

DRAFT FOR CONSULTATION

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Primary Market Technical Note

Sponsors: Application of principle to deal with the FCA in an open and co-operative manner

The information in this note is designed to help issuers and practitioners interpret our UK Listing Rules (UKLR), ~~Prospectus Regulation Rules~~ Prospectus Rules: Admissions to Trading on a Regulated Market (PRM), Disclosure Guidance and Transparency Rules (DTR), 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 and guidance

UKLR 1.2.4G; UKLR 2.2.1R; UKLR 24.2.1R; UKLR 24.2.6R – UKLR 24.2.19G; UKLR 24.2.9R(1); UKLR 24.2.17G; UKLR 24.4.5R; UKLR 24.5.1G; UKLR 24.5.2R; UKLR 24.5.12R

Introduction

Under UKLR 24.2.9R(1), a sponsor must at all times (whether in relation to a sponsor service or otherwise) deal with the FCA in an open and cooperative way.

A separate obligation exists for issuers under Listing Principle 2 to deal with the FCA in an open and cooperative manner. TN/209 sets out guidance on the application of Listing Principle 2.

This Technical Note sets out guidance for sponsors on applying UKLR 24.2.9R(1) to their obligations under UKLR 24.

The responsibilities of a sponsor

Sponsors are critical to the integrity of the listing regime. As set out in UKLR 24.2.1R, they perform two key roles; firstly, providing us with assurances, explanations and confirmations relating to listing rules, ~~Prospectus Rules~~ PRM, disclosure requirements and transparency rules compliance by issuers with a listing of equity shares or applying for admission of its equity shares (UKLR 24.2.1R(1) and UKLR 24.2.1R(2)); and secondly, providing guidance to issuers with a listing of equity shares or applying for admission of their equity shares, in understanding and meeting their responsibilities under the listing rules, the ~~Prospectus Rules~~ rules in PRM, the disclosure requirements (set out in Articles 17, 18 and 19 of the Market Abuse Regulation) and the transparency rules (UKLR 24.2.1R(3)). Sponsors, therefore, have a critical role to play in helping us meet our objectives of maintaining the integrity of the market, ensuring an appropriate degree of protection to consumers and promoting effective competition in the interests of consumers.

Operationally, a sponsor is embedded into a number of the FCA's regulatory processes in connection with issuers with a listing or applying for admission of equity shares, in the listing categories for which the sponsor regime applies. For example, a sponsor interacts with us on behalf of listed issuers and applicants with regard to the preparation of transactional documentation and provides key declarations in connection with transactions carried out by listed issuers and applicants. In light of the nature of these types of arrangements, we expect a very high level of cooperation and openness between us and a sponsor.

We consider UKLR 24.2.9R(1) to be a fundamental principle which sets out how sponsors should interact with us, and which will determine how we supervise sponsors.

As set out in Final Notice 2015: Execution Noble & Company Limited¹, the FCA is of the view that a sponsor may breach the principle of being open and cooperative even where the breaches are not committed deliberately or recklessly.

¹ 1 Final Notice 2015: Execution Noble & Company Limited
<https://www.fca.org.uk/publication/final-notice/execution-noble-and-company-limited.pdf>

Where the principle applies

We expect sponsors to consider their obligations under UKLR 24 in light of the application of all the Principles for Sponsors (UKLR 24.2.6R – UKLR 24.2.19G), including UKLR 24.2.9R(1). UKLR 24.2.9R(1) requires sponsors to deal with the FCA in an open and cooperative way at all times, whether or not they are providing sponsor services.

Supervision of sponsors

An open, cooperative and constructive relationship is crucial to our overall ability to supervise sponsors. As set out in UKLR 24.5.1G, the FCA expects to have an open, cooperative and constructive relationship with a sponsor to enable us to have a broad picture of the sponsor's activities and its ability to satisfy the criteria for approval as a sponsor as set out in UKLR 24.4.5R.

Given the important role played by sponsors, the FCA maintains a dedicated supervisory team, the Primary Market Specialist Supervision team, which is responsible for monitoring the performance of sponsors and their compliance with UKLR 24. Each sponsor has an allocated relationship manager within the Primary Market Specialist Supervision Team.

Positive duty to communicate with us

This principle can result in a sponsor being under a positive duty to communicate with or provide information to us. It is not possible to describe all of the factors that sponsors should take into account when determining whether to contact us in order to satisfy the requirements in UKLR 24.2.9R(1). However, sponsors should consider whether, in entering into a course of action, there is likely to be an impact on their obligations to the FCA under UKLR 24, whether at the time of action or in the foreseeable future.

In such instances, we expect sponsors to engage with us in a manner that gives us sufficient time to consider the issue presented, form a view and, if necessary, provide guidance on the matter before an issue arises. This is particularly important where there is a timetable that cannot be delayed.

The following non-exhaustive list sets out some examples of circumstances where we would expect sponsors to contact us in a timely manner, in order to satisfy the requirements in UKLR 24.2.9R(1):

- when the sponsor is responding to information requested in connection with periodic or ad-hoc supervisory enquiries, visits or meetings pursuant to UKLR 24.5.2R, noting that UKLR 24.5.2R(2) requires sponsors to provide the information or documents requested as soon as practicable
- where the sponsor is concerned about its ability to provide sponsor services in accordance with UKLR 24.2 and UKLR 24.3
- prior to entering into an arrangement which may prevent it from complying with UKLR 24.5.2R
- when complying with the notification requirements contained in UKLR 24.5.12R, noting that UKLR 24.5.12R requires a sponsor to notify the FCA in writing as soon as possible (TN/711 sets out further guidance on the application of UKLR 24.5.12R)
- where the sponsor is considering the possibility of managing a potential conflict of interests or is considering the possibility of a perception of a conflict of interests (we have provided further guidance on this area below)

We would also expect a sponsor to consider the guidance given in UKLR 1.2.4G, under which a sponsor should consult us at the earliest possible stage if it is in doubt about how the listing rules apply to a particular situation, including UKLR 24.2.9R(1).

Interaction between UKLR 24.2.9R(1) and conflicts management

Conflicts management is an example of where we expect sponsors to communicate with us at an early stage. UKLR 24.2.11G to UKLR 24.2.17G set out the relevant rules applicable to sponsors in relation to identifying and managing conflicts. Under UKLR 24.2.17G, if a sponsor is in doubt about whether a conflict can be effectively managed, it should discuss

the issue with us at an early stage, i.e. before it decides to provide a sponsor service or, where an issue arises during a transaction, as soon as reasonably practicable after that². Should a sponsor be in doubt as to whether it should approach us to discuss whether a conflict of interest can be effectively managed, we expect a sponsor to consider also the application of UKLR 24.2.9R(1). This is most likely to be a relevant consideration where a sponsor has identified a potential conflict of interest, or an interest that could give rise to a perception of conflict, which carries an unusual amount of risk, such as a novel or particularly large or complex undertaking.

Interaction between UKLR 24.2.9R(1) and UKLR 24.2.10R

UKLR 24.2.10R requires a sponsor to promptly notify the FCA if, in connection with the provision of a sponsor service, it becomes aware of a failure to comply with the listing rules, the disclosure requirements (set out in Articles 17, 18 and 19 of the Market Abuse Regulation) or the transparency rules by either the sponsor itself or an issuer with a listing of equity shares or applying for admission of its equity shares.

Although a sponsor is subject to the requirement to be open and cooperative with the FCA in UKLR 24.2.9R(1) at all times, we would not interpret UKLR 24.2.9R(1) in a way that extends the obligation on a sponsor set out in UKLR 24.2.10R so that it applies at all times.

Implications of UKLR 24.2.9R(1) for contractual arrangements

We expect sponsors to be aware of the need to ensure that they are not entering into contracts that prevent them from complying with their regulatory obligations. When considering the scope of their obligations to us, we expect sponsors to consider the need to comply with UKLR 24.2.9R at all times, as discussed above.

The most common area where this consideration will arise is that of confidentiality. Agreements entered into in the initial stages of a proposed merger or settlement agreements typically include a mutual non-disclosure obligation (NDAs). These clauses usually include “carve outs” to address the need for parties, who may be subject to regulatory requirements, to disclose confidential information that they are required or otherwise obliged to disclose either under law or regulation. Such ‘permitted disclosures’ are the subject of negotiation between the parties to the agreement and, as such, we expect sponsors to consider their regulatory obligations to the FCA in negotiating NDAs.

² Also see our Technical Note Sponsors: Conflicts of interest (TN/701)

The consideration of whether a sponsor is 'required' or 'obliged' to disclose information to the FCA can be complicated by the fact that some listing rules do not, by themselves, impose a positive obligation on a sponsor to notify us of an issue or otherwise draw to our attention to a set of circumstances. However, as discussed above, it is important that sponsors consider the requirements of UKLR 24.2.9R(1) – that is, that a sponsor must deal with us in an open and cooperative way at all times.