UK Finance-AFME response to CP 24/12: Public Offers and Admissions to Trading Regulations regime

18 October 2024

Submitted via email to Helen Boyd and Adam Wreglesworth (FCA) and cp24-12@fca.org.uk

Dear Helen and Adam,

We enclose the collective responses of the member firms of UK Finance and the Association for Financial Markets in Europe ("AFME") to CP24/12: *Public Offers and Admissions to Trading Regulations regime*, produced with advisory support from A&O Shearman LLP.

We are grateful for this opportunity to share our views and recommendations for improving the public offers and admissions to trading regime. An innovative regulatory regime, which upholds robust and proportionate standards, is fundamental to ensuring that the UK continues to be a market of choice for investors and issuers, both domestic and international.

UK Finance and AFME members ("Members") welcome the FCA's ambition to modernise UK capital markets and note the important role played by disclosure to ensure investors have sufficient, reliable information on companies' securities to make informed investment decisions. Our Members are therefore supportive of the overarching framework that the FCA intends to put in place through implementing the proposals and the FCA's general premise that the rules should broadly maintain the existing requirements as set out in the UK Prospectus Regulation. Members believe that amendments should focus on those requirements that may fail to achieve the right outcomes or that adversely affect the competitiveness of the UK regime as compared to other jurisdictions.

Our response to this consultation is therefore largely focussed on recommending targeted adjustments to ensure that the operation of the public offers and admissions to trading regime in practice reflects the policy objectives which sit behind it.

If you have any questions in relation to the information within our submission, please do not hesitate to get in touch.

Kind regards,

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Executive summary

As mentioned in the introduction, our response to this consultation is largely focussed on recommending targeted adjustments to ensure that the operation of the public offers and admissions to trading regime in practice reflects the policy objectives which sit behind it.

We have focused on the areas of most relevance to our Members, i.e. the POATRs as they apply to shares and depositary receipts of commercial companies and admission to trading on regulated markets. We have not, therefore, responded to those questions relating to non-equity securities, investment companies or MTF admission. We are, in addition, not proposing to respond to the separate consultation on Public Offer Platforms ("POP"). We have assumed that other financial market participants or bodies representing them will engage on those other aspects of the POATRs consultation and on the POP consultation. Should the FCA have any specific questions for our Members on areas we have not covered in this response, we would be happy to discuss these with our Members. We do not refer to those questions which we have consequentially chosen not to engage on.

Members key positions are:

- **Working capital**. The requirement for a working capital statement should be retained and we would welcome the ability for issuers to disclose the key assumptions used in its preparation. We advocate the FCA to publish guidance as to what may constitute a key assumption and examples of good disclosure. Members do not consider that disclosure of judgements and sensitivities is necessary or desirable.

- **Complex financial histories**. Members agree with the FCA's approach to providing additional guidance for issuers with a complex financial history but believe that there should be more detailed guidance than is currently proposed by the FCA.

  We suggest that an expert working group, including members of the accounting profession, be established to assist the FCA in drafting guidance on working capital assumptions and complex financial histories.

- **Prospectus triggering threshold**. Members acknowledge that there is scope to raise the threshold for triggering the requirement to publish a prospectus for further issuances of securities already admitted to trading on a regulated market. Members strongly believe that the 75% threshold is too high. In particular, Members believe that this will result in an information asymmetry where the information available to investors is insufficient, or of insufficient robustness, to support a large capital raise. This creates risks for the stability and reputation of the UK markets, and increases significantly the risk of litigation and regulatory actions for all market participants. Members believe that duplication can be mitigated and the burden on smaller issuers can be reduced through other means. Having an appropriate threshold would remove the need to have a separate regime for rescue financing.

- **Climate disclosures**. Members broadly agree with the proposed climate disclosure rule and the minimum climate-related disclosures in the prospectus annexes (Members note that they would need to be updated if/when the ISSB Standards are adopted by the Government and implemented by the FCA). Members agree that such disclosures should only be required when climate change is material to an issuer but believe that materiality should be as defined under the necessary information test. Members believe that it is potentially confusing for issuers to introduce a separate materiality trigger where an issuer has identified climate-related risks as risk factors or climate-related opportunities as material to the issuer's prospects. In addition, Members believe that it is essential that forward-looking statements in climate disclosures, including summaries of transition plans, are adequately protected from liability as PFLS given their inherent uncertainty and the long-time scales involved.

- **Additional sustainability disclosures beyond climate**. For the reasons given by the FCA, members agree with the FCA's approach with respect to additional sustainability disclosures. Members believe it would, nonetheless, be helpful to convene a working group of experts to consider whether additional guidance beyond climate change disclosures would be helpful.

- **Projected forward-looking statements**. Members agree with the premise for protecting forward-looking statements but believe that the FCA's proposals are unnecessarily limiting and complicated and would, in practice, severely restrict the forward-looking statements that could potentially benefit from the regime - this risks undermining the regime's policy objective. Members believe that qualitative and "*aspirational*" (which is defined for this response as comprising, *inter alia*, targets, aims, plans and indications) statements ought to be able to benefit from the regime. In addition, Members do not believe that the standards that apply to the preparation of forward-looking statements should be used to define what is a protected forward-looking statement. In the view of our Members, such standards would better appear in guidance on the preparation of forward-looking statements, rather than the criteria for protected forward-looking statements. Members also consider that the manner in which the rules have been drafted risks causing confusion, in particular the desire to distinguish between statements that are mandatory and those which are not and, as mentioned above, rendering guidance which relates to how statements are prepared into criteria for the protection of those statements.

Takeovers, mergers and acquisitions

Question 3: Do you agree with our proposed approach to the takeover exemption as described above? Y/N. Please give your reasons.

Members agree with having the proposed exemptions but consider that the drafting should be clarified as the reference to “exchange offer” implies a contractual takeover, rather than also including a scheme. It may also suggest that the consideration is fully comprised of shares, which we assume is not the intention. Members consider that it would be helpful to more closely align the language between proposed rules 1.4.7 and 1.4.8.

Question 4: Do you consider that we should publish guidance on what we consider should be the contents of exemption documents as described above in a Technical Note?

Members agree with having guidance, and with having such guidance in a technical note. Members consider that the content requirements should be no more onerous than Commission Delegated Regulation (EU) 2021/528. As with some of our other responses, Members suggest that it would be helpful to have a working group of relevant practitioners to assist the FCA in preparing guidance.

Prospectus content requirements and incorporation by reference

Question 10: Do you agree with our proposed approach to revising the requirements for a summary as described above? Y/N Please give your reasons

Members are supportive of a less prescriptive approach and are supportive of not having to include all the detailed financial information currently required.

Whilst Members do not consider there to be a need for a page limit, Members are happier with a higher page limit than the current one.

Members also agree with retaining the existing liability standard for summaries.

On an unrelated point, Members referenced the *HMT UK Prospectus Regime Review outcome* which noted that in time, the Government intended to develop a new regime of regulatory deference for offers into the UK of securities listed on certain designated overseas stock markets. It is unclear what the status of this is and, whilst Members acknowledge that this is an area of focus for HM Treasury, Members felt it necessary to draw the FCA's attention to the usefulness of this regime given the FCA and HM Treasury's alignment on enhancing retail participation by reducing the cost of, and facilitating, cross-border retail offers into the UK.

Question 11: Do you agree with our proposed approach to incorporation by reference? Y/N Please give your reasons

Members agree with the proposed approach to incorporation by reference.

Issuers should be free to decide whether to incorporate by reference, with regard, amongst other matters, to the continued accuracy of such information, the context in which it was prepared, and events subsequent to the production of such information. This is particularly the case given the different standard of care and burden of proof that applies to information in prospectuses from that which applies to other information.

General financial information requirements

Question 12: Do you agree with our proposed approach to carry forward financial information requirements? Y/N. Please give your reasons.

Members agree with and support the proposals to carry forward the current financial information requirements under the UK Prospectus Regulations.

Question 13: Do you agree with our proposal to clarify requirements relating to material uncertainty regarding going concern and other matters reported on by exception? Y/N. Please give your reasons

Members support the FCA's proposal. Most likely such information would be material for disclosure.

Working capital statement

Question 14: Do you agree that we should retain the current requirement for a working capital statement in a prospectus? Y/N Please give your reasons

Yes, Members agree that the current requirement for a working capital statement in a prospectus should be retained.

Members believe that a working capital statement provides important information and protection to investors. It gives investors comfort that an issuer has sufficient working capital to continue trading in the foreseeable future (12 months) following the receipt of the proceeds from the capital raise. It also gives investors confidence that the funds raised will be utilised for the purposes articulated.

It is worth distinguishing working capital statements from going concern and viability statements.

- A going concern statement goes to the basis upon which financial statements have been prepared and the assets and liabilities recorded. Whist the exercises and processes underlying the preparation of the going concern statement and the working capital statement have become increasingly aligned over time, they are still two different exercises with fundamentally different purposes.

- A viability statement relates to the longer term and considers the circumstances under which the company will continue to be a viable concern over the longer term; in doing so it considers the risks and scenarios under which a company might not remain viable. Whilst these include working capital, they are broader.

In addition, going concern statements and viability statements are prepared at the time of, and in the context of, the preparation of the financial statements. They reflect the situation as it is known at the time of their preparation and the conclusions are derived following the work undertaken to support the preparation of the financial statements. A working capital statement is given at a different point in time when circumstances will most likely have changed, new information will be available and it is given in the context of a capital raise.

When raising capital that, given its size, triggers the need for a prospectus and a working capital statement, Members consider that it is appropriate that the analysis is done at the time of and in the context of the capital raise having regard to the facts, including the capital raise and its deployment, that then exist.

Question 15: Do you consider that we should allow issuers to disclose significant judgements made in preparing the working capital statement, including the assumptions the statement is based on and the sensitivity analysis which has been performed? Y/N Please give your reasons

Members do consider that it would be beneficial to investors and issuers to allow the disclosure of the key assumptions upon which the working capital statement is made. Allowing the inclusion of such assumptions benefits both investors and issuers.

- Investors benefit from understanding the key assumptions that the issuer has had to have made to address material uncertainties affecting the issuer's working capital position. Such disclosure provides investors with useful information regarding such uncertainties and the risks associated with them.

- Issuers benefit because they can avoid the negative perception associated with a qualified working capital statement without having to undertake actions which are not necessarily in their or investors' interests, and which may be contrary to their or investors' interests.

Examples of situations where the disclosure of a key assumption rather than having to undertake action to avoid a qualified working capital statement would be beneficial include:

- A company has certain facility agreements that are due to be refinanced during the working capital period, there is a high degree of confidence that they will be refinanced in the ordinary course, and there is no reason, other than the working capital exercise, for amending or entering into a new facility agreement at the time of the capital raise. This may divert management attention and/or result in less favourable terms to the issuer.

- An issuer in a financially stressed situation undertaking a capital raise (or debt-to-equity swap) where there is a material uncertainty impacting the business, which uncertainty may have caused the financially stressed situation. In the view of our Members, a qualified working capital statement risks worsening the issuer's position (for example, with its customers and suppliers) and, given the uncertainty, an accounting firm (not as well placed as the issuer to take a view on the uncertainty) is unable to give the necessary comfort to support a clean working capital statement. The company is consequentially required to undertake additional actions that it would otherwise not take, such as raising further funding on harsher terms, and which in the longer term may worsen its position.

- The occurrence of a macro economic, social or political event, such as Covid-19, which, given its nature, cannot be sufficiently modelled for in a working capital exercise resulting in a qualified working capital statement. Investors would have benefited from an understanding of the assumptions that the issuer has made to give a clean working capital statement.

It is important to ensure that only key assumptions are disclosed. Generic, broad and/or a long list of assumptions would undermine the clarity of a working capital statement and unduly transfer risk to investors. Members would recommend that the FCA produce guidance on what assumptions and disclosures are appropriate. Members would suggest that the FCA establish a working group to assist it with the preparation of such guidance. Members have found the continuing engagement with the FCA on refreshed sponsor guidance helpful and would note that it will be important to clarify the interaction of assumptions and the relevant sponsor declaration. We look forward to engaging further with the FCA on this.

Members, on the other hand, do not think investors benefit from the disclosure of significant judgements or the sensitivity analysis for the following reasons:

- Significant judgements are matters for the board and the risk involved in making such judgements should rest with the board.

- Sensitivity analysis would likely require significant additional disclosures which might diminish the usefulness of a working capital statement to investors. For example, they would require articulation of the sensitivities, the combination of sensitivities, mitigants and explanations, i.e. the exercise typically documented in a working capital report.

Question 16: Do you agree that we should allow issuers to base the working capital statement on the underlying due diligence performed for the purposes of viability and going concern disclosures in its annual financial statements? Y/N Please give your reasons

Members are unclear as to what is being suggested.

As described in our responses to question 15, the working capital, going concern and viability statements serve different purposes, are prepared at different times, and are prepared in different contexts.

Whilst, when preparing a working capital statement, Members consider that it may be possible to leverage off (utilise) work undertaken to support the going concern and viability statements, the proper process for the preparation of the working capital statement still needs to be undertaken in full. The extent to which it is possible to leverage off such prior work will be company specific, and, in any event, it will be necessary to update such work taking into account any developments since the earlier date.

We suggest that there is no need, or benefit, to include any guidance relating to the use of work undertaken to support the going concern and viability statements.

Complex financial histories

Question 17: Do you agree with our proposed approach to give additional guidance for companies with a complex financial history? Y/N

Members agree that there should be more clarity regarding the financial disclosure requirements of companies with a complex financial history and agree that such clarity should be provided in the form of guidance rather than rules. Guidance can be more easily evolved and be updated as practice develops under the new regime.

As a proposed principle - the guidance ought to give sufficient clarity so that listed companies, companies considering a listing and their respective advisers can, with sufficient confidence, predict what the financial disclosure requirements are likely to be. Such clarity facilitates preparations for a listing (and a capital raising where a prospectus is required) and, for companies with a complex financial history, may be a relevant consideration when choosing a listing venue. Indeed, a lack of clarity can lead to increased legal and administrative costs, potential delays in the IPO process and, in some situations, a decision to list on an alternative market.

Question 18: How far do you consider the draft guidance attached to this CP would be useful for companies and their advisors? Y/N Please give your reasons including any proposals you may have to change the draft guidance

Members believe that the draft guidance proposed is not sufficiently detailed and does not meet the objective of the guidance that we proposed in our response to question 17. It might therefore result in the adverse consequences identified in our response.

The guidance would benefit from more detail articulating how the timing and size of acquisitions and disposals influence the additional financial information required. It would be helpful to have further guidance on the aggregation of acquisitions and disposals, in particular given an aim of the listing reforms to permit more types of business models, including highly acquisitive companies.

The FCA should have flexibility to depart from the more detailed guidance as necessary and the principles pursuant to which such flexibility might be exercised should be clearly articulated.

We would, therefore, suggest that a working group be convened to make a set of recommendations for the FCA to consider, potentially having regard to the equivalent rules in the US (under Regulation S-X) and other jurisdictions. Please see our prior articulation of this in our response to FCA Engagement Paper 1 on 23 September 2023, a copy of which is enclosed in this response, which makes some suggestions.

We believe it important that representatives from the accounting profession be included in the working group given their role in preparing such financial statements and advising companies as to their preparation. We would also like to suggest that representatives from the investment banking and legal communities be part of the working group. By drawing on a diverse range of expertise, the working group can develop comprehensive and practical guidance that addresses the needs of all stakeholders involved.

Age of financial information

Question 19: Do you consider that we should include requirements related to the age of financial information in prospectus requirements? Y/N Please give your reasons

Members considered it helpful to have some limits as to the age of financial information in prospectus requirements but are mindful of introducing rules that unnecessarily reduce flexibility and that are not consistent with the requirements of, or potentially make the UK less competitive than, other countries.

The statutory obligation to ensure that prospectuses contain all material information, market practice, assurance requirements, and investor expectations largely drive the age of financial information regardless of any regulatory intervention. For example, up-to-date financial information is required to substantiate the equity story, support marketing and underpin equity valuation and the need for recent financial information is a pre-requisite to the receipt of US accounting comfort.

The current UK prospectus requirement as to the age of financial information (that the latest balance sheet date must not be more than 16 months before the date of the prospectus, or 18 months if audited interim statements are included) is consistent with the European regime and consistency with Europe is helpful for issuers and investors who operate in multiple markets.

Given that existing practice, without regulatory intervention, will self-regulate the age of financial information and the objective of being consistent (save where objective justification for departure) with other jurisdictions, members advocate not introducing unnecessary inflexibility through adoption of the age requirements that were previously contained in the financial eligibility requirements.

That said, members do recognise that there may be some scope for reducing the 16 and 18 month periods given that balance sheets rarely have dates close to these specified limits.

Six-day rule

Question 21: Do you agree with our proposal to change the requirement that a prospectus be made available to the public for 6 working days for admissions of securities at IPO to 3 working days? Y/N. Please give your reasons.

Yes, Members agree. The existing rule extends the period of risk during which conditions may change that may negatively impact the outcome of an offering, e.g. due to general market conditions or broader economic, political or other developments. In such circumstances, an offering may be cancelled / delayed or the price adjusted. This may create a disincentive for an issuer to involve retail investors in their IPO. Technology developments have both improved the speed and manner of accessing information and the form in which such information is presented, in turn reducing the time required by retail investors to consider the information.

Whilst the retail platforms and service providers will be better placed to advise as to what the appropriate period of time is, Members consider 3 days to be a sensible proposal based off their understanding of current technology and processes. Over time, with technology developments and changes in market practice, it may be possible to reduce this period of time further.

Further issuance of securities

Question 22: Do you agree with our proposal to raise the threshold for triggering the requirement to publish a prospectus for further issuances of securities already admitted to trading on a regulated market to 75% of existing share capital? Y/N Please give your reasons

While there are differences in views about the exact threshold for a further issuance prospectus, Members consider the FCA's proposed threshold for triggering the requirement to publish a prospectus for further issuances of 75% of an issuer's existing share capital to be too high in the context of a capital raising.

Members believe that the aim of reducing duplication with existing disclosures can be better achieved through the better use of simplified prospectuses for follow on offerings and that the aim of reducing the burden on smaller issuers can be better achieved either through simplified prospectus requirements for smaller issuers or through a more proportional interpretation of the prospectus requirements. Whilst Members support the aim of reducing duplication with existing disclosures, most existing disclosures will not have been prepared to a 'prospectus standard' or to take account of the transformative events driving and inherent in larger capital raises; and even where they are, there are significant gaps between the content, detail, and precision of a prospectus and an issuer's ordinary course ongoing disclosures. Where there is duplication and information has been prepared to a requisite standard, issuers can, as they do currently, incorporate that information into a prospectus by reference.

In addition, Members believe that the FCA's proposal for a voluntary prospectus regime where this is necessary to demonstrate a level of compliance with other jurisdictions (for example, the United States) when offering shares to certain investors in those jurisdictions is not sufficient to ensure adequate consistency in the level and quality of disclosure across the market, and consider that a mandatory prospectus requirement is appropriate as a means of achieving the requisite level of protection for issuers, underwriters and investors in the context of larger capital raisings. The FCA's proposal would put the UK in the peculiar position of giving its domestic investors less fulsome and comprehensive disclosure than those outside the UK.

In reaching this conclusion, Members have carefully considered the FCA's rationale in CP24/12, as set out in more detail below, and the conclusions of the Secondary Capital Raising Review (the "SCRR").

In particular:

- Members do not agree that the data relating to further issuance capital raising as a proportion of existing share capital presented in CP24/12 by itself justifies the conclusion that the requirement for a prospectus at or above 20% has had a dampening effect on the level of capital raising in the UK. A more likely explanation for our Members is the high importance historically ascribed to the 20% ceiling for non-pre-emptive offers. Anecdotally, Members are of the view that non-pre-emptive capital raisings have typically been conducted at a level below the 20% maximum permitted for non-pre-emptive issuances by the Pre-emption Group's Statement of Principles (Members' views are that 12-15% represents the typical deal size for a non-pre-emptive capital raise in the UK). Pre-emptive offers in the UK tend to take the form of rights issues which – taking into account the deeper discounts required and therefore the total level of share capital required to be issued as a percentage of existing share capital – means that issuers do not generally seek to raise capital within the 20-40% of issued share capital. This would suggest to Members that the current requirement for a further issuance prospectus at a threshold significantly below 75% does not in of itself constrain overall capital raising in the way presented in CP24/12.

- The observations made in CP24/12 regarding the costs of preparing a prospectus, as well as other arguments made in CP24/12 and the SCRR as to the burden that a prospectus places on issuers, fail to take account of the diligence and assurance benefits derived through the process undertaken to produce a prospectus which, in the absence of a prospectus, would need to be obtained through other means. Members consider that the process of collating, drafting and checking information in the prospectus provides a structured and well understood process through which issuers and their advisers can agree on the relevance, materiality, accuracy and completeness of disclosures necessary to support the capital raise and inform investors. It also provides the platform upon which financial, legal, accounting and other assurance processes are undertaken. For example, certain financial and legal comfort letters tie back to the information in prospectuses as do management due diligence questions. It is the net savings and the net burden which is relevant, and this is much harder to quantify. Members believe that, by trying to save listed companies time and money through no longer being required to issue prospectuses, this creates a risk that (a) investors, both professional and retail investors, refrain from investing or lose money as a result of purchasing shares, on the basis of inadequate levels of disclosure, and (b) this could have an adverse impact on the UK market.

- In seeking to make net cost savings and reduce perceived friction in the capital raising process, it is important in the view of Members not to lose sight of the need to ensure that investors are receiving all of the information that they require to make an investment decision, and that they are appropriately incentivised to invest on that basis. A key question for Members is whether the capital raising is being marketed using documentary marketing materials (e.g. a presentation) and/or meetings with the issuer's management – if it is, then investors should have access to a prospectus so that they are apprised of the balanced full picture and the potential risks and negatives that apply to the issuer and the offering, since marketing materials and management meetings typically focus, only or for the most part, on the positive aspects and reasons to invest.

Members recognise that there are situations in which the burden of preparing a prospectus may be disproportionate to the amount of capital being raised or the basis on which the offer is being made. In addition, where new share capital is being issued in circumstances where cash is not being raised – for example, where the new shares are issued to a small number of sellers as consideration for an acquisition – there may be less need for a prospectus to be prepared than in the context of a capital raise. In these circumstances, Members consider that it may be more appropriate to have specific exemptions from the requirement for a follow-on prospectus, and Members would support this approach in preference to setting the threshold for a follow-on prospectus at so high a level as to introduce risks into the market which Members consider detrimental to investors in terms of the level and quality of disclosure in the context of capital raises. In Members' view, the FCA can still achieve its objectives of introducing bold changes which significantly reduce the disclosure requirements for further issuances through (i) the introduction of further specific exemptions where the rationale for a prospectus is less compelling or where the cost and burden of a prospectus is disproportionate to the transaction being undertaken, (ii) combined with a lower, more appropriate and better substantiated increase in the percentage threshold.

Information asymmetry

The rationale in CP24/12 for moving the further issuance prospectus threshold to 75% is that the existing ongoing disclosure obligations for listed companies would mitigate the risk of information asymmetry between issuers and investors, thereby removing the need for additional disclosure through a prospectus. This is predicated on the basis that sufficient information would already be accessible to the market on these securities through other regulatory frameworks, such as the Disclosure Guidance and Transparency Rules and the Market Abuse Regulation. Our Members consider that this is not the case today and, in this context, note that the FCA has recently consulted on amendments to enhance the effectiveness of the National Storage Mechanism (NSM), with the aim of improving data quality controls and making it easier for NSM users to find regulated information, as part of the first phase of a wider three phase long term initiative to improve its functionality. However, at this stage, Members consider that annual reporting cannot be considered equivalent to prospectus disclosure, particularly with matters such as risk factors, trends information and forward guidance on financial performance, in the same way as is the case in other jurisdictions such as the United States which have embraced robust ongoing disclosure obligations. While Members believe that existing disclosure is likely to be sufficient in the context of an 'ordinary course' capital raise, or where the size of the raise is below an indication of a material change in the issuer's financial position or strategy (as set out in our response to Engagement Paper 2), they believe that larger capital raisings require additional disclosures. In the context of larger capital raises, it is not in the interests of issuers, their boards of directors, existing shareholders, new investors, or the market to risk share price volatility or the creation of a false market from any actual or perceived shortfall in the quality of the disclosure available to investors. Such risks could arise from incomplete or insufficiently supported disclosures made in connection with further issuances, which could expose issuers and underwriters to legal action from investors outside the UK. Under the laws of those jurisdictions, if successful, these investors could demand that the new shares they purchased in an offering be bought back by the issuer or the underwriters. The proposed 75% threshold for a follow-on prospectus would therefore in the view of our Members, have an extensive impact on existing developed market practice, and, we believe, not for the benefit of issuers, their directors and shareholders, new investors or underwriters, or for the long-term stability and reputation of the UK market.

Accordingly, Members are of the view that long-established market expectations regarding the following disclosure standards on larger capital raisings are indicators that investors consider there to be an information asymmetry in the context of those transactions:

1. ***Disclosure of risk factors**:*

   Listed companies do not disclose risk factors in their annual reports with the same level of detail and specificity as they do in prospectuses. Furthermore, these companies do not update their risk factors throughout the year to reflect macro-economic and business changes. This discrepancy could in the view of our Members lead to insufficient market information, particularly if the capital raise is driven by such changes or the proposed use of proceeds would give rise to additional risks, for example if it is acquisition-related. In addition, prospectuses tend to disclose a broader set of risks than an issuer might be required to disclose the Market Abuse Regulation's precision and 'reasonable investor' tests, which are of significance to a new investor in the context of a larger capital raise.

2. ***Due diligence and verification***:

   The due diligence and verification processes for ordinary course reporting (for example, routine announcements and annual reports) and prospectus-style due diligence and verification differ significantly. Prospectus-style due diligence and verification is designed to protect issuers, directors and investors by ensuring that disclosures are prepared, diligenced and verified to a sufficiently robust standard in the context of the negligence standard liability regime imposed under s.90 of the Financial Services and Markets Act 2000. For underwriters, this standard of due diligence and verification is considered necessary to support a capital raise of the size being contemplated, ensuring that all information reasonably required for a new investor to make an informed and balanced investment decision is included in the formal offering materials to an appropriate standard of accuracy and completeness. Without this safeguard that accompanies formal offering materials including prospectuses, Members are concerned that the quality of disclosure to investors will deteriorate, with underwriters put in a potentially difficult position of having to enforce standards in the absence of regulatory oversight.

3. ***Financial disclosures***:

   The operating and financial review ("OFR") section included in a prospectus is considered a critical part of a document prepared to international disclosure standards (in particular in the context of an offering to US institutional investors) and is not prepared to the same standard in equivalent disclosure found in an annual report. Even if the issuer has prepared equivalent standard OFR disclosure in its annual report, it will not take into account the proceeds of the offering or how the proceeds are to be utilised by the issuer. Members consider that it is difficult to see how this discrepancy can meaningfully be addressed by other means (for example, an enhanced announcement).

In addition, the working capital statement is an important component of financial disclosure which is of significance to investors in the context of capital raises, as an indicator of the issuer's understanding of its working capital requirements, especially when contemplating the types of material changes that typically accompany such capital raises. As detailed in our response to question 14 above, a working capital review process is distinct from a going concern determination, as the latter is conducted within the context of a wider audit process and cannot be relied upon in isolation or updated mid-year in the context of a working capital exercise. Members consider it important in larger capital raises to give investors confidence as to the issuer's working capital position (or clear explanation where a qualified statement is made) and the diligence that has gone into giving that statement, rather than relying on a going concern statement made potentially up to 12 months earlier. When taken together with the intended use of proceeds of the capital raise, especially if related to an acquisition, this can in the view of our Members have a significant impact on an issuer and so is more likely to require the level of consideration and disclosure that a prospectus would require.

4. ***Underwriters' involvement***:

   Even where they also act as brokers to an issuer, underwriting banks are not involved in ordinary course disclosure to the same extent as they are during capital raising activities, and do not have the same liability to the market and to investors or carry the same reputational risks as they do when underwriting a capital raise. During capital raises, underwriters receive a variety of reports and comfort letters, the contents of which are long established by market practice, designed to address that liability and reputational risk. These reports and comfort letters are not provided in the context of ordinary course reporting. This lack of involvement, and the absence of comfort packages, make it challenging for banks to determine whether a company's due diligence process is sufficiently robust under ordinary course reporting requirements to support a sizeable further issuance.

It is noted that the proposed content requirements for an EU Follow-on prospectus under the EU Listing Act are almost identical to the suggestions made by this group for a further issuance prospectus in our response to Engagement Paper 2 (with the notable exception of the OFR). Members therefore continue to believe that, in considering further issuance prospectuses, the FCA should have regard to the content requirements, rather than simply focusing on the size of the further issuance.

It is worth mentioning that while there is potential for closer alignment between periodic reporting standards and prospectus requirements, achieving this from the current position would necessitate a significant gear shift in terms of an increase in the level and quality of ordinary course reporting to meet the standards that are currently required for a prospectus. While this may be possible in future, potentially aided by a higher level of digitalisation in financial and corporate reporting, it is currently not considered by our Members to be at the level required to support large further issuances in the context of a capital raise.

Views on threshold

Members believe that the proposed 75% threshold for triggering the requirement to publish a prospectus is arbitrary and lacks a clear basis. It does not align with any existing thresholds which are relevant to a UK-incorporated issuer, such as the one-third threshold for general allotments of shares and two-thirds threshold in connection with a rights issue, or the waiver of pre-emption rights up to 20% of issued share capital which are generally accepted by investors in the context of an annual general meeting.

Taking into account these thresholds, the level of importance placed on the existing 20% pre-emption threshold, and anecdotal views on the size of transactions typically conducted with a prospectus – together with the position proposed under the EU Listing Act for an EU Follow-on prospectus for transactions over a 30% threshold – this would indicate to Members that the market sees a threshold around 30%, or a third, of issued share capital to be a watershed above which a capital raising would be considered to be outside the 'ordinary course', and so should require a prospectus. Members consider that this is supported by the recent National Grid rights issue, where the new shares issued represented 22.6% of the existing share capital; although the amount raised was very large, the overall percentage of new shares being issued means that the view can be taken that the reasons for the raise were well understood by the market, and so 'ordinary course' in the view of investors. Although a voluntary prospectus regime would always permit an element of choice for issuers and underwriters, Members consider a clear threshold set at an appropriate level above which a prospectus must be prepared and approved by the FCA is a critical means of regulating practice in circumstances where the market might otherwise be incentivised to move towards other forms of unregulated disclosure, which will vary in content and consistency. Members consider that the UK market as whole would benefit both from the consistency of disclosure in analogous circumstances, and the rigour of producing that disclosure to internationally accepted standards and subsequent approval by a regulator. Accordingly, while Members recognise there will be differences in views on the appropriate threshold, the overall view is that it makes more sense for the threshold to be set at or around one-third of issued share capital, than at 75%.

Alternative suggestions

There are, of course, situations which do not merit the disclosure requirements of a full prospectus, and a number of these are already included in the proposed list of exemptions to the requirement to produce a prospectus. We address three additional situations below that Members consider merit different treatment:

- A share issuance to support an acquisition where there is no separate capital raise. In the context of the UK Listing Rules, an acquisition of any size below 100% under the relevant class tests (and which does not in substance results in a fundamental change in the business of in a change in board or voting control of the issuer) is not considered significant enough to require a circular and shareholder vote (and would not, pursuant to the UK Listing Rules, require a prospectus outside of a reverse takeover transaction). However, the proposed 75% threshold could result in additional disclosure and therefore burden on the issuer through the requirement for a prospectus where consideration for the acquisition takes the form of shares representing 75% or more of the issuer's existing share capital, in circumstances where the same transaction would not be deemed to require additional disclosure or impose an additional burden on the issuer if the consideration took another form (for example, cash funded from the issuer's existing capital or through debt facilities). It may therefore be more appropriate to have a specific exemption where there is no capital raising transaction, rather than seeking to impose an additional burden on issuers which is not aligned with the UK Listing Rules.

- Members recognise that their concerns are more acute in the context of larger capital raises, where the requirement for increased disclosure of a level and quality provided by a prospectus is driven by the marketing documentation that is considered necessary to educate investors as to the reasons for, and risks of, the capital raise. A 'one size fits all' approach is likely to have a disproportionate impact on small and mid-cap issuers, compared to issuers seeking to raise larger amounts which have higher risks and which require appropriate alignment with disclosure standards in other jurisdictions. Accordingly, a concession for SME companies raising capital (for example, equivalent to the EU's proposed shortform Annex IX Document) or a monetary threshold below which no additional disclosure is required might in the view of our Members have more impact for those issuers than simply focusing on the percentage of issued share capital represented by the further issuance.

- It is also recognised that (as is currently the case) a lower threshold may result in situations where more than one 'ordinary course' equity issuance transaction in any 12 month period could result in issuers being required to prepare a prospectus pursuant to the aggregation rule, even where the market does not consider those transactions to be considered sufficiently transformative as to give rise to an information asymmetry. The FCA could consider amending the circumstances in which aggregation is required and/or shortening the 12 month look-back period, to avoid issuers incurring the burden and cost of preparing a prospectus in circumstances where it is not considered necessary.

Question 23: Do you agree with our proposal to retain the requirement to use a simplified or full prospectus for further issuances of securities already admitted to trading on a regulated market, where not exempt or if issuers wish to produce a voluntary prospectus? Y/N Please give your reasons

It is consistent with the FCA's policy objective to remove unnecessary duplication to provide for simplified prospectuses for further issuances. And, where a prospectus is required, Members think it is beneficial to retain optionality for issuers as to whether to publish a simplified prospectus or a full prospectus if they choose to do so.

An appropriately defined simplified prospectus regime may be more proportionate for issuers with a lower market capitalisation or where the equity raise is being conducted only in the UK. For issuers with a larger market capitalisation or an international shareholder base (e.g., in the US or the EEA, APAC and MENA), a simplified prospectus regime is unlikely to comply with disclosure requirements in those jurisdictions, and so issuers are likely to continue to choose to prepare an enhanced simplified prospectus or a full prospectus to meet those requirements.

Financial difficulty

Question 24: Do you agree with a potential proposal to require issuers to notify us if the further issuance relates to rescue financing even if below the 75% threshold, based on which we may also require a prospectus? Y/N Please give your reasons or provide any alternative approaches we could consider

Members believe that, if an appropriate threshold is set above which a prospectus will be required, there will be no need for the FCA to intervene or for issuers to notify the FCA that financial difficulty is the reason for increased disclosure. Concluding that an issuer is in financial difficulty, or that rescue financing is required, is likely to be an emotive situation for issuers, and it would be considered unhelpful by Members for the fact that a prospectus is or may be required to flag that this is the case. Where issuers need to raise capital, the time taken in having a debate about whether the situation does or does not equate to financial difficulty is in the view of our Members more likely to hinder the process rather than to aid it. The FCA's proposed approach removes flexibility for issuers and so is not aligned with the core objective of removing friction in secondary capital raising situations.

In addition, Members are of the view that there will always be an element of subjectivity in the FCA's decision-making over whether a prospectus is required for reasons of financial difficulty. Certainly, there will need to be clear and robust guidance around the circumstances under which rescue financing will be considered to have arisen, and it is unclear how it is proposed that the FCA would make the determination in each case, which in our Members' view risks giving rise to uncertainty for issuers. Our Members consider that this would be solved by having a lower threshold at which a prospectus must be produced in the context of a capital raising, as proposed in our response to question 22, regardless of the rationale for the capital raise. As rescue situations are likely to require a follow-on issuance which is larger than one-third of issued share capital, our Members consider that this also supports a threshold at or around that level.

Sustainability related disclosures

Question 31: Do you agree with the proposed climate disclosure rule to prompt relevant and financially material information to be included in prospectuses? Y/N Please give your reasons If not, what should be done differently?

Members agree that companies are currently, and should remain, required to publish material sustainability related information. Market practice is at an early stage, and we anticipate it to develop quickly once the IPO market re-opens in the UK.

Members consider it appropriate for requirements relating to sustainability related information be consistent with other regulatory and market requirements and developments in the UK (in particular, periodic reporting) and internationally (in particular, the TCFD, the ISSB (IFRS S2) and the Corporate Sustainability Reporting Directive ESRS). There is almost universal agreement that there needs to be, in so far as practicable, consistency and interoperability between the rules in different jurisdictions, in particular with the EU and the US (noting their differences).

Our Members consider that it is a logical first step to introduce the TCFD framework into the prospectus rules, since adopted in ISSB standards, for the presentation of climate related information. This is an already widely adopted standard and the UK government is committed to adopting the ISSB standards in the UK. Members advocated for such an approach in our response to Engagement Paper 3 and Members are of the view that this would be the natural development in any event, with or without regulatory intervention. Members also noted that the four limbs of the TCFD framework reflect existing disclosures in prospectuses regarding risk factors, the equity story, governance, and disclosure of metrics and targets in the equity story and OFR.

It is also, therefore, in the view of our Members, logical to refer to the TCFD and ISSB standards for guidance as to what information to include with the framework.

The questions that the consultation raises for our Members are:

- The setting of the materiality threshold, and whether it is right / sufficiently clear. Members have some concerns.

- The extent to which further detail or guidance on what information to include would be helpful, or whether it should be left to market practice to evolve over time. Members are of the view that whilst some high-level guidance may be helpful, it would be best to leave it to markets to develop over time. As the FCA alludes to in the consultation paper, the key question is ultimately what information investors require to make an informed investment decision which would become clearer once the markets re-open.

- Whether solely focusing on climate-related information, as opposed to a broader set of sustainability information, is the right approach for now given current evolution and understanding of standards relating to other sustainability areas. Members believe that this is the right approach but expect the presentation of other sustainability-related information to evolve in time in a similar away to climate-related information, as seen with the development of the TNFD framework and the TISFD. Members therefore agree with the proposal to indicate that ISSB standards may be useful with respect to other sustainability matters.

Notwithstanding Members views, Members believe that there is some merit to having a separate working group test the benefits and extent of any further guidance on climate related information and the benefits of extending the requirements and/or guidance to other sustainability factors. This needs to be considered from the perspective of what investors need to make informed investment decisions; not seen through the same lens of what information is useful for disclosure in annual or other periodic reporting.

Consistent with the view expressed in the prior paragraph, Members believe that the "materiality" trigger should be assessed by reference to what is material for an investor's investment decision – the same test as for any other prospectus disclosure. The way the proposed rules are drafted potentially suggest otherwise; they suggest to our Members that materiality of climate risks is assumed where there is a reference to climate within the risk factors. In practice, risk factors may include references to climate risk that would not merit triggering the disclosure of climate related information, such as where such information is context setting. Our Members consider that it should be made clear that only climate risks that are relevant and material to investors' decision-making, as is the case with opportunities, trigger the obligation to include additional climate related information in the prospectus.

With respect to the TCFD recommendations and recommended disclosures of IFRS S2, our Members consider that the language in paragraph 6.17 is in danger of suggesting fulsome disclosure (i.e. the statement that "It is not our expectation that issuers will need to disclose **all** information under these frameworks in **all** circumstances"), whereas Members think that it should ultimately be left to the market to evolve in respect to investor demands. It would be helpful if this were made clearer.

Please see our responses to questions 44, 47 and 48 with respect to the extent to which sustainability-related disclosures should benefit from the PFLS regime, in particular Member concerns that the criteria proposed to be applied to PFLS may result in sustainability-related disclosures that would benefit from being subject to the regime being excluded.

Members agree that climate-related disclosures related to strategy, transition plans and metrics and targets are more likely to be forward-looking statements, whereas disclosures related to governance and risk management are not. But, as with our prior reasoning, this stems from the intrinsic nature of such statements irrespective of the approach taken by the FCA to seek to generally exclude mandatory disclosures from the definition of PFLS.

Members also note the potential different liability treatment of qualitative sustainability-related disclosures should such disclosures appear in the annual report and accounts or in a prospectus. The flow through consequences of having a negligence standard apply to such disclosures in a prospectus but a reckless/fraudulent/dishonest standard applying to such disclosures in an annual report and accounts needs to be carefully considered. In particular, if a disclosure in an annual reports and accounts influences whether such information needs to be subsequently included in a prospectus. There may, in the view of our Members, be a consequentially perverse incentive not to include certain information in the annual reports and accounts.

Question 32: How do you consider our proposed requirements on sustainability related disclosures could affect the cost of producing a prospectus?

Our Members consider that this depends on how market practice develops, and the extent to which the rules defer to the natural evolution of market practice. If information is deemed material by investors for making an investment decision, then it becomes part of the normal cost of undertaking such transactions. The cost is less related to what the rules prescribe, but more related to how market practice develops.

In the view of our Members, the risk is that too much information is front-loaded into a prospectus which then requires a company to undertake all the underlying work to support such information in advance of an IPO when the certainty of a successful IPO is not guaranteed. This may be a wasted cost for the business and introduces a potential friction (in particular if multiple exit routes are being considered or multiple markets are being considered). In the view of our Members, there needs to be a balance between the provision of information required by investors to make a narrower investment decision and providing the fuller suite of disclosures and implementing the full suite of internal procedures and controls that are required for an already listed company.

Therefore, Members would advocate not having rules that unnecessary front load the costs of being a listed company. As a practice matter, companies are likely to be reluctant to incur such costs pre-IPO, whereas there is more acceptance of such costs once a company is listed. All subject to the separate discussions regarding the appropriate reporting burden on listed companies.

Question 33: Do you have any views on the importance that investors and other readers of prospectuses would place on the additional climate related information disclosed under the proposed climate disclosure rule?

Our Members consider that depends on the nature of the company, the sectors in which it operates, the geographies in which it operates, and the point in time at which the prospectus is produced given that standards and practice are evolving rapidly and dynamically. It also depends on the nature and strategies of its investors, the jurisdictions they are located in, the rules to which they are subject, and the preferences of their ultimate owners.

To our Members, it is definitely the case that for certain companies' investors will attach significant importance to climate -related information, such as:

- companies whose business model involves climate solutions or climate enabling solutions (i.e. "green" equity);

- companies who are transitioning to net-zero and whose transition is important to the longer-term sustainability of its business; and

- companies whose businesses are in higher-emitting sectors or sectors who otherwise risk substantial disruption from climate change, such as industrial companies, energy companies and certain real-asset companies.

Question 34: Do you agree that our proposed climate disclosure rule should apply to issuers of equity securities and issuers of depositary receipts only, with other securities addressed through the Technical Note? Y/N Please give your reasons.

Members believe that the rules are appropriate for issuers of equity securities and issuers of depositary receipts. We do not express a view with respect to listed investment entities or on other securities.

Question 35: Do you agree with the proposed minimum climate related disclosures in the Annexes to the PRM Y/N Please give your reasons If not, what should be changed?

Members agree. See our response to question 31.

Question 36: Do you agree with our proposed approach to transition plans? Y/N Please give your reasons If your reasons relate to cost or other concerns, please provide further detail.

If a transition plan contains information that is material to investors, Members agree that it would be impractical and unhelpful to require the full inclusion, including by incorporation by reference, of the transition plan into a prospectus. Members therefore agree that a summary of the transition plan would be appropriate and believe it would be helpful for the FCA to provide some guidance as to what might be included in such a summary. It should be clear that any reference to the transition plan is not an incorporation of its contents by reference.

Members are not clear why the rules need to refer to the TPT Disclosure Framework given that the proposed requirement is to summarise a published (i.e. existing) transition plan. The disclosure will reflect what is in that plan and the standards to which is has been prepared. It will be those standards that are relevant.

As a practical matter, Members anticipate that UK listed companies will likely adopt disclosures in line with the TPT Disclosure Framework in particular given that ISSB has taken custodianship of that framework.

Members understand that the FCA is due to consult on its expectations for listed companies with respect to transition plans in 2025. We therefore consider that it is not necessary or appropriate to reference the TPT disclosure framework at this stage, but this could be considered in the future once the FCA's expectations are set out.

Please see our responses to questions 44, 47 and 48 with respect to the extent to which sustainability-related disclosures should benefit from the PFLS regime.

Question 38: Do you agree with our proposed approach to addressing sustainability related information beyond climate through the Technical Note?

Yes. Members agree that, given the current status of the market, it is premature to include minimum content requirements beyond climate-related at this time.

How practice evolves with respect to climate-related disclosures will likely influence the markets approach to other sustainability-related information and it would be helpful to see how the market evolves first. The UK would also benefit from seeing how the requirements in other jurisdictions also evolve before introducing rules that may, with the benefit of hindsight, appear to place the UK at a competitive disadvantage.

See also our response to question 31.

Question 39: Do you agree with the proposed areas for revision of the Technical Note in relation to sustainability related disclosures? Y/N Are there any other areas that we should seek to address?

Members believe that the FCA should establish and consult a technical group of capital markets and sustainability specialists on the possible content of the guidance.

Members agree with the principle that such guidance should refer to industry standards where appropriate.

Protected forward-looking statements

Question 44: Do you agree with our overall approach to specifying the kinds of statements that can be protected forward-looking statements? Y/N Please give your reasons

Members agree with the premise that the protected forward-looking statements regime ("PFLS" and "PFLS regime") should facilitate the disclosure of information that, given its inherent nature, justifies the application of a different liability standard and where the application of the usual negligence standard may prevent or restrict the disclosure of investor useful information.

However, Members believe that the PFLS regime, as proposed, is not likely to result in the publication of all the information that the FCA wishes to see published and is not likely to result in the regime achieving its policy objective. Members are also concerned that the regime as proposed may have a number of unintended consequences.

- Firstly, Members believe that the exclusion of qualitative and aspirational statements is an artificial narrowing of forward-looking statements that potentially excludes, and therefore discourages disclosure of, otherwise useful information.

    - With respect to qualitative statements, whilst these may not contain specific data points (or information from which specific data points can be derived), they are based upon underlying strategies, plans and data points and expose the issuer to potential liability in much the same way as the disclosure of specific data points does. Having come from a situation where qualitative disclosures may have been used where there were concerns about disclosing quantitative information, it would be perverse to potentially encourage the disclosure of quantitative disclosures at the expense of qualitative information. Depending on the context, such quantitative disclosures may be less reliable than and unable to disclose the nuances that qualitative information would have been able to. The regime should encourage the disclosure of forward-looking information more broadly, and the market should then regulate, as between market participants, the exact presentation of that information.

    - With respect to aspirational statements, as for qualitative statements, these also carry risk for issuers so the market would benefit from the regime to encourage their disclosure when relevant and appropriate for investors. They are useful information for investors and just as valuable as estimates and expectations and entirely appropriate where the data point is an aim or target rather than an expectation, hence their widespread existing use in prospectuses. As for qualitative information, it would be a perverse outcome if the regime unintentionally encouraged the re-classification of targets into forecasts in order to benefit from the different liability standard.

    - This leads to a related point - much sustainability disclosure will be qualitative and/or aspirational. Its disclosure will potentially be discouraged by its *de facto* exclusion from the PFLS regime due to the narrow criteria for qualifying as PFLS and its treatment will be at odds with the liability regime attached to such statements in annual reports. A good example is the FCA's proposal to include summary information regarding any published transition plan; key information in a transition plan, given its very nature, will be aspirational due to the number of dependencies and assumptions and its aims. For instance, common targets published in financial sector transition plans include emissions intensity reduction targets for specific portfolios such as energy and automotive. The desire to encourage such disclosure yet to functionally exclude it from the PFLS regime appears contradictory and unduly limiting. It is essential to ensure that the framework provides adequate safe harbours for the disclosure of forward-looking information in sustainability disclosures including summaries of transition plans.

- The exclusion of qualitative and aspirational statements is also at odds with the US regime (safe harbour), putting the U.K. at a competitive disadvantage to the U.S., which would increase over time given the expectation for increased sustainability disclosure. We would note that the policy objective of the US safe harbour is consistent with the policy objective of the FCA, i.e. to encourage greater or more extensive disclosure by providing a safe harbour from frivolous or vexatious litigation.

- Further, the exclusion of qualitative and aspirational statements from the regime is at odds with the ISSB's position on the information that should be disclosed in general purpose finance reports to explain measurement uncertainty.

- Secondly, including principles of good preparation within the definition of PFLSs is misconceived and artificially narrows the scope of the PFLS regime. It also introduces potential circularity and consequential confusion. In our Members' view, such principles should be in the guidance to accompany the PFLS regime, rather than as qualifying criteria.

  - Firstly, introducing principles of good preparation as part of the criteria for what qualifies as a type of information is inconsistent with disclosure standards more generally. This is the case with the ICAEW guidance.

  - Secondly, it becomes harder to apply the regime and introduces uncertainty, which uncertainty may result in the exclusion of information. For example, issuers, their advisers, and the FCA will need to assess the satisfaction of those criteria in order to assess whether a statement is able to benefit from the regime, and it is not clear how the FCA itself will be able to determine whether a PFLS satisfies these criteria. Members ask how does the FCA propose to get itself comfortable that information is reliable?

  - How this then interacts with the PFLS liability regime is not clear. Something that is not "reliable" (i.e. not supportable or based on sound business analysis and assumptions) may be excluded from the protected regime because, in short, it was negligently prepared, subjecting it to the prospectus negligence standard rather than the fraudulent / reckless standard.

  - When considering the standards to which forward-looking statements should be prepared, in addition to the standards articulated in the ICAEW guidance, it may be useful to have regard, when considering the presentation of sustainability-related financial information, to the qualitative characteristics set out in Appendix D to IFRS S1 (relevance, materiality, faithful representation, comparability, verifiability, timeliness and understandability).

- Finally, whether a statement should be protected should be assessed by reference to its nature and the policy objective. In our Members' view, it should not be determined by whether its disclosure is otherwise mandated by the rules. This distinction does not appear in the equivalent US safe harbour. The rule which excludes mandated information, as drafted, would appear to exclude those sections of the prospectus where forward-looking statements are most likely to be included, so it is not clear to our Members that the rule achieves its purpose.

Separately, Members question the need to distinguish between financial and operational information.

- The reason for having that distinction appears to derive from the application of different criteria to financial and operational information. Recrafting the principles of good preparation as guidance (rather than criteria) would largely remove the differences in the criteria, and potentially therefore the rationale for distinguishing between them.
- If the distinction were retained, this may: (i) introduce uncertainty where it is not clear whether information is financial or operational (for example, Bank Guide 3 information or reserve and resource amounts); (ii) require significant effort to make such determinations (the classification of information might be challenging to apply to the vast swathe of non-financial sustainability datapoints (for example emission intensity reduction targets); and (iii) certain information may also be a combination of both (e.g. number of Stock Keeping Units sold?). Given the potential complications and costs, the rationale for the distinction needs to be clear, which we do not believe it is.

- The separation into financial and operational information together with wishing to include principles of preparation as criteria introduces a further complication – how to classify sustainability information – which can be both financial and operational information. our Members consider that the principles for preparing sustainability information should be consistent with the principles that apply to other sustainability disclosures, in particular ISSB standards. If those principles were to be included as qualifying criteria, then up to four separate categories of information: financial; operational; sustainability financial; and sustainability operational may be required.

- Finally, operational information is likely to be derived from the same or related systems governing a company's disclosure controls and procedures, and therefore subject to similar oversight and reporting, such that the principles of good preparation and the manner of preparation is similar and will converge over-time.

Question 45: Do you agree with our proposed general definition for protected forward-looking statements? Y/N Please give your reasons

Please see our response to question 44. For completeness and without prejudice, we have still commented on the proposed general definition.

Limbs (1) and (5) of the proposed new 8.1.3R refer to the other proposed rules and we address them in our other responses. Addressing the remaining limbs:

- Limb (2). This appears to simply be saying that a forward-looking statement relates to a future event or circumstance. Our Members believe that it is also unhelpful to define statements by reference to how they are verified rather than their inherent nature. In our Members' view, it ought to be sufficient to rely on established and customary market practice that looks at the tense and context of statements in identifying them as forward-looking. Our Members also note that the terms 'truth, correctness and completeness' are more aptly used with respect to *factual* statements. A forward-looking statement will be satisfied or not satisfied based on the actual outcome but is not something that becomes 'true, correct or complete' as a result of that outcome. The addition of the proposed general and specific accompanying statements will further assist in clearly identifying such statements (see also our responses to questions 52 and 53). Members would therefore propose deleting this limb.

- Limb (3). It is unclear to our Members whether this requires a reference to a date or period or whether more generic statements would suffice, such as "medium term". Whilst Members understand that attaching a time frame to a forward-looking statement is frequently required in order for such statement to be meaningful and useful, imposing time requirements that are overly restrictive will result in the counter-productive exclusion of forward-looking statements that investors find useful. Members therefore consider it important that generic statements such as "medium term" are covered by the PFLS regime. It is expected that these types of statement will remain a preferred form of guidance - they are well understood by investors to indicate uncertainty in the timing of the outcome of the statement. Being able to accommodate such uncertainties within forward-looking statements also assists in mitigating the liability risks of including such statements. Requiring precise time periods in the view of our Members would be at odds with the broader push to disclose more information by reference to the short, medium and longer terms (such as within sustainability and risk factor disclosures). For example, the TPT framework requires the entity to disclose its "ambitions and actions to reduce its GHG emissions in the short, medium and long-term." If the limb is retained, Members propose that more generic statements be included and that there is greater clarity or guidance as to what the requirement is.

- Limb (3). our Members consider that the terms 'estimate' and 'expected' could suggest that aims and targets are excluded from the PLFS regime, which for the reasons discussed above we believe would be the wrong approach. If this limb is retained, we would suggest changing 'estimate' to 'indication' and adding 'or targeted' after the word 'expected'.

- Limb (4). Members suggest that it is confusing and unnecessarily restrictive to impose a concept from the market abuse regime. The risk of potential confusion is, we believe, highlighted in paragraph 7.23 and 7.24 of the consultation paper. Our Members consider that the requirement is unnecessarily restrictive because it would introduce uncertainty as to whether a particular statement would benefit from the PFLS regime. Our Members consider that it is also unhelpful that the classification of information as a PFLS requires the market to be subsequently informed as soon as such information becomes sufficiently precise. in the view of our Members, this presumption may discourage companies from classifying information as PFLS. Whether an update is required in the future under MAR ought to be determined by the MAR regime, not by whether it is included in a PFLS section of the prospectus.

- Limb (4). If a specific requirement relating to the usefulness of information were deemed necessary it is not clear to our Members why the test of relevance from the ICAEW guidance was not used as an alternative alongside the other tests from the ICAEW guidance (although see our comments on the ICAEW guidance in our response to question 46).

Question 46: Do you agree with our proposed criteria for financial information that can be considered to be protected forward looking statements? Y/N Please give your reasons

Please see our response to question 44. For completeness and without prejudice to our earlier response, we have commented on the proposed criteria for financial information.

It appears to our Members that the criteria for financial information is derived from, or at least having regard to, the ICAEW guidance on prospective financial information (ICAEW tech release 04/20), a link to which is here: ICAEW guidance.

Members would recommend, to the extent not already occurring, that the FCA discuss the definitions and the practical application of such criteria with the ICAEW and the accounting firms given their expertise in this area. We agree that further guidance in the meaning and application of any criteria would be helpful. At a minimum, it should be clear of the interrelationship between the accounting guidance and the FCA criteria and guidance, in particular whether regard can be had to the accounting guidance when interpreting the FCA criteria. Also, as referenced above, if sustainable information prepared according to sustainability principles of good disclosure is financial information, it would be helpful to be clear on the inter relationship between those different sets of principles.

Question 47: Do you agree with our proposed criteria for operational information that can be protected forward looking statements? Y/N Please give your reasons.

Please see our response to question 44. For completeness and without prejudice to our response, we have commented on the proposed criteria for operational information.

Members are unsure as to the rationale for the criteria in 8.1.8R(1). Any information in the prospectus needs to be prepared to prospectus standards, which are well understood. What additional requirement does “faithfully” intend to impose beyond the standards that otherwise already apply? The rationale in paragraph 7.31 of the consultation paper seems to ignore the fact that any disclosure in a prospectus is already subject to standards and has responsibility and potential liability attached to it.

Members consider that the introduction of a new test should be avoided unless there is a clear unmet need for it and it is clear what is means.

Members are unclear on the rationale for the difference between 8.1.8(R)(2) and the equivalent criteria in 8.1.6(R)(2)(c). If there is corresponding historical operational information in the prospectus, should the forward-looking information not be prepared on the same basis (or the equivalent test)? If 8.1.8(R(2) is to be retained, we believe that it would be clearer to replicate a similar requirement as in 8.1.6(R)(2)(c).

Finally, it would be helpful to understand whether the lack of reference to a technical note is deliberate. In other words, that whilst the FCA intends to produce guidance in respect of financial PFLS it does not intend to introduce guidance for operational PFLS. Our Members consider that such guidance may also be helpful.

Question 48: Do you agree with our proposed exclusions for the type of information that can be consider as protected forward looking statements linked to existing required prospectus disclosures for regulated markets? Y/N Please give your reasons

As mentioned in our response to question 44, Members disagree with the approach proposed by the FCA.

in the view of our Members, whether or not a forward-looking statement should benefit from the different liability regime ought to be determined by (i) the innate nature of the statement and (ii) the public policy objective of encouraging its disclosure. It ought not be determined by whether or not the information is currently required by the Annexes.

We note, however, that the exceptions listed in 8.1.4R appear to be references to those sections or items of disclosure that drive most of the forward-looking statements that we would ordinarily expect to be disclosed in a prospectus. The manner in which the rule is crafted excludes from its scope most of the relevant sections. It is consequentially not clear to our Members what the rules are, in fact, seeking to exclude.

Question 49: Do you agree with our proposal to include profit forecasts in the definition of PFLS even where our rules require an issuer to include a profit forecast in their prospectus? Y/N Please give your reasons

See our response to questions 44 and 48. Members support the FCA’s proposal.

Question 51: Do you agree with our overall approach to the presentation of PFLS in a prospectus? Y/N Please give your reasons

Subject to the comments below, members agree with the overall approach.

Question 52: Do you agree with our proposed requirements for the general accompanying statement for protected forward looking statements? Y/N Please give your reasons

Members question the need to make the statement that the information is consistent with internal projections. This is the basis upon which any forward-looking statement should be prepared and, if not prepared to the PFLS liability standard, would expose the issuer to potential liability. Making an explicit statement potentially exposes an issuer to additional liability and it is not clear to our Members whether the liability standard for that additional liability is the same as for the PFLS regime.

It implies, of course, that PFLS is company generated data, not third-party data, which data we assume will be subject to the existing regime that relates to reproduced third-party data.

Such a statement may also not always be strictly accurate. For example, there may be different sets of internal projections (e.g. for prudential risk management and for transition planning purposes) which are inconsistent given their distinct purposes; so, without further clarification, you could not simply state that the information is consistent with internal projections. In addition, there may be third party assumptions / projections upon which a disclosure in the prospectus is based, but which are inconsistent with an issuer's own internal projections, and the issuer has valid reasons for disclosing using third party assumptions / projections.

Question 53: Do you agree with our proposed requirements for the specific accompanying statement? Y/N Please give your reasons

Members are concerned that without additional guidance the proposed requirement for content-specific accompanying statements may result in numerous, and potentially unmanageable, accompanying sets of statements.

Members would suggest that, where there are multiple references in a prospectus to the same PFLSs, as will often be the case, the issuer be able to choose to have the content-specific accompany statement only appear once. For example, by having a principal section of the prospectus containing all the PFLSs, and references elsewhere in the prospectus to individual PFLSs being able to refer back to the principal section.

With respect to the specific disclosures:

- Members question what is envisaged in the disclosure of "the basis and assumptions" upon which the statements have been prepared. How does this compare to the assumptions that may potentially be disclosed in the context of working capital statements and profit forecasts. Members suggest that some guidance will likely be required.

- Members also question what is envisaged by the disclosure of "significant factors" that could cause the statements to be inaccurate. What kind of disclosures is this intended to prompt and is there a risk that this causes lengthy and unnecessary disclosures. Again, Members suggest that some guidance will likely be required.

- It will be important that whatever is required to satisfy the disclosures on basis, assumptions and significant factors does not inadvertently prejudice the value and, therefore, take-up of the PFLS regime as a result of making those disclosures subject to the same level of potential risk and liability as the forward-looking statements that they support but without the protection of the PFLS regime.

About UK Finance

UK Finance is the collective voice for the banking and finance industry. Representing more than 300 firms across the industry, it seeks to enhance competitiveness, support customers and facilitate innovation. Our primary role is to help our members ensure that the UK retains its position as a global leader in financial services. To do this, we facilitate industry-wide collaboration, provide data and evidence-backed representation with policy makers and regulators, and promote the actions necessary to protect the financial system. UK Finance's operational activity enhances members' own services in situations where collective industry action adds value. Our members include both large and small firms, national and regional, domestic and international, corporate and mutual, retail and wholesale, physical and virtual, banks and non-banks.

The Capital Markets & Wholesale division, led by Conor Lawlor, focuses primarily on policy and regulatory initiatives spanning primary markets, M&A, secondary markets, post trade and liquidity management. Our work in these areas includes bringing technical experts from across our membership together to form new views, drive thought leadership, and develop policy positions relevant to the UK reform agenda. Further information is available at: www.ukfinance.org.uk.

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About AFME

AFME (Association for Financial Markets in Europe) promotes fair, orderly, and efficient European wholesale capital markets and provides leadership in advancing the interests of all market participants. 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. AFME participates in 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) through the GFMA (Global Financial Markets Association). For more information please visit the AFME website: www.afme.eu.

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About A&O Shearman LLP

A&O Shearman was formed in 2024 via the merger of two historic firms, Allen & Overy and Shearman & Sterling. With nearly 4,000 lawyers globally, we are equally fluent in English law, U.S. law and the laws of the world's most dynamic markets. This combination creates a new kind of law firm, one built to achieve unparalleled outcomes for our clients on their most complex, multijurisdictional matters – everywhere in the world. A firm that advises at the forefront of the forces changing the current of global business and that is unrivalled in its global strength.

A firm whose teams deliver unmatched insight with seamless service. A firm with strong values and a commitment to sustainability, where diverse individuals, perspectives and backgrounds belong, excel, and make a decisive difference. Our lawyers have long enjoyed a reputation for cultivating powerful relationships, thriving on seamless collaboration with each other and with their clients and earning the right to be trusted advisors.

Our clients benefit from the collective experience of teams who work with many of the world's most influential companies and institutions, and have a history of precedent-setting innovations. Together our lawyers advise more than a third of NYSE-listed businesses, a fifth of the NASDAQ and a notable proportion of the London Stock Exchange, the Euronext, Euronext Paris and the Tokyo and Hong Kong Stock Exchanges. This experience and expertise creates a firm with the power to shape our clients' fortunes and apply the law in groundbreaking ways – whether through innovative thinking or new products, services and technologies. Further information is available at www.aoshearman.com.

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