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Kirkland Alert

New UK Listing Rules: Implications for Financially Distressed Companies

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At a Glance

The UK Financial Conduct Authority published new Listing Rules and a Policy Statement last week, overhauling the existing regime. Effective from 29 July 2024, certain of the reforms are important for distressed listed companies and their stakeholders.

The new rules are the biggest changes to the UK listing regime in over three decades. The stated aim is to support a wider range of companies to list their shares on a UK exchange, increasing opportunities for investors, by moving to a more disclosure-based approach. In addition, the previous categories of 'premium' and 'standard' listings have been removed and replaced with a unified category of 'equity shares (commercial companies)' which is less onerous than the previous premium listing segment, but slightly more onerous than the previous standard listing segment.

The main changes relevant in a distressed context are as follows.

- **Removal of the need for advance shareholder approval of 'significant' or 'related party' transactions** — although 'significant transactions' must be disclosed, and companies must be transparent if the transaction was entered into to alleviate financial difficulty. Restructuring transactions are unlikely to be in the 'ordinary course of business' and therefore unlikely to be exempt from such disclosure requirements. This will remove a potential condition to restructuring-related transactions and remove the requirement to convene shareholder meetings to approve them (absent any other corporate law requirement for such meetings (for example, if required to amend the articles of association or to authorise allotment of further shares)).

- **Flexibility around enhanced voting rights**, via relaxation of restrictions on listing dual class share structures — this has broad implications. In a distressed context, it could for example facilitate listing a company following a debt-for-equity swap while enabling creditors (now shareholders) to retain enhanced voting rights as to the appointment of directors or reverse takeovers (for up to 10 years post-IPO and subject to transfer restrictions).
- **Simplification of requirements** where a listed commercial company produces a circular with a proposal for shareholders relating to a reconstruction or refinancing — thereby reducing friction at an often-critical juncture in the company's existence.

These updates are likely to make it somewhat easier to restructure listed companies in financial difficulty.

Overview of Reforms

No Shareholder Vote on 'Significant' or 'Related Party' Transactions: The new Listing Rules no longer require advance shareholder approval for 'significant transactions' or 'related party transactions', although shareholder approval will still be required for delisting or a reverse takeover. However:

- 'significant transactions' — i.e. 'Class 1' (≥25%) transactions (based on existing class tests (though the profits test has been removed)) will require notification to the market as soon as possible (1) after the terms of a significant transaction are agreed and (2) again after completion;
- where a listed company has entered a 'significant transaction' to alleviate financial difficulty[1] (including anticipated financial difficulty), the requisite market notification[2] should describe the "nature, urgency and severity of that financial difficulty". The notification may also contain information about financing arrangements connected to the transaction, and about what may happen if a proposed transaction does not complete.[3] Issuers will not be required to appoint a sponsor where they are undertaking a 'significant transaction' owing to financial difficulty (though this does not prevent them from choosing to seek advice);
- for 'related party transactions', a sponsor fair and reasonable opinion and board approval will be required for any related party transaction which is ≥5% based on class tests; and
- for a transaction that is classified as a 'Class 1' significant transaction (such as a large disposal to raise finance), the new Listing Rules require additional, bespoke content for the requisite notification but do not require a working capital statement or, for acquisitions, financial information or fairness statements. Nonetheless, the

company should still consider its obligations to disclose market sensitive information at the relevant time under the Market Abuse Regulation (**MAR**). (As with all companies who are subject to MAR, issuers undertaking a significant transaction must always consider their MAR obligations and obtain appropriate advice where necessary).

The requirement to announce 'Class 2' (≥5% to <25%) transactions is abolished, although disclosure may nonetheless be required under MAR.

The FCA recognises that removing shareholders' ability to veto significant transactions takes away an "attractive stewardship mechanism" and the "safety net" of the existing veto right. However, the change gives boards of listed companies greater freedom to make decisions they consider are in the best interests of the company's stakeholders. In a distressed context: where insolvency is imminent or insolvent liquidation or administration is probable, directors will continue to owe a duty to consider creditors' interests and balance them against shareholders' interests where they may conflict[4], but these reforms may enable distressed listed companies to act more quickly than previously as they will not have to convene a meeting to obtain shareholder approval (absent any other corporate law requirement for such meetings (for example, if required to amend the articles of association or to authorise allotment of further shares)).

Restructuring Transactions Are Not 'Ordinary Course of Business': New guidance clarifies that transactions entered into to alleviate financial difficulty are unlikely to be in the 'ordinary course of business' and therefore unlikely to be exempt from constituting a 'significant' or 'related party' transaction.[5] Given that such transactions no longer require shareholder consent, the practical importance of this point is limited to the question of whether the transaction needs to be disclosed.

Flexibility Around Dual Class Share Structures (DCSS): Companies with an existing DCSS (which provides enhanced voting rights for certain shares) will be capable of admission to listing, bringing the UK regime closer to that of the U.S., provided there is clear disclosure of such rights in the listing prospectus.[6]

Holders of such 'specified weighted voting rights shares' will be able to influence reverse takeovers and vote to elect and re-elect independent directors; they may also hold different rights as to dividends or entitlement to any surplus capital on winding up but will be restricted from voting on certain matters, including dilutive transactions and delisting. Specified weighted voting rights shares can be issued to institutional investors prior to listing[7], subject to transfer restrictions and a 'sunset provision' of 10

years, after which the enhanced voting rights must expire. Such shares will not be able to be issued following listing.

Simplification of Requirements for Circulars Relating to Reconstruction or Refinancing: Where a listed commercial company produces a circular containing proposals to be put to shareholders in general meeting relating to a reconstruction or refinancing (where required under company law), the following will no longer be required:

- a working capital statement;[8]
- the mandate of a sponsor[9] (although this does not prevent issuers from choosing to seek advice); nor
- FCA vetting of the draft circular.[10]

The stated rationale is that "these requirements add friction at an often-critical juncture in the company's existence".[11] Shareholders retain protection from (1) the continuing requirement for circulars to comply with the general requirements for circulars[12] and (2) the fact that restructuring and refinancing transactions remain subject to applicable law and directors' duties.

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1. The FCA had originally proposed enhanced disclosure obligations for companies notifying the market about having entered into a notifiable significant transaction to alleviate 'severe financial difficulty'. However, this proposal has been dropped owing to the market response to the consultation (see paras. 5.63-5.75 of the Policy Statement). Instead, the FCA has introduced guidance setting out its expectations on this point and the types of information issuers should consider disclosing.↩

2. Under new UKLR 7.3.1R.↩

3. New UKLR 7.3.5G(3).↩

4. According to the UK Supreme Court in *Sequana* (2022) (see our *Alert*).↩

5. New UKLR 7.1.10G(4) (in relation to significant transactions) and 8.1.17G(4) (in relation to related party transactions).↩

6. New UKLR 5.4.↩

7. As well as to directors, employees and individual shareholders, subject to transfer restrictions (but no sunset provision).↩

8. As in existing LR 9.5.12R. ↩

9. As in existing LR 8.2.1R(3). The role of a sponsor is principally to provide guidance to the issuer in meeting its responsibilities and provide the FCA with confirmations relating to compliance with the listing rules by issuers; see new UKLR 24. ↩

10. As in existing LR 13.2.1R(4). ↩

11. Para. 5.80 of the Policy Statement. ↩

12. Set out in new UKLR 10. ↩

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Suggested Reading

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- 12 June 2024 Kirkland Alert English Court Imposes >£18 Million Personal Liability on Former Directors of BHS for Breach of Directors' Duties and Wrongful Trading
- 05 June 2024 Kirkland Alert Judge Rules SPAC Trust Account Sacred for Public Shareholders and Not Property of the Estate