

New FCA measures to assist listed companies to raise funding during the coronavirus crisis

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The FCA has today published additional [primary market measures](#) to help listed companies. The focus of the measures balances the need to help companies raise funding, whilst at the same time maintaining investor protection.

The measures include:

- Clarifying the FCA's expectations about the due diligence supporting working capital statements in share and GDR prospectuses and Listing Rules circulars in light of the uncertainties in the current environment.
- Practical solutions to help deliver shareholder approvals for certain transactions under the Listing Rules where physical general meetings fall foul of government guidelines on social distancing.
- Encouraging listed companies who are taking advantage of the [PEG's recent statement](#) encouraging investor flexibility around non pre-emptive offers of up to 20% of the share capital to help deliver "soft pre-emption rights" by exercising their right to be consulted on, and to direct, book runners' allocation policies – the idea is to try to achieve an allocation which reflects existing proportionate holdings of investors in the listed company.
- Encouraging eligible companies to make use of the new simplified prospectus regime introduced under the Prospectus Regulation last year.
- Reiterating, once again, that listed companies continue to have to comply with the Market Abuse Regulation to disclose inside information as soon as possible.

Their measures around the working capital statement, shareholder approvals, and the simplified prospectus regime are discussed in more detail below.

Working capital statements

This is perhaps the most significant measure offered by the FCA. The working capital statement in a prospectus or Listing Rule circular (including for Class 1 transactions) tells investors whether or not the listed company has sufficient working capital for its present requirements, that is for at

least 12 months from the date of the prospectus or the circular. It provides a forward-looking assessment around the company's financial headroom to cover the reasonable worst-case scenario. In the UK market, working capital statements are supported by extensive due diligence including detailed financial modelling to help the company's directors and its reporting accountants give the requisite comfort as part of the due diligence, including (where required) to the company's sponsor. The approach to working capital statements in prospectuses has been binary – either the company has sufficient working capital (leading to a clean working capital statement) or it does not (leading to a qualified working capital statement). If it is qualified, further disclosure is required as to what the proposed action plan is to remedy the current shortfall in working capital.

Regulators in Europe have historically not permitted companies to craft the working capital disclosure contained in prospectuses to provide the underlying assumptions because that would place "the onus on investors to reach their own conclusion regarding adequacy of working capital". However, the FCA is adopting greater flexibility in the current environment, noting that the uncertainty created by the coronavirus pandemic and its resulting economic impact makes the financial modelling underpinning the working capital statement "uniquely challenging". Clean working capital statements with coronavirus related assumptions: the FCA will permit disclosure of clear, concise, and comprehensible assumptions related to business disruption during the coronavirus crisis which underpin the "reasonable worst-case scenario" for a clean working capital statement. The rationale is that it should only be coronavirus related assumptions that are subject to so much uncertainty that investors can judge them for themselves. There is no change in position as regards qualified working capital statements. Note that the new approach applies to share and GDR prospectuses published during the coronavirus crisis, together with shareholder circulars requiring a working capital statement published during the crisis by premium listed companies. The FCA has published [this technical supplement](#) with further guidance and Q&As on its new approach.

The FCA's flexibility is a very important move for companies in the current climate. There may well be some practical challenges in applying this flexibility in practice, however. One of these challenges will be in attempting to forensically separate coronavirus related impacts and non-coronavirus related impacts. In addition, the FCA has included a "reminder" that working capital statements relying on existing bank facilities and proceeds of the offering can only be clean to the extent that the proceeds are fully underwritten or the bank facilities are contractually committed for the period covered by the working capital statement. Its reminder comes with a red flag that underwriting agreements and bank facility agreements typically contain force majeure and material adverse change clauses and that issuers and their advisers should consider whether these clauses can be triggered by events linked to the coronavirus crisis and any risks arising from this impacting the working capital statement.

General meeting requirements under the Listing Rules

Under the Listing Rules, shareholder approval is required for class 1 transactions and related party transactions of significance. Essentially, the FCA has moved to alleviate the practical issues involving general meetings. Accordingly, companies can apply to the FCA for a dispensation from the requirement to hold a general meeting and instead obtain sufficient number of written undertakings from shareholders that they approve the proposed transaction and would vote in favour of a resolution if a general meeting were to be held. While welcome, this concession may be of limited utility. First, it will only apply to votes required by the Listing Rules and not to votes required by companies law (for instance, in respect of the election of directors or the authorisation of share issuances or buy-backs). Second, the FCA's concession will require a

company to obtain the approval of shareholders holding a majority of shares eligible to vote on the relevant resolution whereas if a general meeting were to be held (with voting by proxy), only the consent of the majority of the shareholders eligible and **actually voting** on the relevant resolution would be required. For further guidance and Q&As, click here to read the [FCA's technical supplement](#) which outlines the modification of the general meetings requirements.

Short form prospectuses

The FCA, understandably in this environment, encourages issuers and their advisers to use the new simplified prospectus introduced under the Prospectus Regulation last year. The regime is available to issuers admitted to trading on a regulated market or SME Growth Market for at least 18 months. The rationale behind this regime is that investors are already familiar with the company and tend to be focused on changes that have occurred since the publication of the company's last annual report and the reason for the follow-on offering of shares. The short form prospectus does not require an operating and financial review, capital resources disclosure or disclosure on remuneration and benefits and the like, on the basis that these will already have been disclosed. Importantly, the FCA notes that it may not be an option where the offer has non-EU component in a jurisdiction with its own disclosure requirements, for example if the offer has a U.S. element. This is a very important point and one that has been a significant hurdle for issuers eligible to use the short form prospectus. Any offer of securities into the United States comes with significant liability concerns which are mitigated in accordance with fairly well accepted customs. Moreover, liability concerns are not exclusive to offerings in the United States. Unless legislators in key global jurisdictions can come up with protection against liability, in particular for advisers helping issuers come to market in this environment, there may well not be a significant take-up of the short form prospectus, particularly where this environment might justify more, rather than less, disclosure about operating results, capital resources, and cash flows.

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