

## **ICAEW Corporate Finance Faculty: Guidance on financial position and prospects procedures Exposure Draft March 2012**

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The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees and in this case the response has been prepared by a working party of the CLLS Company Law Committee comprising senior and specialist corporate lawyers.

We welcome the opportunity to respond to the ICAEW "Guidance on financial position and prospects procedures" Exposure Draft. We respond to the questions on page 4 of the Exposure Draft as set out below; where we have no comments we have not provided a response.

### **Question 1**

We note paragraph 19 of Part 3 of the Exposure Draft. We agree that FPP assurance reports are linked to specific regulatory responsibilities but point out that they are also used by all banks on a transaction (not just the sponsor) as part of the due diligence process in order to ascertain, for example, that the company is suitable for a listing on the premium segment of the Official List. Certain accountants currently address their private assurance reports to those banks who are not acting as sponsor, who, for example, are acting as joint bookrunners or co-lead managers although they do not address the comfort letter to such banks. We see this as an acceptable compromise between the regulatory responsibilities that you refer to and the banks' due diligence requirements. As you note in paragraph 15 of Part 2, FPP commentary often forms part of a long form due diligence report which is addressed to all the banks on the transaction.

### **Question 2**

The elements of a directors' assertion in paragraph 52 ( which is also reflected in the paragraph on Board Responsibilities in Appendix 2 and the paragraph on Subject

matter in Appendix 4) include, in a case where the directors have described FPP procedures for which plans for implementation have been drawn up, a confirmation that the directors will “ensure” those plans are brought into operation and “subsequently operated in accordance with those plans”. We think this is too strict a formulation. The directors are not the persons who will have to implement the plans. Instead, they can ask for reports as to how the procedures are operating and deal with any issues that arise. The proposed wording should be amended to reflect this.

#### **Question 4**

Paragraphs 47-49 of Part 3 set out certain scenarios where a FPP opinion may be given by reporting accountants in "special situations" which are classified as (1) entity that is a new applicant by virtue of a reverse takeover (2) IPO involving a newly formed company with no track record (3) IPO of a demerged business. Another example that might be included is on a secondary issue by an already listed company where either the company is issuing new equity in connection with the acquisition or this is the first transaction that the sponsor and the company have done together. Neither case requires a FPP declaration by the sponsor under the FSA's Listing Rules but the sponsor often requires such comfort from the reporting accountants for due diligence reasons. In the first example, the concern is how the company's existing FPP will be affected after a large acquisition, particularly where the target may already have its own FPP procedures. The Exposure Draft does not currently envisage FPP comfort being given in situations where there is no regulatory requirement as such and it would be helpful to state that FPP comfort may be given by reporting accountants in such situations if requested by the sponsor.

#### **Question 7**

We recognise that the work carried out by the reporting accountant, of itself, will not be sufficient for the purposes of the declaration of the sponsor/confirmation of the nominated adviser/confirmation of the corporate adviser. However, the way in which this wording is formulated suggests that that work cannot form any part of the basis on which the declaration or confirmation is given – which we do not think is correct. We suggest the example wording is changed to read “ that we make no representation that the work carried out in accordance with this engagement letter is, of itself, sufficient for the purposes of “ etc.

#### **Question 8**

It is very helpful to set out the wording of the form of the opinions in order to avoid negotiating the form during a transaction. This sometimes happens now as there is no agreed form.

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