

Consultation response

FCA Primary Market Bulletin No. 18: Technical Notes 708.3, 718.1, 719.1 and 720.1 (UKLA Guidance for Sponsors)

October 2017

The Association for Financial Markets in Europe (AFME) welcomes the opportunity provided to us by the FCA to comment on changes to UKLA guidance set out in the FCA Primary Market Bulletin No. 18.

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. It advocates stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia. AFME is registered on the EU Transparency Register, registration number 65110063986-76.

Introductory remarks

We are writing with regards to the FCA's recently published Guidance Consultations (Technical Notes 718.1, 719.1, 720.1 and 708.3) regarding various Sponsor obligations.

AFME has discussed the FCA Primary Market Bulletin No. 18 with member firms of its Listing Rules working group and would like to take this opportunity to provide comments on those aspects that relate to the sponsor regime and the provision of sponsor services.

AFME's member firms firmly support the UK's sponsor regime and believe that the rigorous standards that it imposes on sponsors and applicants and listed companies alike works well and is an important contributor to the strength of the UK's premium listing regime. Accordingly, as a general matter, AFME and its member firms think that the new and revised notes are a helpful contribution to the ongoing clarification of a sponsor firm's obligations. Sponsor firms are required to use their judgment and experience to a significant degree when advising applicants and listed companies and in providing declarations to the UKLA; as a result, the more guidance sponsors have from the FCA, the better they will be able to perform their sponsor services and advise their clients.

The comments below are given with two key objectives in mind:

1. Firstly, AFME and its member firms would like to clarify whether, in the FCA's opinion, any of the draft guidance is intended to extend the scope of any relevant sponsor obligations. If so, AFME and its member firms will need to consider what enhanced sponsor record keeping and procedural requirements are required to be put in place in order to comply with this enhanced sponsor regime.
2. AFME and its members are fully aware of the importance of complying with LR 8.3.2AG A. As a result, we are also seeking to ensure, that there is a common understanding of the limits of sponsors' ability to provide advice on, and judgments regarding, matters which are outside the sphere of compliance with the Listing Rules, the Prospectus Rules and the Disclosure Requirements and Transparency Rules and which are more appropriate for other professional advisers such as accountants, lawyers, regulatory compliance experts and IT consultants to provide advice on.

In light of the guidance in question that is focused on defining the scope of a sponsor's obligations, given the importance of the sponsor regime to the UK's capital markets, AFME and its member firms would also like to discuss with the FCA the ways in which the FCA can assist sponsors in helping to educate new applicants, and keep listed companies well informed, of the requirements under the sponsor regime, whether through guidance or otherwise.

Specific comments

We summarise below our high-level response to the three new technical notes TN 718.1, 719.1 and 720.1 and amendments to existing technical note TN 708.2 relevant to sponsors and their obligations in Chapter 8 of the Listing Rules and for your ease of reference enclose mark-ups of each of the four notes to show changes that we would propose to the text drafted by the FCA.

With reference to the first key objective set out above, our specific comments assume that the purpose of the new and amended notes are not to set out new or extended obligations for sponsors, but rather to provide helpful clarification on how a sponsor can and should fulfil such obligations. By way of example, in the context of page 3 of TN 708.3 in the context of page 3 of TN708.3, we assume that there was no intention on the part of the FCA to suggest a sponsor should be responsible for designing and implementing an applicant's financial position and prospects procedures, rather a desire (which AFME and its member firms strongly support) to remind sponsors of the need to ensure that such procedures are subject to appropriate independent checks and challenges.

1. TN 718.1 – Sponsors' duty regarding directors of listed companies (new guidance)

- 1.1 AFME welcomes the proposed publication of guidance on a sponsor's obligation to take reasonable steps to satisfy itself that the directors of a listed company understand their responsibilities and obligations under the Listing Rules and the Disclosure Requirements and Transparency Rules. Subject to the points below, the proposed guidance broadly reflects current understanding of the expectations of a sponsor and market practice in meeting those expectations, as well as serving as a useful reminder of record keeping obligations and the need for issuers to co-operate with a person fulfilling the role of sponsor (see introductory remarks above).
- 1.2 Based on the member firms' extensive experience in the provision of sponsor services, transactions often do not proceed in a uniform manner and therefore we would suggest reference to "early stage" be amended to "appropriate stage". In addition, we consider that actions may not necessarily be required of the sponsor alone and therefore we suggest "carry out any required actions" be amended to "ensure any required actions are carried out. We would also suggest the addition of "before a sponsor provides its declaration" to make it clear the point at which its confirmation is given.
- 1.3 Under the heading "Reasonable steps" to be taken (pages 1 and 2), AFME agrees with circumstances 1) through 3) that the guidance suggests can be taken into account by a sponsor. In practice, a sponsor will also have regard to a fourth factor, namely the position and experience of the company itself – in taking reasonable steps, sponsor firms believe that it is a relevant consideration whether they are providing sponsor services to a private company that is pursuing an IPO on the one hand, or a seasoned listed company that regularly enters into related party or Class transactions on the other hand. AFME requests that this be reflected as a fourth limb in the guidance note or alternatively built into the second limb under a heading "The nature and experience of a listed company or applicant".
- 1.4 Under the heading "The sponsor's role", we note the statement that you would expect the sponsor to "enhance" the work undertaken by the listed company or applicant (page 3, para 4). We are unclear as to the meaning of "enhance" and suggest that a clearer way of expressing the point might be to replace the first sentence with the following:

"In providing its confirmation under LR 8.3.4R, we would expect the sponsor to apply its own knowledge and experience of the listed company or applicant and take into account other factors that it may consider relevant including the company's operating environment and any particular knowledge or experience it may have of the approach taken by companies of a similar size, with a similar corporate structure or operating in the same sector."

2. TN 719.1 – Sponsors' obligations on established procedures (new guidance)

- 2.1 AFME welcomes the proposed publication of guidance on a sponsor's obligation – in the context of an IPO or other initial application for admission to listing – to come to a reasonable opinion that the directors have established procedures to comply with the Listing Rules and the Disclosure Requirements and Transparency Rules on an ongoing basis. Subject to the points below, the proposed guidance broadly reflects current understanding of the expectations of a sponsor and market practice in meeting those expectations. As an overarching point, AFME believes it is important to remember in the context of establishing procedures that a sponsor's role is to provide independent check and challenge to the work of the applicant and its advisers; it is not the role of a sponsor to act, for example, as an IT or systems consultant.
- 2.2 AFME notes and agrees with the statement that there is overlap and connection between the work that is carried out by a sponsor in connection with financial position and prospects procedures and established procedures to comply with the Listing Rules and the Disclosure Requirements and Transparency Rules on an ongoing basis (page 1, para 5).
- 2.3 The note contains various references to a sponsor and "design" of systems and procedures. AFME and its member firms feel very strongly that responsibility for the "design" of systems and procedures rests firmly with the directors of an applicant or listed company, as the case may be, and not the sponsor who is responsible for reviewing and challenging the efficacy of such systems and procedures. This view is not just held by AFME and its member firms, but is also reflected very clearly in the updated *Guidance on financial position and prospects procedures* (TECH 14/14CFF) published by ICAEW. Accordingly, we would encourage the FCA to review the context in which the term "design" is used throughout this note and we have suggested a number of clarificatory changes.
- 2.4 Under the heading "The sponsor's role" (pages 3 and 4), there are a number of references to "the listed company" that we assume should be references to "the applicant". In relation to the third paragraph under the heading, we believe it would be appropriate to rephrase the final sentence as follows:

"In order to meet its obligations, we expect the sponsor to review and challenge the work done by the applicant and its advisers. In providing its confirmation under LR 8.4.2R(3), we would expect the sponsor to apply its own knowledge and experience of the applicant and take into account other factors that it may consider relevant including the company's operating environment and any particular knowledge or experience it may have of the approach taken by companies of a similar size, with a similar corporate structure or operating in the same sector."

- 2.5 The new guidance does not expressly address the appropriate level of diligence and enquiry that a sponsor should apply in circumstances where a new holding company is seeking admission to listing in connection with a restructuring of an existing listed company. AFME's member firms would find it helpful if the FCA would consider the addition of a specific paragraph addressing the listing of new holding companies on page 6.

3. TN 720.1 – Sponsors' obligations on no adverse impact (new guidance)

- 3.1 AFME welcomes the proposed publication of guidance on a sponsor's obligation – in the context of, among others, a Class 1 transaction – to come to a reasonable opinion that the transaction will not have an adverse impact on the listed company's ability to comply with the Listing Rules and

the Disclosure Requirements and Transparency Rules. Subject to the points below, the proposed guidance broadly reflects current understanding of the expectations of a sponsor and market practice in meeting those expectations.

- 3.2 Under the heading “The sponsor’s role” (pages 2 and 3), we believe it would be appropriate to rephrase the fourth paragraph as follows:

“In order to meet its obligations, we expect the sponsor to review and challenge the work done by the listed company and its advisers. In providing its confirmation under LR 8.4.12R(2), we would expect the sponsor to apply its own knowledge and experience of the listed company and take into account other factors that it may consider relevant including the company’s operating environment and any particular knowledge or experience it may have of the approach taken by companies of a similar size, with a similar corporate structure or operating in the same sector.”

- 3.3 In relation to the paragraphs headed “Determining due and careful enquiry” and “Appropriate procedures, systems and controls”, we note that the FCA has previously informally expressed the view that – absent an indication of a problem – it does not expect a sponsor to carry out the same level of diligence on a listed company’s existing systems and controls as it would do in the context of an IPO in order to meet its obligations under LR 8.4.2R(4). AFME believes that it is crucial for this previously informal guidance to be included now that the FCA is publishing a formal guidance note for the first time on “no adverse impact”. In addition, it would also be helpful for the FCA to recognise that, in determining the level of diligence required, a sponsor will in practice take into account its prior relationship with the listed company (for example, has the sponsor recently reviewed systems and controls in the context of an IPO or other transaction) and any recent corporate or Listing Rule transactions that the listed company has completed. We have suggested some wording.

4. TN 708.3 – Sponsors’ obligations on financial position and prospects procedures (amended guidance)

- 4.1 AFME welcomes the publication of this updated guidance. Given the FCA’s focus on ensuring that applicants comply with their obligations and co-operation with the sponsor firm providing sponsor services, we would welcome the FCA cross referencing the extensive guidance for applicants and their directors on financial position and prospects procedures provided by ICAEW in TECH 14/14CFF (see above). As an overarching point, and similar to the point made above in the context of established procedures, AFME also believes it is important to remember in the context of establishing financial position and prospects procedures that a sponsor’s role is to provide independent check and challenge to the work of the applicant and its advisers; it is not the role of a sponsor to act, for example, as an IT or systems consultant.

- 4.2 Under the heading “The sponsor’s role”, AFME believes that an applicant appoints a reporting accountant, not a sponsor (page 2, para 2).

- 4.3 Under the heading “The sponsor’s role” (page 2), we believe it would be appropriate to rephrase the second paragraph as follows:

“In order to meet its obligations, we expect the sponsor to review and challenge the work done by the applicant and its advisers. In providing its confirmation under LR 8.4.2R(2), we would expect the sponsor to apply its own knowledge and experience of the applicant and take into account other factors that it may consider relevant including the company’s operating environment and any particular knowledge or experience it may have of the approach taken by companies of a similar size, with a similar corporate structure or operating in the same sector.”

- 4.4 In the first sentence of the third paragraph under the heading “The sponsor’s role” (page 2), we believe it would be more accurate to state “throughout the engagement” rather than “at all stages

of the engagement” as there will be periods of time where the focus of the transaction and advisory teams is on areas other than financial position and prospects.

- 4.5 We believe that the second sentence of the fourth paragraph under the heading “The Sponsor’s role” (page 3) would read more clearly as:

“As a starting point, the sponsor may wish to understand from the applicant the procedures, systems and controls that the directors of the applicant have established or propose to establish ahead of admission in order to enable them to make proper judgements on an ongoing basis as to the financial position and prospects of the applicant and its group. The sponsor may also wish to understand the extent to which the applicant’s reporting accountants or auditors have been involved in reviewing the design of such procedures, systems and controls and the extent to which any recommendations on the same have been taken into account.”

This makes it clear that primary responsibility for establishing such procedures, systems and controls rest with the directors of the applicant (see above).

- 4.6 We further believe that the third sentence of the same paragraph would read more clearly as:

“The sponsor should assess the appropriateness of the procedures, systems and controls in place or proposed to be put in place ahead of admission and identify any gaps in or recommendations in relation to the same. Where the sponsor identifies any gaps in or recommendations in relation to the applicants’ procedures, systems and controls, the sponsor should ensure that the applicant and its directors have taken or have undertaken to take necessary steps to address the same before the sponsor provides its declaration.”

- 4.7 The amended guidance does not expressly address the appropriate level of diligence and enquiry that a sponsor should apply in circumstances where a new holding company is seeking admission to listing in connection with a restructuring of an existing listed company. AFME’s member firms would find it helpful if the FCA would consider the addition of a specific paragraph addressing the listing of new holding companies on page 3.

As noted in our introductory comments, we welcome confirmation that this helpful guidance is solely for the purpose of clarifying how a sponsor can and should fulfil its obligations, rather than seeking to extend the same. We very much hope that our specific comments will be considered in this light.

Following publication of these notes, the FCA will have completed a suite of public guidance notes for sponsors on the operation of the UK sponsor regime, but will have only published one note that touches on the need for an applicant or listed company to work with the FCA and its sponsor. AFME and its member firms would welcome the development of a public guidance note that addresses a sponsor’s obligations from the perspective of an applicant or listed company and highlights the FCA’s expectations for how an applicant or listed company should interact with and assist a sponsor in fulfilling its regulatory obligations. We would be delighted to work with the FCA and provide input into such a note from the sponsor community.

We would welcome the opportunity to discuss the suggestions made in this response in further detail with the FCA.

Contact: Andrew Brooke andrew.brooke@afme.eu

+44 (0)20 3828 2758

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