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Dear FCA colleagues,

FCA Engagement Paper 5 - The public offer platform

We welcome the opportunity to respond to the FCA's Engagement Paper on the public offer platform.

The Quoted Companies Alliance *Legal Expert Group* and *Primary Markets Expert Group* have examined the proposals and advised on this response from the viewpoint of small and mid-sized quoted companies. A list of Expert Group members can be found in Appendix A.

Overall, we agree with the outcomes that the FCA is proposing for operators of Public Offer Platforms. However, we believe that the outcomes identified by the FCA, while appropriate, will not be realised through the proposals offered in this Engagement Paper. The FCA's proposals would create a liability regime for public offer platforms that is weighted too heavily towards the platforms themselves and risks making their operating model financially unviable. The proposed changes, in their current guise, could result in making the cost of operating these platforms untenable due to the increased risk that operators face if an error is made when conducting due diligence and making disclosures.

We urge the FCA to reconsider the balance of liability across the different actors engaged in utilising public offer platforms, including the platforms themselves, companies, and investors. As the FCA correctly identifies, it intends to construct a liability regime that is proportionate by ensuring that individuals are made aware of the risks they assume when investing. We believe the FCA must address the current imbalance its proposals risk creating between the platforms, investors and companies when designing the new liability regime.

If you would like to discuss our response in more detail, please do not hesitate to contact us.

Yours sincerely,

James Ashton

James Ashton

Chief Executive

Q1 Do you agree with our analysis of potential harm and the key outcomes we identify as a focus for regulation in this area? Is there anything else we should consider or prioritise?

Yes – we agree with the FCA's analysis of potential harm and the key outcomes identified as a focus for regulation in this area.

Q2 Do you agree with the outcomes we are proposing for operators of the Public Offer Platform, including linking the Public Offer Platform with the work on consumer investments? Are there any other outcomes that we should consider as part of this work?

Yes – we agree with the outcomes the FCA is proposing for operators of the Public Offer Platform. We note that paragraph 48 sets out that the FCA needs to strike the right balance and to ensure that platform operators are not subject to unnecessary burdens which will discourage firms from operating as public offer platforms but in our view the proposals set out in the paper do not strike the right balance for the reasons set out below.

Q3 What due diligence is currently conducted by crowdfunding platforms, and should we consider certain existing practices or other due diligence approaches to inform our rules?

Whilst our members' experience in this area is more limited, given their focus on public markets, it is our understanding that due diligence is not always conducted thoroughly by crowdfunding platforms. In particular, the forward-looking information that companies include and the due diligence that is performed on these areas does not appear to be particularly rigorous. The platforms will often perform due diligence and provide opinions on very limited company information (effectively sometimes little more than anti-money laundering checks). Investors will then decide on whether to ask a company that is on the platform to provide further information (including non-audited financial information, trading prospects and market data), which falls outside the platforms checks. How information is presented to investors is an area of concern and greater oversight here is important.

It is our view that the crowdfunding platform should provide information on how a valuation for a company was arrived at. This would entail a description of what basis a valuation has been determined. This would not involve the platform conducting due diligence of the valuation itself, but it would entail them providing the necessary information on how the valuation was determined. This is particularly important as there is no process of price discovery on these platforms, with investors offered a subscription price and terms by the company in question.

Q4 Do you agree with the scope of the due diligence requirements we are proposing? What estimates do you make on the costs of complying with these proposals?

Overall, we believe that it is imperative that a platform's liability position is clear to participants. Firstly, we suggest that a form of disclaimer be introduced in order to show that any form of payment has passed a due diligence process.

We believe that the FCA should establish a liability regime for these platforms which is proportionate in ensuring individuals are aware of the risks they are making when investing. We believe that this new regime should be placed on a statutory footing that details that there are disclaimers in order that individuals understand on what basis they are investing, and the risks associated with doing so.

However, we recognise that due diligence is a challenge, particularly as requiring crowdfunding platforms to conduct all of the due diligence required to protect consumers may be cost prohibitive for them. Nevertheless, greater clarity is needed in this area as currently, both companies and investors are often unsure of their liability position.

Another area we believe that is in need of greater clarity is the extent to which private companies, which are not required to prepare a prospectus, can remain in compliance with the Companies Act 2006 (75) on the provision of misleading information.

It is important to note that not all of our members share the position set out above. Some members believe that it should be made clear to potential investors that platform operators are not responsible from a legal perspective for offerings on the platform and that any redress should be to the issuer. According to this view, one alternative approach could be for the issuer to provide an appropriately worded confirmation or attestation and for the liability regime to relate to that attestation.

Q5 Are there any alternative approaches we could consider when designing due diligence requirements?

Please see our response to Question 4.

Q6 How do current platforms communicate the due diligence that has been undertaken? Are there any other ways in which the due diligence that has been undertaken could be communicated with investors?

At present, the general standard of communication around due diligence is poor, with approaches varying across platforms.

Regarding the first option proposed by the FCA that an operator would need to produce a due diligence report, we believe this would not be a particularly user-friendly vehicle for investors. A more appropriate way of communicating that due diligence has been undertaken would be through careful disclosures and disclaimers.

Another area of concern regarding the production of a report is liability. Specifically, who the report would be addressed to and the implications this would have in terms of liability for the platform operator. Considering the position on public markets where a bookrunner has due diligence completed by third parties on an issuer, the participants in an issue of securities could have the opportunity to seek damages from the company and/or from the bookrunner (and indirectly through them to the due diligence provider). Whether the aim is for the platform to have a similar role as a route to a due diligence (legal or financial) provider being subject to claims from subscribers in a crowdfunding or not is a key question in this regard.

While the platform provider should be liable to the FCA, currently it is not clear whether a platform operator may be liable against a claim from an investor for not having conducted the necessary due diligence as set out in the report. We urge the FCA to provide further guidance on this area regarding which actor is ultimately liable for conducting proper due diligence.

If the FCA intends for platforms to be liable for producing the due diligence report, we would also highlight that there are risks attendant with this as it may make the cost of operating a platform too prohibitive due to the possibility of having a liability claim made against the platform if a mistake is made.

Regarding the preparation of a due diligence attestation, we believe that this, alongside the provision of a due diligence report, is important for providing assurance to an investor. However, if any issues arise when due diligence is conducted, there does not exist a methodology to make investors aware of it. This presents a challenge as it would require the creation of a summary document available on the company that due diligence attestation was conducted accurately and is not misleading. However, we believe that this should avoid becoming in effect the writing of a prospectus and admission document in other form.

Q7 What risks do these different approaches to due diligence create?

Currently, the main risk is that different approaches to due diligence lead to inconsistencies and variations in how due diligence is conducted which causes a lack of understanding amongst users of platforms as to what due diligence has occurred.

Q8 Do investors feel that they are currently getting the appropriate level of information around due diligence. What additional information do investors need around due diligence to make an informed decision?

No – investors do not feel they are currently getting the appropriate level of information around due diligence. Currently, there is information asymmetry when conducting an IPO compared to fundraising on a crowdfunding platform. IPOs involve institutions, valuations and research on a company. On crowdfunding platforms, investors are required to undertake this work on their own before making an investment decision.

Q9 Do you agree with our proposed approach to the disclosure of information under the Public Offer Platform regime? Are there further disclosures that investors would find useful?

We have concerns with the proposed approach highlighted by the FCA with regards to the detailed written report, as we do not consider that this will be user-friendly for investors. Moreover, it is unclear who this report will be addressed to and how the liability regime applies is currently unclear.

We also do not consider that the other proposal around the preparation of a due diligence attestation to be an improvement. Again, it is not clear to who the attestation would be addressed.

Q10 Do you agree with the categories of information that we have proposed including as part of the disclosure regime? Are there other pieces of information that investors would find useful?

We agree with the type of information (as set out in paragraph 133 of this Engagement Paper) to be included as part of the disclosure regime. We also agree with the standard of disclosure set out at paragraph 92 and that the guiding principle for disclosure about the issuer and its securities being the necessary information test (for example, information that enables an informed decision to be made in relation to the fund raise). In addition, general guidance on the tax consequences of an investment (as is typical in a prospectus or AIM admission document) would be helpful for investors.

Q11 How do current crowdfunding platforms approach ongoing disclosures?

In general, approaches to ongoing disclosures by crowdfunding platforms are varied and can be sporadic. There is no set practice and updating investors is usually the responsibility of companies. This is because platforms are utilised on a one-off basis. Once a fundraise has been completed, the role of the platform has been fulfilled. Therefore, from the perspective of the platform, there is no need to produce ongoing disclosures. Usually, updates only occur through disclosures when there is a need for investors to be updated, for example if there is a liquidity issue or an exit opportunity for a company. This is partly because there is no secondary trading once the offering has completed, and the situation may need to change if the intermittent trading venue concept is implemented effectively.

Q12 Do you agree with our analysis and preferred option?

We believe that the FCA should adopt the first approach 'Creating a requirement of 'information needed to make an informed decision'. We believe this approach to be preferable as it offers a more bespoke option given the challenges in reaching agreement on minimum requirements. However, the FCA must carefully consider who is rendered liable if insufficient information is provided in order to give clarity to platforms and investors.

Q13 Do investors feel that they are currently getting the correct level of information about the security they are purchasing or the company that they are investing in? What additional information do investors need to make an informed decision?

No, particularly where ordinary shares of a different class, such as convertible debt, loan notes or preference shares are offered. The rights of these instruments are not adequately described in a plain and straightforward manner. For example, the rights of different classes of shares in the event of business failure, or the protections and information rights of holders.

Q14 What information is needed by investors to be able to make an informed investment decision? How should this be communicated to investors?

As a broad point, we are concerned by the extent to which platform providers will be liable for the information provided in order for investors to make an informed decision. In addition, fulfilling this criteria will be onerous for the platforms. The information needed to produce the necessary guidelines would likely be significant and could result in the production of a prospectus-lite document.

Q15 What would be the anticipated cost of producing the disclosures outlined above? Are there any foreseeable problems in producing certain types of information?

While we do not possess the exact figures, we anticipate that the costs would be substantial for producing the disclosures outlined above.

Q16 Do you have any comments on our approach to liability under the public offer platform regime?

We observe that the FCA is focused primarily on the platforms when apportioning liability. It is important that the FCA finds the correct balance in terms of liability for all actors, including directors. For example, a number of areas identified in the non-exhaustive list of content would apply more appropriately to directors rather than the platform operator.

We recommend that the FCA outline more clearly the liability attached to each actor involved including the platform operators and companies. For example, we believe that the FCA should establish a liability regime

for public offer platforms which is set out in statute so that the liability regime is clear. In practice, this may involve use of disclaimers and acceptance by investors of standard terms limiting liability and stating that investors are responsible for their investment decisions.

It is important to highlight that not all QCA members were in agreement with all aspects of the approach outlined above. Some members viewed the suggestion in paragraphs 146 and 147 that an investor might be able to make a claim under section 138D of the Financial Services and Markets Act 2000 (FSMA) as inappropriate for an investor to be able to make a claim under these provisions. Instead, some members believe that specific legislation should be introduced to cover the liability position relating to offers on public offer platforms from an issuer perspective, and not the platform.

Q17 Do you have any comments on our proposed initial approach to setting requirements in relation to liability and redress?

Please see our answer to Question 16 above.

Q18 Do you agree that the activity of operating a Public Offer Platform should fall within the compulsory jurisdiction of the Financial Ombudsman Service?

Yes – we agree with this proposal.

Q19 Do you agree that the scope of FSCS protections should be the same as apply in relation to current crowdfunding platforms?

Yes – we are in agreement with this proposal.

Q20 Do you agree with our approach or the alternative options that we set out, is there any other way in which these types of offers could be differentiated?

On balance, we believe that Option 1 (exempt and non-exempt offers shown alongside each other with clear marking to distinguish each type) would provide the investors with the appropriate information to make an investment decision.

Appendix A

The Quoted Companies Alliance *Legal Expert Group*

Mark Taylor (Chair)	Dorsey & Whitney (Europe) LLP
Stephen Hamilton (Deputy Chair)	Mills & Reeve LLP
Paul Airley	Fladgate LLP
Danette Antao	Hogan Lovells International LLP
Paul Arathoon	Charles Russell Speechlys LLP
Kate Badr	CMS
Naomi Bellingham	Practical Law Company Limited
Ross Bryson	Mishcon De Reya
Philippa Chatterton	CMS
Paul Cliff	Gateley
Matt Cohen	Stifel
Jonathan Deverill	DAC Beachcroft LLP
Sarah Dick	Stifel
Tunji Emanuel	LexisNexis
Kate Francis	Dorsey & Whitney (Europe) LLP
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Jonathan King	Osborne Clarke
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Catherine Moss	Shakespeare Martineau LLP
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Kieran Rayani	Stifel
Jaspal Sekhon	Hill Dickinson LLP
Patrick Sarch	Hogan Lovells LLP
Gary Thorpe	QCA Director
Robert Wieder	Faegre Drinker LLP
Sarah Wild	Practical Law Company Limited
John Young	Kingsley Napley LLP

The Quoted Companies Alliance *Primary Market Expert Group*

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Azhic Basirov (Deputy Chair)	Global Alliance Partners Financial Limited
Colin Aaronson	Grant Thornton UK LLP
Stuart Andrews	Zeus Capital
Mark Brady	Spark Advisory Partners Limited
Andrew Buchanan	Peel Hunt LLP
David Coffman	Novum Securities Limited
Richard Crawley	Liberum Capital Ltd
Dru Danford	Liberum Capital Ltd
David Foreman	Zeus Capital
Chris Hardie	W.H. Ireland Group PLC
Stephen Keys	Cenkos Securities PLC
Nick McCarthy	Shoosmiths LLP
Katy Mitchell	W.H. Ireland PLC
Hayley Mullens	Radnor Capital Partners Limited
Nick Naylor	Allenby Capital
Jeremy Osler	Cenkos Securities PLC
Niall Pearson	Hybridan LLP
Mark Percy	Shore Capital Group Ltd
Oliver Pilkington	Shoosmiths LLP
George Sellar	Peel Hunt LLP
James Spinney	Strand Hanson
Stewart Wallace	Stifel