

## FCA PRIMARY MARKET BULLETIN 50 – KEY POINTS FOR SPONSOR FIRMS

On 11 July 2024, the FCA published its [Primary Market Bulletin 50](#) including (i) drafts of new technical notes relating to supervisory reviews of sponsor firms and the FCA's expectations of a sponsor in relation to specialist due diligence, as well as (ii) publishing an update to its existing technical note on sponsor record keeping.

### BACKGROUND

As part of the Primary Markets Effectiveness Review commenced in 2021, the FCA's starting point was to question whether the sponsor regime should be retained at all. Whilst feedback received in response to the FCA's consultation paper CP21/21 supported the retention of the regime broadly in its existing form, the FCA acknowledge that some feedback expressed concerns about aspects of the sponsor regime being inefficient and problematic for sponsor firms. In particular, in its consultation paper CP23/31 the FCA acknowledged sponsor feedback expressing concerns including:

- the lack of clarity in the sponsor's role in undertaking due diligence, particularly in specialist areas and when relying on a third party expert;
- a mismatch in expectations regarding record keeping obligations and market practice; and
- the extent to which the role of the sponsor is fully understood by companies seeking to list in London.

Whilst a range of views were expressed as part of the FCA's engagement with sponsors, there has been consensus that more practical guidance and feedback was desirable to empower sponsors to make judgements that result in their work being efficient and proportionate. In response to that feedback, Primary Market Bulletin 50 provides new and updated guidance in a number of areas relevant to sponsors.

### Specialist due diligence – new draft technical note TN 722.1

New draft FCA technical note TN 722.1 provides guidance on what the FCA regards as its reasonable expectations of sponsors when they are coordinating due diligence in specialist areas.

Sponsors are expected to apply their knowledge of the rules and their understanding of the issuer to ensure the FCA is presented with relevant

### Key issues

- Primary Market Bulletin 50 provides updated guidance for sponsors particularly around due diligence, record keeping and how the role of the sponsor is understood by companies seeking to list in London.
- The FCA provides guidance on sponsors' due diligence in specialist areas, emphasizing the need for sponsors to apply their knowledge and understanding of the issuer to present relevant information to the FCA.
- The FCA acknowledges the concerns about the burden of record-keeping requirements and provides updated guidance, including FAQs, to clarify expectations. Records should provide a detailed understanding of the work performed and the basis for confirmations and declarations provided to the FCA.
- A key change has been made to the sponsor's record-keeping obligations, lowering the standard of sufficiency of records. Now, a person with a basic understanding of the transaction (rather than none) should be able to review the records, which should ease the administrative burden on sponsors.
- The FCA plans to write to issuers at the start of an IPO to clarify the sponsor's responsibilities and the expectation that sponsors must be able to demonstrate due care and skill through their records.
- Amendments will be made to the sponsor declaration forms to clarify that the declaration is provided by the sponsor firm, not by an individual, addressing concerns about individual responsibility.

information at the appropriate time. The due diligence undertaken by a sponsor is expected to help provide a reasonable basis for the sponsor to provide its declaration and other information to the FCA. As matters that are important to investors when considering whether to make an investment have changed over time, so have the FCA's rules – for example, the recent addition of requirements relating to disclosure and transparency on various ESG matters. As such, sponsors are increasingly involving environmental and climate reporting specialists in connection with their due diligence.

The FCA expects sponsors to understand both the rules and the industry or specialist nature of the issuer to discharge its obligation to apply the rules expertly. A sponsor must therefore be able to oversee a due diligence process that is suitably focused to the specific risks and issues (based on an understanding of the issuer, its business and operations, including specialist technical information) in order to be confident in giving its declaration to the FCA, and that the prospectus or circular provides the information investors require to make an informed assessment of the investment or decision on which they are being asked to vote.

The FCA expects a sponsor to exercise due care and skill in forming reasonable opinions after making due and careful enquiry. This means a sponsor applying common sense judgement which the FCA view as being the judgement possessed by a reasonable professional with skill and experience in corporate finance, after assessing information carefully, with curiosity and a sceptical mind. The FCA provide a non-exhaustive list of examples of due and careful enquiry, including whether sufficient appropriate evidence has been obtained to support key technical statements in the prospectus, and whether independent sources are required rather than merely relying on management's confirmations – hence the importance of an appropriately scoped verification exercised undertaken by the issuer's counsel which is overseen, reviewed and challenged by or on behalf of the sponsor. In relation to a sponsor's work in connection with working capital, the FCA affirm what has long been market practice - that a sponsor should consider the basis and preparation of forecasts, historic forecasting accuracy, the assumptions underlying the issuer's base case financial model, the appropriateness and extent of sensitivities and of the downside scenarios considered.

The FCA appreciate that a sponsor cannot be an expert in all areas and hence it is important for the sponsor to draw on experience from across the broader firm, such as involving sector, country and industry specialists, where appropriate. Third party specialists may also be required in circumstances where deeper technical expertise or independent reporting is required. In addition to the customary reports prepared by reporting accountants, mineral experts, property valuers, specialist due diligence reports on the issuer and/or management (to the extent required depending on the circumstances) and the work undertaken by lawyers on verification, the FCA notes the increasing trend of involving environmental and climate reporting specialists.

As has long been the case, the FCA highlight that the sponsor cannot simply delegate its responsibilities to a third party expert and the FCA will have regard to whether the sponsor has appropriately used its own knowledge, judgement and expertise to review and challenge information provided by a third party expert. Examples include considering the capacity and capability of the expert, reviewing the scope of the expert's work, reviewing, commenting on and challenging drafts of reports, discussing the expert's report with the

issuer's board and ensuring that they are in agreement with its assumptions and conclusions (and this should be reflected both in board minutes approving the reports and in warranties in the relevant underwriting or sponsor's agreement) and considering if any bring down procedures are required if there is an extended period between the date of the report and the date the sponsor gives its declaration to the FCA. A record should be kept of at least the points set out above. However, a sponsor will need to exercise judgement so that it keeps material records that support important points of detail within their due diligence rather than keeping everything. For example, extensive records are not required when something is objectively evident – such as the capabilities of an internationally recognised reporting accountant to provide customary accountant's reports – nor is it necessary to provide evidence of challenge of expert reporting in circumstances where the sponsor is reasonably satisfied with the comfort that an expert's report provides.

## **Record keeping – updated existing technical note TN717.2**

The burden of complying with the FCA's record keeping requirements, and the uncertainty of what is required, have been long standing areas of concern for many sponsor firms. The FCA position is that to be able to supervise the sponsor regime appropriately, they must be able to perform sponsor reviews after the conclusion of transactions and to do so they need access to records that provide a relatively detailed understanding of the work performed and of the basis on which confirmations and declarations were provided to the FCA. Whilst sponsor firms have asked for better practical guidance, the FCA believe that this remains an area for sponsor judgement and that it is not possible to specify the precise records that will be reasonable in all cases. That being said, the FCA have updated their existing technical note TN717.2 on sponsor record keeping requirements to include a selection of FAQs from sponsors and explanations of issues they regularly have to confront. These Q&As include (the following are selected and summarised for ease of review):

- ***"Do we need to provide specifically prepared and/or curated records for a FCA sponsor service review?"***
  - No, records presented in the existing file structure and format will suffice. Some firms may find using a contemporaneous control schedule helpful but there is no requirement to do so. Best practice will include the following being included in the sponsor transaction file: contemporaneous file notes of material discussions, committee papers and minutes containing detail of the committee's considerations and the basis on which decisions were made, marked up versions of reports, accompanied by correspondence discussing material points, email exchanges between the deal team capturing material discussions underpinning the basis of a sponsor's approach.
- ***"Are there any common areas where sponsor records are incomplete or lacking sufficient detail?"***
  - Committee meetings.
  - The basis on which the issuer has established procedures to enable it to comply with the LR and DTRs on an ongoing basis.
- ***"We are satisfied that an expert's report provides the information we need to support our ability to provide assurance to the FCA? What***

***records do we need to make to support the work we have undertaken?"***

- Best practice includes written records describing the work of the deal team to review and challenge (where appropriate) expert reports or information underlying these.
- ***"What records are required to demonstrate the adequate supervision and oversight of sponsor staff?"***
  - Often contemporaneous records of the discussion of material points or decisions will evidence the involvement and oversight of senior staff. Committee escalation shows oversight and supervision of sponsor staff.
- ***"Do we need to retain all emails in respect of a sponsor service? Where we determine that emails are relevant, how can we reduce the quantity we need to keep?"***
  - A complete record of all emails is not required but given email inboxes are often preserved as part of the firm's IT and data management policies, it may be more efficient to provide the FCA with access to all retained emails.
- ***"What level of detail is required in file notes or minutes of meetings?"***
  - Best practices include short summaries of the work of the deal team, evidence of raising questions/concerns, summarising the basis on which decisions were reached, following up desk-side discussions with an email recording the decision reached and the thought process leading to it.
- ***"We are concerned we have not been able to obtain records from an issuer that our procedures would normally require. What should we do?"***
  - Remind the issuer of its obligation to cooperate with its sponsor and if concerns persist such that it cannot evidence the basis on which opinions on matters key to the transaction have been reached, a sponsor will need to consider whether it is appropriate to proceed with the transaction.

**Record keeping – change to the new UK Listing Rules made under PS24/6**

There has also been one key change in relation to a sponsor's record-keeping obligations as part of the FCA's new UK Listing Rules (made under PS24/6). Whereas under the previous regime the standard for sufficiency of sponsor records was that the records should allow a person with no specific knowledge of the actual sponsor service undertaken to understand and verify the basis upon which material judgements were made throughout the provision of the sponsor service, under the new rules this standard has been lowered such that reference is now made to a person with a basic understanding of the transaction reviewing the records being sufficient.

We believe this is helpful to sponsors as it ought to ease the administrative burden around record-keeping and limit the records required to be kept by a sponsor (e.g. a sponsor need not retain records relating to matters of public record).

## **Issuer understanding of the sponsor's role and obligations – new "Dear Issuer" letter from the FCA**

To ensure that issuers understand that the sponsor has important responsibilities to the FCA, the FCA propose writing to the board of an issuer at the outset of an IPO explaining the FCA's expectations as regards the issuer's interactions with their sponsor. This is expected to include a clarification that the sponsor is assisting the FCA in carrying out its functions and that sponsors are closely supervised. In addition, the FCA will make clear that a sponsor must be able to demonstrate, through its own records, that it has exercised due care and skill and provided opinions after due and careful enquiry.

It is hoped that this will make clear to issuers the distinction between the sponsor and other advisers on a transaction.

## **FCA supervisory reviews of sponsor services – new draft technical note TN723.1**

The FCA has produced a new draft technical note TN723.1 setting out its approach to supervisory reviews of sponsor firms, including how it will provide feedback to sponsors and what the FCA expects in response. The draft technical note explains why the FCA needs to undertake performance reviews of sponsor firms from time to time, the different circumstances which might give rise to a review (being either on a proactive or a reactive basis), how reviews will be conducted (including the expectation that copies of all material records will be asked to be provided), what the FCA are looking for in their review – which included whether the sponsor has undertaken certain steps (such as identifying and managing conflicts of interest, being open and cooperative with the FCA, applying due care and skill, keeping appropriate records etc), how the FCA will make its assessment of the sponsor's performance and what the FCA expect in response to feedback given following their review.

## **Sponsor declaration is from the sponsor firm (not the individual signing the form) – revised sponsor declaration forms**

In response to concerns raised about the individual responsibility felt by sponsor staff members when signing a sponsor declaration, the FCA is also making amendments to the sponsor declaration forms to make it clear that the declaration is provided by the sponsor firm and not by an individual.

## CONTACTS

### ECM



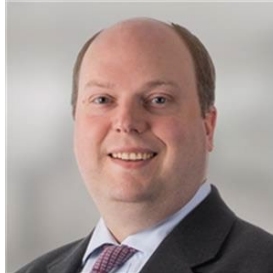
**Simon Thomas**  
London Head of Capital  
Markets

**T** + +44 207006 2926  
**E** simon.thomas  
@cliffordchance.com



**Adrian Cartwright**  
Senior Partner

**T** +44 207006 2774  
**E** adrian.cartwright  
@cliffordchance.com



**Christopher Roe**  
Partner

**T** +44 207006 4609  
**E** christopher.roe  
@cliffordchance.com



**James Koessler**  
Senior Associate

**T** +44 207006 1375  
**E** james.koessler  
@cliffordchance.com



**Anjaneya Das**  
Senior Associate

**T** +44 207006 1633  
**E** anjaneya.das  
@cliffordchance.com



**Radhika Sharma**  
Lawyer

**T** +44 7929184072  
**E** radhika.sharma  
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, 10 Upper Bank Street,  
London, E14 5JJ

© Clifford Chance 2024

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street,  
London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to [nomorecontact@cliffordchance.com](mailto:nomorecontact@cliffordchance.com) or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Houston • Istanbul • London • Luxembourg • Madrid • Milan • Munich • Newcastle • New York • Paris • Perth • Prague • Riyadh\* • Rome • São Paulo • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

\*AS&H Clifford Chance, a joint venture entered into by Clifford Chance LLP.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.