



PRIMARY MARKET EFFECTIVENESS REVIEW (CP 23_10)

Issued 30 June 2023

ICAEW welcomes the opportunity to comment on the CP 23_10 Primary Market Effectiveness Review published by FCA on 3 May 2023, a copy of which is available from this [link](#).

This response of 30 June 2023 has been prepared by the ICAEW Corporate Finance Faculty, with input from ICAEW's Financial Reporting Faculty and Audit & Assurance Faculty, and ICAEW members operating in listed companies.

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For questions on this response please contact ICAEW Corporate Finance Faculty:
CFF@icaew.com quoting ICAEW REP 64-23.

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ICAEW

Chartered Accountants' Hall Moorgate Place London EC2R 6EA UK
icaew.com

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Registered office: Chartered Accountants' Hall Moorgate Place London EC2R 6EA UK

KEY POINTS

MORE DISCLOSURES AND ADVISORY INVOLVEMENT NEEDED

1. ICAEW sees merit in the FCA's proposal for a disclosure-based regime but, as proposed, the regime will not adequately replace current investor protections, including shareholder votes and independent attestations. Further work is needed to develop disclosures and other measures for the protection of and to provide clarity to investors, in particular, for minority and new investors. The advisory role is also integral to the operation of a disclosure-based regime and should be extended beyond what is envisaged in some cases. [See responses to Q7-15].

UNCERTAINTIES WITHIN THE WIDER ENVIRONMENT FOR LISTINGS

2. The listing rule proposals would best be evaluated with knowledge of the outcome of reforms to other components of the UK's capital markets. Without sight of what the prospectus rules will be and of changes to the secondary capital market regime, some of our views regarding CP23_10 are necessarily based on assumptions [see our response to Q1 and Q3].
3. The outcome of the FRC's review of the UK Corporate Governance Code is relevant given the proposed governance compliance disclosures for the new Equity Shares in Commercial Companies (ESCC) category. The FCA should ensure that the outcome of its engagement on this with the FRC is reflected in the next consultation on the listing regime.
4. Legislative changes to implement corporate governance, corporate reporting and audit reform have yet to be made. While the timing of these changes is outside the FCA's control, it should note the impact these changes will have when combined with the proposed changes to the listing regime. See also paragraph 15.
5. The way that index providers approach the new ESCC is also relevant and the FCA should also be in a position to refer to this in its second consultation. While we do not have feedback to inform Q47 we observe that, if index inclusion requirements include mandatory compliance in areas where the FCA proposes a lighter regime, there is a risk that such inclusion requirements become the minimum standard.

INDIRECT CONSEQUENCES OF REMOVING INVESTOR PROTECTIONS

6. The proposals in the consultation paper openly remove investor protections that have been longstanding feature of a Premium listing. Other consequences of removing investor protections have not been highlighted or made sufficiently clear.
7. In its commentary, the FCA describes balancing the shift of greater investment risk to investors and the need for them to enhance their due diligence with placing greater onus on companies to make high quality disclosures and more effectively engage with investors. Investors and companies will also need support to understand and gain experience of the shift in their responsibilities. Measures including 'grandfathering' periods for certain changes and the provision of guidance will be appropriate.

Potential loss of value-added exercises for companies and boards

8. Certain financial information and other disclosure requirements for fundraising and significant transactions will no longer be mandated of companies. Hitherto published to inform investors' decisions, both their preparation by the company and their scrutiny by the board demand unique thought and careful consideration of risk and strategic and other corporate priorities. These exercises are valuable disciplines for corporate actions as they ensure that appropriate information underpins directors' decisions and also illustrate good governance that increases investor trust.
9. Newly listed companies and ones requiring enhancement in their governance and internal controls framework to transition to the ESCC, should be required to build up this experience

for a certain period. The FCA should consider differentiating its approach, eg with “grandfathering” before the mandatory requirement is removed.

Gaps in guidance for companies and directors

10. The removal of prescriptive, mandatory requirements, eg around class 1s, will involve a different way of working for issuers. Members working in listed companies have told us that they expect to have to place significant reliance on legal advice – with implications of cost as well as for variation in disclosure and announcements. A balance is needed between having flexible rules to accommodate more diversity in listed companies and facilitating quality and consistency in the listing regime.
11. Guidance for directors and boards will be needed such for the examples listed below. In some areas, guidance could fall to the market (professional bodies) to develop. It would be helpful for the FCA to share its thinking and plans for developing guidance, for example:
 - Conducting shareholder engagement that does not breach the Market Abuse Regulations (MAR)
 - Communicating ‘comply or explain’, especially to minority and retail investors [see response to Q5 and Q6]
 - Information on risks that hitherto would be in a circular
 - Provisions for requiring a shareholder vote (except controlling shareholder) to terminate existing controlling shareholder agreements
 - Transitioning of corporate governance and internal controls of a Standard-listed company [see our response to Q21]
12. The FCA’s proposed reporting requirements for the ESCC will bring more types of company into the scope of the UK Corporate Governance Code. While the Code is not in its remit the FCA has an interest in engaging with the FRC on guidance that may be needed to support directors of companies that will need to step up in order to implement Code provisions. [See response to Q21]

Support needed for investors

13. The FCA’s efforts to attract and retain shareholders to invest in UK capital markets must include provision for adequate support at different levels; namely, for the changing onus on existing investors, for smaller and minority investors that don’t have the experience and/ or means to engage meaningfully with issuers, and for retail investors participating in listed equity ownership.

Increased involvement of auditors yet debate over audit reform continues

14. There is little recognition that the removal or reduction of prescription and regulatory involvement will need to be bridged by increased involvement of legal advisers (see paragraph 10 above) and by auditors as a disclosure-based regime becomes more important, and the implied reliance on the annual report, which is not a prospectus or a circular, and itself needs to be clarified in detail.
15. As an improvement regulator that authorises the regulated activity of audit, ICAEW strongly supports continuous improvements in audit quality and clarity around the auditor’s role. We have been closely engaged in with government and the FRC as part of the corporate governance, corporate reporting and audit reform initiatives. We have been vocal in our support for reform and critical of delays in implementation. The ability and willingness of audit firms to perform higher risk and more complex audits is challenged by, among many other things, the absence of a conclusion to the audit reform debate and this may be exacerbated by the changes to the risk profile of companies subject to these deregulatory proposals. This should be of concern to the FCA and the FRC.

Uncertainty of framework for residual Standard List issuers

16. Details of transition arrangements for Standard Listed commercial companies to the ESCC have not yet been published. Some companies that, while eligible to do so, are not willing or able to transfer to the ESCC, may be permitted to transfer on a time-limited basis to the FCA's proposed 'other shares' category. That category is intended for equity and non-equity shares of companies that are *not* eligible to transfer either to the ESCC or to the proposed category for SPACs and shell companies. It remains to be seen if the regulatory approach to issuers of 'other shares', details of which are to be published in due course, will be appropriate for residual Standard-listed commercial companies and will not negatively impact the perception of quality of the ESCC. [See response to Q32]

ANSWERS TO SPECIFIC QUESTIONS

17. We have responded to questions on issues where there is most overlap with the activities of our members.

Q1: Do you agree with the proposal to remove specific financial information eligibility requirements for a single ESCC category? If not, please explain why and any alternative preferred approach.

18. The FCA goes further in its streamlining of the eligibility requirements for Premium listings than was envisaged in the 2020 [UK Listings Review](#) and, instead, gives prominence to an enhanced disclosure framework.
19. Depending on the quality of disclosures and the standards of transparency and investor communication practices that it promotes, a disclosure-based regime could provide investors with the information they need for initial (and ongoing) investment decisions, together with other measures. It will be necessary for the FCA to spearhead efforts, including the development of guidance, to empower and boost the ability of investors to identify information they need from companies. There will also be a much stronger need to ensure that companies and boards have access to, and implement, good practice regarding engaging with investors and transparent and timely communication, that will build trust with shareholders.
20. Our support for the removal of specific financial information eligibility requirements assumes that the replacement prospectus regime will retain the requirement for disclosure of historical financial information and also subject to the review of the detail which will be set out in the FCA's second consultation.

Q2: Do you agree with a proposal to explore a modified approach to the independence of business and control of business provisions for a single ECSS category, with a view to enhancing flexibility, alongside ensuring clear categories for funds and other investment vehicles?

21. We agree that a modified approach to the independence of business and control of business provisions for the ESCC category may be appropriate for certain investor groups. However, combined with the proposed 'comply or explain' approach to related party transactions and controlling shareholders, the same approach is not likely to provide adequate protection to minority shareholders. While we agree that a modified approach should be explored, the FCA should be also open to a differential approach that boosts protection, eg for smaller investors. This would protect the market's integrity.

Q3: Do you have views on what rule or guidance changes may be helpful, and whether certain disclosures could also be enhanced to support investors and market integrity, or any alternative approaches we should consider?

22. The listing rule proposals would best be evaluated with knowledge of the outcome of reforms to other components of the UK's capital markets. For example, there is available an outline only for the replacement for the prospectus regime, and a simple statement of the government's acceptance of the recommendations of the Secondary Capital Raising Review, without implementation detail. Legislative changes to audit, corporate reporting and corporate governance requirements are also yet to be passed, yet the FCA proposals extend to reporting, governance and the involvement of auditors.
23. For issuers and directors, guidance should be developed on:
- Conducting shareholder engagement that does not breach MAR [see response to Q9]
 - Communicating 'comply or explain', especially to minority and retail investors
 - Information on risks that hitherto would be in a circular
 - Applying Listing Principles (which are due to be revised) as eligibility criteria [see response to Q24]
 - Transitioning of corporate governance and internal controls of a Standard-listed company to those appropriate for an ESCC

Q5: Do you agree with our proposed approach to the controlling shareholder regime for a single ESCC category? Do you have any views on the suitability of alternative approaches to the one proposed?

and

Q6: Do you agree that our proposals as regards controlling shareholders align with our need to act, as far as is reasonably possible, in a way which is compatible with our strategic objective of ensuring markets work well and advances our market integrity and consumer protection objectives? If you don't agree, how do you believe these should be balanced differently?

24. We agree with the proposed approach to the regime, providing that 'comply or explain' disclosures are comprehensive and that there is a clear statement to investors of their responsibility to evaluate the disclosures, including those on voting rights.
25. On the point about advancing market integrity, we refer to our response to Q13 on RPTs with a controlling shareholder. Our comments in response to Q2 are also relevant.

Q7: Do you agree with the proposed approach to significant transactions for a single ESCC category? If not, please explain why and any alternative proposals.

and

Q8: Do you consider that additional disclosure could be considered to further support transparency to shareholders on significant transactions and, if so, what (e.g., considering current circulars)?

26. We agree with the proposed approach but with the addition of a 'grandfathering' period. New issuers need time to develop effective engagement with investors and to gain their trust. We understand that other commentators have recommended a minimum period post IPO during which shareholder approval is still required. We would support this.
27. We believe additional disclosure should be considered. If the shareholder vote is removed as proposed, the importance of providing disclosures to shareholders on significant transactions is heightened. We do not believe that this obligation would be met using the current requirements for a Class 2 transaction. Under the proposed approach, even for a transaction that is very significant, shareholders would only receive information on the impact of a

proposed transaction on the company in the next annual report and accounts or interim financial statements. We have previously expressed and continue to hold the view that, in addition to the potential delay in such information being available to help inform a decision relating to a transaction, it is not appropriate for the annual report to be relied upon for reasons other than that for which it is prepared.

28. For significant transactions, absent a circular to inform their investment, retention or divestment decisions, investors should receive a minimum standard of information on the proposed transaction. An announcement should include forward-looking information on working capital and financial position, the impact of the transaction on the issuer's risk profile and, subject to the FCA's intended modifications to Listing Principles, information regarding the issuer's continuing ability to comply with these, post completion.
29. Consideration should be given to raising the Class 1 percentage threshold. This would ease constraints reportedly felt by some boards in the current regime while retaining accountability and oversight of larger proposed transactions. In the context of Q10, it would also mean less reliance on the sponsor's role. We note that raising the threshold received support among respondents to DP22/2.

Q9: Should we consider further mechanisms prior to a significant transaction being formally completed (for example, a mandatory period of delay between exchange and completion) to support shareholder engagement with listed commercial company equity issuers in place of shareholder approval? What should those mechanisms be and why?

30. Our members do not consider that a mandatory period of delay would be of meaningful benefit to shareholders and, if companies are permitted to complete a transaction without a shareholder vote (as this consultation paper proposes), will merely add delay and uncertainty to any transaction.
31. Moreover, the FCA must ensure that issuers have access to clear, simplified guidance on shareholder engagement within the provisions of MAR.

Q10: Should the sponsor's advisory role in assessing whether a potentially significant transaction meets the proposed disclosure threshold be mandatory or optional, and what are your reasons? Do you agree with our proposal that sponsors have more discretion to modify the class tests, including substituting the tests with alternative measures, without seeking formal FCA agreement to the modifications? If you disagree, please provide your reasons and alternative proposals.

32. We believe that sponsor's advisory role in assessing whether a potentially significant transaction meets the proposed disclosure threshold should be mandatory. This will prevent errors and inconsistency in assessments of the application of the rules, especially among future ESCC applicants and those Standard-listed issuers that transfer to the ESCC and that will not have experience regarding the classification tests.
33. We would support giving more discretion to sponsors to modify the class tests, without requiring the formal agreement of the FCA, providing that there is a clear framework, or specific rules, for doing so. The FCA must also be prepared to receive an increased number of guidance requests and will need to be able and willing to facilitate these in a timely manner. If this is not likely to be possible, the FCA's oversight must involve sponsor seeking its formal agreement to modifications,

Q11: Should we consider expanding the sponsor's role further on any aspects of significant transactions?

34. Our members consider that the sponsor's role in the proposed listing regime does need expanding.
35. We would recommend that the role should include:
- mandatory consultation when an issuer is carrying out a transaction, in order to ensure that it is correctly classified [see response to Q10]
 - review and sign off for the significant transaction announcement
 - oversight of the issuer's continuing ability to comply with the LRs and Listing Principles post-transaction
 - consultation by Standard-listed companies during transitional period, and while on 'other share' category
36. We recognise that beyond a certain level, expansion could lead to the sponsor role resembling a retained adviser role – is this the FCA's intention?

Q12: Do you agree with the proposed approach to RPTs for a single ESCC category, which is based on a mandatory announcement at and above the 5% threshold, supported by the 'fair and reasonable' assurance model which includes the sponsor's confirmation as described above? If not, please explain why and any alternative proposals in the context of a single ESCC category.

and

Q13: Do you consider that additional disclosure requirements could be considered to further support transparency to shareholders on RPTs, and should we consider requiring certain mechanisms prior to a deal being completed (for example, a mandatory period of delay between exchange and completion) to support shareholder engagement with listed companies to replace the requirement for independent shareholder approval?

37. We agree with the proposed approach to RPTs, except for transactions that involve a controlling shareholder. Given that a more permissive controlling shareholder regime is being proposed and, for DCSS, a longer sunset period for enhanced voting rights, the current approach to such RPTs would be more appropriate for transparency, and market integrity.
38. Can the FCA clarify if it intends to retain the exemptions in LR 11 Annex 1 for matters falling outside the related party regime?

Q14: Should it be mandatory for a listed company in the single ESCC category to obtain guidance from a sponsor on the application of the LR, DTR and MAR whenever it is proposing to enter into a related party transaction (irrespective of the size of the transaction), or should it be at the company's discretion?

and

Q15: Should it be mandatory for the sponsor to consult with the FCA and agree any modifications to the class tests and classification of a proposed RPT, or should the sponsor have more discretion? Please explain your reasons.

39. Guidance from a sponsor should be mandatory, given the risks of conflicts of interest in RPTs and potential harm to shareholders.
40. Because of those risks, we believe it should be mandatory for the sponsor to seek FCA agreement for modifications to the class tests and classification of a proposed RPT.

Q17: Do you agree with the proposed approach to cancellation of listing for the single ESCC category, and do you have any views on other possible changes to the existing cancellation process?

41. We agree with the proposed approach to cancellation of listing, for transparency and for the protection of smaller shareholders.

Q21: Do you agree with our proposed approach to reporting against the UK Corporate Governance Code for companies listed in the single ESCC category, and are there any other mechanisms the FCA could consider to promote corporate governance standards?

42. We agree with the proposed approach to reporting against the UK Corporate Governance Code.

43. The FCA indicates it intends to publish details of transitional arrangements in its second consultation paper. Arrangements will need to address the FCA's expectation for Standard-listed companies that transfer to ESCC to apply provisions for Premium listings in the UKCGC. We expect that arrangements will include the development of guidance in this respect. The FRC is currently consulting on its review of the UK CGC, and it will be both efficient and desirable for the FCA to be able to reflect the impact of changes to the UK CGC in the transitional arrangements.

Q22: Do you have any views on the proposed application of reporting requirements under LR 9.8 (i.e., premium LR requirements) as the basis for the single ESCC category?

44. We support the proposal.

Q23: Do you agree with our proposed changes to the LR principles? If not, please explain why and provide details of any alternative suggested approach.

45. We agree with the aim of having a single set of Listing Principles. We are keen to understand the role the FCA expects directors to perform in relation to an issuer's compliance with those principles, and what, if any, confirmations will be required.

Q24: We are considering applying the principles as eligibility criteria, to clarify expected standards and reflect the fact that in practice these requirements need to be complied with at the point of listing. Please provide details if you foresee any issues with this approach.

46. Together with its clarification of expected standards, the FCA will also need to set out its thinking on how companies can demonstrate compliance with the eligibility criteria at the point of listing. There will need to be special consideration regarding standards of behaviour if a company has not had opportunity or reason to exhibit these prior to listing.

47. There is likely to be a need for FCA guidance in this area for companies and boards.

Q28: Do respondents have any concerns about the availability of sponsor services as a result of the proposed changes to the listing regime and the sponsor role?

48. It will be necessary to have sight of the FCA's forthcoming details regarding the sponsor's role to be able to form a view. At this stage, some members are concerned about the availability and quality of sponsor services as a result of the proposed changes. Others are concerned that, while there is general support for the sponsor's role, the scope is not yet clear.

Q32: We welcome views on proposed restructure of the listing regime set out above. In particular, do you agree with our preliminary proposals for dealing with issuers that are not issuers of equity shares in commercial companies?

49. The FCA may permit Standard-listed issuers of equity shares that are commercial companies, that are not able or willing to transfer to the ESCC, to transfer instead to the proposed 'other shares' category, for a limited time. It is not possible to form a view on this as the proposed approach for the 'other shares' category is not described in any detail. There is also no indication of the process for Standard-listed issuers to transfer to the ESCC, including any maximum timescale, and the extent of involvement of sponsors.
50. The FCA should publish these details to prevent unnecessary uncertainty regarding the regulatory approach to Standard-listed issuers, and the risk of this to the reputation of other listing categories.