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FCA Consults Further on the New UK Listing Regime

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The Financial Conduct Authority (FCA) published a consultation paper on 20 December 2023 (CP23/31), setting out its proposals to reform the UK listing regime with reference to feedback received in previous consultations. Generally, the FCA has adopted the same approach and retained most of the proposals set out in its last consultation paper published in May 2023 (see our alert on the proposed reforms to the UK Listing Rules). The FCA presents the first tranche of the new Listing Rules in this consultation paper (the second tranche is to follow in Q1 2024), and if these changes are adopted, the FCA expects that the new Listing Rules will go live early in the second half of 2024.

Summary of the key proposals

The FCA retains the majority of the proposals set out in its last consultation paper, with modifications which are in bold below:

- A single listing category for equity shares of commercial companies to replace the current standard and premium segments of the Official List, **with a new 'transition' category for certain existing standard listed companies.**
- The removal of eligibility rules requiring a three-year financial track record and a revenue earning track record as conditions for listing, and no longer requiring a 'clean' working capital statement.
- The removal of eligibility and ongoing rules requiring that an issuer has an independent business and has operational control over its main activities.
- Retaining the current controlling shareholder regime for premium listed companies, **which requires a written and legally binding controlling shareholder agreement to be in place.**
- A more permissive approach to dual-class share structures, **where enhanced voting rights are only to be held by specified persons (not limited to just directors), but without mandated, time-based sunset clauses.**
- The removal of compulsory shareholder votes for significant transactions, **with an enhanced market notification regime for transactions at ≥25% under the class tests, which is intended to provide key information – including financial information – but not mandating working capital statements or restated historical financial information.**
- The removal of compulsory shareholder votes for related party transactions, including where a controlling shareholder is involved.
- **A new international secondary listing for non-UK incorporated companies with more than one listing where the primary listing is on a non-UK market, which will replicate the current standard listing rules with targeted ongoing/continuing provisions tailored to a secondary listing.**

Highlights of the key proposals

Given the nature of the reforms, the FCA is proposing a completely new UK Listing Rules (UKLR) sourcebook. The first tranche of the new Listing Rules, which are contained in CP 23/31, focuses on the proposals underpinning the new commercial companies category, and as such, this alert focuses mostly on the proposals relating to that new category. A second tranche of the new Listing Rules for the other listing categories and remaining provisions will be published in Q1 2024, together with proposed revisions to key FCA Technical and Procedural Notes.

The 'commercial companies' category and the 'transition' category

The FCA has retained its key proposed reform to create a new single 'commercial companies' category to replace the current standard and premium segments of the Official List. The FCA has confirmed that all companies in the commercial companies category must adhere to the UK Corporate Governance Code on a 'comply or explain' basis.

The FCA proposes that existing premium listed issuers be automatically mapped to the new commercial companies category once the new regime goes live, while certain existing standard listed commercial companies would be mapped to a new 'transition' category (as set out further below). The FCA may also move existing standard listed issuers into the shell companies category or international secondary listing category, based on FCA analysis.

The new transition category would replicate the existing standard listing continuing obligations, but it would be closed to new entrants. This transition category would have no fixed end date, and issuers could apply to transfer to other categories when and if they wish to do so. Any transfer to the commercial companies category, or the shell or closed-ended investment funds category, would require a sponsor and be subject to targeted eligibility assessments.

The consultation paper also sets out details on the FCA's proposed separate listing categories for closed-ended investment funds, open-ended investment companies, shell companies – including special purpose acquisition companies (SPACs) – and international secondary listings, as well as discrete categories for non-equity shares and non-voting equity shares, debt and debt-like securities, depositary receipts, securitised derivatives and warrants, options, and other miscellaneous securities.

The FCA proposes to have one set of listing principles to underpin a reformed listing regime for all of the above categories, which combines the current Listing Principles and Premium Listing Principles.

Removed, modified and simplified eligibility and ongoing rules for the new commercial companies category

The general approach is to allow the commercial companies category to be sufficiently flexible to accommodate issuers with operational businesses that generate, or have the prospect of generating, revenue from their own activities, while being clear that the FCA is open to diverse business models and more complex corporate structures.

Removed eligibility requirements for new listings

The FCA has retained its proposal to remove the eligibility requirements for three years of audited historical financial information that represents at least 75% of the issuer's business, a revenue earning track record, and a 'clean' or unqualified working capital statement that currently apply to the premium listing segment. The prospectus regulation will still require a prospectus to include historical financial information and a working capital statement. Sponsors still need to consider whether an issuer has a reasonable basis for making any working capital statement in a prospectus and provide declarations to the FCA to that effect.

Independence and control of business

The FCA proposes not to mandate eligibility requirements and continuing obligations around independence of business (other than where an issuer has a controlling shareholder) and control of business in the commercial companies category. It is proposed to retain the requirement that the board's discretion to make strategic decisions has not been limited or transferred to a person outside the issuer's group.

The FCA is proposing to set the scope of the commercial companies category such that it is open to issuers that are able to meet the applicable eligibility requirements and continuing obligations and are not a type of issuer for which there exists a separate listing category. For an issuer where there exists a separate listing category (e.g., a shell company or a closed-ended investment fund), it would have to meet the eligibility requirements of that separate category in order to be eligible for a listing.

The FCA has stated that it does not propose to restrict admission to the commercial companies category to issuers with specific business models, as long as their characteristics are fairly communicated to allow investors to conduct their own assessment and due diligence.

Controlling shareholders

The FCA proposes to retain the current controlling shareholder regime for premium listed companies within the new commercial companies category. An issuer with a controlling shareholder must demonstrate that, despite having a controlling shareholder, it is able to carry on its main business activities independently from such controlling shareholder. This includes the requirement to have a written and legally binding agreement with the controlling shareholder which includes certain specified undertakings. The FCA also proposes to retain the current premium listing approach on approving the cancellation of listing and the election or reelection of independent directors when the issuer has a controlling shareholder.

Dual-class share structures

Since 2021, companies listing on the premium segment have been able to have a limited form of dual-class share structure. The FCA is proposing a more flexible arrangement, as follows:

- **No specified voting ratio or weighting limits:** The FCA proposes removing limits on the maximum enhanced voting ratio that can be attached to enhanced voting rights shares and leaving it to the market to negotiate a suitable level.
- **Permitted holders:** Enhanced voting rights shares may only be issued to the following persons at the time of the issuer's first admission to listing (and constitutional arrangement should be put in place to ensure this):
    1. Directors of the issuer.
    2. Natural persons who are investors in, or shareholders of, the issuer.
    3. Employees of the issuer.
    4. Persons established for the sole benefit of, or solely owned and controlled by, a person in (1), (2) or (3) above.

No further weighted voting rights shares would be able to be issued after listing. This is a wider group than was set out in the prior consultation paper, but it would still not allow enhanced voting rights shares to be made available to all pre-initial public offering (IPO) shareholders, as is common in the US.

- **Sunset requirement:** There will not be any mandatory time-related sunset period on enhanced voting rights (the FCA had proposed 10 years post-listing in the prior consultation paper). The FCA notes that this is because there may be case-specific reasons to consider longer periods, or conversely could imply 10 years is an appropriate period when, for certain companies, investors may prefer and seek to negotiate a shorter period (e.g., three or five years).
- **Restrictions on transfer:** A holder would not be permitted to transfer the voting rights associated with such shares except to a person established for the sole benefit of, or solely owned and controlled by, that holder.
- **Use of enhanced voting rights shares:** In a change of approach from its prior consultation paper, the FCA is proposing that, other than in relation to approving a reverse takeover and the election or reelection of independent directors, if there is a controlling shareholder, enhanced voting rights would not be allowed to be exercised on matters that are subject to a vote under the new Listing Rules (which should be decided upon by a vote of the issuer's listed class of shares only).

Significant transactions for the commercial companies category

Class 1 transactions: For transactions meeting the 25% threshold on the class tests, the FCA proposes to carry over key aspects from premium listing requirements to the new commercial companies category, except for removing the following:

- The requirement to obtain shareholder approval (except for on a reverse takeover).
- The associated obligation to produce an FCA-approved shareholder circular and to appoint a sponsor on the circular.
- The profits test currently used to classify significant transactions.
- The requirement to seek sponsor guidance (the issuer will still need to appoint a sponsor when it seeks individual guidance in relation to a significant transaction or requests an FCA waiver or modification of the Listing Rules requirements, including on the class tests).

As a new proposal in this consultation paper, the FCA proposes enhanced disclosures in the class 1 transaction announcement, which includes some of the more detailed information included in the current class 1 circular and class 2 transaction notification disclosures. This includes at least two years of historical financial information on the target and a statement of the effect of the transaction on the group's earnings and assets and liabilities. A working capital statement and restated financial information would not be required. The FCA would not require pro forma financial information to be published to prospectus standards, but clear disclosures would be required explaining the sources of any unadjusted financial information included in the announcement and the basis upon which the pro forma financial information is prepared. These changes mean that the financial information would no longer be subject to mandatory third-party scrutiny from reporting accountants. In addition, the FCA is not proposing to replicate the current requirements relating to profit forecasts and profit estimates.

These disclosure requirements would be supported by an overarching obligation on the issuer to include any other relevant circumstances or information necessary to provide an understanding of, or enable shareholders to assess, the terms of the transaction and its impact on the issuer.

In addition, the FCA is proposing new guidance on whether a transaction is to be assessed as within or outside of the ordinary course of business of the issuer. This will clarify, for example, that transactions that are undertaken to support the existing business may be ordinary course, even if not regularly undertaken as part of

the issuer's day-to-day business activities.

Class 2 transactions: The FCA proposes to remove the class 2 notification requirement for transactions between 5% and 25% threshold on the class tests.

Related party transactions for the commercial companies category

The FCA proposes for related party transactions with a percentage ratio of 5% or more based on the class tests, excluding transactions in the ordinary course of business, to require issuers in the new commercial companies category to:

- Adopt a board approval process that excludes any conflicted director from board discussion and approval of a transaction.
- Publish an announcement of the key details of the transaction containing specific prescribed content (based on the current requirements for announcements of smaller related party transactions).
- Include in the announcement a statement from the board that the transaction is fair and reasonable as far as its security holders are concerned, having obtained the same confirmation from a sponsor.

As such, the FCA has retained its proposal not to carry forward the current requirements under the premium listing segment around obtaining independent shareholder approval (and the associated requirement for a circular and sponsor confirmation) and seeking sponsor guidance when entering into a related party transaction above the 5% class test threshold. The FCA also proposes to remove the market notification and sponsor fair and reasonable opinion for smaller related party transactions (≥ 0.25% but <5% based on the class tests).

The FCA is also proposing to:

- Increase the threshold at which a substantial shareholder becomes a related party from 10% to 20%.
- As with significant transactions, issue new guidance on the exemption for transactions within the ordinary course of business.
- Clarify when a related party transaction needs to be aggregated with earlier transactions, or when the issuer is required to comply afresh with the related party rules.
- Confirm that Disclosure Guidance and Transparency Rules (DTR) 7.3 will not apply to companies listed in the commercial companies category, addressing feedback that requiring issuers to be subject to two different related party transaction regimes is overly complex.

Other requirements retained for the commercial companies category

The initial and ongoing obligations that currently apply both to the premium and standard segments would apply to the commercial companies category (e.g., the 10% minimum free float and the £30 million minimum market capitalisation requirement). The FCA proposes to carry over the following premium listing requirements in relation to:

- Preemption rights.
- Share buybacks at a premium.
- Discounts to market price not to exceed 10% without prior shareholder approval.
- Employee share schemes, long-term incentive plans and discounted options arrangements.
- Cancellation of listing.
- Matters relating to conduct of rights issues, open offers, vendor consideration placings, and offers for sale or subscription.
- Ancillary matters relating to fractional entitlement to shares and ownership documentation.

The secondary listing category

This new category seeks to accommodate non-UK incorporated companies where domestic company law or rules flowing from their 'primary' listing venue may make meeting certain requirements proposed in the commercial companies category more difficult.

Issuers being mapped to the secondary listing category by the FCA could apply to transfer to the commercial companies category at any stage after implementation, potentially using the modified transfer process. Unlike the transition category, this category will be open to new applicants. Eligibility and continuing obligations for this category would largely replicate the standard listing requirements, subject to certain targeted additional requirements (e.g., the issuer's place of central management and control must be located in either its country of incorporation or its primary place of listing). The sponsor regime will not apply to this category.

For overseas issuers, the proposed secondary listing category would address concerns raised regarding non-UK incorporated issuers that follow the corporate governance code of another jurisdiction. The FCA proposes to carry over the existing requirement to comply with DTR 7.2, where the obligation is to include a corporate governance statement in the director's report to confirm the corporate governance code that the issuer is subject to, along with all relevant information about the corporate governance practice applied over and above the requirements of national law.

Sponsor regime

Consistent with the prior consultation paper, the FCA proposes that the sponsor regime applies to commercial companies, SPACs and other shell companies, and closed-ended investment funds at the stage of application for listing and on reverse takeovers. The FCA expects that the sponsor's role at the time of listing will remain largely unchanged from how it currently operates, but taking into account the proposed removal of certain of the existing eligibility requirements which sponsors would no longer need to assess as part of the requirements for listing in the commercial companies category.

After the initial listing, the FCA proposes that instances requiring sponsor involvement are targeted at circumstances where an issuer is facing fundamental change, as well as in certain narrow circumstances where it offers the most benefit to the FCA, the issuer and its shareholders. As such, sponsors will continue to have an ongoing role in further issuance listing applications with a prospectus, sponsor fair and reasonable opinions for related party transactions, or where issuers seek guidance, modifications or waivers to FCA rules, as well as where the issuer is proposing to enter into a reverse takeover and for certain transfers between listing categories.

The FCA proposes to allow wider factors to demonstrate sponsor competency and to extend the lookback period for relevant experience from three to five years. The consultation period for the rule changes in relation to sponsor competency closes on 16 February 2024, and the changes are expected to be implemented by mid-Q2 2024.

Next steps

The consultation period for the new Listing Rules closes on 22 March 2024, and the FCA intends to publish the final Listing Rules at the start of the second half of 2024, followed by a very short period before the new Listing Rules come into force. Once the rules are implemented, existing issuers will be mapped into the relevant category, and all new applications submitted for eligibility review will need to comply with the processes and requirements of the new Listing Rules.

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