

FSA consultation paper on CP11/28 - UK implementation of Amending Directive 2010/73/EU

The City of London Law Society ("CLLS") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

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 FSA consultation paper on CP11/28 and set out our comments below. Where we do not have any comments, we have not responded.

Question 17

In relation to the draft statutory instrument, article 6(2)(c) states that a condition under which a supplementary prospectus allows withdrawal is that "a significant new factor etc. which caused the supplementary to be published arose before delivery of the securities". This is a new condition and is welcome as it imposes an extra, legitimate, hurdle before an investor can withdraw. However, the wording of the condition "before delivery of the securities" is not entirely clear as to whether it conforms to the current UKLA practice (outlined in the FSA's technical notes on the Prospectus Rules) that in the case of a rights issue the time limit for withdrawal is when the provisional allotment letter ("PAL") is paid up i.e. the share is unconditionally allotted and in the case of consideration on a takeover is when the consideration is unconditionally allotted i.e. after the bid has become unconditional and the allotment has been made. We query whether it is sufficiently clear that "delivery of the securities" will amount to the same thing as the above. In the case of a hard copy PAL, the investor holds that PAL and once payment is made it is an unconditional allotment. However, it is not entirely clear that this is the same as "delivery" which could be taken to mean that the shares were registered in the person's name, which takes place later.

In the case of CREST allotment, payment up does not prevent subsequent transfer of the fully paid rights and therefore again delivery of the securities would, arguably, not have taken place. We suggest that either this is amended or further guidance provided by the FSA. We would be happy to comment on any draft of this.

Question 18

In relation to the draft prospectus rules, Rule 1.2.2(5)(c)(i) requires that to avail oneself of the exemption for employee share schemes for example in the case of a US company which is trading on a US exchange "a document is made available containing adequate information, including the number and nature of the transferable securities". The word "adequate" does not appear in 1.2.2(5)(a) or (b) in relation to EU companies, although we note that "adequate" is the wording used in Amending Directive 2010/73/EU to amend Article 4 of the Prospectus Directive (2003/71/EC) (the "Prospectus Directive"). We request that the FSA asks ESMA to amend "ESMA update of CESR Recommendations" (ESMA/2011/81) page 44, which sets out what "information" is required for the existing exemption, to clarify that this guidance also covers the requirement for "adequate information".

Question 19

Currently DTR 1.1.1(4) states that DTR 3 applies to a non-EEA state issuer which is required to file with the FSA an annual information update in relation to shares in accordance with the Prospectus Directive. As Article 10 of the Prospectus Directive has been deleted by the Amending Directive, this provision will not make sense from 1 July 2012, however, we note that the draft handbook changes do not make any amendments to DTR 1.1.1(4). We suggest that the reference should be replaced by a reference to a non-EEA issuer with the United Kingdom as its home member state. Whilst the Amending Directive does not make any change to the MAD Implementing Directive (2003/24, Article 6) which contains the cross reference to Article 10 of the Prospectus Directive, this would be a sensible change to make as some may otherwise interpret the deletion of the annual information update to suggest that DTR 1.1.1(4) is no longer relevant and that DTR 3 does not apply to non-EEA issuers.

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