Anne Masacorale
Primary Market Policy
Financial Conduct Authority
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By email to: cp13-15@fca.org.uk

5 February 2014

Dear Anne,

NAPF RESPONSE TO CP13/15 – ENHANCING THE EFFECTIVENESS OF THE LISTING REGIME

The NAPF is the leading voice of workplace pensions in the UK. We speak for 1,300 pension schemes with some 16 million members and assets of around £900 billion. NAPF members also include over 400 businesses providing essential services to the pensions sector.

The NAPF welcomes the opportunity to respond to the FCA's further consultation 'Enhancing the effectiveness of the listing regime'. We believe the proposals to protect the interests of minority shareholders are important and well considered, providing protection to independent shareholders without unduly burdening issuers.

The revised package of measures is well focused and has the potential to provide significantly greater protection for independent shareholders in those circumstances where a controlling shareholder is present. We particularly welcome the proposed introduction of a dual voting hurdle in those circumstances where a premium listed company wishes to cancel or transfer its listing. Furthermore, the additional disclosure requirements in relation to independent directors is positive; we believe it is important that shareholders are able to make a full assessment of the quality and independence of those nominated to act on their behalf. We urge the FCA to keep the matter of the balance of the board in those circumstances where there is a controlling shareholder under review.

Our members continue to believe that a 25% free float should be seen as a minimum requirement. Whilst we welcome the tightening of the definition of those shares which count towards the free float, we do not believe that an imposition of a 25% floor represents too onerous a burden on issuers and nor is it so high as to be a disincentive to new entrants considering listing on the London market.

A reputation for high standards of governance, transparency and protection of minority shareholder rights is, in our view, vital to maintaining the reputation, integrity and thus attractiveness of the UK market for both investors and issuers. Is it with this in mind that we welcome more use being made of the Standard segment ensuring there is a natural and appealing home for less mature fast-growing companies wishing to list in London whilst protecting the reputation and integrity of the market.

Yours sincerely

Will Pomroy
Policy lead: corporate governance and stewardship
NAPF

CONSULTATION QUESTIONS

Independent business

Definition of a controlling shareholder

1. Do you agree with our proposed definition of a 'controlling shareholder' as described above?

Yes, the proposed definition of a controlling shareholder is well focused. Mirroring the definition of a 'substantial shareholder' which is already understood in the context of related party transactions (RPTs) appears a sensible approach.

We agree that maintaining the original 30% (of control of votes) threshold is appropriate. We also support the inclusion of "associates" within the assessment of whether a controlling shareholder exists and the inclusion of the concept of acting in concert; this is sensible in order to prevent flagrant avoidance. If the objective is to identify the control of votes, then it is right that this assessment considers 'control' in aggregate where the control is dispersed amongst corporate structures.

The acting in concert concept is well understood already and we note and welcome the confirmation that the FCA would not regard institutional shareholders coming together to consider a specific resolution to be acting in concert.

Definition of an associate

2. Do you agree with our proposal to amend the definition of an 'associate' as described above?

Yes, it is right to seek to identify controlling shareholders via both direct and indirect control of votes.

We therefore strongly support the proposals which identify "associates" in circumstances where:

- An individual or company is a controlling shareholder of a company which is itself a controlling shareholder of a company – this indirect route to control would be a clear concern.

- An individual or company is able to appoint or remove directors at either a controlling shareholder or identified associate of a controlling shareholder

Enhanced oversight measures in LR 11

3. Do you agree with our proposals relating to the circumstances for imposition of the enhanced oversight measures (LR 11.1.1AR) and the consequences of their imposition (LR 11.1.1CR), as discussed above?

Yes we warmly welcome the proposals to strengthen significantly independent shareholders' oversight of related party transactions in the circumstances set out.

It is right that the proposed sanctions for non-compliance (by the controlling shareholder or company) with the agreement safeguarding the company's independence are severe but also do not result in further penalising the minority shareholders as would be the case through a forced de-listing. We believe that the proposed measures provide a clear incentive to the controlling shareholder both to agree to the agreement and subsequently to comply with its provisions.

Ordinary course transactions

4. Do you agree with the proposed guidance in LR 11.1.1DG?

Yes, exclusion, upon FCA approval, of ordinary course transactions from the new oversight requirements is sensible.

It is not in the interest of independent shareholders to impede the ability of the business to function but it is important to ensure that the enhanced oversight measures are truly a disincentive to the controlling shareholder not to abuse their position of power. For that reason, the proposed onerous requirement that these routine transactions would need to receive pre-clearance from the UKLA is positive.

Waiving the application of the enhanced oversight measures

5. Do you agree with the guidance proposed in LR 11.1.1BG?

We would welcome additional clarity as to the circumstances in which the FCA would consider waiving the enhanced oversight measures.

Duration of enhanced oversight measures

6. Do you agree that the enhanced oversight by minority shareholders should continue to apply until a clean statement has been made in an annual report and the report does not contain a statement that an independent director disagrees with the board assessment (LR 11.1.1ER)?

Yes the enhanced oversight measures should remain in place until such a time as the whole board can attest that the agreement is now being complied with in practice.

Given the significant disincentive to breach the agreement, shareholders would have serious concerns if the enhanced oversight measures were triggered. In such a situation, it is right that proper reassurance is able to be offered to minority shareholders that the issues which triggered the enhanced oversight measures have been resolved and that the errant behaviour has ceased.

Transitional provisions

7. Do you agree with our proposals for transitional provisions for existing premium listed companies with controlling shareholders, as well as for premium listed companies that in due course 'acquire' a controlling shareholder (proposed LR TR 11, section 1 and LR 9.2.2BR(1))?

As outlined by the FCA, we do not believe that the proposals represent the introduction of any significant burden towards either party in those circumstances where a company has a controlling shareholder. For that reason, as suggested, our members would be concerned if there was either a refusal to comply with the new requirement or it took longer than six months to either put an agreement in place, or amend an existing agreement to cover the independent provisions.

Annual report disclosure

8. Do you agree with our proposals to impose an obligation to make a statement as reflected in draft LR 9.8.4R(14) and the associated notification obligation in draft LR 9.2.25R?

Yes we strongly agree that the board should be required to attest within its annual report and accounts that the agreement with the controlling shareholder has been complied with, or if it hasn't been (or an NED disagrees with the attestation that it has been) that the FCA has been notified.

9. Do you agree with our proposals in draft LR 9.8.4AR requiring a statement to be included in an annual report where an independent director has declined to support the relevant statements of compliance made by the board and the associated notification obligation in draft LR 9.2.26R?

Yes, it is important to further empower the independent directors of boards where a controlling shareholder is present. For that reason we believe that it is very important that where an independent director declines to support a statement that the agreement has been complied with, that this fact is clearly and prominently within the report and accounts.

This is especially important once the enhanced oversight measures have been triggered as the whole board would need to attest that the previous non-compliance has now been resolved and errant behaviour ended.

Independent directors

Circulars in relation to election of independent directors

10. Do you agree with our proposal to require disclosure to be included in circulars relating to election of independent directors?

In the previous consultation the NAPF had favoured the proposal to hardwire the Corporate Governance Code requirement to have a majority of independent directions on a company's board. We favoured this approach because in those circumstances where a controlling shareholder is present, it is even more important to ensure that there is a robust and independent board, this is more likely to be the case if there is a majority of independent directors on the board. We would encourage the FCA to keep this issue under close examination and revisit the proposal in the near future when an assessment can be made as to whether the other proposals have successfully achieved the desired objective.

We very much agree that the quality of directors is important, but in circumstances such as those captured in these proposals the quantity of independent directors also matters. Shareholders appoint and re-elect directors annually (in most cases); given these directors are appointed to the board to act on behalf of the shareholders in running the day to day affairs of the business, it is important the shareholders are able to receive pertinent information about them in a timely manner.

11. Do you agree that our proposals in this area should be limited to commercial companies with a controlling shareholder or should they be applied to all premium listed commercial companies or all premium listed companies (regardless of whether there is a controlling shareholder or not)?

We believe there is merit in assessing whether sufficient information is currently disclosed about directors seeking appointment to the boards of premium listed commercial companies, regardless of whether there is a controlling shareholder.

The principle of shareholders being able to fully consider the balance, independence and effectiveness of the board of directors being appointed to act on their behalf is relevant to all commercial companies.

The issue of the director's independence is clearly of particular importance where a controlling shareholder is present; it is certainly in these cases where it is most important to ensure that shareholders receive these disclosures in a clear and timely fashion.

Individual disclosure requirements

12. Do you agree with our proposal to include specific disclosure requirements as described above (LR 13.8.17R(i) and (ii))? Are there other requirements we should consider? Transitional provisions (election of independent directors)

Yes we broadly agree, however, we would also encourage the FCA to be consider being more prescriptive.

Given the recognition of the importance of board effectiveness and the widespread acceptance of annual re-election, the NAPF encourages companies to state more fully the rationale for a directors' election or re-election to the board. Such a statement should present investors a clearer picture of the relevant skills and experience that a Director is bringing to the Board. It should also include other current appointments which might affect his/her ability to make a full contribution to the work of the board (e.g. an executive role or a potential conflict of interest). In this way shareholders can make a better informed voting decision.

Given that individuals who are controlling shareholders – whether directly or as associates, are likely to be substantially influential on boards - perhaps to the extent of being de facto shadow directors – we would welcome the application of significant disclosure requirements to such individuals also.

13. Do you agree with our proposal for transitional provisions as set in draft sections 2 and 3 of LR TR11 and LR 9.2.2BR(2)?

Yes, the proposal to delay applying the new requirement until the next general meeting for which notice has not already been given appears pragmatic and sensible.

Shares in public hands

Specific criteria for modification of the free float requirement

14. Do you support our proposal to delete LR 6.1.20G and replace it with LR 6.1.20AG as described above?

We accept that that the debate around the appropriate level of the free float largely results from concerns surrounding shareholder protection and which to a large extent are being addressed by these proposals. Our members continue to believe however, that 25% should be considered the bare minimum expectation to enable protection for independent shareholders invested in Premium listed companies – this corresponds with for example a Special Resolution which requires a 75% majority. We were particularly concerned at the proposed guidance in the previous consultation would have effectively guidance would set an effective new floor of 20% - this would be have been unwelcome.

That said, the new LR 6.1.20AG does offer more clarity and the recognition that the number *and nature* of the public shareholders is a welcome addition. We encourage the FCA to take a robust approach to their assessments and avoid setting any precedent which effectively lowers the free float floor.

Application of certain provisions to the standard segment

15. Do you agree that the provisions that are being introduced for the premium segment as discussed above should also be introduced for shares listed on the standard segment (LR 14) and GDRs (LR 18), including consequential amendments to 'group' definition?

We agree that the rationale for including these provisions, such as the excluding of shares locked-up for more than 180 days, for the calculation of the free float in the Premium segment is equally applicable to the standard segment and does not contradict the approach of having the standard segment 'directive minimum'.

Continuing obligations

Transitional provisions for voting on matters relevant to premium listing

16. Do you agree with our proposal to allow existing premium listed companies 2 years to bring themselves into compliance with LR 9.2.22R? Transitional provisions relating to annual report disclosure

We agree the rejection of grandfathering given the importance of ensuring a consistently high level of governance amongst those companies listed on the premium segment.

We also agree that two years is sufficient time for those companies to make arrangements to comply with the rules that are applicable to the premium segment or to apply to transfer to the standard segment.

17. Do you agree with the transitional provisions as described above? Miscellaneous amendments to LR 9.8.4R

A transitional period whereby this requirement comes into effect for companies with accounting periods that end at least three months after this rule has been implemented appears reasonable.

18. Do you agree with our proposal as explained above?

Yes.

Smaller related party transactions

19. Do you agree with our proposals for the treatment of smaller related party transactions as discussed above?

We believe that there is room for enhancing the detail and timeliness of disclosures of smaller related party transactions in order to assist investors' ability to monitor these important disclosures and identify any concerning trends.

We welcome the proposal to require transactions that fall within the smaller RPT range to be announced via an RIS at the time they take place.

We accept that this new proposal is more helpful to shareholders in equipping with them with more timely information rather than having to wait until the premium listed company's next published annual report and accounts. That said, where these smaller RPTs aggregate to a significant level then they should still be reported in the annual report.

The Listing Principles

Consequential changes to LR 7 and DEPP 6

20. Do you agree that the consequential changes described above are appropriate?

No comment.

Cancellation of listing

21. Do you agree with Option 1 or Option 2?

We strongly support option 1. The proposal to move to a requirement that a majority of the votes attaching to shares of those independent shareholders voting must also sanction the cancellation (in addition to achieving a majority of in excess of 75%) where a controlling shareholder is present offers an important and very welcome protection for independent shareholders.

The double hurdle does not in our view present an undue administrative burden to the company and nor does it present excessive power to a small minority of holders.

We also agree with the proposed circumstances where this double voting hurdle would apply. Importantly, it is right that this should apply for transfers out of the premium segment in order to prevent circumventing of the new regulations. Equally importantly, we agree that it would be inappropriate to introduce this requirement for companies facing the threat of formal insolvency proceedings as this would present an unnecessary and potentially costly delay in these circumstances.

22. Have we set the 80% threshold in draft LR 5.2.11DR at the appropriate level?

We agree that in the circumstances described a level should be set at which the resultant free float ceases to be acceptable and cancellation should proceed.

The proposal that where an offeror has acquired or has agreed to acquire more than 80% of the listed class of shares that no further approval/acceptances by independent shareholders should be required to cancel the premium listing appears to be a sensible starting point. Determining the appropriate level in this circumstance is clearly not an exact science and as such we would ask that the FCA keep this under close scrutiny.