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24 September 2021

Dear Sir, Madam

### **Re: UK prospectus regime review**

We are writing on behalf of the British Private Equity and Venture Capital Association (“BVCA”), which is the industry body and public policy advocate for the private equity and venture capital industry in the UK. With a membership of over 700 firms, we represent the vast majority of all UK based private equity and venture capital firms, as well as their professional advisers and investors. Between 2016 and 2020, BVCA members invested over £47bn into around 3,500 UK businesses, in sectors across the UK economy ranging from heavy infrastructure to emerging technology. Companies backed by private equity and venture capital currently employ 1.1m people in the UK and 90% of the businesses our members invest in are small and medium-sized businesses.

### **Overview of BVCA recommendations**

The BVCA supports, in principle, many of the measures proposed in this consultation, with many appearing to be well reasoned and balanced. We consider that, if calibrated correctly and accompanied by changes consistent with other recommendations from the Lord Hill Listing Review, the proposals could support the objective of wider participation in public markets, keeping them open and accessible, with high standards that are trusted and transparent. The regime in its current form is overly complex, too inflexible and shaped by overlapping, duplicative requirements. While we are supportive of the general direction of the proposals, further consultation on the FCA’s proposed powers will be required, and clarity and further information is needed in a number of areas.

### **BVCA responses to the consultation questions**

We have limited our responses to those questions we believe are particularly relevant to our members.

<b>Q1: Do you agree with our overall approach to reforming the UK prospectus regime?</b>
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Yes, we agree with the overall approach. We generally agree with the recommendations put forward by the Lord Hill Review, in which we participated, that have been brought forward in this consultation document. However, as this is just the second phase of the process, uncertainty remains, and we look forward to further clarity being delivered legislation and FCA rules in the future. It is our view that improving the prospectus regime could help drive greater listing activity in the UK and for ambitious emerging growth companies and we are keen to participate in future consultations on the detail of further proposals.

<b>Q2: Do you agree with the key objectives that we are seeking to achieve?</b>
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Yes, we agree with the stated objectives, in particular in facilitating the greater ownership of public companies and improving the quality of information investors receive under the prospectus regime.

However, we would like to note the importance of the investor protections included in a prospectus, especially when an IPO is taking place, as well as the necessity of creating proportionate regulations that do not create uncertainty or increase costs for businesses or investors alike.

**Q3: Do you have any views on the underlying purpose of a prospectus when seeking admission to a regulated market?**

We do not have any particular views and generally agree with what is included in the consultation document. A prospectus has an important role to play in the context of a company seeking admission to a regulated market both in respect of an IPO and a secondary offering.

**Q4: Do you agree the FCA should have discretion to set rules on when a further issue prospectus is required?**

Yes, we agree with this proposal. Providing the FCA with the necessary powers should have the effect of allowing rules to be agile and more flexible. The prospectus should continue to play a central role in IPOs and further offerings on regulated markets. It is important that the FCA use the powers it is given to meet the objectives set out in chapter 2.

**Q5: Do you agree the Government should grant the FCA sufficient discretion to be able to recognise prospectuses prepared in accordance with overseas regulation in connection with a secondary listing in the UK?**

Yes, we are supportive of this proposal. We would add that further information is needed on this area in terms of an equivalence regime for prospectuses drawn up overseas.

**Q6: Do you agree with our approach to the 'necessary information test'?**

Yes, we agree with the approach presented. It is well understood and represents a robust, clear and comprehensible standard which has the support of market participants. One comment we would like to make however is that the proposal should take into account the level of information already available to the market. Due to current reporting requirements for listed companies, there is a whole array of information available to investors and other stakeholders. Accordingly, if the FCA exercises its powers so that a prospectus is required to be issued by a listed issuer, the prospectus contents should be focused on only providing the new information that is not already in the market, and there should be sufficient flexibility within the statutory framework to allow for this.

We should also note that while there are regimes that support reduced prospectus disclosure for already listed companies, these are backed by enumerated standards (e.g. EU Prospectus Regulation) and/or a robust liability regime (e.g. the US).

**Q7: Do you agree the FCA should have discretion to set out rules on the review and approval of prospectuses?**

We believe the FCA should have this discretion. However, we believe more clarity is needed on where the powers will sit, for example, the FCA handbook, and in what circumstances the FCA would decide not to review a prospectus. The general expectation should be that a prospectus would be reviewed and approved by the FCA and as such, to protect investors, it should be clear in what circumstances a review would not take place and if this discretion is used the FCA would need to be mindful of the risk of investor confusion in a regime where some prospectuses are reviewed and others are not. There

is value to both issuers and investors in the approval process, as it gives confidence that the prospectus requirements have been satisfied.

**Q8: Do you have any comments on what ancillary powers the FCA will need in order to ensure admissions of securities to Regulated Markets function smoothly? (See list of potential powers in Annex A.)**

No, we agree with the proposal and the powers as set out in Annex A.

**Q9: Do you agree with our proposed change to the prospectus liability regime for forward looking information?**

**Q10: Do you think that our proposed changes strike the right balance between ensuring that investors have the best possible information, and investor protection?**

Forward-looking statements can be important for investors, but as flagged by the UK Listings Review the current liability regime creates a disincentive for issuers to provide such information. The proposed change to a recklessness standard ensures consistency with the annual report standard and should help promote the provision of useful forward-looking information.

However, it may not be practical to identify explicitly every piece of forward-looking information in a prospectus. Provided that there is a clear warning about forward looking information, it does not seem necessary or proportionate to call out every relevant piece of forward-looking information to be able rely on the new liability standard.

We would also add that in the US there is a safe harbour for forward-looking information based on a warning/disclaimer that refers to forward-looking information without specifically identifying it. We see no reason why the UK should not take a similar approach. In any event, since UK prospectuses are often used in connection with marketings of securities subject to US securities laws and so include US disclaimer wording, the proposed new rules should be framed in such a way that there is nothing to prevent the continued use of such wording in a UK prospectus.

**Q11: Which option for addressing companies admitted to MTFs do you favour and why?**

Subject to detail to be consulted on at a later date, Option 2 would be our preferred option, as long as the existing regime is largely preserved (i.e. additional review/burdens are not added to the admission document process). If the admission document is brought within section 90, it should be clear that this displaces any common law test, to ensure the benefit of the forward-looking statement changes eventuates.

We are supportive of the proposed change to the prospectus liability regime for forward-looking information which seeks to encourage issuers and directors to disclose information of this type directly to investors via prospectuses. We believe that this is an important aim, not only in the context of regulated markets but also and possibly even more so, in the context of growth markets, and we agree that a solution needs to be found such that issuers are encouraged to disclose forward looking information in admission documents.

**Q12: Do you agree there should be a new exemption from the public offer rules for offers directed at existing holders of a company's securities?**

**Q13: Do you agree we should retain the 150 person threshold for public offers of securities and the 'qualified investors' exemption? Do you have any comments on whether they operate effectively?**

Given the level of information made available by a public company, and the familiarity of shareholders with the company in which they have invested, it makes sense to carve out offers to existing shareholders from the public offer of securities definition. The qualified investor and 150 person threshold both also serve a useful purpose as stated, and help strike the right balance between investor protection and administrative burden.

**Q14: Does the exemption for employees, former employees, directors and ex-directors work effectively?**

In relation to the offers to employees exemption, given the increased range of working arrangements, it might be considered whether contractors to an issuer or an affiliate also benefit from an exemption. As with employees, contractors have a different relationship with the issuer than the general public.

**Q15: Which option for accommodating the right of private companies to offer securities to the public do you favour?**

It is our view that a specific regime might be beneficial as the rules could be better tailored going forward. We agree with the commentary in the consultation on the €8 million threshold acting as a cap. We have considered the merits of both options and consider them both reasonable. However, we would need to see further information from the FCA on any bespoke regime to be sure.

In order to enable private companies to raise amounts of capital in excess of €8 million through public offers whilst also providing for appropriate investor protection, both Options 1 and 2 could be accommodated to a large extent by the existing regulatory framework. Such offerings could be regulated through the MiFID II rules, the RAO, the financial promotions regime and related provisions in the FCA Handbook. We would note that these regulations broadly focus on regulating the intermediary or platform, whereas the prospectus regime provides for investor protection through the imposition of disclosure requirements.

**Q16: Which of the options above do you prefer? (Please state reasons)**

**Q17: Do you have any further thoughts or considerations over how a new deference mechanism (Option 2) should operate?**

Given the lack of retail participation in overseas IPOs/issues to date, maintaining the status quo would result in retail investors continuing to be shut out from such offers. Provided that an appropriate equivalence analysis is undertaken to select the eligible overseas jurisdictions, a new deference regime has merit. Any equivalence analysis should not be overly technical or restrictive, and should recognise that investor protection can be achieved through a number of different mechanisms.

The BVCA would of course be willing to discuss this submission with you further - please contact Ciaran Harris (charris@bvca.co.uk) at the BVCA.

Yours faithfully,





Amy Mahon

Chair, BVCA Legal & Accounting Committee