Bank of England to support the market-led Working Group on Sterling Risk-free Rates to enable transition to SONIA.

Issuers of LIBOR-related listed securities need to plan on the assumption that LIBOR will not be available beyond 2021, and ensure the risks in relation to LIBOR discontinuation have been considered and disclosed to investors, as part of their prospectus requirements.

1.6.4 The European Single Electronic Format (ESEF)

In its 6 September 2019 consultation on Handbook amendments,[18] the FCA proposed a new provision in the DTR to implement requirements for annual corporate reporting in ESEF under the TD. This caters for a scenario where the UK remains subject to EU law on 1 January 2020.

When the TD was amended in 2013, it was stipulated that all annual financial reports should be prepared in a single electronic format with effect from 1 January 2020. The aim was to make reporting easier and facilitate the accessibility, analysis and comparability of financial data. A regulatory technical standard specifying the electronic format entered the Official Journal on 29 May 2019. It applies directly within the European Union in respect of accounting periods starting on or after 1 January 2020.

The new rules introduce structured data formatting to corporate annual financial reporting in the EU. Issuers will be required to prepare their annual financial reports in XHTML format. They must also mark up, or tag, disclosures within the IFRS consolidated financial statements using inline Extensible Business Markup Language (iXBRL) and the taxonomy specified in the RTS. This tagging process makes disclosures machine-readable, enabling consumers to use software tools to screen and analyse data across issuers.

[18] *https://www.fca.org.uk/publication/consultation/cp19-27.pdf* [accessed 2 October 2019.

Management Arrangements, Systems and Controls sourcebook (SYSC) and the Conduct of Business sourcebook (COBS); and

- UK incorporated issuers with voting shares admitted to a regulated market are subject to new requirements to make disclosures and establish arrangements for the approval of non-ordinary course material transactions with parties that are related to them in new DTRs provisions.

The new rules for related party transactions are additional to the existing rules for these types of transactions in Chapter 11 of the LRs for issuers with a premium listing. The FCA also introduced new continuing obligations in the LRs which require non-EEA incorporated issuers with a standard or premium listing of equity shares, or a premium listing of depository receipts, to comply with the new disclosure requirements for RPTs in the DTRs.

1.6.3 Benchmarks

Benchmarks are fundamental elements of financial markets' infrastructure. Trustworthy benchmarks help individual savers and institutional investors to measure prices and assess investments. Markets need to be able to trust that benchmarks are fair and accurately reflect the underlying markets. Ensuring benchmarks are anchored in observable transactions, rather than judgements, makes them more robust against manipulation.

The FCA identified in its 2019/20 Business Plan that there is increasing awareness of withdrawal of official sector support for the London Inter-bank Offered Rate (LIBOR) at the end of 2021. The FCA has been clear that the absence of underlying markets raises a serious question about the sustainability of the LIBOR benchmarks based upon these markets. The industry has now begun transitioning to more robust alternatives such as the Sterling Overnight Index Average (SONIA), the risk-free rate which has been identified as the preferred alternative for sterling LIBOR. The FCA continues to work closely with the

Bank of England to support the market-led Working Group on Sterling Risk-free Rates to enable transition to SONIA.

Issuers of LIBOR-related listed securities need to plan on the assumption that LIBOR will not be available beyond 2021, and ensure the risks in relation to LIBOR discontinuation have been considered and disclosed to investors, as part of their prospectus requirements.

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[18] *https://www.fca.org.uk/publication/consultation/cp19-27.pdf* [accessed 2 October 2019.

Markets Act 2000 (FSMA), and this chapter is written on the basis that the UK is still a member of the EU.

At the time of writing it remains unclear when, and on what terms, the UK will leave the EU. If the UK leaves the EU without entering into a withdrawal agreement with the EU under the provisions of art.50 of the Treaty on European Union, it is expected that the European Union (Withdrawal) Act 2018 (EUWA 2018) will convert EU law as it applies at "exit day" (as defined by EUWA 2018) into UK law. EUWA 2018 gives the UK government powers to make changes through secondary legislation to "correct deficiencies" in "retained EU law", which includes EU-derived domestic law, in order to ensure that the UK legal system continues to function correctly outside the EU. Statutory instruments made under EUWA 2018 will amongst other things remove provisions in the Listing Regime that depend on reciprocal action by EEA member states and/or involve the European supervisory authorities. These changes will come into force on the exit day. However, if the art.50 withdrawal agreement between the UK and the EU is ratified, these provisions would apply from the end of the transition period under the withdrawal agreement. During this transition period, EU law will generally continue to apply to and in the UK and the Listing Regime will remain unchanged. Under the terms of the withdrawal agreement, the UK will have to continue to implement EU legislation that comes into effect during the transition period.

An explanation of the UK Listing Regime should start with the EU legislation that governs the capital markets. In some areas, the relevant EU legislation lays down detailed mandatory requirements while, in other areas, such as liability and enforcement, it is left to Member States to make their own provisions. In addition, the FCA's rules impose certain "super-equivalent" obligations on issuers or other persons, which are not derived from EU legislation.

2.2.1 *The EU foundations of the Listing Regime*

The majority of the rules that make up the UK Listing Regime derive, directly or indirectly, from EU legislation designed to facilitate capital raising and enhance public confidence in capital markets by: (1) ensuring clear, fair and transparent markets throughout the EU; and (2) the harmonisation of rules, to ensure a level playing field, reduce compliance costs and enhance comparability between different investments.

EU financial markets legislation is made under the so-called "Lamfalussy" legislative process, which is a four-level approach that aims to speed up the legislative process by passing relatively high-level framework directives or regulations (Level 1) which delegate the making of the rules containing more technical details (Level 2) to the European Commission, supported by advice from other bodies (Level 3). Level 4 consists of the process of monitoring and enforcing the implementation of the directives across the EU Member States.

In relation to the capital markets, the European Securities and Markets Authority (ESMA) is the body that provides advice on regulatory matters to the European Commission. ESMA was established with the ultimate goal of developing a "single rulebook" for the capital markets in the EU. Its overall objectives are to ensure the integrity, transparency, efficiency and orderly functioning of securities markets as well as enhancing investor protection. ESMA's powers include:

(1) the ability to draft legally binding "technical standards";
(2) the ability to ensure consistent application of EU law through "a fast track procedure"; and
(3) powers to resolve disagreements between national authorities.

The key EU measures underlying the Listing Regime are:

(1) the EU Prospectus Regulation (2017/1129) (new Prospectus Regulation or new PR) which came into force in July

traded on regulated markets. The Pt 6 Rules comprise rules made by the FCA in the following areas:

(1) admission to the Official List, including rules on applications for listing, suspension of listing, sponsors and continuing obligations, under ss.75, 77, 79, 88, and 96 of the FSMA (Listing Rules or LRs);
(2) prospectuses and related requirements in respect of transferable securities (Prospectus Regulation Rules Sourcebook or PRRs). These replaced the previous Prospectus Rules which implemented the Prospectus Directive. As the New Prospectus Regulation is directly effective it replaces previous Prospectus Rules made by the FCA, but the Prospectus Regulation Rules Sourcebook brings all the relevant new legislation together in one place (including the new Prospectus Regulation and the Level 2 legislation) together with a small number of FCA rules.);
(3) the disclosure of periodic financial and other information by issuers; and the notification of major shareholdings in issuers. These rules (Transparency Rules) are made under s.89A–N of the FSMA;
(4) various aspects of corporate governance required by EU company law and applicable to companies with securities admitted to trading on a regulated market, which have been made under s.89O of the FSMA (Corporate Governance Rules); and
(5) rules relating to related party transactions under DTR 7.3;
(6) primary information providers (PIPs) which provide regulatory information services for the purposes of the Pt 6 Rules. These rules are made under s.89P–V of the FSMA.

The Pt 6 Rules also contain the Disclosure Guidance which provides guidance on parts of the Market Abuse Regulation, which replaced the more substantive Disclosure Rules in place previously (see s.2.5.2.1).

The Transparency and Corporate Governance Rules, as well as the Disclosure Guidance and the rules of PIPs, are combined in a single part of the *FCA Handbook*, the *Disclosure Guidance and*

Transparency Rules Sourcebook (DTR): Chs 1, 2, and 3 contain the Disclosure Guidance; Chs 1A, 4, 5, and 6 contain the Transparency Rules; and Chs 1B, 7, and 8 contain the Corporate Governance Rules and rules on PIPs.

2.2.4 *The FCA's objectives*

The FCA's strategic objective is to make sure that the financial markets and markets for regulated financial services function well. The operational objectives of the FCA, set out in s.1B(3) of the FSMA, are:

(1) consumer protection: the FCA must secure an appropriate degree of protection for consumers. This includes having regard to the amount of risk involved in different types of investment, the varying levels of experience and expertise that different consumers may have and consumers' potential expectations for different types of investments;
(2) market integrity: this objective means the FCA must act to protect and enhance the integrity of the UK financial system; and
(3) competition: this objective obliges the FCA to promote effective competition in the interest of consumers in the markets for regulated financial services or services provided by recognised investment exchanges in carrying on certain regulated activities. Note that this is not a focus on the competitive position of the UK markets as an end in itself but a focus on competition for the benefit of consumers.

2.2.5 *The FCA Handbook*

The *FCA Handbook* is comprised of a large number of different sets of rules and guidance, including the Listing Rules, Transparency Rules, Disclosure Guidance and Prospectus Regulation Rules Sourcebooks. In addition, parts of the FCA's *Supervision Manual* (SUP), *Decision Procedure and Penalties Manual* (DEPP) and the *Enforcement Guide* (EG) are also relevant as these deal with the FCA's supervision and

resulting from the conversion or exchange of a transferable security without the 20% limit; and

(3) securities resulting from the conversion or exchange of other securities, own funds or eligible liabilities by a resolution authority due to the exercise of a power referred to in certain articles of Directive 2014/59/EU. This is the bank recovery and resolution directive dealing with the recovery of distressed financial institutions.

2.3.1.4 *Exempted documents for takeovers and mergers*

The exemptions in articles 1.4(f), 1.4(g), 1.5(e), and 1.5(f) new PR for securities offered in connection with takeovers and mergers are subject to the publication of a document containing information describing the transaction and its impact on the issuer (referred to by ESMA in its guidance as, an "exempted document"). This may contain broadly the same contents as a prospectus but does not carry the statutory baggage that the prospectus has under the FSMA, in terms of the liability regime (see s.2.3.6), the updating requirement of supplemental prospectuses (see s.2.3.5.4) and so on. In particular, the withdrawal rights provisions of art.23 new PR do not apply to exempted documents. On the other hand, exempted documents do not benefit from the ability to be "passported" (see s.2.3.4). Since it is possible to opt to publish a prospectus instead of an exempted document, bidders in securities exchange offers need to make a judgement as to the advantages and disadvantages of choosing to use an exempted document over a prospectus according to the circumstances of the particular offer.

2.3.2 *Requirement for listing particulars*

Listing particulars are required in connection with an application for admission to the Official List in circumstances where a prospectus is not required. This includes certain issues of securities within Sch.11A to the FSMA, most importantly open-ended collective investment schemes and non-equity securities issued by the government of an EEA Member State, a local or regional authority of an EEA Member State or public

international bodies of which an EEA Member State is a member. It also applies in the case of applications for admission of securities to be listed on the Official List and traded on the PSM.

It is nevertheless possible under article 4 new PR for certain issuers who would otherwise be exempt from the requirement for a prospectus to opt in to the prospectus regime (and thereby benefit from the passport arrangements).

2.3.3 *Home state and approval of prospectus*

Where a prospectus is required, it must be approved by the competent authority of the "home state" in relation to the issuer of the securities, before publication (art.20.1 new PR). In the UK, under Pt VI of the FSMA, the FCA has responsibility for determining eligibility for listing, reviewing and approving the prospectuses of issuers whose home state is the UK as well as for determining eligibility for listing of securities.

Even where securities are to be admitted to the Official List in the UK and nowhere else, it will not necessarily be the case that the UK is the home state. The home state principle is an important element of the prospectus regime and essentially limits the choice that issuers have in determining who they will be regulated by, at least in the context of equity securities and low-denomination non-equity securities.

In summary, the home state for issuers incorporated in the EEA will be:

(1) in the case of equity securities or non-equity securities with a denomination of less than €1,000 (or its equivalent in another currency), the member state where the issuer has its registered office (art.2(m)(i) new PR; and

(2) in the case of non-equity securities with a denomination of at least €1,000, the member state where the issuer has its registered office, or where the securities were or are to be admitted to trading on a regulated market or where the

2.3.8.1 *Publication without knowledge (Prospectus Regulation Rule 5.3.7R and regulation 6(2))*

A director is not a "person responsible" and therefore is not liable if the document was published without his knowledge or consent and on becoming aware of publication he gives reasonable public notice of that fact.

2.3.8.2 *Part not included in agreed form and context (Prospectus Regulation Rule 5.3.9R and regulation 6(3))*

A person who accepts responsibility for, or authorises the contents of, the document only in relation to certain specified parts or only in certain specified respects is only liable to the extent specified and only if the material in question is included in (or substantially in) the form and context to which he has agreed.

2.3.8.3 *Reasonable belief as to statement (Schedule 10 paragraph 1 of the FSMA)*

A person is not liable if he shows that, at the time when the document was submitted to the FCA, he:

> "reasonably believed, having made all such enquiries (if any) as were reasonable, that the statement was true and not misleading or that the matter whose omission caused the loss was properly omitted."

However, he must, in addition, show that one of four further conditions has been fulfilled, namely that:

(1) he continued in that belief until the securities were acquired;
(2) the securities were acquired before it was reasonably practicable to bring a correction to the attention of those persons likely to acquire them;
(3) before the securities were acquired, he had taken all reasonable steps to secure that a correction was brought to the attention of those persons likely to acquire them; or

(4) he continued in that belief until after commencement of dealings in the securities following their admission to the Official List or regulated market and the securities were acquired after such a lapse of time that he ought reasonably to be excused.

2.3.8.4 *Statements by experts (Schedule 10 paragraph 2 of the FSMA)*

A responsible person will not be liable for losses caused by an expert's statement where, at the time the document was submitted to the FCA, he believed on reasonable grounds that the expert was competent to make or authorise the statement and had consented to its inclusion in the form and context in which it was included. Again, four additional conditions have to be fulfilled, equivalent to those relevant for the defence described in s.2.3.8.3.

2.3.8.5 *Correction issued (Schedule 10 paragraphs 3 and 4 of the FSMA)*

Even if reasonable belief in the accuracy of the document cannot be proved, there is still a defence if the person responsible can show that:

(1) before the securities were acquired a correction was suitably published; or
(2) he took all reasonable steps to secure such publication and reasonably believed that it had taken place before the securities were acquired.

2.3.8.6 *Statement by an official or in an official document (Schedule 10 paragraph 5 of the FSMA)*

It is a defence to show that the statement concerned is an accurate and fair reproduction of a statement made by an official person or contained in a public official document.

2.3.8.7 *Plaintiff's knowledge of misstatement/omission (Schedule 10 paragraph 6 of the FSMA)*

It is a defence to show that the person suffering the loss acquired the securities with knowledge that the statement was false or misleading or of the omitted matter. Where a supplementary prospectus or listing particulars should have been published, it is a defence to show that the person suffering loss acquired the securities with knowledge of the change or new matter which required such publication.

2.3.8.8 *Reasonable belief that supplements not required (Schedule 10 paragraph 7 of the FSMA)*

A person is not liable for failing to produce a supplementary document if he reasonably believed that the change or new matter was not such as to make it necessary to produce one.

2.3.8.9 *Professional advisers (Prospectus Regulation Rule 5.3.10R and regulation 6(4))*

Responsibility does not attach to professional advisers who provide advice as to the contents of the listing document in a professional capacity, by reason only of their giving advice. There is obviously a thin line here between giving advice and "authorising the contents". Happily for the legal profession, lawyers are generally thought to fall on the right side of the line so far as this provision is concerned.

2.3.9 *Other sources of liability on prospectuses*

2.3.9.1 *Negligent misstatement and misrepresentation*

In addition to the statutory obligation to compensate investors, there may be common law liability on a prospectus or listing particulars, including for negligent misstatement or misrepresentation (s.90(6) of the FSMA).

The scope of the duty of care arising under the law of negligence was narrowed in the line of cases of which *Caparo Industries Plc v Dickman*[9] is the most prominent. In *Al Nakib Investments (Jersey) Ltd v Longcroft*,[10] the plaintiffs brought an action against the directors of the company as well as the company itself, alleging that, inter alia, they had purchased shares in the company in the market in reliance on a rights issue prospectus and that this prospectus contained untrue and misleading statements. Following the old case of *Peek v Gurney*,[11] the court held that, whilst directors owed a duty of care to those who subscribed for shares under the rights issue in reliance on the prospectus, they did not owe a duty of care to a shareholder or anyone else who relied on the prospectus for the purpose of deciding whether to purchase shares through the stock market, and the relationship between the directors and those investors was not sufficiently proximate for a duty of care to arise.

However, in *Possfund Custodian Trustee Ltd v Diamond*,[12] in a preliminary hearing of the defendants' attempt to strike out the plaintiffs' claim that a duty of care was owed to the plaintiffs in respect of purchases of shares in the after-market following the issue of a prospectus, the court held that it was at least arguable that a duty of care was owed to investors in such circumstances and that the plaintiffs' claim deserved full consideration at trial. Lightman J, in the concluding remarks of his judgment, gave support to the view, expressed in a leading textbook, that the decision in *Peek* was "outmoded" and that the decision in *Al Nakib* "[should] be reviewed by a higher court".[13]

A claim at common law for fraudulent misrepresentation would require the claimant to establish that the defendant

[9] *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605; [1990] 2 W.L.R. 358; [1955–1995] P.N.L.R. 523 HL.
[10] *Al Nakib Investments (Jersey) Ltd v Longcroft* [1990] 1 W.L.R. 1390; [1990] B.C.C. 517; [1991] B.C.L.C. 7 Ch. D.
[11] *Peek v Gurney* (1873) L.R. 6 H.L. 377; [1861–1873] All E.R. Rep. 116 HL.
[12] *Possfund Custodian Trustee Ltd v Diamond* [1996] 1 W.L.R. 1351; [1996] 2 B.C.L.C. 665; *The Times*, 18 April 1996 Ch. D.
[13] *Possfund* [1996] 1 W.L.R. 1351 at 1366.

Whatever specific prospectus content requirements apply in a particular case, it is always important to consider whether the fundamental "informed assessment" test has been satisfied. It does not necessarily follow that a prospectus is complete merely because all of the detailed information required by the New Prospectus Regulation or the Prospectus Regulation Rules has been included (PRR 3.1.1).

The "informed assessment" test under the New Prospectus Regulation art 6.1 is cast in wider terms than the previous "informed assessment" test, which still applies, by virtue of s.80 of the FSMA, in relation to listing particulars. The test under s.80 refers to such information as investors and their professional advisers would reasonably require and reasonably expect to find in the document; whereas the test under the New Prospectus Regulation art 6.1 refers to the information "necessary" to assess the various factors listed. In practice, this distinction is unlikely to have a significant effect on the high standards of care that are, in practice, required in preparing a prospectus.

The importance of the positive duty of disclosure is reinforced by the requirement for a prospectus to contain a responsibility statement, which is a declaration by those responsible to the effect that the information given is to the best of their knowledge in accordance with the facts and contains no omission likely to affect its import (New Prospectus Regulation art.11.1). There is also a duty on the applicant, mirroring the responsibility statement, to take reasonable care that the prospectus is, to the best of its knowledge, in accordance with the facts and contains no omission likely to affect its import.

Under Ch.8 of the FCA's Listing Rules, a sponsor of new applicants or new issuances also has to think beyond the specific disclosure requirements of the New Prospectus Regulation Rules. A sponsor must:

(1) give a Sponsor's Declaration to the FCA, pursuant to LR 8.4.3, confirming that all matters known to it which, in its reasonable opinion, should be taken into account by the

FCA in considering the application for admission to listing have been disclosed with sufficient prominence in the prospectus or otherwise in writing to the FCA;

(2) confirm that it has come to a reasonable opinion, based on professional experience and after having made due and careful enquiry, that the applicant has satisfied the applicable requirements of the New Prospectus Regulation Rules;

(3) confirm in their declaration that, to the best of their knowledge and belief, they have provided all the necessary services in LRs 8.2, 8.3 and 8.4 with due care and skill. These responsibilities include an obligation to guide the issuer in understanding and meeting its ongoing responsibilities under the Listing Rules and Disclosure Guidance and Transparency Rules (LR 8.3.1(2)); and

(4) submit a letter to the FCA setting out how the applicant satisfies the criteria for listing in the Listing Rules.

4.3 Structure and content requirements

4.3.1 General

The statutory basis for the specific contents of prospectuses (as opposed to the general disclosure provision already considered) is to be found in the New Prospectus Regulation which makes provision for prospectus rules to prescribe matters such as the required form and contents of a prospectus (including a summary) and various procedural matters.

The specific contents of prospectuses are determined by the Commission Delegated Regulation EU 2019/980 and ESMA guidance. It should be noted that ESMA's "update of the CESR recommendations for the consistent implementation of the Prospectus Directive" should be borne in mind in relation to compliance with prospectus content requirements.[6] It is necessary to refer both to ESMA's questions and answers on the

[6] European Securities and Markets Authority, *ESMA update of the CESR recommendations: the consistent implementation of Regulation (EC) No.809/2004 implementing the Prospectus Directive*, ESMA/2013/319 (20 March 2013).

companies, mineral companies, investment companies, scientific research-based companies and shipping companies.

This chapter will consider the contents requirements by reference to the most onerous schedule, namely that applying to a prospectus relating to shares or transferable securities equivalent to shares. For other types of security for which a prospectus is required, the regime is in general more relaxed, particularly in the case of wholesale debt securities.

Please see Ch.8 for the disclosure requirements applicable to debt securities.

4.4.2 Persons responsible and auditors

The most important item in s.1 ("Persons Responsible") of Annex 1 to the Commission Delegated Regulation EU 2019/980 is the declaration of responsibility for the information given in the prospectus. The schedule requires a list of "persons responsible" being:

> "all persons responsible for the information, or any part of it, given in the Registration Document with … in the latter case, an indication of such parts."

The New Prospectus Regulation requires responsibility to attach at least to the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for admission to listing or the guarantor. Otherwise, it leaves the choice of who is to be regarded as responsible for the prospectus to the Member States.

FCA Prospectus Regulation Rules 5.3.2 and 5.3.5 set out the persons responsible for prospectuses relating to equity and non-equity securities respectively. Equity securities are shares and other transferable securities comprised in a company's share capital, as well as any other type of transferable securities issued by that company or any entity in the same group as that

company, giving the right to acquire securities as a consequence of them being converted or the rights conferred by them being exercised.

For equity securities, the persons responsible are the issuer, its existing and named future directors, each person who is a senior executive of any external management company of the issuer, those who expressly accept responsibility in the prospectus, the offeror and its directors, the applicant for listing and its directors and, finally, anyone who authorises the contents of the prospectus. For non-equity securities, including convertible securities, directors do not have to accept responsibility. The persons responsible are the issuer, those who expressly accept responsibility, the offeror or applicant, any guarantor in relation to information about the guarantee and anyone who authorises the contents of the prospectus. It is worth noting that the New Prospectus Regulation requires someone to be responsible for the whole of the prospectus (including information sourced from third parties) so that "split" responsibility statements are not possible. Statements of responsibility for parts of a prospectus remain possible but only for those who accept responsibility for or who "authorise the contents" of the prospectus (PRR 5.3.9). Note that ESMA confirmed the position that one person must take responsibility for the whole prospectus, notwithstanding that there might be different persons responsible for particular parts, and provided guidance on the issue of responsibility of a guarantor. Issuers should also be mindful of not including other disclosures in the prospectus which could be seen to qualify the responsibility statement.

The meaning of the expression "authorise the contents" is not clear. It may mean that it imposes liability on senior management below board level to whom the board has delegated the responsibility for finalising the document, or on whom the board is relying in relation to the provision of information for inclusion in it. Alternatively, it could mean that it imposes liability on a residual category of persons who have had some measure of control over the document. The market consensus view is that professional advisers, such as lawyers and

already noted above, it is important to consider whether the "informed assessment" test is met; it is particularly important for an issuer to consider whether the current trading and prospects information included in the prospectus gives a fair and balanced picture when measured against that wider test and when considered in the light of the other information in the prospectus.

4.4.5 The management

Through disclosure, the issuer should explain how a new applicant's directors and senior management collectively have appropriate experience to manage the group's business. Section 12 ("Administrative, Management, and Supervisory Bodies and Senior Management") of Annex 1 to the Commission Delegated Regulation EU 2019/980 supports that approach by providing for the inclusion of information about the management expertise and experience of members of the issuer's administrative, management or supervisory bodies, its partners, founders and any senior managers. This includes names, business addresses and functions within the issuer, together with an indication of the principal activities performed by the relevant directors or managers outside the issuer where these are significant with respect to the issuer. Other details to be included are items such as the names of all companies and partnerships in which the relevant director or member of management has been a member of the administrative, management or supervisory bodies or a partner in the previous five years and details of bankruptcies, receiverships and liquidations with which the individual has been associated as a member of an administrative, management or supervisory body, a partner, a founder or a senior manager. Also disclosable are convictions in relation to fraudulent offences in at least the last five years and details of public criticisms. An appropriate negative statement is required where there is no relevant information to disclose.

Section 13 ("Remuneration and Benefits") of Annex 1 to the Commission Delegated Regulation EU 2019/980 requires the prospectus to disclose the amount of remuneration paid on an

individual rather than aggregate basis, including deferred or contingent compensation, and benefits in kind granted to the individuals listed above by the issuer or any member of the group during the last completed financial year under any description whatsoever. Amounts set aside by the issuer or its subsidiaries to pay pensions or retirement benefits to the individuals listed above must also be disclosed. Details of the terms of office and any benefits to be provided on termination of employment should be given.

Any potential conflicts of interest must be clearly stated or a negative statement made. Any arrangement or understanding with major shareholders, customers, suppliers or others which allows them to appoint a member of the issuer's senior management or administrative, management or supervisory bodies must also be disclosed.

Section 14 ("Board Practices") of Annex 1 to the Commission Delegated Regulation EU 2019/980 requires the prospectus to include information on the terms of office and service contracts of the management and other key persons including benefits payable on termination. Information about the audit and remuneration committees and details regarding compliance with domestic corporate governance requirements must also be given.

The prospectus must also disclose the interests of the directors in the issuer's capital, including stock options, and any restrictions on their disposal. Details of any schemes involving employees in the capital of the issuer must be given. Finally, the prospectus must summarise the provisions of the memorandum and articles of association of the issuer with respect to the members of the administrative, management and supervisory bodies.

4.4.6 Financial information

Section 18 ("Financial Information Concerning the Issuer's Assets and Liabilities, Financial Position and Profits and Losses") of Annex 1 to the Commission Delegated Regulation

> assumptions to a clean working capital statement will put the onus on the investors to reach their own conclusion as to the adequacy of working capital and hence detract from the value of the working capital statement. Note that, while it is not normally acceptable to have detailed assumptions alongside a clean working capital statement, the FCA has taken the view that this does not prevent the continuation of the practice of disclosing the basis on which the working capital statement is made (for instance, "taking into account existing bank facilities").[11]

ESMA's recommendations also state that issuers should ensure that there is very little risk that the basis of a working capital statement is later called into question. In practice, the margins of available cash and facilities as against cash requirements may be considerable and the extent of verification necessary to support the working capital statement will be tailored accordingly. Nevertheless, the financial projections which are normally produced to support the working capital statement can be an invaluable cross-check against much of what is of real substance in the prospectus, such as the current trading position and the future prospects and investment intentions of the issuer. The FCA emphasises that:

> "[t]he document as a whole … is consistent with the risk factor disclosure".[12]

In its Technical Note on Working Capital Statements and Risk Factors (December 2012), the FCA reminded market participants that there is the potential for a significant degree of overlap between the risk factors section of a prospectus and the issuer's working capital statement. Issuers might, instead of providing a qualified statement, have a desire to draft the risk factors broadly and generically or to include in the risk factors section potential caveats (such as a disclaimer that states the risk factors are not intended to qualify the issuer's working

[11] Financial Conduct Authority, *FCA Technical Note on Working Capital Statements—Basis of preparation*, FCA/TN 320.1 (last updated December 2012).

[12] Financial Conduct Authority, FCA *Technical Note on Working Capital and Risk Factors*, FCA/TN 321.1 (2012), p.2.

capital statement) to a clean statement. However, the FCA is of the view that certain risk factor disclosures are fundamentally inconsistent and can never be reconciled with a clean working capital statement. In such circumstances, the FCA will be prepared to challenge an issuer's prospectus and/or working capital statement.

The FCA has stressed that it will not be appropriate for an issuer to simply remove or redraft the risk factors if the effect would lead to deficient disclosure which prevents investors from making informed assessments of the financial condition and prospects of the issuer. Instead, the FCA will either require the issuer to address the facts underlying the risk factors or provide the working capital statement on a qualified basis. As has been emphasised by the FCA, a prospectus should present a clear picture of the issuer's position that is consistent as a whole. The FCA encourages issuers to maintain a meaningful dialogue with it if there are concerns that certain risk disclosures might not be consistent with a clean working capital statement. It should be noted, however, that, as the FCA has clarified, not all risk factors dealing with matters of funding or finance are necessarily inconsistent with a clean working capital statement. Similarly, disclosure of the risks, which, if they were to materialise, would cause severe impact, may be found to be consistent with a clean working capital if the probability of such risks materialising is sufficiently low.

The FCA has also pointed out that some issuers might try to express risk factors in a way which suggests the risk will only operate "in the longer term" or after the period covered by the 12-month working capital statement. The FCA has made it clear that they will test the genuineness of such disclosure and seek to ensure that the disclosure is appropriate and accurate and not simply used as a way of taking the risk factor outside the strict 12-month period of the working capital statement.

Where the prospectus is being published in connection with the issue of shares in consideration for an acquisition, it can also be of importance to ensure that the combined working capital requirements of the issuer's group and of the business

of the state of affairs of [ABC Plc]/[XYZ Ltd] as at [specify dates] and of its profits, cash flows and [recognised gains and losses] [changes in equity] for the [specify periods] in accordance with International Financial Reporting Standards as adopted by the European Union.

Declaration[4]

For the purposes of [Prospectus Rule [5.5.3R(2)(f)/ 5.5.4R(2)(f),] we are responsible for [this report as part] of the [prospectus] and declare that we have taken all reasonable care to ensure that the information contained in [this report] is, to the best of our knowledge, in accordance with the facts and contains no omission likely to affect its import. This declaration is included in the [prospectus] in compliance with [Item 1.2 of Annex 1 to the PR Regulation[5] and Item 1.2 of Annex 3 to the PR Regulation].

Yours faithfully

Reporting accountant."

5.2.5 *Qualified audit report*

There are requirements under the Companies Act 2006 and PR Regulation (Annex 1, item 18.3.1(b)) to give details of any audit qualifications. For Companies Act purposes, such details form part of the statement under s.435 of the Companies Act 2006 that the historical financial information does not constitute the company's statutory accounts and that such statutory accounts have been filed with the Registrar of Companies. This statement forms a paragraph within the statutory information section of the document in question, which is usually the last section.

[4] Relevant for a prospectus but not a circular. The form of responsibility statement contained in a registration document differs from that required in a prospectus.

[5] Regulation 809/2004 implementing Directive 2003/71 as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements [2004] OJ L149/3.

The reporting accountant's opinion should be arrived at independently of any previous audit opinions given on the financial statements which form the basis for the historical financial information to be reported on. It is not part of the reporting accountant's role to explain why their opinion differs from the opinion of the auditor (where this is the case). The directors of the issuer will be required to disclose details of the qualifications or disclaimers contained in audit reports prepared by the statutory auditor and the reporting accountant considers the disclosures made. If he/she is not satisfied with the disclosures, the reporting accountant should discuss the matter with the directors and ensure appropriate information is included by the issuer or is included in the accountant's report.

5.2.6 *Accounting standards*

For new applicants, the PR Regulation (1, item 18.1.3) requires that the historical financial information be drawn up in accordance with Regulation 1606/2002,[6] if applicable. This regulation requires a company listed on a regulated exchange to prepare its consolidated financial statements using IFRS as adopted in the EU. For third-country issuers, the PR Regulation also permits the historical financial information to be drawn up in accordance with the national accounting standards of the third country, if those standards are equivalent to IFRS as adopted in the EU.

In the case of Class 1 acquisitions, the Listing Rules require the financial information table on the target to be prepared in a form that is consistent with the accounting policies adopted in the issuer's latest annual consolidated accounts (LR 13.5.4) (except where the target is admitted to trading on a regulated market or has securities listed on an investment exchange or admitted to a multilateral trading facility where appropriate standards as regards the production, publication and auditing of financial information are in place, in which event the financial information table will reflect the target's accounting

[6] Regulation 1606/2002 on the application of international accounting standards [2002] OJ L243/1.

policies and be accompanied, if necessary, by a reconciliation to the issuer's accounting policies).

5.2.7 *Liaising with the UK Listing Authority*

Communication between the directors of the issuer and the FCA is conducted through the sponsor appointed for the transaction. Where the queries raised by the FCA are easily resolved, this presents no problem, but, for specific queries on the historical financial information and the reporting accountant's ability to report on it, it can be helpful to involve the accountants in the discussion so that misunderstandings can be avoided.

5.2.8 *Adjustments from previously audited figures*

The directors of the issuer may make adjustments to restate previously audited historical financial information which fall broadly into three categories:

(1) to present the financial information for all years on the basis of consistent, acceptable and appropriately applied accounting policies, in accordance with the applicable requirements;
(2) to correct errors; and
(3) to record adjusting post balance sheet events where appropriate.

The directors should only seek to make adjustments insofar as necessary to achieve the objectives set out above. The directors do not seek to replace accounting policies, accounting estimates or valuation adjustments with those selected by themselves. They consider whether the specific application of the basis of accounting originally adopted falls within an acceptable range of alternatives and, if not, may conclude that an error has occurred which may need to be adjusted. Furthermore, adjustments should not be made in order for the track record to be more consistent with the entity's expected operations or structure following the transaction. Such adjustments would anticipate future events and are not consistent

with the principle that the historical financial information should record the events which actually occurred during the period of the historical financial information.

Some examples of the circumstances where adjustments can be made are to:

(1) ensure that the same accounting policies have been applied throughout the period covered by the information (e.g. if new accounting standards have been introduced during the period);
(2) ensure that the accounting policies are consistent with those which will be in use in the next set of annual financial statements; and
(3) correct a failure to comply with an accounting standard.

The adjustments are made by the directors to arrive at the restated financial information group being reported upon, which may often have changed its composition within the period covered by the report. The question therefore arises as to how the relevant historical financial information should be prepared.

In the case of a new issue, the primary objective is to give a fair presentation of the results of the business being floated and which has been managed by the people concerned. It is not uncommon for entrepreneurs to have been operating separate companies previously which may then be brought together to form a group for flotation. Clearly, whatever the form of reconstruction, it is likely to assist in an understanding of the historical record of the business to combine the results of the separate enterprises under common control as if they had been part of a group throughout the three-year period. Other businesses may have been acquired and the management of them may now form part of the central management of the enlarged group. In these circumstances, there may be a desire to bring in the results of such businesses throughout the period. However, the only circumstances in which the FCA will permit the presentation of combined or aggregated figures is

(2) the assumptions must be reasonable, readily understandable by investors, specific and precise and not relate to the general accuracy of the estimates underlying the forecast; and
(3) in the case of a forecast, the assumptions shall draw the investor's attention to those uncertain factors which could materially change the outcome of the forecast.

The prospectus is required to include a statement that the profit forecast or estimate has been compiled on a basis which is comparable with the historical financial information and consistent with the issuer's accounting policies.

LR 13.5.32 and 33 set out the circumstances in which profit forecasts or estimates must be included in a class 1 circular. In the event that the circular must include the profit forecast or estimate then the listed company must comply with the requirements of the PR Regulation and include a statement confirming that the profit forecast or estimate has been properly compiled on the basis of assumptions stated and that the basis of accounting is consistent with the accounting policies of the listed company.

Since July 2019 an accountant's report on a profit forecast or profit estimate is no longer required.

The Listing Rules include a requirement to reproduce any profit forecast or estimate in the annual report, to set out the actual figures and to provide an explanation if the actual figures differ by 10% or more from the profit forecast or estimate (LR 9.2.18).

5.5 Working capital

The PR Regulation (Annex 11, Item 3.1) and Listing Rules require the issuer to make a statement in the prospectus, or circular relating to a Class 1 transaction, that in its opinion the working capital available to the group is sufficient for its present requirements or, if not, how it proposes to provide the

additional working capital thought by the issuer to be necessary. Present requirements are interpreted to mean a minimum of 12 months from the date of the prospectus. In the case of a new applicant, the working capital statement must be without qualification (LR 6.7.1).

The Listing Rules make it clear that in the case of an acquisition the statement must be on the basis that the acquisition has taken place, and in the case of a disposal on the basis that the disposal has taken place.

The company's sponsor must confirm to the FCA that they are satisfied that the directors of the issuer have a reasonable basis on which to conclude that the working capital available to the issuer and its group is sufficient for at least the next 12 months from the date of publication of the prospectus or Class 1 circular (as applicable). The sponsor will undertake its own due and careful enquiry into the directors' conclusion, including seeking a comfort letter from the reporting accountants.

The comfort will take the form of a private letter from the reporting accountants to the company and the sponsor. In order for the reporting accountant to be able to provide comfort, it is necessary for the company to prepare a Board Memorandum setting out the cash flow projections and the assumptions which underlie them. Any profit forecast will need to be considered as this, of course, has a direct bearing on the cash forecast. The level of detailed work performed by the reporting accountant will vary, to a certain extent, depending upon the margin between the facilities available and the requirements shown by the forecast. The period has to be a minimum of the next 12 months, although in practice a longer period may need to be covered and in particular it is necessary to consider any known circumstances beyond that time.

5.6 Statement of capitalisation and indebtedness

A new applicant is required to present a statement of capitalisation and indebtedness (distinguishing between guaranteed and unguaranteed, secured and unsecured indebtedness) as of a date no earlier than 90 days prior to the date of the document (PR Regulation, Annex 11, item 3.2). The information should be computed on the basis of the consolidated accounts of the issuer.

The information, so far as it relates to capitalisation, should be derived from the last published financial information of the issuer but, if this information is more than 90 days old and there has been a material change, the issuer should provide more up-to-date information. If any of the capitalisation information is older than 90 days but there is no material change then this fact should be stated.

There is no specific reporting by the sponsor on this matter, this being a statement required by the PR Regulation and, therefore, the responsibility of those who take responsibility for the prospectus (i.e. the directors). The company and sponsor may request the reporting accountants to perform procedures in relation to the balances which make up the statement and to report the findings from those procedures.

ESMA guidance includes details on how capitalisation and indebtedness information is expected to be presented.[7]

5.7 Significant change in financial performance and significant change in financial position

The issuer must include a description of any significant change in the financial performance since the end of the last financial period for which financial information has been published to the date of the prospectus, or provide an appropriate negative

[7] ESMA, *ESMA update of the CESR recommendations: The consistent implementation of Regulation 809/2004 implementing the Prospectus Directive*, ESMA/2013/319 (20 March 2013).

statement. In addition, the issuer must include a description of any significant change in the financial position of the group which has occurred since the end of the last financial period for which either audited financial information or interim financial information has been published, or provide an appropriate negative statement. The company and sponsor generally request the reporting accountants to perform procedures in relation to the significant change statements.

5.8 Financial position and prospects procedures

For new applicants seeking a premium listing, the Listing Rules include a requirement for the sponsor to confirm that the directors have established procedures which provide a reasonable basis for them to make proper judgements on an ongoing basis as to the financial position and prospects of the issuer (LR 8.4.2(4)).

The reporting accountants are usually asked to provide comfort to the sponsor in this area.

The ICAEW published a Technical Release in 2014 (Tech 14/14CFF) entitled *Guidance on financial position and prospects procedures* which is aimed at directors and reporting accountants and sets out how they might establish and report on the procedures.

5.9 Annual accounts, preliminary statements and interim reports

Once listed, a company must satisfy the demands for continuing financial information. The principal requirements are contained Ch.4 of the Disclosure and Transparency Rules (DTRs) with some additional requirements set out in Ch.9 of the Listing Rules. The DTRs implement the requirements of the EU Transparency Directive.[8]

[8] Directive 2013/50 amending Directive 2004/109 on the harmonisation of

stated that a company cannot withhold price-sensitive information due to confidentiality agreements with its clients and it was noted that Wolfson had, in any event, ultimately announced the positive news in an anonymous manner.

Also, in January 2009, Entertainment Rights Plc ("ER") was fined £245,000 for a 78-day delay in disclosing inside information, in breach of DTR 2.2.1R. ER had entered into a distribution agreement, which was subsequently varied resulting in an estimated reduction in ER's profits for 2008 of approximately US $14 million. At the time of variation, the board of ER concluded that it was too early to quantify the impact of the variation and that there would be various opportunities to mitigate the negative impact. The FSA concluded that the variation of the distribution agreement should have been disclosed to the market as soon as possible.[40] The fact that there may be opportunities to mitigate the negative impact did not justify the delay.

On 21 June 2010, the FSA published a Final Notice imposing a fine of £500,000 on Photo-Me International Plc (see s.6.2.3.6) and, on 26 January 2011, it issued a Final Notice imposing a fine of £455,000 on JJB Sports Plc (see s.6.2.3.2), both as a result of the issuers' failure to publicly disclose inside information as soon as possible in breach of DTR 2.2.1R and for breaching the Listing Principles.

On 16 August 2011, the FSA imposed a fine of £210,000 on Sir Ken Morrison, the former chairman of Wm Morrison Supermarkets Plc, for breach of DTR 5.8.3R (see s.6.3.2.8).

In 2013, the FSA imposed two significant fines on Lamprell Plc (see s.6.2.3.3.2) and Prudential Plc (see s.6.4.2.3) of £2.4 million and £14 million respectively, in the former case for breaches of the DTRs, Model Code and Listing Principles and, in the latter case, for a breach of the Listing Principles alongside Principle 11 of the Principles of Businesses.

[40] Paragraph 2.4 of FSA, Final Notice to Entertainment Rights Plc (19 January 2009).

In 2017, the FCA found that Rio Tinto breached the DTRs by failing to carry out an impairment test and to recognise an impairment loss on the value of mining assets based in the Republic of Mozambique which it acquired in August 2011 for US $3.7 billion when publishing its 2012 interim results (published 8 August 2012).[41] Had Rio Tinto complied with its obligation to carry out the test, a material impairment would have been required to have been disclosed at the time of its 2012 half-year financial reporting. Rio Tinto's financial reporting was therefore inaccurate and misleading. This continued until 17 January 2013 when Rio Tinto announced an impairment of the Mozambique assets, writing off approximately 80% of the value of the investment in the Mozambique mine. The FCA considered that Rio Tinto's delay in carrying out an impairment test given there were indicators of impairment demonstrated a serious lack of judgement. The FCA imposed a financial penalty on Rio Tinto in the amount of £27,385,400.

6.9.2.3 *Suspension*

Previously, examples of when the FCA could require the suspension of trading for breach of the DTRs included where an issuer failed to make a RIS announcement as required by the DTRs within the applicable time limits, which, in the opinion of the FCA, could affect the interests of investors or affect the smooth operation of the market, or where there was or may be a leak of inside information and the issuer was unwilling or unable to issue an appropriate RIS announcement within a reasonable period of time (DTR 1.4.4G). Under the new s.122I of the FSMA, the FCA may suspend trading for the purposes of exercising its functions under the EU MAR. This ultimate sanction is obviously something of a double-edged sword because penalising a company in this way may protect future investors but only at the expense of denying existing investors a market for their securities.

It should be noted that, where an issuer's securities have been suspended from listing or trading, the issuer, any PDMRs and

[41] FCA, Final Notice to Rio Tinto Plc (17 October 2017).

Section 7.4 deals with transactions (other than acquisitions and disposals) that are required to be classified.

Section 7.5 deals with miscellaneous issues.

Sections 7.6 and 7.7 deal with the documentation which flows from the relevant classification: notifications and shareholder circulars.

Section 7.8 sets out the procedures to be followed in the case of a Class 1 acquisition and s.7.9 provides a worked example of such an acquisition.

Section 7.10 deals with reverse takeovers.

Section 7.11 lists the requirements in relation to public takeovers which are supplementary to the provisions of the City Code on Takeovers and Mergers.

Section 7.12 sets out the provisions for related party transactions covered in Ch.11.

In this chapter, the references to "LR paragraphs" are to paragraphs of the Listing Rules. References to "Disclosure Requirements" are to arts 17, 18, and 19 of the Market Abuse Regulation.[1] References to "sections" are to the numbered sections of this text.

7.1.1 Overview

The purpose of Ch.10 is to ensure that holders of listed equity shares:

- are notified of certain transactions entered into by the listed company; and
- have the opportunity to vote on larger proposed transactions.

[1] Regulation 596/2014 on market abuse (market abuse regulation) and repealing Directive 2003/6 and Directives 2003/124, 2003/125 and 2004/72 [2014] OJ L173/1.

In order to achieve this purpose, Ch.10 sets out rules for the classification by size of transactions and for documentation and action consequent upon such classification. It follows that the directors of a listed company proposing to make an acquisition or disposal and its advisers need to have the potential classification in mind at an early stage.

Chapter 11 sets out safeguards that apply to:

- transactions and arrangements between a listed company and a related party; and
- transactions and arrangements between a listed company and any other person that may benefit a related party.

The safeguards in Ch.11 are intended to prevent a related party from taking advantage of its position and also prevent any perception that it might have done so.

Chapter 5 deals, amongst other things, with reverse takeovers, i.e. transactions where any percentage ratio (see below) is 100%, or which in substance result in a fundamental change in the business or a change in board or voting control of the listed company.

Where a listed company is proposing to enter into a transaction which could amount to a Class 1 transaction, a reverse takeover or a related party transaction, the listed company is required to obtain the guidance of a sponsor to assess the application of the Listing Rules and the Disclosure Requirements and the Transparency Rules.

7.1.2 Application to listed companies and their subsidiaries

The provisions of Chs 10 and 11 apply only to companies that have a premium listing of equity shares, referred to here as "listed companies". They do not apply to public companies generally or, in particular, to companies which have a standard listing, or to companies whose securities are traded on AIM, a market operated by London Stock Exchange Plc. The general rule is, therefore, that Chs 10 and 11 are relevant whenever the

company entering into a transaction is a listed company with a premium listing or the subsidiary undertaking of such a listed company. References in this text to the "listed company" are to the relevant company in a group where the parent has a premium listing, save in respect of reverse takeovers.

The rules relating to reverse takeovers in Ch.5 apply to companies with a premium listing, a standard listing of shares or a standard listing of certificates representing equity securities.

7.1.3 *Definition of "transaction"*

Transactions classified under Ch.10 are principally, but not exclusively, acquisitions and disposals. Other transactions to which Ch.10 applies are the granting of certain indemnities, break fee arrangements, issues of securities by a major subsidiary undertaking and entering into or exiting joint ventures (see s.7.4). Transactions include not only agreements but amendments to agreements.

For the purpose of Ch.10, transactions do not include: a transaction in the ordinary course of business; an issue of securities by the listed company or a transaction to raise finance which does not involve the acquisition or disposal of any fixed asset; and intragroup transactions.

The grant to, or acquisition by, a listed company of an option will constitute a transaction as if the option had been exercised. The exception is where the exercise of the option is solely at the listed company's discretion. In that case, the transaction will be classified on exercise and only the consideration (if any) for the option will be classified at the grant or acquisition stage.

7.1.4 *Ordinary course of business*

Chapter 10 is intended to cover transactions that are outside the ordinary course of the listed company's business and may change a security holder's economic interest in the company's assets or liabilities (whether or not this change is recognised on

the company's balance sheet). In assessing whether a transaction is in the ordinary course of business, the Financial Conduct Authority (FCA) will have regard to the size and incidence of similar transactions which the company has entered into. The FCA may determine that a transaction is not in the ordinary course of business because of its size or incidence.

7.2 Classification

7.2.1 *Categories*

A transaction is classified by assessing its size relative to that of the listed company proposing to make it. The comparison of size is made by using percentage ratios.

Chapter 10 lists two categories of transactions. These are, in order of ascending magnitude, Class 2 and Class 1. The class tests are also used to calculate the percentage ratios of potential reverse takeovers. Where a class test produces a result of 100% or more, the transaction will be a reverse takeover.

7.2.2 *Class 2*

Class 2 describes a transaction where any percentage ratio is 5% or more but each is less than 25%. Class 2 transactions are those which are of sufficient size to require a notification to a Regulatory Information Service ("RIS").

7.2.3 *Class 1*

Class 1 describes a transaction where any percentage ratio is 25% or more. Class 1 transactions are those which are of sufficient size to require a notification, the issue of a circular to shareholders and also the prior approval of shareholders in a general meeting.

If the number of shares to be issued will increase the issued equity share capital of the acquiring company by 20% or more, or if the shares to be listed are to be offered to the public before admission, and if none of the exemptions apply, then a prospectus will be required.

The Class 1 circular to the shareholders of the acquiring company will have to be accompanied by, or incorporate, the prospectus, if required. It will also contain a notice of a general meeting at which resolutions to approve the acquisition and, if necessary, authorise the directors to allot the shares and to disapply pre-emption rights (if applicable) will be proposed.

A number of documents will be produced in parallel: the sale and purchase agreement; the placing agreement; the notification; the Class 1 circular; and, if required, the prospectus.

A further consequence of the purchaser's issued share capital being increased by 10% or more is that compliance with the guidelines issued by the Investment Association will require the new shares to be offered to existing shareholders pro rata to their holdings. This will typically be done by a placing with clawback by way of an open offer to existing shareholders. The shares to be issued will be placed under the terms of the placing agreement (typically, to institutional shareholders who may or may not be existing shareholders of the company), but such placing will be conditional upon shareholder approval of the acquisition and admission of the new shares to listing and will be subject to the right of existing shareholders to subscribe for their pro rata portion of those shares in preference to the placees.

The timetable runs along the following lines. Work on all the documents proceeds in parallel up to a proposed impact date when the sale and purchase is announced and the shares are conditionally placed. On the evening before that date, the placing agreement—the agreement under which the cash to finance the consideration is to be raised—will be executed in escrow. At the same meeting, the sale and purchase agreement, which is conditional upon shareholder approval, is also signed

and held in escrow. First thing the next morning, both the sale and purchase agreement and the placing agreement are released from escrow and become binding, subject to their conditions. The agreed notification of the acquisition is released on a RIS. The financial adviser to the acquiring company places the shares, conditional upon shareholder approval and admission of the new shares to listing, by reference to a substantially final proof or "P-proof" of the Class 1 circular and prospectus.

The FCA provides written confirmation of its approval of the prospectus and the circular, and the prospectus is then published and the circular is despatched to shareholders.

The resolution to approve the transaction and to authorise allotment of the shares will normally be an ordinary resolution. A special resolution will be needed if pre-emption rights are being disapplied. The offer to existing shareholders to take up new shares must be made available to them for at least 10 business days. So, on the appropriate day, the general meeting will be held and the company's registrars will separately notify the purchaser's financial advisers of the number of shares taken up by existing shareholders from which the financial advisers will determine the number of shares which will be placed with placees.

7.9 Example of a Class 1 acquisition

7.9.1 The transaction

Acquisico Plc, a company whose shares are admitted to the premium segment of the Official List of the FCA, is considering the acquisition of the entire issued share capital of Target Ltd, a private company owned by five shareholders. The directors of Acquisico agree with the shareholders of Target that Acquisico will acquire Target for £15 million.

The Target shareholders wish to receive cash. Acquisico wishes to finance the acquisition of Target by the issue of new ordinary