

## DRAFT FOR CONSULTATION

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# Primary Market Technical Note

## Sponsors' duty regarding directors of listed companies

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

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UKLR 2.2.1R; UKLR 24

### Introduction

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Under UKLR 24.2.8R, where, in relation to a sponsor service, a sponsor gives any guidance or advice to a listed issuer or applicant on the application or interpretation of the listing rules, the disclosure requirements or the transparency rules, the sponsor must take reasonable steps to satisfy itself that the director or directors of the listed issuer understand their responsibilities and obligations under the listing rules, the disclosure requirements and the transparency rules. Listing Principle 3 requires a listed company to take reasonable steps to enable its directors to understand their responsibilities and obligations as directors. The Listing Principles are general statements

of the fundamental obligations of listed companies. Issuers should therefore be aware of the importance we place on compliance with these principles on an ongoing basis. The UKLR 24.2.8R sponsor duty sits alongside (and should be read in conjunction with) Listing Principle 3.

This technical note is intended to help sponsors understand how we expect them to approach their work in order to comply with the UKLR 24.2.8R duty. This guidance is not intended to be exhaustive and a sponsor should exercise professional judgement when it decides what steps it should take to comply with the rule.

### **The meaning of 'reasonable steps'**

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UKLR 24.2.8R requires a sponsor to take 'reasonable steps' to satisfy itself that the director or directors of the listed issuer understand their responsibilities and obligations.

The sponsor should assess the circumstances in which the guidance or advice will be given to determine what action (if any) to take. This assessment should take place at a stage of the sponsor service which will allow sufficient time for the sponsor to carry out any required actions.

Reasonable steps will vary depending on the circumstances but typically a sponsor should consider:

#### **1. The type of sponsor service being provided**

The nature and degree of a sponsor's interaction with the directors is likely to differ according to the type of sponsor service. For example, a sponsor may provide guidance to a listed company on the application of the class tests under UKLR 4.2.6R. In such a case, we would expect a sponsor to have satisfied itself that the directors understand which transactions need to be classified, how they should be classified using the class tests and, depending on the result of the classification, whether any further obligations may arise in relation to requesting a waiver, modification or substitution of the operation of UKLR 7, UKLR 8 or UKLR 11, from the FCA. In

some circumstances, a sponsor may choose to interact only with the director who has the relevant responsibility for the sponsor service within the listed issuer and/or senior management. Those interactions may be sufficient for the sponsor to be reasonably assured in relation to its obligations if, in the sponsor's judgement, those interactions will lead to the director or directors understanding their responsibilities and obligations. That is, it will not be necessary for a sponsor to interact directly with all directors in all circumstances. In the instance of an IPO, where the sponsor is providing guidance to a new applicant, the relevant listing rules, disclosure requirements and transparency rules to be covered will be wider in scope. The sponsor may therefore need to interact directly with all of the directors.

**2. The nature and characteristics of the listed issuer or applicant:**

The sponsor should take into account the characteristics of the listed issuer or applicant when deciding what reasonable steps it should take. Sponsors should consider whether particular focus should be placed on certain responsibilities.

**3. The directors' level of understanding and their experience of complying with their responsibilities and obligations under the listing rules, the disclosure requirements and the transparency rules.**

As a starting point the sponsor will need to assess the directors' level of understanding of the relevant rules. In order to carry out this assessment, the sponsor should review the nature and extent of each director's experience of complying with their responsibilities and obligations, for example, in their current or previous role as a director of a listed company. Issuers may have also undertaken induction programmes and provided ongoing training to assist the directors in understanding their responsibilities and obligations. If a director does not have recent, relevant experience or has recently been appointed, the sponsor will need to consider tailoring its approach to the requirements of that director.

Other factors are likely to be relevant depending on the particular circumstances. We would expect the sponsor to record the steps taken to satisfy itself that the directors understand their

responsibilities and obligations. Records should include the facts and circumstances the sponsor has taken into account in forming its reasonable opinion and the sponsor should retain any documentary evidence it has relied upon. Sponsors should refer to the TN/717 – Sponsors: Record Keeping Requirements for further guidance on the application of record-keeping requirements.

UKLR 24.2.8R applies to all sponsor services and sponsors should be aware that this can include preparatory work that a sponsor may undertake before a decision is taken as to whether or not it will act. The sponsor should consider the implications of complying with UKLR 24.2.8R if it provides guidance or advice to the listed issuer or applicant during the preparatory stage of any sponsor service. In such circumstances, it should recognise the fact that, for an IPO, not all directors may have been appointed at that point in time.

A sponsor will also need to be mindful of satisfying UKLR 24.2.8R up to completion of a sponsor service. Depending on the type of transaction, this can for example include the period between publication of a circular and completion of the relevant transaction, ~~or~~ the period between publication of a prospectus and admission to the Official List (first admission of shares of a particular class) or the period up until the approval of a prospectus (further issuances of shares). As this period may stretch into a number of months, a sponsor should ensure directors understand under what circumstances they may need to obtain guidance or advice from the sponsor on their responsibilities and obligations during this period and ensure it is available to provide such advice if required.

### **The sponsor's role**

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Sponsors have a critical role to play in maintaining the integrity of the listing regime by providing assurances to us that directors understand their responsibilities and obligations under the listing rules, disclosure requirements and transparency rules. UKLR 24.2.8R requires a sponsor to take action rather than rely on the work of third parties the listed issuer or applicant itself. In other words, the sponsor's role is in addition to other parties involved in the sponsor service. As stated in UKLR 24.2.5G, a sponsor remains responsible for meeting its responsibilities even where reliance is placed on a listed issuer,

applicant or third party. Therefore, where a sponsor relies on the work of a third party such as its or the company's lawyers, to satisfy UKLR 24.2.8R, we would expect the sponsor to form a judgement as

to whether the third party's work is sufficient for the purpose of the sponsor forming its reasonable opinion.

For example, for certain sponsor services such as an IPO, the listed issuer or applicant's lawyers or other advisers may provide memoranda or training to the directors on their responsibilities and obligations in order to assist the directors to comply with Listing Principle 3. In order to satisfy its own obligations under UKLR 24.2.8R, we would expect the sponsor, typically in conjunction with its legal advisers, to review any memoranda or training materials. The sponsor should come to a reasonable opinion that the scope and content of these documents is sufficient and has been understood by the directors. In this regard, the sponsor will need to interact directly with the directors of an issuer during the IPO, for example by attending relevant board meetings.

In providing its confirmation under UKLR 24.2.8R, we would expect the sponsor to apply its own knowledge and experience of the listed issuer or applicant and take into account other factors that it may consider relevant. These factors could include the issuer's operating environment and any particular knowledge or experience the sponsor may have of the approach taken by issuers of a similar size, with a similar corporate structure or operating in the same sector. Further, the sponsor should recognise its unique role among the parties involved in the process by drawing on its experiences of advising on other sponsor services and corporate finance transactions and its interaction with the FCA on matters concerning the application of the listing rules, the disclosure requirements and the transparency rules.

If the sponsor determines there are gaps in the directors' understanding of the relevant rules, the sponsor will need to decide upon the most effective way of addressing the gaps.

Examples of actions a sponsor could take include:

- attending and participating at board meetings where presentations and memoranda are used to educate the directors on their responsibilities and obligations

- discussing with the directors examples of good practice and highlighting pitfalls by referring to FCA publications and guidance, as well as FCA Final Notices in relation to breaches of FCA rules by listed companies
- working through illustrative scenarios with the directors to assist them in understanding the application of their responsibilities and obligations
- in certain circumstances such as where a director has limited knowledge or experience of the relevant rules, carrying out one-to-one director training

Sponsors should ensure directors are provided with an opportunity to ask questions and, where it is apparent that further work is necessary, an appropriate follow-up should take place. We would expect the sponsor to record the steps taken to come to its view including retaining any materials used such as presentations or training aids, minutes of meetings and signed letters/statements.

Where the sponsor comes to the view that there are no material gaps in the directors' understanding such that limited (or no) action is required on behalf of the sponsor, we would expect the sponsor to be able to demonstrate how it came to this view. In this regard, reliance on a director's questionnaire or comfort letters provided by the listed issuer or its lawyers is, without an appropriate level of enquiry, consideration and challenge (where appropriate) by the sponsor, unlikely to be sufficient evidence to demonstrate that a sponsor has taken reasonable steps. Where reliance is placed by a sponsor on its previous experience of advising the directors of the listed issuer, we would expect the sponsor to record the basis of its judgement that there is limited or no requirement to carry out further steps.

Should a sponsor be of the opinion that a director or directors of the listed issuer or applicant are unwilling or unable to understand their responsibilities and obligations, these concerns should be highlighted to the issuer at the earliest opportunity. In this instance, the listed issuer or applicant should have regard to its responsibility to cooperate with the sponsor under UKLR 4.5.1R by providing all information reasonably requested by the sponsor for the purpose of carrying out the sponsor service in accordance with UKLR 24. This is likely to include providing access to relevant meetings with directors, and,

where applicable, senior management. The sponsor should also have regard to its obligation to promptly notify the FCA of the company's failure to comply with its obligations under UKLR 24.2.10R.