

Primary Market Technical Note

Share buybacks – novel/complex approaches and Listing Principle 5

The information in this note is designed to help issuers and practitioners interpret our UK Listing Rules, Prospectus Regulation Rules, Disclosure Guidance and Transparency Rules, and related legislation. The guidance notes provide answers to the most common queries we receive and represent FCA guidance as defined in section 139A FSMA

Rules

UKLR 3.2.4R; UKLR 2.2.1R, UKLR 9.6

There are a number of approaches that can be used by issuers in the equity shares (commercial companies) and closed-ended investment funds categories which achieve the same effect of a buyback of listed shares in substance but which are not a buyback of shares in legal form. In such circumstances, UKLR 9.6.10G advises that issuers should contact the FCA to discuss the application of UKLR 9.6 to their proposed transaction. Generally, where the method proposed replicates the substance of a share buyback, our approach is to interpret the rules purposively and apply the rules in relation to dealing in own securities in UKLR 9 in a 'substance over form' manner.

A typical example is the return of value to shareholders involving the creation, issue and repurchase of a new class of shares followed by a share consolidation. Often such an approach also includes an income

option through a special dividend as an alternative. We consider this method is acceptable where an issuer can demonstrate to us that an appropriate approach has been taken to apply the principles of UKLR 9.6 – for example, allowing all shareholders the ability to participate on the same terms where the substance of the transaction is equivalent to a buyback of over 15% of the issuer's shares occurring. However, where this (or a similar) method involves the 'stapling' of the new security to the existing equity share for a prolonged period of time, we would question the extent to which the listed equity shares remain freely transferable in their own right, as required under UKLR 3.2.4R. Issuers or their advisers proposing such approaches are recommended to contact us for individual guidance before embarking on this course (see below)

Equality of treatment in share buybacks

Issuers of listed securities and their advisers are reminded that the principle of equality of treatment of shareholders applies to share buybacks. In summary, Listing Principle 5 (UKLR 2.2.1R) states that all holders of the same class of listed securities that are in the same position must be treated equally. We will examine closely share buybacks undertaken in a manner that may offend this principle.

Some examples of share buybacks that we consider as potentially offending this principle are those that seek to:

- offer different terms to different shareholders (or groups of shareholders) without a sound objective rationale for such shareholders to be viewed as being in a different position; or
- exclude certain shareholders (or groups of shareholders) without a sound objective rationale, for example the exclusion of shareholders in certain jurisdictions where it is not obvious that there is any sound reason to do so.

An example of a rationale that we would consider to be sound and objective would be where local laws or regulations in a particular jurisdiction may result in a significant risk of civil, regulatory or criminal exposure for the listed company if the buyback was conducted there. An example of a rationale that we would consider to be neither sound nor objective would be a buyback where shareholders in certain jurisdictions are excluded based on an apparent risk of such exposure but yet employees in the same jurisdiction have been included in the

buyback and there is no basis for different treatment of employees/shareholders under the relevant local law or regulation. Similarly, an arbitrary size criterion for exclusion does not appear to present a sound objective rationale.

Contacting the FCA for individual guidance

Please note that the examples given above regarding what the FCA would consider to be a sound objective rationale (or otherwise) are not an exhaustive list. Where issuers and their advisers have queries over the correct application of the UK Listing Rules to their specific circumstances, they are encouraged to contact the FCA for individual guidance. The procedure for requesting individual guidance is set out in SUP 9 of the FCA Handbook.