ACT

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Richard Brearley
Financial Services Authority
25 The North Colonnade
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Dear Sir,

Consultation Paper 203
Review of the listing regime

The Association

The Association of Corporate Treasurers was formed in 1979 to encourage and promote the study and practice of corporate finance and treasury management and to educate those involved in the field. Today, it is an organisation of professionals in corporate finance, risk and cash management operating internationally. A professional body and not a trade association, it has over 3,000 Fellows, Members and Associate Members. With more than 1,200 students in more than 40 countries, its education and examination syllabuses are recognised as the global standard setters for treasury education. Members of the Association work in many fields. The majority of Fellows work in large UK public companies, responsible for the treasury and corporate finance functions.

The ACT usually comments from the corporate and not the financial services sector standpoint, so in this response we are coming from a standpoint of an issuer of securities.

General

We very much support the purpose of the Listing Review that you are undertaking and are pleased to be able to contribute to this project. We are in agreement with the overall objectives of simplifying and modernizing the listing regime and accommodating the effects of European regulation, whilst at the same time not detracting from the reputation of the London markets through diluting the effectiveness of regulation here.

Given the background and nature of the ACT we have not thought it appropriate to respond to every question you posed in the consultation but rather have approached it selectively so as to concentrate on the subject areas of particular relevance to our members. The Chapter 6 on debt prompts some very much wider questions as to the structure of the debt market as between specialist and non-specialist issues and the relationship with the PD definitions of wholesale debt. We note in our answer to question 11 that this is an area which would benefit from further consideration and review amongst those involved in this market.

Response to questions

Q1: Do you support the proposed move to a regime which has overarching general principles supported by specific rules and guidance?

A1: Yes. The overriding principles should allow a measure of flexibility while at the same time providing a background substance-over-form type of approach that should allow blatant manipulation of specific rules to be stamped out. We recognise that the vast majority of any enforcement action will be made under the detailed rules, but if need be the principles could be invoked and enforced.

Q8: Do you consider that we should relax or maintain our requirement that issuers provide a clean working capital statement?

A8: We consider it a good idea to relax the working capital requirement. We support your move towards a system whereby the issuer would state that it has sufficient working capital and, if not, how it proposes to provide the additional working capital needed, rather than the present requirement for full cover for all forecast cash needs. There are times when it is not economic or necessary for an issuer to line up finance a long way ahead of need if it is reasonably certain as to likely availability. Although this does throw more onus onto the investors to consider whether they view the working capital statement as acceptable, they ought to have sufficient information to make their own judgments and react accordingly. The role of the sponsor is important here, which supports our response to Q39. It is particularly necessary to avoid the need for third party confirmation of the statement since accounting firms, and other advisory bodies, are increasingly unwilling to give a public, written opinion on the adequacy of working capital availability and its sources.

Q9: What are your views on whether the Listing Rules' requirement for the disclosure of directors' experience and expertise should be replaced by the provisions in the PD and by enhanced UK corporate governance standards?

A9: We feel that in this area a combination of (i) disclosure and (ii) requiring a sponsor to be responsible for the listing should be sufficient and that the FSA need not check if the directors' experience and expertise are adequate. It is tempting to think that this sort of matter ought to be able to be dealt with perfectly well by disclosure, leaving the investors to make their own judgments, but we would be unhappy with disclosure alone as the means to filter out undesirable directors, as the disclosure of facts, even if honest and full, will be no substitute for the antennae used by reputable sponsors, keen to preserve their reputation, in sniffing out unsuitable candidates. Again we believe that sponsors have a valuable role here, which is yet another reason, in addition to those discussed in A39 below, for our strong wish to retain the role of sponsors

Q10: What are your views on whether the requirements for independence and control over the majority of assets held should be repealed?

A 10: We believe that it remains important for a listed company to be able to carry on an independent business. Therefore, where the listed company remains under the control or influence of a parent or dominant shareholder, assets owned or controlled by the latter but used by the former should (as presently provided) be the subject of arm's length contracts

that protect the issuer's position and that can only be amended or terminated with the agreement of the directors who are independent of that parent or shareholder.

We support a change so that the rules that issuers must control the majority of their assets in order to be eligible for listing are repealed. There may be groups where a large proportion of the group's assets are held through associated companies that are not controlled by the group, but where this could nonetheless be a perfectly sound structure.

Q11: Do you support our proposal not to follow the PD definition of debt securities in relation to eligibility and continuing obligation requirements?

A11: We note that the PD definition for the distinction between professional and retail style issues is based on a denomination size of Euro 50,000, while the UK Listing rules define the break point based on who the security is aimed at. We believe that it would be desirable to continue with the UK distinction between specialist and non specialist securities over and above the PD rules. This means that an issue with denomination of say Euro 10,000 aimed at professional investors would not have to meet the UK's onerous requirements for non specialist debt, although it would have to meet the PD rules for non-wholesale issues.

The concern remains that if the UK has super-equivalent requirements for non-specialist issues which are significantly more onerous than applicable in Europe it is very unlikely that any "retail" style issues would ever be listed in London, which is a negative for the London debt markets generally.

We would therefore like to see a relaxation in the super-equivalent requirements placed upon non-specialist issues.

This is a complicated area and one that we feel is worthy of an in depth study to be commissioned by the FSA

Q12: What are your views on dropping the requirement for a two-year track record for specialist issues?

A12: With the aim of avoiding complex rules where practical and with the aim of coming in line with European rules we feel that it would be appropriate to move away from an absolute 2 year track record requirement and instead have the '2 years or since start of operations if shorter' rule, as is found in the PD.

Q13: What are your views on removing the requirement for a working capital statement and accepting a two-year track record in relation to non-specialist debt issues?

A13: This would seem to be a good opportunity to simplify the rules and at the same time conform to the 2 year rule in the PD. We note that the PD does not require a working capital statement in a prospectus for any debt security, so your proposals are helpful in moving towards the PD.

Q14: Do you think that the authorised adviser regime should be retained for specialist debt issues?

A14: We support the need for sponsors on an equity issue (Q39) and a non-specialist debt issue. We recognise that for specialist debt issues the role of adviser is less crucial. We do not see a problem in removing the adviser requirement on specialist debt issues, even though it could be argued that they do bring some advantages through helping to maintain standards in the listing process.

Q19: We also invite comment on whether there are any other areas of Company Law or practice that you consider are fundamental to shareholder protection.

A19: We do not wish to comment generally on this subject but we do want to offer our support to your proposals on extending the requirements on pre-emption rights to overseas issuers with a primary listing. Other control mechanisms such as on the discounts to market value are of limited use except for the largest and most liquid issues.

Q25: Do you agree that we should maintain a requirement for shareholder approval of Class 1 transactions?

A25: We recognize that the UK is unusual in requiring a shareholder vote on major transactions, but nonetheless we believe that this is a vitally important shareholder right and one that should be retained. The ACT stance is generally to support more simplification, but in this instance we favour keeping the existing and more onerous principle, which forms an essential part of UK corporate governance. The US does not follow the UK practice but there is extensive literature urging that shareholders there should be consulted on large transactions.

We acknowledge that the requirements of a Class 1 circular present issuers with a significant workload, but despite this consider it an important safeguard that should be retained.

Q26: Do you support our proposed extension to the Class 1 regime? How do you think securitisations should be treated under the new regime? Are there any other kinds of transactions that you consider should be caught or not caught by this new approach?

A26: We very much support your proposal to extend the Class 1 regime. It is only right that if shareholders' investments are to be significantly changed or diluted, the shareholders should be consulted. Your approach whereby you will create principles to capture securitisation transactions where the entire economic interest in the assets is being transferred to a third party is correct.

Q27: We welcome views on the quantitative criteria that should be applied to classifiable transactions.

A27: We do not see any strong reasons to alter the quantitative criteria of having various percentage tests to determine what Class of transaction applies, provided the UKLA continues to be able to exercise discretion on a case by case basis.

Q28: What are your views on our proposals to strengthen shareholders' rights where a company intends to cancel its listing?

A28: We note that you are proposing to require shareholder approval as a general rule before delisting can occur. We support your proposal since delisting is a move which fundamentally

alters a shareholder's position and as such should require their consent. However, we suggest that the approval be by special resolution (i.e. 75% of the votes cast at a duly convened general meeting), rather than by the vote of 75% of the shareholders as suggested in paragraph 9.24.

Q29: What issues would you like us to address in streamlining the Model Code?

A29: We affirm the issues raised during your roundtable meetings as summarised in section 9.44. The problem referred to in the fourth bullet point in paragraph 9.44 - having to notify an investment manager of the existence of a prohibited period could amount to disseminating PSI – could be avoided by prohibiting directors (and other relevant employees) and their connected persons from allowing shares in the company to fall within an investment manager's discretionary authority. Thus, the initiative to deal in such shares could only come from the director/relevant employee/connected person – which they would avoid during a prohibited period.

Additional points:
We realise that in the light of there being a subsequent consultation on the implementation of the MAD you have not proposed any changes to the PSI regime nor on share buy-backs. Nonetheless we feel it appropriate to express the ACT's view that certain clarifications will be essential.

On timing of announcements of PSI we favour immediate announcements and therefore support the stronger wording ("without delay" as opposed to "as soon as possible") and would not want to see current practice weakened.

On selective disclosure we regard it as essential to bring the Listing Rules in line with common practice and to allow the disclosure of PSI to parties bound by a confidentiality agreement. In relation to credit rating agencies we view this as an extremely important point for our members, and for the efficient functioning of debt markets.

Indeed the need to be able to make such disclosures will apply to any parties involved in facilitating a transaction as advisors in the wider sense. Additionally it should be possible for the company to be able to discuss major plans with very large shareholders in advance, so long as the latter are formally made insiders and prevented from dealing until the information becomes public.

On share buybacks we note your view that new rules are required. When these are being considered we very much hope that the provision of safe harbours in the case of debt buy-backs will be incorporated

Q30: What are your views on giving the Company Secretary the role of giving clearance/approval to deal?

It is important that whoever carries out this role needs to be aware of material potential developments and this should be the key criterion. The Company Secretary is well placed to fulfill this requirement and therefore we would support a change to give the Company Secretary this authority. Even so there should be an obligation on the Company Secretary to make appropriate enquires to ensure they are fully informed in each specific case. Indeed this may already be the working practice in many companies.

Q31: Do you agree with our proposal enabling issuers to publish additional information provided that the source of such information is fully disclosed and it is made clear

whether or not such information is unaudited and that there is subsequent comparability?

A31: We agree that this proposal is a step in the right direction and should discourage issuers from holding back information which may be of interest to investors

Q32: Do you agree that the introduction of the two overriding concepts will adequately replace paragraph 2.20? If not, what do you think the current requirements add and what alternative might be introduced?

A32: We agree that it would be helpful to replace para 2.20 concerning the disclosure of financial information not taken from the published accounts with the general concepts of disclosing the source, that it is unaudited (if this is the case) and that it will be capable of comparison with subsequently published information.

Q33: Do you agree that companies should be allowed to disclose non-statutory figures alongside statutory ones, or do you think such disclosures should only be allowed if the disclosures are audited?

A33: We agree with your stance that issuers should be free, within reason, to disclose whatever financial information they believe is appropriate. Such information should be presented in a balanced fashion, and should be very clearly marked as unaudited. It would be a useful control over potential abuses if it were possible to construct a system whereby such information would be subject to a reasonableness test by the auditors. This should be a prima facie test only and should not require extensive review or testing, or expose the auditor to suits from a third party, so as to limit the time involved and the costs incurred

Q34: Do you think that the requirement to report on forecasts should be removed where the information is not disclosed in a prospectus?

A34: You are proposing abolishing the reporting requirement on Prospective Financial Information (PFI), including forecasts and estimates. We consider that this can only be acceptable if restraints are built in to avoid the PFI becoming no more than a wish list, and the necessity for PFI to be comparable to subsequent results goes some way towards this. As in A33 above we believe that it would be beneficial if it were possible to construct a system for the auditors to certify that the information was "reasonable", although they should be able to comment that certain specified matter is "speculative" if they did not think it should be excluded altogether
As in A33 above the auditors reasonableness test should be prima facie only.

Q35: Do you agree that the proposed approach will continue to allow appropriate information to be released to investors? Is the list of key attributes that financial information must possess adequate or are there other elements you believe should be included?

A35: At present the Listing rules require financial information to be presented in a specified format. We agree with your position that there is no overwhelming argument to support a particular form of presentation as long as the principles of reliability, relevance and consistency are satisfied. We agree with your list of key attributes required of such financial information, save that we would point out that in the obligation to ensure that the information "provides all information that is necessary to investors" the words all and necessary could be misinterpreted. It might be preferable to state that such information "is provided in a form and with sufficient content, so as not to be misleading to investors" or alternatively to pick up

the kind of standard applicable under FSMA, s.80 ("all such information as investors and their professional advisers would reasonably require, and reasonably expect to find there, for the purpose of making an informed assessment of the assets and liabilities, financial position … and profits and losses").

Q36: What are your views on removing the requirement for a significant change statement in Class 1 circulars, if quarterly reporting is introduced?

A36: It appears that were quarterly reporting to be introduced you feel that the need for a significant change statement to be included in Class 1 circulars is lessened. We do not agree with this point of view since certain types of significant change can arise very quickly and if significant should be disclosed. The fact that apparently most significant change statements either are negative or link into other statements in the document is not a good reason to dispense with the requirement for such a statement.

Q37: What do you think should be meant, in this context, by the word 'significant'?

A37: In the context of a Class 1 circular the term significant should be determined in the context of the decision being put to the shareholders. In any event, we think that no useful purpose is served by perpetuating the use of this term, in contrast to "material". Given that it has to be applied not just to the financial position but also the trading position, "significant" cannot have only a quantitative meaning. It must also be capable of having a qualitative meaning, like the term "material". The latter probably means "sufficiently important to be relevant for disclosure", and it seems to us that there is no policy reason why "significant", as used in paragraph 6.E.8 of the Listing Rules, should have a different meaning; thus, the word "material" would be preferable, to avoid confusion.

Q38: We would welcome your views on whether the Listing Rules should require issuers that do not have subsidiaries (solo companies) to prepare their accounts in accordance with IAS.

A38: The move towards IAS is overall a positive one and ensures a good degree of comparability between companies. The benefits of IAS should be available to investors irrespective of the structure of the issuer and whether or not it has subsidiaries. However, we hold no brief for investment trusts or for investors in investment trusts and are quite prepared to accept that there may be good reason for the listing regime to differentiate between investment trusts' accounts and the accounts of other types of solo company.

Q39: What are your views on the proposed options for the sponsor regime?

A39: We support option 1, to retain the current regime on sponsors on equity issues. We believe the existing requirements for a sponsor on new issues and major transactions distinguishes the London market and greatly improves standards and its reputation. An experienced sponsor can advise and assist an issuer on the market precedents on the listing and speed the whole process. The sponsor's advice can go further than just advising on the legal and technical requirements (which may be delegated by them to lawyers) and can give a real insight into the consequences in the market of disclosure now as compared to information reaching the market later on. This may go beyond the skill sets of the lawyers and accountants involved; and even if it does not, it will be seen as more "practical" in terms of its effect on the market if it comes from a sponsor than if from a lawyer or accountant.

In earlier answers A8 and A9we have mentioned specific areas where the sponsors can have a valuable role namely in relation to working capital forecasts and in assessing directors' suitability.

The role of the sponsor benefits the issuer with direct market advice and also benefits the investor through contributing to the overall orderliness of the market.

Q40: Would you welcome the choice for issuers of whether or not to use a sponsor? What difficulties do you foresee with this option?

A40: Given that the ACT sees the role of sponsor as essential we do not favour giving the issuer a choice.

Q41: What is your view on the possible consequences of us needing to spend more time on transactions and recovering our costs accordingly?

A41: We quite understand that without a sponsor the UKLA might need to spend more time on its documentation review and indeed this is one important reason why we support the continuation of the sponsor arrangements for equity. Even if more time was spent by the UKLA, this would not be on many of the important non-documentary matters, such as educating the company into the consequences of listing, taking a view on suitability of the company for listing and of the directors, discussing the projections and assumptions backing the working capital statement and any profit forecast, etc., nor on advising as to market consequences.

Q42: In relation to the eligibility criteria for sponsors:

- do you think that the requirement for four eligible employees is too stringent?
- what other experience do you think should be added to the list of significant transactions?
- what are your views on reducing the requirement for an eligible employee's experience to three significant transactions in thirty-six months on a rolling basis?

A42: We do not wish to comment on detail here but would point out a possible anomaly if the requirements for eligible employees are too stringent. Even if an eligible employee has been working in a closely related area for two years, when they come back they are not qualified any more. Some sort of quick route back is needed, rather than having to wait for three significant transactions to go by – which might be quite a period in some firms.

Q43: Do you agree with our proposals addressing conflicts of interest?

A43: There is a risk that conflicts can arise in having the sponsor's firm do other work for the issue. Nonetheless we accept that there will be cost savings and efficiencies from having the same advising firm engaged in two capacities, though usually through separate people. Therefore your proposals to deal with conflicts through independent review within the sponsor firm and via disclosures to you are an acceptable safeguard.

However we note that section 11.31 mentions how you propose to assess whether a sponsor has a significant economic interest in the issuer through owning its securities, and hence may create a conflict. The level is set at 50%. This appears exceedingly high. A limit nearer 5% would be better and would still indicate a significant interest.

We note that it is the FSA's policy to make all responses to formal consultations available for public inspection unless the respondent requests otherwise. These comments are on the record and may be freely quoted and made available for public inspection.

We hope these responses are helpful for your deliberations and if you need any further information or clarifications please contact any of the people listed below.

Yours sincerely,

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