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Adetutu Odutola
Markets Policy
Financial Services Authority
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14 April 2008

Dear Ms Odutola,

FSA Consultation Paper – DP 08/01: Review of Structure of the Listing Regime

We are writing to you on behalf of the London Investment Banking Association (LIBA) and the Securities Industry and Financial Markets Association (SIFMA). As you know, LIBA is the principal trade association for investment banks with operations in London. Its objective is to ensure that London continues to be an attractive location for the conduct of international investment banking business. A list of our members is attached (and is also available on our website: www.liba.org.uk).

SIFMA brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

General Observations

In general, our members consider that the current structure of the Listing Regime strikes an appropriate and successful balance between investor protection and competitiveness. The broad range of options available to market participants has played a large part in establishing London as the premier international financial centre. We believe that the model should be maintained and substantive changes pursued only to the extent that they build on the success of the existing structure or remedy a market failure. Proposals which appear sound but neither address a material market failure nor enhance market competitiveness should be considered sceptically. Proposals that might actually undermine the market's competitive posture, particularly those that do nothing to materially enhance investor protection, should be considered even more sceptically.

In our view, and as summarised below, several proposals contained in the Consultation Paper fall into these categories. In particular, we believe that the proposals to open Secondary Listing to UK companies and to require non-UK companies to adhere to the same corporate governance standards as UK companies appear conceptually logical, but would undermine the efficiency and competitiveness of the UK financial markets. On the one hand, opening Secondary Listing to UK companies poses little risk to the competitiveness of the UK financial markets (and may actually enhance it if UK companies that might otherwise list abroad remain in London), but could interfere with established expectations in an undesirable way. On the other hand, requiring non-UK companies to meet UK governance standards poses clear competition risks to the UK market. In neither case is there a market failure to be addressed or demonstrable demand to be met. Accordingly, we believe changes along these lines should be deferred.

The proposal in respect of Listing categories suffers from similar flaws. Clear and more informative labelling of the Listing segments seems to address a perceived market failure (confusion around listing quality). Our members have reservations about whether such confusion exists or whether substitution of new terms for those in common usage would be an effective remedy. Assuming, however, the existence of a market failure and that relabelling is the appropriate solution, our members are eager to see the programme designed and executed optimally. If the relabelling is poorly designed, it may pose competitive risks by blunting demand for a UK Listing. The exercise should also be carefully crafted to minimise the impact on currently Listed issuers. Real or perceived diminution of the quality of a Listing in the eyes of investors should be avoided. Option 1 seems to our members to invite the worst of both worlds: it diminishes the competitiveness of all current Listing categories (except Primary Listing) and results in unfairness to issuers with Secondary and GDR Listings. Hence, our members prefer Option 2 and would support relabelling to the extent necessary to cure confusion around Listing segments.

Summary of Responses

Our answers to the specific questions put in the Consultation Paper are attached. We can summarise our main points as follows:

1. Our members strongly favour maintaining the super-equivalent requirements for what is now termed a Primary Listing, which should continue to be set by the FSA, as the independent regulator.
2. As discussed above, our members support clear labelling of all types of listing offered in the UK. Because we believe that the new terms should be as clear and descriptive as possible, we have suggested ‘Premium’ and ‘Standard’ be used instead of ‘Tier 1’ and ‘Tier 2’. We further suggest that a standard explanatory text that explains the differences among the UK Listing categories might be desirable for inclusion in offering documents.
3. Our members do not dispute the general principle that UK companies should be on a level playing field with non-UK companies in being able to choose a Secondary Listing. However, they are concerned that there is a developed acceptance by UK companies and a present expectation by investors that UK companies will seek a Primary Listing. In the absence of a strong demand by UK companies or by UK investors for a change, we consider that the conceptual appeal of a level playing field would not justify its likely practical effect.
4. Similarly, our members do not, in principle, challenge the theory that the same corporate governance requirements should apply to UK and non-UK issuers. They do, however, question whether this is possible or desirable. Our members are concerned that most non-UK companies currently holding a Primary Listing would consider an *ex post* rule change prejudicial and unfair. They also believe that non-UK companies considering a Primary Listing would view such a requirement as an extra-territorial extension of UK law to their non-UK activities. In both of these cases, the ability of non-UK companies to adhere to UK law may be questionable, and in any event, should be a voluntary process.
5. Our members are strongly opposed to an imposition of the sponsor regime in a GDR listing. Adding a sponsor requirement would yield little more than higher costs and unnecessary complexity. Purchasers of GDRs are sophisticated investors who have the benefit of full disclosure. Given the availability of listing in another EU member state, the competitiveness of the UK securities market would suffer if this requirement were to be imposed.
6. Our members accept that a Primary Listing ought to be available to an issuer which will only trade on an MTF. However, we would recommend that a watching brief be maintained by the FSA as the MTF sector develops to see whether any demand for this type of listing develops. In the absence of any imminent demand, it seems advisable at this time to refrain from changes that may complicate or confuse perceptions of the Listing Regime’s structure.

Endorsement of Other Submissions

We take this opportunity to endorse the response of the BBA and ICMA with which we are in general agreement.

Thank you for this opportunity to contribute to the discussion on the structure of the Listing Regime. We would be very happy to meet with you to discuss this response and the issues raised in the CP, if that would be helpful to you.

Yours very truly

A stylized, handwritten signature in black ink, appearing to be 'W J Ferrari'.

W J Ferrari
LIBA

A handwritten signature in black ink, appearing to be 'Laurie Charlton'.

L Charlton
SIFMA

FSA DP 08/1 – A Review of the Structure of the Listing Regime

Questions and Answers

1. *Do you consider that the UK super-equivalent Listing standards should be retained?*

Our members strongly maintain that the UK super-equivalent Listing standards should be retained. The UK has emerged as the listing venue of choice for investors and issuers alike, largely as a result of the broad range of options available to market participants. The super-equivalent regime represents the high end of this spectrum and has attained international recognition among institutional investors as the highest-quality standard in the publicly traded equities sector. Elimination of the super-equivalent option would strip the UK financial markets of an established premium offering. The likely results would be a perceived reduction in investor protection, a contraction of the investor base, and a loss of existing and future listings to other venues.

2. *Do you consider that the super-equivalent Listing standards should continue to be set by the FSA or should they be determined by the market (exchanges, trade associations or other independent body)?*

Our members favour the continuation of the FSA's role in setting super-equivalent Listing standards. As the independent regulatory body charged with ensuring investor protection, orderly and fair markets, and the competitive position of the UK, the FSA is best positioned to implement and oversee a comprehensive regulatory framework. The market actors listed above are ill-equipped to replicate or improve upon the predictable and stable regulatory environment that the UK financial markets require to remain globally competitive.

3. *Should we allow equity securities to be admitted to the Official List if they are only to be admitted to trading on a MTF operated by an RIE or an investment firm and not on a Regulated Market of an RIE? If so, on what basis?*

Our members consider that, in principle, it should be possible for a company's shares to be admitted to the Official List even when trading will take place on an MTF instead of an RIE. Our members appreciate the FSA's concern that permitting Listed securities to trade on an MTF could reduce the level of investor protection, as the requirements of several regulatory regimes would no longer apply.¹ While our members would support new requirements to close regulatory gaps, they see little practical benefit to issuers in using a single MTF trading venue after having met the listing requirements that would qualify them for admission to an RIE. The overall result at this time would be to add further complexity and confusion to the

¹ These include the Prospectus Directive, the Transparency Directive, and, in certain cases, the Market Abuse Directive. In addition, certain trade transparency requirements of MiFID would fall away.

Listing structure in order to accommodate a contingency for which there would be little demand. We would propose that this measure be deferred for further consultation at a date when the role of, and demand for, MTFs is more developed.

4. *Which of the options described above do you consider to be optimal? Please provide the reasons for your chosen option.*

Our members unanimously favour Option 2 (subject to our answers to Questions 5 and 8). We support the FSA's stated goal of designing a structure that strikes an 'appropriate balance between investor protection and maintaining the competitiveness of the UK capital markets'. We believe that this objective is best achieved through moderate changes that clarify standards to the extent necessary with minimal disruption. Option 2 best meets these criteria: It is narrowly tailored to address the concerns that the FSA has raised while preserving the range of choice and investor protection that characterise the UK financial markets.

By contrast, Option 1 appears to our members to be an overly broad solution that brings no increase in investor protection. We are concerned that a measure that unduly alters the obligations or expectations of market participants could jeopardise the competitiveness that the FSA seeks to maintain. This concern is particularly relevant in the case of issuers with GDRs or Secondary Listings. Our members expect that these issuers would view Option 1 as a termination of their Listing status for which no remedy would be available. In a number of cases, as the FSA has noted, removal from the Official List would frustrate the original business rationale for seeking a London Listing (*e.g.*, tax relief, prestige, diverse investor base, and liquidity). Although these issuers would theoretically be free to seek Primary Listings, the additional costs would in many cases be prohibitive, even if local laws of incorporation allowed governance requirements to be met. Consequently, we expect that the substantial majority would drop off the Official List. Left to choose between remaining in London and seeking a listing elsewhere (*e.g.*, the continent, US, or Asia), these issuers would have little apparent incentive to remain in London.

Regardless of whether issuers chose to remain in London, we would expect investor protection to suffer. If an issuer moved to a Regulated Market, investors would lose the incremental protection afforded by the standards imposed by the FSA under the Listing Rules. Issuers would also be free to seek admission to a market that is not regulated, where investor protection may be seen as lower and less established.

Finally, limiting the Official List to companies that meet super-equivalent requirements would reduce the range of options that is the core competitive advantage of the UK financial markets. The potential for a negative, self-reinforcing spiral is apparent: As the appeal of a London listing fades, more issuers will elect to list elsewhere; investor capital will follow, further reducing investment opportunities and narrowing the investor base.

5. *What are your views about opening up Secondary Listing for UK incorporated companies?*

While our members generally favour any measure that increases the choices available to issuers, we do not anticipate that many UK companies would seek a Secondary Listing if it were available. In our members' view, this option would only be appropriate for a very limited group of UK issuers who do not qualify for an AIM listing (*i.e.*, too large) or a Primary Listing (*i.e.*, unable to supply three-year earnings record). Recent changes to the rules for investment companies have eliminated one possible source of issuer demand for Secondary Listings. In all other cases, our members believe that the status quo embodies the expectations of market participants as they have developed over time. Issuers of suitable scale and longevity seek a Primary Listing and benefit from the opportunity to be included in a FTSE index; investors receive the full panoply of LSE Main Market protections. Smaller, newer companies benefit from the cost-effective listing option offered by AIM; investor protection is augmented by the NOMAD requirement.

In light of these settled, and apparently functioning, expectations, we are uncertain that this change is either required or desirable. In practice, making a Secondary Listing available to UK issuers may be inconsistent with the FSA's goal of regulatory clarity and homogeneity.

6. *What are your views on how the provisions we have described above under core requirements should apply to overseas Primary Listed companies?*

Our members are in favour of the existing requirements in the Primary Listing regime as applied to the corporate governance of overseas issuers. The existing regime allows the UK to maintain its status as an international financial centre while providing transparency to investors. Overseas issuers are required to disclose the nature of, and their compliance with, analogous local regulation in a manner sufficient to ensure that investment decisions are fully informed.

The consequences of mandating compliance with a broad range of UK corporate law would be similar to those flowing from the adoption of Option 1, as discussed in the answer to Question 4, above. Overseas issuers with Primary Listings would drop to Secondary Listings; some period of forced selling could be expected as investors with defined mandates divested the securities; and the range of choice in the UK financial markets would be diminished.

The Primary Listing regime as it applies to overseas issuers is already stratified by market forces in a more efficient way than could be achieved by regulation. Overseas issuers that wish to pursue inclusion in a FTSE index and tap a broader investor base publicly acknowledge 'adherence to the principle of the U.K. Combined Code, pre-emption rights and the UK Takeover Code as far as practicable.' In this way, overseas companies that are able to comply with these provisions are afforded the opportunity to trade in a broader and more liquid

market. We note that some companies based abroad have decided to reincorporate in the UK as another way to achieve a Primary Listing.

Accordingly, our members are of the view that any modification to the regime applicable to overseas issuers with Primary Listings should be carefully designed to favour increased transparency over mandated compliance. With respect to the Takeover Code, our members agree that it is not possible to extend the reach of the Code to companies formed in non-EU jurisdictions. However, it would be possible for companies to make specific disclosures concerning the share structures, voting rights, and control arrangements in place, as well as the processes required to effect changes in these areas. Our members suggest that it would perhaps be most appropriate for the principles of the EU Takeover Directive to be set as a standard, as far as practicable.

7. *Should we require the appointment of a sponsor for a transaction involving the issuance of GDRs? If not, are there any other responses to the significant growth in GDRs that are necessary?*

Our members are not in favour of introducing a sponsor requirement for a GDR listing. The focus on the GDR market in the Consultation Paper appears to have been motivated by increased volume and not by any actual or perceived market deficiency. The growth of the GDR market owes much to investor appetite for investment opportunities in growing companies located in emerging markets. The model that has developed to meet market demand relies on a sophisticated investor base, a rigorous disclosure regime, and pricing that reflects an appropriate risk premium.

The security and strength of this market lie in the sophistication of its investor base. Because only professional investors are offered the securities in the primary market (in most cases through the LSE's Professional Securities Market), the GDR market is generally confined to those investors that fully appreciate the overall risk/reward profile of this asset class. Our members consider that the risk disclosure made available to potential investors in GDR issues is extensive and leaves them in a position to make informed investment decisions. Other investors may infrequently acquire GDRs in the secondary market. In these rare cases, the COB rules, recently strengthened by MiFID requirements, should facilitate appropriate investment decisions.

Introduction of a sponsor requirement into a liquid and well-functioning market would do little to protect these investors, but would substantially increase the cost and complexity of obtaining a GDR listing in London. The additional cost attendant upon gold-plating the admission requirements would act as a disincentive to the issuer when choosing a venue. London would become uncompetitive vis-à-vis other trading centres, and this base of issuers would quickly move elsewhere.

8. *Do you have views on the labeling options?*

Our members support the FSA's desire to relabel the Official List market segments in order to provide clear and objective descriptions of the standards underlying a Listing. The suggested Tier 1 and Tier 2 designations are quite similar to the current Primary and Secondary Listing designations. Consequently, they do little to dispel the suggestion of ranking that has mistakenly been ascribed to the Primary and Secondary labels as they have lost their original meanings. We believe that a more complete break with these legacy terms would better accomplish the FSA's goal of providing clarity for investors. Our members suggest that a Primary Listing might more appropriately be named 'Premium' and a Secondary Listing be named 'Standard'. These labels give proper effect to the additional obligations (above the EU minimum) that are assumed by an issuer seeking a Primary Listing, while accurately describing the nature of a Secondary Listing.

In addition, it might be helpful to add 'GDR Listing' as a separate Listing segment. A further clarifying measure might be to include in the prospectus (or other selling document) a concise paragraph describing the Listing segments and their associated requirements, in order to illustrate the differences among them.

Whether labels or explanatory information (or both) are deemed appropriate or not, we would recommend further consultation with stakeholders as to the specific language before implementation.