkeeping under the rule. Such an interpretation could encourage a much more litigious context for capital-raising in the UK but also in other jurisdictions e.g. 10b-5 suits in the US which could seek to use in hindsight sponsor's recordkeeping with respect to listing rules as a basis for a claim against the sponsors as underwriter based on prospectus disclosure. This may deter issuers and/or sponsors from including US investors in certain offerings.

Clearly sponsors must maintain records of the substance of its reviews and communications which support its material conclusions and confirmations. However, it would be appropriate to state 8.6.16A in general terms only while leaving 8.6.16B as proposed. We propose that the UKLA/FSA work with stakeholders to draft detailed guidance concerning sponsor record keeping.

Q23. ***Do you agree with the proposal to amend the Listing Rules (LR 8.7.8) so that sponsors are required to notify the FSA of matters that would be relevant to the FSA in respect to: market confidence; reorganisations; and, ongoing approval as sponsor?***

We have no objection to this proposal.

Q24. ***Do you support the proposal to amend the Listing Rules (LR 8.7.21AG) so that sponsors are required to submit a cancellation request in the event that they are unable to provide the requisite assurance of ongoing eligibility?***

We support the proposal.

Q25. ***Do you support the proposal to amend the Listing Rules (LR8.7 and LR 8.3.13G) so that sponsors are no longer required to submit Conflicts Declarations?***

We support the proposal although would note that in reality there will likely be certain points in a transaction at which a sponsor would run specific checks. See our response to Question 21.

Q26. ***Do you support the proposal to amend the Listing Rules (LR8.6.17R and LR 8.7.8R(9)) so that sponsors are no longer required to carry out regular reviews?***

We have no objection.

Q27. ***Do you support the proposal to amend the Listing Rules (LR8.6.5R) to introduce a specific obligation on premium listed companies and applicants to co-operate with their sponsor to enable the sponsor to discharge its obligations to the FSA?***

Yes. Further we propose that the rule extend specifically to 8.3.4 and that it state a requirement for primary issuers and applicants to confirm in writing to the FSA and relevant sponsor their understanding of the proposed rule as well as their undertaking to cooperate with the sponsor.

Q28. ***Do you agree with the proposed amendments set out in paragraph 3.45?***

No comments.