UKLA Technical Note

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

Ref: UKLA / TN / 713.1

R 8.3.5R;
LR 8.3.12G;
LR8.6.12G-13BG

Under LR 8.3.5R (1), a sponsor must at all times (whether in relation to a sponsor service or otherwise) deal with the FCA in an open and co-operative way.

A separate obligation exists for issuers under Listing Principle 2 to deal with the FCA in an open and co-operative manner. UKLA/TN/209.1 sets out guidance on the application of Listing Principle 2.

This Technical Note sets out guidance for sponsors on applying LR 8.3.5R (1) to their obligations under LR8.

The responsibilities of a sponsor

Sponsors are critical to the integrity of the premium listing regime. As set out in LR 8.3.1R, they perform two key roles; firstly, providing us with assurances, explanations and confirmations relating to Listing Rule compliance by companies with or applying for a premium listing of equity shares; and secondly, providing guidance to companies with or applying for a premium listing of their equity shares in understanding and meeting their responsibilities under the Listing Rules, disclosure requirements (set out in Articles 17, 18 and 19 of the Market Abuse Regulation) and Transparency Rules. Sponsors, therefore, have a critical role to play in helping us meet our objectives of maintaining the integrity of the market and ensuring an appropriate degree of protection to consumers.

Operationally, a sponsor is embedded into a number of the UKLA Department's (UKLA) regulatory processes in connection with premium listing. For example, a sponsor interacts with us on behalf of listed companies with regard to the preparation of transactional documentation and provides key declarations in connection with transactions carried out by premium listed companies. In light of the nature of these types of arrangements, we expect a very high level of co-operation and openness between us and a sponsor.

Given the important role played by sponsors, the FCA maintains a dedicated supervisory team within the UKLA responsible for monitoring the performance of sponsors and their compliance with LR 8. Each sponsor has an allocated relationship manager within the UKLA. An open, co-operative and constructive relationship is crucial to our overall ability to supervise sponsors – an expectation which is reiterated in LR 8.7.1G.

We consider LR 8.3.5R (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 co-operative in LR 8.3.5R (1) even where the breaches are not committed deliberately or recklessly.

1 Final Notice 2015: Execution Noble & Company Limited
www.fca.org.uk/your-fca/documents/final-notices/2015/execution-noble-company-limited

When the principle applies

We expect sponsors to consider their obligations under LR8 in light of the application of all the Principles for Sponsors (LR 8.3.3R – LR 8.3.15G), including LR 8.3.5R (1). LR 8.3.5R (1) requires sponsors to deal with the FCA in an open and co-operative way at all times, whether or not they are providing sponsor services.

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 LR 8.3.5R (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 LR8, 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 LR 8.3.5R (1):

- when the sponsor is responding to information requested in connection with periodic or ad-hoc supervisory enquiries, visits or meetings pursuant to LR 8.7.1AR, noting that LR 8.7.1AR (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 LR 8.3 and LR 8.4
- prior to entering into an arrangement which may prevent it from complying with LR 8.7.1AR
- when complying with the notification requirements contained in LR 8.7.8R, noting that LR 8.7.8R requires a sponsor to notify the FCA in writing as soon as possible (UKLA/TN/711.1 sets out further guidance on the application of LR 8.7.8R)
- 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 LR 1.2.5G, 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 LR 8.3.5R(1).

Interaction between LR 8.3.5R (1) and conflicts management

Conflicts management is an example of where we expect sponsors to communicate with us at an early stage. LR 8.3.7AG to LR 8.3.12AG set out the relevant rules applicable to sponsors in relation to identifying and managing conflicts. Under LR 8.3.12G, 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 that[2]. 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 LR 8.3.5R (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 LR 8.3.5R (1) and LR 8.3.5AR

LR 8.3.5AR 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, a premium listed company or a company applying for a premium listing.

Although a sponsor is subject to the requirement to be open and co-operative with the FCA in LR 8.3.5R (1) at all times, we would not interpret LR 8.3.5R (1) in a way that extends the obligation on a sponsor set out in LR 8.3.5AR so that it applies at all times.

Implications of LR 8.3.5R (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 LR 8.3.5R 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 from an NDA. 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.

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 LR 8.3.5R (1) – that is, that a sponsor must deal with us in an open and co-operative way at all times.

2 Also see our Technical Note Sponsors: conflicts of interest (UKLA/TN/701.3)