

UKLA Publications LIST!



Issue No. 22 – August 2009

Welcome to the 22nd LIST! newsletter, our third in 2009. Within this edition we have adopted a question and answer format in addressing some of the issues faced during the daily work of the UKLA on transactions, plus we give messages for issuers on black lining, comfort letters for schemes of arrangement and restrictions on transfer in ETF vehicles. In addition, there are some communications on compliance with the Listing Principles, and on Continuing Obligations.

We also have details of the freshly launched UKLA Equity Markets Group section of the FSA website.

Please do send in your feedback; we appreciate this and will endeavour to consider it when producing future LIST! publications, where it is relevant.

If there is a specific rule or area which you would like to see an article on, please contact Tim Ross at tim.ross@fsa.gov.uk.

Guidance

In this newsletter we have tried to provide a broad coverage of topical issues of both a technical and non-technical nature. We are limited in the way we can address technical matters by the requirements of the Financial Services and Markets Act 2000 (FSMA), which restricts the scope for issuing guidance without prior consultation.

It is important to understand that the contents of this newsletter are not intended to be guidance as contemplated by FSMA. You should refer to the Listing Rules (LRs), Prospectus Rules (PRs) and Disclosure and Transparency Rules (DTRs) for general guidance and where you need individual guidance, you may approach us. An explanation of the status of FSA guidance and other supporting material published by the FSA may be found here: http://www.fsa.gov.uk/pages/Library/Other_publications/Miscellaneous/2009/guidance.shtml.

1. Q. Do break fees require aggregation?

A. At first glance, a review of LR10.2.10(2) may suggest that Break Fees do not require aggregation under the Listing Rules. However, on closer examination, the wording within LR10.2.7 makes it clear that the concept of aggregation does still apply to break fees. This is indicated through the use of the definition 'break fee' or 'break fees' and within the text in LR10.2.7 '*the total value of the fee or fees in aggregate*'.

We have previously pointed out that, where an issuer has committed to more than one break fee as part of a transaction, we would expect it to aggregate break fees and test the greatest possible amount that could crystallise as payable under the terms of the fees. In calculating this amount, we would not expect an issuer to aggregate those break fees that are mutually exclusive.

However, it is important to clarify that in circumstances where we would consider it appropriate to aggregate transactions under LR10.2.10, it may also be appropriate to aggregate the break fees in relation to those transactions. Aggregation under the Listing Rules seeks to act as an anti-avoidance mechanism, ensuring that class 1 transactions are not split into a number of transactions to avoid regulatory requirements. This principle would equally apply to break fees attaching to such transactions. Issuers and their advisors should contact us before entering into break fees that may require aggregation under LR10.2.10.

2. Q. How do we aggregate transactions?

A. The requirement to carry out the class tests crystallises at the point at which the transaction is announced. As such, the impact on the issuer in relation to the market capitalisation test is measured at that point in time. LR10 Annex 1 sets out the source figures to be used in classifying transactions.

When aggregating transactions, issuers should add together the class test percentages of the earlier transaction (as classified at that time) with the class test percentages of the subsequent transaction. The combined percentage will indicate the aggregated classification of the transactions.

For example, Company A enters into a transaction in January 2009 and a second transaction in May 2009. Both are in relation to the same business and are aggregated under LR10.2.10(1)(b). The class test results are:

	January 2009	May 2009	Aggregated results
Consideration to market cap	15%	15%	30%
Profits test	10%	4%	14%
Gross assets	13%	7%	20%

On the above results the second transaction would be treated as a class 1 transaction requiring shareholder approval under LR10.2.10(3), as the aggregated results are greater than 25% for one of the 3 tests.

It would not be appropriate to recalculate the class test results for the January transaction in May 2009, as we consider that the class test regime seeks to measure the impact of a transaction on an issuer. This impact crystallises at the time a transaction is entered into, and is not affected by subsequent events such as a movement in an issuer's share price.

3. Q. In determining whether a shareholder in a Dual Listed Company ("DLC") is a substantial shareholder for the purposes of LR11, is the threshold an aggregated 10% holding in the combined share capital of both heads of the DLC structure, or a 10% stake in either parent company?

A. In determining whether a shareholder should be treated as a *substantial shareholder* under the Listing Rules, we would look to the aggregated percentage holding across the two parent companies, rather than just the individual holdings within each parent. This is because, due to the constitution of the DLC, shareholders may not '*exercise or control the exercise of 10% or more of the votes able to be cast on all or substantially all matters at general meetings of the company*' if they only hold a stake of more than 10% in one head of the structure. Usually, as a result of the constitution of DLCs, most matters are voted on a joint electorate basis and so, even though a shareholder may own more than 10% of one of the listed parents, their combined shareholding may or may not result in them exercising more than 10% of the votes '*on all or substantially all matters at general meeting*'.

However, it should be noted that the above only applies at listed company level. This means that a holder of 10% or more of any subsidiary of the DLC will still be caught by the definition.

4. Q. What do we mean by 'latest practicable date'?

A. In a number of instances Listing and Prospectus Rules disclosure within documents is required to be provided at a 'latest practicable date'. The term is often used in relation to share-based disclosure. This is necessary in order to bring the disclosure up to as close a date to the document as possible. We have had a number of queries from advisors in recent months seeking to agree the 'latest practicable date' before approval of the document. We thought it important to clarify that the latest practicable date should, as a matter of fact, be the latest date before publication that the disclosure can be prepared; typically we would

expect this to be within 48 hours. We are often approached to agree longer periods of time, based on the fact it is time consuming, difficult to prepare or costly to update (often in cases where stamping dates have slipped), rather than it being impracticable to do so. We believe it is important that this information is as up to date as possible and, as such, we do not consider it to be appropriate for issuers to use longer periods of time.

5. Q. Should the discount in LR9.5.10 be calculated at the time of announcement or at the time of agreeing the placing?

A. LR9.5.10R(1) specifies the maximum discount that can be applied to offers and placings.

We understand there has been some confusion over when the discount should be calculated, i.e. whether it should be calculated at announcement or at the time the placing is agreed.

Historically, the rules in respect of the discount for offers and placings were located in separate parts of Chapter 4. When the rules were revised in June 2005, we merged them into LR9.5.10R(1). The words ‘(as the case may be)’ were inserted at the end of the new rule to clarify that, for a placing, the reference point for the discount is at the time the placing is agreed and, for an offer, the reference point for the discount is at the time of announcing the terms. A placing is ‘agreed’ at the time the issuer and the underwriter or placing agent agree the placing price.

Q. When calculating the discount, where should the share price for the purposes of LR9.5.10R be derived from?

A. When calculating the discount, LR9.5.10R(2) requires the reference point to be the middle market quotation for the shares, as derived from the daily official list of the London Stock Exchange (SEDOL) or any other publication of a Recognised Investment Exchange, showing quotations for listed securities for the relevant date.

SEDOL is available from 06:00 (GMT) each business day, and includes the official closing quotation from the previous business day. While the use of SEDOL as a reference price would be

appropriate when a placing is entered into at the start of the trading day, it can be problematic for a placing agreed during the course of the day. Where a placing is agreed during the trading day, we consider it appropriate to use an on-screen intra-day price as a reference point, provided that it is from a reasonable source and widely accepted.

The use of SEDOL as a reference price may be inappropriate for an issuer whose securities are also traded on another exchange. In such cases, at the time the placing is agreed, the SEDOL price may be out-of-date if trading is still ongoing in the alternative market. Where the securities are listed on another exchange, the price on that exchange could be used as an alternative source if we are satisfied that there is sufficient justification and the alternative market has an appropriate level of liquidity in the shares. When considering whether an alternative market price should be the reference point, we would look for evidence, such as the level of trading in the issuer’s shares that takes place on the other market. Issuers wanting to follow this route should contact the UKLA.

An example of when it might be appropriate to follow this route could be where an issuer has a listing in London and New York. If a placing is agreed after the London market has closed, the use of the London price may be inappropriate if trading is ongoing in New York. In such a case, provided the issuer could show that a sufficient level of trading in its stock takes place in New York, we would accept an appropriate New York price as the reference price.

6. Black lining – a request for help

The Prospectus Rules set out the requirements for marking up changes and annotation (in PR3.1.5). However, they are not specific to the format of the mark up. Increasingly we are noticing a move towards the submission of documents that are marked up for deletions, but do not include the actual text that has been removed. We appreciate that in some of the low risk documents we see in the department, such as vanilla fund raisings, repeat programmes or updates, this causes no practical issues, but on the more high risk documents, such as those falling within the super and significant transaction fees (as set out in FEES3.2.7) this can make the vetting process more difficult. We would appreciate advisors providing us with the actual

deleted text, either through the use of strike through, comment boxes or the use of track changes comment pages at the back of the document. This assists in the vetting process and ensures that the process is as efficient as possible. It also avoids issues that can arise where text that is explicitly included to address UKLA comments or required to address disclosure rules is inadvertently removed. The inclusion of the deleted text makes it far easier for the UKLA to identify such deletions at an early stage.

7. Schemes of arrangement – comfort letters

In List! 16 we outlined the procedures issuers should follow to avoid having their own shares suspended when undertaking a scheme of arrangement. We stated that if the admission is due to take place at 8am and you cannot get the relevant certification from Companies House until after 7am on the morning of admission, we would accept letters providing comfort about the scheme of arrangement becoming effective as proposed. This would allow the shares to be admitted the morning that the scheme becomes effective.

We have recently had several queries about the requirement for and the content of these comfort letters. As noted in List! 16, where this arrangement is followed, we will require certain comfort letters. It should be noted that the comfort letter route is a concession to the usual position under the Listing regime that the admission to listing cannot be conditional upon any event, so we have made this route available only in the limited circumstances outlined below and only if we receive acceptable comfort letters.

When should issuers submit comfort letters?

Generally, the comfort letter approach is only appropriate where an existing issuer is undertaking a scheme of arrangement to insert a new holding company. In such cases the continuity of the trading of the issuer's shares is maintained. As noted above and in List! 16, issuers should only contemplate this approach where the alternative would be a suspension of the issuer's own shares and thus this approach is not available to schemes relating to mergers and acquisitions (M&A) where the suspension would affect only the target. We would suggest that issuers and their advisers are mindful of this when structuring M&A transactions.

What should the letter contain?

On the comfort letters themselves, we intend to make available some model versions on our website soon. In the meantime, we can clarify the requirements noted in List! 16 as follows:

The confirmation from the legal advisers stating that 'all conditions to the scheme have been satisfied or waived' may be made subject (only) to:

- the filing and registration of the scheme court order at Companies House; and
- the admission of the shares themselves.

Additionally, the confirmation stating that 'the scheme is irreversible at the time of writing' may be made subject (only) to the filing of the court documents themselves.

We would highlight that, as we set out in List! 16, a key requirement for us is that the letters include an unqualified undertaking to deliver the documentation to Companies House. We will not under any circumstance accept any caveats to this.

Need more help?

For further information, please contact the Listing Applications team via the Helpdesk, selecting option 3.

8. Restrictions on transfer and ETFs

Recently, we have been asked our views on restrictions on transfer in Exchange Traded Fund issuer vehicles. We most recently talked about this in List! 16 in July 2007. Then, most new applicant companies wishing to apply restrictions on transfer were closed-ended investment funds applying for listing under LR15. Now more ETF issuers are seeking listing under LR16.

Irrespective of this, however, our views on restrictions on transfer have not altered. As we said in List! 16, we do not permit restrictions on transfer save where it is necessary to avoid the company triggering onerous overseas legislative requirements. However, in those cases, we seek to ensure the power is limited to restricting transfers which would trigger requirements under specific, clearly identified legislation. We do not accept broad powers of restriction, for example to avoid 'any pecuniary, tax, financial or other material disadvantage'.

9. Compliance with the Listing Principles

We sometimes get queries about the interaction between the Listing Principles (set out in LR7) and the Disclosure & Transparency Rules (DTRs) and Prospectus Rules (PRs). We therefore thought it would be helpful to remind issuers of the approach we take regarding compliance with the Listing Principles. The Principles are a general statement of the fundamental obligations of listed companies. They were introduced to ensure adherence to the spirit as well as the letter of the various rules, including the DTRs and PRs, comprising the listing regime.

Issuers should therefore be aware of the importance we place on compliance with the Principles on an ongoing basis. As our Handbook notes, a breach of a Listing Principle will make a listed company liable to disciplinary action by the FSA. While cases may be brought in conjunction with action for a breach of a specific rule or rules, the FSA is prepared to take enforcement action on the basis of the Principles alone, taking account of the standard of conduct required by the Listing Principle in question.

10. Continuing obligations

We would like to remind issuers of previously issued comments on the risks associated with balancing positive and negative news (see List! 5 of April 2004). We have also taken public disciplinary action (see, for example, our Final Notices on Wolfson Microelectronics plc of 19 January 2009, Entertainment Rights of 19 January 2009) to convey the message that justifying non-disclosure of information by offsetting negative and positive news is not acceptable. Issuers should continue to assess whether information held meets the tests for inside information and whether any announcement obligations arise.

It is generally not acceptable for issuers to attempt to choreograph the assessment and possible disclosure of various and offsetting information that may individually meet the tests for inside information. In this context we have, in our capacity as the UK Listing Authority, recently privately warned an issuer as a result of concerns that it may have delayed announcing inside

information until it was ready to announce other, off-setting news. It is vital that issuers disclose all inside information they have in accordance with the Disclosure and Transparency Rules and do not attempt to delay the publication of negative news, for example, until there is off-setting positive news.

11. Equity Markets on the website

We have recently launched a new Equity Markets Group section of the UKLA website, which provides an overview of the team, along with practical information on submission processes and turnaround times.

The Equity Markets Group is responsible for reviewing and approving certain circulars and prospectuses in relation to equity, as well as assessing the eligibility of companies seeking to list equity. The team also answers queries raised through written submissions and through the Helpdesk on option 2.

The FAQ section contains answers to some of the questions most commonly raised through the Helpdesk and you may find it useful to refer to these before contacting us. If there are any areas that you think could be covered through the website and FAQs in particular, we would welcome your suggestions to our Helpdesk. You can find the website at: <http://www.fsa.gov.uk/Pages/Doing/UKLA/equity/index.shtml>.