



Quoted Companies Alliance

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10 September 2018

Dear Nilam,

**Proposed changes to the AIM Disciplinary Procedures and Appeals Handbook**

We welcome the opportunity to respond to London Stock Exchange's consultation on the proposed changes AIM Disciplinary Procedures and Appeals Handbook.

The Quoted Companies Alliance *Legal, Primary Markets* and *Secondary Markets Expert Groups* have examined the proposed changes and produced comments to specific parts of the new Handbook from the point of view our members – small and mid-size quoted companies. Lists of Expert Group members are at Appendix A.

Overall, we agree with many of the proposed changes, but think that some may need further consideration.

If you would like to discuss our response in more detail, we would be happy to attend a meeting.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Tim Ward".

Tim Ward  
Chief Executive

The Quoted Companies Alliance is the independent membership organisation that champions the interests of small to mid-size quoted companies.

A company limited by guarantee registered in England  
Registration Number: 4025281

***Introduction***

A1 *“(ii) an AIM company, a nominated adviser, or any entity applying to become an AIM company or nominated adviser wishes to lodge an appeal against either a non-disciplinary decision of the Exchange or a warning notice.”*

We welcome this addition, as previously there was no mechanism to challenge decisions of the Exchange.

***Disciplinary action and proceedings***

A7 *“The Exchange may take formal disciplinary action in the form of a warning notice, private censure or public censure, all of which may also include a fine.”*

As this expands the Exchange’s current ability to levy fines and results in little practical difference between a Warning Notice and a Private Censure, we question what purpose a Warning Notice will serve under the revised regime.

This subsists within the existing problem of levying fines on Privately Censured AIM companies, which secretly punishes shareholders, despite the fact that they are usually not responsible for the compliance failings of the company’s senior management.

A8.8 *“whether there has been contravention of any prior direction, ruling, instruction or guidance of the Exchange.”*

Although we do not consider this an unreasonable addition, we believe that it could create a motivation for an AIM company and its Nominated Adviser to appeal decisions that they disagree with, so that they cannot be used as evidence for subsequent disciplinary proceedings. Dealing with such appeals may serve to stretch AIM Regulation’s existing limited resources to the detriment of the AIM market generally.

A9 *“The criteria above does not constitute the basis upon which the Exchange may or may not determine to bring disciplinary action. The decision to bring disciplinary action is at the sole discretion of the Exchange.”*

While we accept the rationale that the decision to bring disciplinary action must be the Exchange’s prerogative, we believe that it would be appropriate for the Exchange to provide a clear explanation for bringing disciplinary action against an AIM company or a Nominated Adviser – other than those set out in A8.1 to A8.8 – before the disciplinary action is formally commenced, so that the subject may challenge the reason if it is considered to be inappropriate or unfair.

***Panels & Committees***

A13 *“Appeals of non-disciplinary decisions and of warning notices are conducted before the AIM Executive Panel (“AEP”) and AIM Executive Appeals Panel (“AEAP”), whose members are comprised of appropriately experienced senior members of the Exchange’s staff.”*

If Warning Notices can be subject to a fine, we question why they would be distinguished from disciplinary proceedings. There is a risk that AIM companies and Nominated Advisers will believe that the Exchange may choose to pursue Warning Notices with fines using its own internal panel rather than censures, which are subject to external committee validation, because it will be easier to secure a “conviction”. This could have the unintended consequence of devaluing the disciplinary process and thus damaging the integrity of AIM.

***General provisions***

*B9.2 “(ii) such objection is raised with the Secretary within 5 business days of the party becoming aware of the relevant facts or circumstances.”*

We believe that, in the case of a Committee, this provision should be made consistent with the period of 20 days allowed for objection under B9.1 (ii), in order to prevent the potentially unfair situation of shortening the period for objection simply because the issue was not visible at the outset of the disciplinary process.

*B9.5 Any determination of the Chairman pursuant to rule B9.4 shall be final with no right of appeal.*

There should be more clarity as to whether this precludes the possibility of judicial review on the grounds that a decision was not made consistently with the criteria required by B9.4.1.

*B12 Subject to rule B13, all Panels and Committees shall have a quorum of 3 members, including a Chairman.*

We agree that, subject to rule B13, all Panels and Committees should have a quorum of three members, including a Chairman.

However we would also recommend that there should be the following:

- An upper limit on the number of members in a panel or Committee;
- A public statement stating the individuals who comprise the Panel or Committee;
- A public statement outlining the criteria for being a member of the Panel or Committee; and
- A public statement stating the maximum number of persons eligible for membership of a Panel or Committee.

*B18.2 “excluding a specific individual or individuals from being present during the hearing or any part of the hearing, as the circumstances may require, for example to: (i) prevent the disruption of the orderly running of the hearing; or (ii) protect the privacy and confidentiality of the hearing.”*

On the grounds of fairness the criteria for excluding someone should be clearly stated and not on a discretionary basis as, in accordance with B9.5, there would be no right of appeal if someone was unfairly excluded.

Accordingly, the two examples given should become the stated criteria for exclusion and not just example reasons.

*B20 “Determinations and directions which are reserved to a full Panel or Committee may be reached on a majority basis. Where a majority determination is reached, this will not be disclosed.”*

We believe that this is intrinsically unfair. The fact that the decision is not unanimous should be relevant in determining the type of decision to be made and the incidence, or quantum, of a fine.

In addition, where a decision on a majority basis is made, this should be disclosed to avoid the possible adverse perception that the disciplinary process is a “kangaroo court”.

*B30.2 “such disclosure is pursuant to: (i) rule 22 and related guidance notes or rule 23 of the AIM Rules for Companies;”*

We believe that this is consistent with the purpose of the relevant AIM Rule that disclosure may also be required by AIM Rule 11, particularly as it is likely that disclosure could be required under Article 17 of the Market Abuse Regulation (MAR).

*B32.3 “details of a warning notice issued by the Exchange,”*

Please see our comments regarding to A7 and A13.

Furthermore, the question remains as to what is the substantive difference between a Warning Notice and a Private Censure given that it is proposed that both may carry a fine and be published. In these circumstances, we consider using the Panel system for Warning Notices inappropriate.

We do believe that a Warning Notice should carry a fine.

### ***Appeals of a Warning Notice***

*C6 “The warning notice under appeal shall remain in full force and effect pending determination of the appeal by the AEP and, where applicable, any subsequent appeal to the AEAP.”*

We believe that it would be appropriate that collection of any fine should be suspended pending resolution of any appeal.

*C13 “Provided the Chairman has not declined to hear the appeal, the Chairman shall direct the date by which the Exchange may submit any written response to the Appellant’s Notice. The date for submission shall not be sooner than 15 business days from the date of the Chairman’s direction.”*

We consider the timing asymmetry to be intrinsically unfair. Whilst the appellant is given a maximum of 15 days to construct an appeal and compile evidence, the Exchange is given a minimum of 15 days (and by implication, potentially an unlimited time) to compile its counter-claim and evidence. We believe that the Exchange should be given precisely the same amount of time to respond to an Appeal that the appellant has.

*C24 “Unless otherwise directed by the Chairman, each party shall provide to the Secretary any written submissions by 16:00 (UK time) 5 business days prior to the scheduled date when the AEP proposes to determine the appeal at a hearing or on the papers. All written submissions shall contain cross-references to the appeal bundle, where relevant.”*

No timeframe is given for the delivery of the appeal bundle to the appellant meaning that it could be delivered so close to the appeal hearing date that the appellant could have little practical opportunity to submit a properly considered written submission. We believe that it would be appropriate to set a clear timetable (e.g. the appeal Bundle must be delivered a minimum of 15 business days prior to the appeal hearing date).

*C34 “Any order of the AEP with regards to costs shall be communicated to the parties as soon as reasonably practicable.”*

Given that the Panel should represent a non-disciplinary process it seems incongruous that considerations of cost should arise.

C38 *“Appeals to the AEAP may only be made on one or more of the following grounds:*

*C38.1 the AEP’s determination was one which no AEP, acting reasonably, could have made on the information or evidence before it; and/or*

*C38.2 the AEP’s determination was based on a misapplication or misinterpretation of the AIM Rules.”*

We agree that appeals may be made on the grounds of misapplication or misinterpretation of the AIM Rules.

We would also suggest adding a further ground: that appeals can be made on grounds of “material irregularity in the procedure followed by the AEP”.

*C48. “Provided the Chairman has not declined to hear the appeal, the Chairman shall direct the date by which the other party may submit any written response to the Appellant’s Notice. The date for submission shall not be sooner than 15 business days from the date of the Chairman’s direction.”*

We consider it appropriate that the “other party”, which will almost always be the Exchange, should also have 15 days to submit their response to the appeal and no more, in line with the time frame given to the appellant in the first instance.

***Disciplinary proceedings before the ADC and appeals to the ADAC***

*D5 “An AIM Disciplinary Commencement Notice shall be published by the Exchange as soon as reasonably practicable after service of the Statement of Case.”*

As an AIM Disciplinary Commencement Notice requires the public disclosure of the name of the relevant AIM company or Nominated Adviser (see Glossary), this effectively renders the option of a private censure obsolete. This is reinforced by the subsequent publication of the AIM Disciplinary Outcome Notice, which requires the same public disclosure.

In addition, this requirement is only appropriate in the case of an AIM company disciplinary action. AIM Rule 11 and Article 17 of MAR generally requires such a disclosure. However, we note that significant reputational damage could be inflicted on a Nominated Adviser’s business if such a disclosure was made and it would be fundamentally unjust if the final determination was an acquittal or the levying of a private censure.

*D26 “Following discontinuance and the determination of any order for costs, the Exchange shall publish a notice confirming discontinuance of the disciplinary proceedings.”*

We feel that, in such circumstances, the Exchange should be required to explain the reason(s) for the discontinuance of the Disciplinary Action.

*D47 “Provided the Chairman has not declined to hear the appeal, the Chairman shall direct the date by which the Respondent may submit any written response to the Appellant’s Notice. The date for submission shall not be sooner than 15 business days from the date of the Chairman’s direction.”*

Please see our comments to C48.

***Non disciplinary appeals***

F6 *“The non-disciplinary decision which is under appeal shall remain in full force and effect pending determination of the appeal by the AEP and, where applicable, any subsequent appeal to the AEAP.”*

We believe that this could inadvertently create problems by effectively rendering an appeal pointless in cases where the Exchange has directed an AIM company to make a public notification under the AIM Rules which the AIM company considers the AIM Rules do not require, or which the AIM Rules allow the AIM company to delay disclosure.

F38 *“In the intervening period between the AEAP’s determination to remit the non-disciplinary decision for reconsideration and any reconsideration by the Exchange in accordance with rule F37, the non-disciplinary decision shall continue to be in full force and effect.”*

Please see our comments to F6.

***Costs & Fines***

G4 *“If a Panel remits a non-disciplinary decision back to the Exchange for reconsideration, or quashes or varies a warning notice, the Panel may, in its discretion, order that an applicant, AIM company or nominated adviser pays the costs of the Exchange, the Secretary and of the Panel. The Panel shall determine the quantum of such costs to be paid.”*

We disagree with this approach and anticipate that it will lead to gross unfairness. We believe that in circumstances where an AIM company or Nominated Adviser is successful in defending itself and/or having the Exchange’s decision overturned, it should be entitled to recover its costs from the Exchange, not vice-versa.

G7 *“In the event of any discontinuance by the Exchange of disciplinary proceedings pursuant to rule D25, the ADC may, in its discretion, order that a Respondent pays the costs or part of the costs of the Exchange, the Secretary and the ADC incurred in relation to the discontinued disciplinary proceedings.”*

See comment on G4.

G10 *“Costs cannot be awarded against the Exchange unless, in the reasonable opinion of a Panel or Committee, the Exchange has acted in bad faith in bringing or conducting proceedings or, in the case of a non-disciplinary decision, in the making of that decision. Such costs shall be limited to the reasonable and proportionate legal costs incurred in the preparation and presentation of the other party’s case.”*

We consider it inconceivable that the Exchange would bring proceedings or make decisions dishonestly.

However, it is not inconceivable that the Exchange may, occasionally, make decisions on an unreasonable basis. We do not believe that the Exchange should be insulated from the effects of not discharging its regulatory responsibilities without due care and attention, which is the standard it requires from Nominated Advisers when discharging their obligations to the Exchange.

**Quoted Companies Alliance Legal Expert Group**

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