

CLIENT UPDATE

FCA PUBLISHES POLICY STATEMENT ON CHANGES TO THE LISTING RULES

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In our recent [Client Update](#) we outlined the changes to the UK Listing Rules introduced by the FCA. The new Listing Rules came into force on 16 May 2014. On the same date, the FCA published its related policy statement *Response to CP13/15 – Enhancing the effectiveness of the Listing Regime* (PS 14/8), which sets out the FCA's feedback on comments received to its earlier consultation, as well as guidance on the interpretation of the new Listing Rules. The policy statement is available [here](#). The new rules in their entirety are set out in Appendix 1 to PS 14/8.

FCA'S CLARIFICATIONS

In its policy statement the FCA has commented, among other matters, on the following changes to the Listing Rules:

- *Agreements with Controlling Shareholders*. The second and third mandatory independence undertakings to be included in agreements with controlling shareholders¹ have been designed

¹ Listing Rule LR6.1.4DR(2) – neither the *controlling shareholder* nor any of its *associates* will take any action that would have the effect of preventing the *new applicant* or *listed company* from complying with its obligations under the *listing rules*.

Listing Rule LR6.1.4DR(3) – neither the controlling shareholder nor any of its associates will propose or procure the proposal of a shareholder resolution which is intended or appears to be intended to circumvent the proper application of the listing rules.

with the intention of strengthening the new cancellation of listing provisions. The aim of the FCA is to prevent a controlling shareholder from engaging in a transaction or a series of transactions which may be taken in compliance with the Listing Rules and applicable legal and regulatory requirements, but when taken together may lead to the cancellation of listing, or otherwise prevent the company from complying with its Listing Rule obligations. The FCA's assessment of whether a particular transaction or series of transactions would be in breach of these undertakings will depend on the totality of the controlling shareholder's interactions with the listed company. However, the FCA has stated that they would not view such provisions as preventing a controlling shareholder from engaging in activities such as accepting or making a takeover offer or voting in favour of a proposed scheme of arrangement to effect a takeover offer, giving an irrevocable undertaking to third parties in connection with a takeover offer, or purchasing shares in the market in connection with a takeover offer, even where that may lead to the cancellation of the listing.

- *Dual Voting on Cancellation of Listing.*² The FCA has reiterated its position that, in introducing the new delisting vote procedures, it remains strongly of the view that cancellation of a listing removes from shareholders significant rights of participation in the governance of a company and so it is essential that minority shareholders are given an appropriate say in the decision.
- *Dual Voting for the Election of Independent Directors.*³ The dual voting test for the election of Independent Directors by companies with a controlling shareholder introduced by the FCA does not require a premium listed company to hold two separate votes in respect of the election of each Independent Director (one vote of all shareholders and, separately, a vote of the independent shareholders), provided that the votes of independent shareholders can be identified by the premium listed company in the vote of all shareholders.
- *Free Float.*⁴ With respect to the exclusion of shares subject to a lockup of more than 180 days from counting towards the free float of a company's securities, the FCA has clarified that it is the term on entry into the lockup arrangement that is relevant and not the term remaining until expiry of the lock-up. The FCA did not clarify how it proposes to exercise its discretion under new Listing Rules LR9.2.15AG and

² Listing Rule LR5.2.5R(2).

³ Listing Rule LR9.2.2ER.

⁴ Listing Rules LR6.1.19R(4)(b) and LR14.2.2R(4)(b).

LR14.3.2AG⁵ to revoke a modification of the 25% free float requirement in respect of a company's shares.

- *Controlling Shareholder.*⁶ The FCA has clarified the definition "controlling shareholder", including by deleting the reference to "associate" from the definition. In addition, the term "control of voting rights" as used in the definition of "controlling shareholder" will include situations where the shares are held on a person's behalf by a nominee, or in the case of shares held by a company, de facto control (i.e., control of more than 50% of the company that holds the shares, as traced through a chain of controlled companies, if necessary). With regard to the term "acting in concert", although the FCA has reiterated that it would not be incorporating Takeover Panel guidance into the Listing Rules in order to maintain discretion, it has stated that "in practice, we think it is unlikely that the outcome of our deliberation on who is acting in concert would be different from the Takeover Panel's conclusion". This should offer reassurance to market participants who may seek to rely on guidance of the Takeover Panel on the interpretation of this term.

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Please do not hesitate to contact us with any questions.

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⁵ Listing Rules LR9.2.15AG and LR14.3.2AG – where the FCA has modified [LR 6.1.19R] [LR.14.2.2R] to accept a percentage lower than 25% on the basis that the market will operate properly with a lower percentage, but the FCA considers that in practice the market for shares is not operating properly, the FCA may revoke the modification in accordance with LR 1.2.1R(4).

⁶ Listing Rule LR6.1.2AR.