FCA Announces Measures To Assist UK Listed Companies During The Coronavirus (COVID-19) Pandemic

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Today, the Financial Conduct Authority ("FCA") has issued a **Statement of Policy** containing a series of measures intended to assist listed companies during the coronavirus (COVID-19) pandemic. These measures include:

- **support for the Pre-Emption Group's temporary guidance** with respect to its Statement of Principles, including encouraging investors to support non-pre-emptive offerings of up to 20 per cent. of a company's existing shares admitted to trading in certain circumstances;
- **encouragement to issuers to consider using shorter-form prospectuses**, where permitted under the Prospectus Regulation, for secondary offers targeted at investors in the UK and European Union;
- **a modified approach to working capital statements in prospectuses and circulars** to allow certain coronavirus (COVID-19) related-assumptions to the reasonable worst case scenario to be disclosed in an unqualified (or "clean") working capital statement; and
- **a modified approach to the requirement to hold a general meeting to approve a Class 1 transaction under Listing Rule 10 or a related party transaction under Listing Rule 11** in circumstances where the issuer secures written undertakings from sufficient shareholders in support of the transaction.

The new measures will apply until the FCA advise otherwise. Whilst providing for this additional flexibility, consistent with its previously **published guidance**, the FCA has nevertheless reminded issuers of the importance of ensuring compliance with the Market Abuse Regulation during this period, including through the timely disclosure of inside information, compliance with the market sounding regime and the maintenance of appropriate insider lists.

In addition to the Statement of Policy, the FCA has also issued two Technical Supplements, which provide more detailed guidance on the approach that should be taken towards **working capital statements** and how an issuer may seek a **derogation from holding a general meeting** for the purposes of obtaining shareholder approval where required under Listing Rules 10 or 11. We have summarised the contents of these Technical Supplements below.

Working Capital Statements

Under the new guidance, an unqualified (or "clean") working capital statement in a prospectus or circular may contain key assumptions that an issuer has applied to its reasonable worst case scenario in relation to business disruption during the coronavirus (COVID-19) crisis. This is a move away from the ESMA Recommendations on prospectuses, which state that it is not normally acceptable to disclose assumptions underpinning a working capital statement. The FCA justify this position on the basis that there is significant uncertainty as to the size and duration of the disruption caused by the pandemic, which makes the construction of a reasonable worst case scenario uniquely challenging.

Additional disclosure in a working capital statement may therefore include:

- key coronavirus (COVID-19) modelling assumptions in the reasonable worst case scenario (i.e., how long the issuer expects its business to be disrupted or the speed of the recovery); and

- details of the main sensitivities that have been applied (i.e., the impact on its revenue).

Working capital statements prepared in accordance with the Statement of Policy and Technical Supplement may not include:

- a description of the base case;
- references to liquidity shortfalls;
- descriptions of mitigating actions not included in the modelling for the reasonable worst-case scenario;
- uncertainties or qualifications regarding any financing or underwriting commitments;
- any drafting that appears to disclaim the clean working capital statement; or
- any drafting that appears to qualify the working capital statement that does not relate to coronavirus (COVID-19) modelling assumptions for the reasonable worst case scenario.

Where this approach is taken, the working capital statement must include disclosure that is has been prepared in accordance with the FCA's Statement of Policy and otherwise pursuant to the ESMA Recommendations. The FCA has also reminded issuers of the need for the whole of a prospectus or circular to be consistent, and that disclosure elsewhere cannot appear to qualify the disclosure in the working capital statement. Further, issuers and their advisers will also need to monitor whether assumptions underpinning a working capital statement remain up to date and, if not, consider whether there is a requirement to publish a supplementary prospectus or circular.

General Meetings

Under the new guidance, an issuer may apply for a dispensation from the requirement to hold a general meeting of shareholders that would otherwise be required to approve a transaction under Listing Rules 10 or 11. In order to be granted a dispensation, an issuer's sponsor must apply to the FCA, who will consider such applications on a case by case basis. Dispensations will only be granted if the following two conditions are met:

- the issuer has or will obtain a sufficient number of written undertakings from those shareholders eligible to vote on the matter under the Listing Rules that they approve the transaction and would vote in favour of the resolution, to meet the required threshold of shareholder support; and
- the issuer updates the market that it has obtained such support and will not proceed with the general meeting.

The issuer will still need to produce a shareholder circular to be approved by the FCA meeting all the content requirements set out in Listing Rule 13 and may seek the undertakings from shareholders before or after it has been published. All other provisions of Listing Rules 10 and 11 will continue to apply and, should there be a material change to the transaction following shareholder approval, the issuer will have to circle back to its shareholders to re-run the process of securing the written undertakings.

The FCA do not intend to review the written undertakings, but state that they should be clear and unequivocal and not subject to any caveats. Undertakings should not be provided by proxies.

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Whilst the guidance may enable premium-listed issuers to avoid the need to hold a general meeting to approve a Class 1 transaction or a related party transaction, listed companies will still need to consider their obligations to hold meetings under their constitutional documents and applicable company law. UK-incorporated issuers may, for instance, still need to hold general meetings in relation to a Listing Rule 10 or 11 transaction where authority is also needed to allot and issue shares or dis-apply pre-emption rights.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

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