MEMORANDUM ON RESPONSIBILITIES AND POTENTIAL LIABILITIES FOR A PROSPECTUS

COBRA RESOURCES PLC

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1. Introduction

This memorandum has been prepared for the board of directors (the "**Board**" or the "**Directors**") of Cobra Resources plc (the "**Company**") to provide them with a summary of their responsibilities and potential liabilities under English law in connection with the publication of the prospectus and any other related documentation regarding the Company which is in the course of being prepared in connection with the proposed admission of the entire issued ordinary share capital of the Company to listing on the standard segment of the Official List of the Financial Conduct Authority ("**FCA**") and to trading on the main market for listed securities of the London Stock Exchange plc.

These responsibilities and potential liabilities arise under:

- the Financial Services and Markets Act 2000 ("**FSMA**");
- the Listing Rules of the FCA ("**Listing Rules**");
- the Prospectus Rules of the FCA ("**Prospectus Rules**");
- EU Regulation 596/2014 (the "**MAR**");
- the Misrepresentation Act 1967 (the "**Misrepresentation Act**");
- the Financial Services Act 2012 (the "**FS Act**");
- the Theft Act 1968 (the "**Theft Act**");
- the Fraud Act 2006 (the "**Fraud Act**");
- the Criminal Justice Act 1993 (the "**CJA**"); and
- common law.

Certain of the liabilities described in this memorandum may also arise in respect of documents other than the prospectus, such as financial promotions and notices. Liabilities may also arise as a result of oral presentations made by or on behalf of the Company.

This memorandum deals with the applicable laws and regulations in force in England on 1 November 2018 in the context of prospectus liability, and does not refer to the laws or regulations of any other jurisdiction. It is not intended to be a comprehensive guide, nor can it be relied on as a substitute for detailed advice on the specific circumstances of any particular transaction. If you would like any further advice or explanation relating to your responsibilities, please raise these points with Ed Lukins (020 7556 4261; elukins@cooley.com) or Ed Dyson (020 7556 4230; edyson@cooley.com) at Cooley (UK) LLP.

2. Civil liability

2.1 FSMA requirements

Part VI of FSMA deals specifically with the listing of securities on the Official List of the FCA. Section 73A of FSMA empowers the FCA to make rules for the purpose of Part VI of FSMA relating to the official listing of securities. The Listing Rules set out the principal requirements that a company must satisfy for the admission to listing of securities and the Prospectus Rules specify the information that must be included in the prospectus. This comprises, in effect, a contractual document on the basis of which shareholders will subscribe for shares in the Company.

(a) General duty of disclosure

Section 87A(2) of FSMA provides for a general overriding duty of disclosure, in addition to the prescriptive contents requirements set out in the Listing Rules and the Prospectus Rules.

The prospectus must contain the information necessary to enable investors to make an informed assessment of:

(i) the assets and liabilities, financial position, profits and losses, and prospects of the issuer of the transferable securities;

(ii) the rights attaching to the transferable securities; and

(iii) include the following:

- a responsibility statement from the Directors (existing and, as the case may be, proposed), the Company, and any third party which is required to take responsibility for the prospectus or a part of it (e.g., a competent person's report provider);
- risk factors;
- general information about the Company and its share capital;
- the principal activities of the Company;
- related party transactions and material contracts entered into by the Company;
- historical financial information and sufficient information as regards the assets and liabilities, financial position and profits and losses of the Company;
- the Company's administration, management and supervision;
- recent developments in the business of the Company and its prospects;
- the names of the statutory auditors and major shareholders of the Company and number of employees;
- statements and confirmations in connection with profit forecasts, estimates or projections which must be prepared on a basis comparable with the historical financial information;
- a statement in connection with lock-ups;
- a statement regarding outstanding litigation faced by the Company;
- a statement that the Company has sufficient working capital for its present requirements (that is at least 12 months from the date of the prospectus); and

- information concerning certain fees and contractual arrangements of the Company.

In relation to each Director, the prospectus is required to contain details of:

(i) their full name, any previous name, and age;

(ii) all companies and partnerships of which they were a Director or partner over the previous five years indicating whether or not the Director is still a Director or partner;

(iii) any unspent convictions in relation to indictable offences;

(iv) bankruptcies or individual voluntary arrangements;

(v) receiverships, compulsory liquidations, creditors' voluntary liquidations, administrations, company voluntary arrangements or any composition or arrangement with creditors where they were a Director at the time of or within 12 months preceding any such events;

(vi) compulsory liquidations, administrations or partnership voluntary arrangements of any partnership where they were a partner at the time of or within the 12 months preceding such events;

(vii) receiverships of any asset of such Director or of a partnership of which they were a partner at or within the 12 months preceding such event; and

(viii) any public criticism of such Director by any statutory or regulatory authority and whether such Director has ever been disqualified by a court from acting as a Director of a company or from acting in the management or conduct of affairs of any company.

Under the Prospectus Rules, the FCA may authorise the omission of information from the prospectus if it receives confirmation that:

(i) the information is of minor importance only and is not likely to influence the assessment of the Company's assets and liabilities, financial position, profits and losses and prospects; or

(ii) disclosure of the information would be seriously detrimental to the Company and its omission would not be likely to mislead investors with regard to facts and circumstances necessary for an informed assessment of the Company's securities.

Liability under the general duty of disclosure arises where information in the prospectus is untrue or misleading or relevant information has been omitted. Accuracy is not sufficient to avoid liability where the information in the prospectus is incomplete or misleading.

(b) Supplementary prospectus

Under section 87G of FSMA, the Company may be required to publish a supplementary prospectus if, between the approval of the prospectus and the closing of the offer of shares or the commencement in dealings in the shares following their admission to the Official List of the FCA (whichever is the later), there arises or is noted any significant new factor, material mistake or inaccuracy relating to the information in the prospectus. For this purpose "significant" means significant for the purposes of making an informed assessment of the matters set out and referred to in section 87A(2) of FSMA.

A person responsible for the original prospectus is under a duty to notify the Company of any significant new factor, mistake or inaccuracy of which they become aware *(section 87G(5), FSMA).* The Company's broker or placing agent (as the case may be) should also be informed. Accordingly, Directors should notify both the Company and the Company's broker or placing agent (as the case may be) as soon as they become aware of any such information (i.e. without delay) so that they can consider whether the issue of a supplementary prospectus or a public announcement is necessary.

(c) The persons responsible for the prospectus

Under paragraph 5.5.3R(2) of the Prospectus Rules, the Directors are among the persons responsible for the prospectus. Other persons responsible include:

- the Company, as the issuer of the securities to which the prospectus relates (*paragraph 5.5.3R(2)(a), Prospectus Rules*);
- anyone who accepts, and is stated in the prospectus as accepting, responsibility for, the prospectus or any part of it (*paragraph 5.5.3R(2)(c), Prospectus Rules*); and
- anyone who authorises the contents of the prospectus or any part of it (*paragraph 5.5.3R(2)(f), Prospectus Rules*).

The Prospectus Rules also require the Directors, alongside the Company, to accept responsibility for the prospectus by virtue of a responsibility statement which appears in the prospectus. The statement must be in substantially the following form:

"*Each of the Directors and the Company accept responsibility for the information contained in this document. To the best of the knowledge of each of the Directors and the Company (who have taken all reasonable care to ensure that such is the case) the information contained in this document is in accordance with the facts and does not omit anything likely to affect the import of such information*."

(d) Section 90 of FSMA

Those persons responsible for the prospectus (or any supplementary prospectus) are liable to pay compensation to any person who has acquired shares in the Company and suffered loss as a result of:

- any untrue or misleading statement in the prospectus (or supplementary prospectus); or

- the omission of any information required to be included in the prospectus. An omission of information for these purposes includes any information required in the form of a negative statement (*section 90(3), FSMA*), (*section 90(1), FSMA*).

Any person who fails to comply with section 87G of FSMA (supplementary prospectus) is liable to pay compensation to any person who has acquired shares and suffered loss in respect of them as a result of the failure (*section 90(4), FSMA*).

It should be noted that liability under section 90 of FSMA may extend to cover purchases of shares in the Company in the secondary market after Admission (rather than directly from the Company) because buyers do not have to show reliance on the prospectus. This liability may exist until such time as new information making the prospectus out-of-date is available.

Schedule 10 to FSMA sets out five main defences against a claim to compensation under section 90(1) of FSMA. A Director will not be liable to pay compensation if they can satisfy the court that:

- at the time when the prospectus was submitted to the FCA, they reasonably believed, having made reasonable enquiries, that the relevant statement was true and not misleading or that relevant information was properly omitted and:
  - the Director continued to hold that belief until the shares were acquired; or
  - the shares were acquired before it was reasonably practicable to bring a correction to the attention of likely investors; or
  - before the shares were acquired, the Director took all reasonable steps to ensure that a correction was brought to the attention of likely investors; or
  - the Director continued in that belief until after the commencement of dealings in the shares and the shares were acquired after such a lapse of time that they ought to be reasonably excused (for example, if the relevant part of the prospectus had been overtaken by events);
- where the loss was caused by an expert's statement included in the prospectus with that expert's consent, the Director reasonably believed at the time when the prospectus was submitted to the FCA that the expert was competent to make or authorise the statement and had consented to its inclusion in the form and context in which it was included (and one or more of the sub-bullet points above apply);
- before the shares in question were acquired:
  - a correction was published or the fact that the expert was not competent or had not consented to the inclusion of their statement was made known to likely investors, in each case in a way calculated to bring it to the attention of those likely to acquire the shares; or
  - the Director took all reasonable steps to secure such publication and reasonably believed that it had taken place before the shares were acquired;
- the loss resulted from a statement made by an official person, or was contained in a public official document, which was accurately and fairly reproduced in the prospectus; and/or
- the person suffering the loss acquired the shares with knowledge that the statement was false or misleading, or knew of the omitted matter.

A Director will not be liable to pay compensation under section 90(4) of FSMA if they can satisfy the court that:

- the person suffering the loss acquired the shares with knowledge that the statement was false or misleading, of the omitted matter or of the change or new matter; and/or
- he reasonably believed that the change or new matter in question was not such as to call for a supplementary prospectus.

2.2 Other civil liability

Civil liability may also arise in respect of untrue or misleading statements in, or omissions from, the prospectus or other marketing documents or other publicly available materials, for example, negligent misstatement and deceit. Untrue statements made orally (for example, in institutional or analysts' presentations) will be subject to the same regime.

(a) Market manipulation

Prospectus liability can arise under the offence of market manipulation in Article 15 of MAR, which has direct effect in the United Kingdom.

Article 12 of MAR describes the behaviour which amounts to market manipulation. This includes the dissemination of information, by any means, which:

- gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument (which would include shares in the Company); or
- secures, or is likely to secure, the price of one or several financial instruments at an abnormal or artificial level, including the dissemination of rumours,

where the person who made the dissemination knew, or ought to have known, that the information was false or misleading.

If the FCA considers that a Company has contravened MAR, it may impose an unlimited financial penalty. It may, as an alternative, publish a statement censuring the Company.

(b) Negligent misstatement

If the Director is negligent in making any statement in the prospectus, they may be liable for an action in damages in tort brought by a person who has suffered a loss as a result of acting on that statement where the loss was a reasonably foreseeable consequence of the negligent misstatement. The scope of negligent misstatement is wider than negligent misrepresentation and may include not just misstatement of fact, but also the giving of negligent opinions and advice. To establish negligence the investor must show that some sort of duty of care was owed to them (as distinct from a claim under the Misrepresentation Act where a contractual relationship is required). This means that the range of aggrieved investors who may bring such an action is potentially broad and is not limited to investors who subscribe for shares in the initial placing. The investor must also show that there was a breach of that duty and a

consequent loss. The responsibility statement required by the Prospectus Rules is thought to place such a duty of care on those accepting responsibility for the prospectus.

(c) Fraudulent misrepresentation or deceit

To obtain damages from a Director for deceit, an aggrieved investor must show that a material misstatement of fact was made fraudulently and that they were induced to subscribe for shares in reliance on that misstatement. A statement will be made fraudulently for these purposes if it is either made with knowledge that the statement was false or it is made recklessly (that is, not caring whether the statement was true or false). It is not necessary to show an intent to defraud or that the fraudulent statement was the sole cause which induced the shareholder to purchase the shares. The measure of damages is calculated to put the investor in the position they would have been in had the misrepresentation not been made (with the presumption that they would not have entered into the contract if the misrepresentation had not been made) so, broadly, the damages will be the difference between the price actually paid for the shares and their market value. The loss recoverable is not restricted to that which is foreseeable, as is the case with negligent misstatement, but is the actual loss suffered by the claimant.

(d) Misrepresentation

Liability for the Directors may arise under the common law for fraudulent or negligent misrepresentation under the Misrepresentation Act.

Section 2(1) of the Misrepresentation Act in essence gives a statutory right to damages in addition to the right to avoid the Contract, in respect of negligent misrepresentations which induce someone to enter into a contract. Under this section, damages may be recovered for any pre-contractual misrepresentation if liability would have arisen had the representation been fraudulently made, unless the person making the representation proved they had reasonable grounds to believe and did believe up to the time the contract itself was made that the facts represented were true.

Section 2(2) of the Misrepresentation Act permits the court (at its discretion) to award damages in lieu of the right to avoid the contract where an innocent misrepresentation has been made. An innocent misrepresentation is where the maker of the statement can show that they had reasonable grounds to believe their statement was true. It is thought that damages under section 2(2) of the Misrepresentation Act are to be awarded at a lower level than damages under section 2(1) for negligent misrepresentation.

(e) Breach of contract

It is possible for a misrepresentation made during pre-contractual exchanges of information to be incorporated as a term of the contract. It is a question of fact for the court whether or not the misrepresentation has become a term of the contract. The action is for breach of contract and damages are measured on the contractual basis. Contractual damages are calculated to put the investor in the position they would

have been in had the misrepresentation been true so, broadly, the damages will be the difference between the actual value of the shares and their value if the misrepresentation had been true.

(f) Duty of care

A Director of a company incorporated in the England and Wales owes a duty of reasonable care and skill to the Company and must act honestly and in good faith to promote the success of the Company. If a breach of this duty results in a misstatement in the prospectus, which leads to the Company suffering loss in compensating third parties who rely on the misrepresentation or misstatement, the Director may be liable to the Company

(g) Breach of statutory duty

Failure to comply with the provisions of Part VI of FSMA may also give rise to an action in tort for breach of statutory duty. The result of such breach would be to confer upon persons who have suffered loss in respect of a breach a common law right of action in tort against those responsible for the prospectus. Such action would be in addition to any remedy available under FSMA itself, but is unlikely to succeed in principle where a claim for compensation under FSMA would not succeed.

(h) Market abuse

The provision of false or misleading information in the prospectus or in other documents could lead to a civil offence of market abuse under the MAR if it gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of a financial instrument. Both the Company and the Directors may be liable for market abuse.

(i) Defamation

Care should be taken to avoid possible claims for defamation in relation to the prospectus. Defamation occurs when there is publication to a third party of words or matters containing an untrue imputation against the reputation of individuals, companies or firms which serves to undermine that reputation in the eyes of right-thinking members of society generally. Defamation is governed by common law and statute under the Defamation Act 1952 and the Defamation Act 1966. An employer will be vicariously liable for defamatory statements made by its employees in the course of their employment. The publisher of defamatory material may face a claim for damages or for injunctive relief. The purpose of damages in a defamation action is to compensate for the harm caused to the claimant's reputation.

3. **Criminal liability**

Criminal (as well as civil) liability may also arise.

3.1 Sections 89 and 90 of the FS Act

Section 89 of the FS Act sets out an offence in relation to misleading statements. A person commits an offence under section 89 of the FS Act if he, knowingly or recklessly, makes a statement which is false or misleading in a material respect or they dishonestly conceal any material facts, in either case, for the purpose of inducing, or they are reckless as to whether making the statement or concealing the material facts may induce, another person to enter into or offer to enter into a relevant agreement (which includes buying, selling, subscribing for or underwriting shares other than, among others, shares in an open ended investment company).

Directors should note that section 89 of the FS Act provides that an offence can be committed if a person makes a false or misleading statement "recklessly", even though they did not know it was false or misleading. By contrast, the omission of a material fact will only be an offence if that fact was concealed "dishonestly". A person will be considered to be reckless if, before doing an act, they either fail to give any thought to the possibility of there being a risk or, having recognised that there is a risk which a prudent individual would not feel justified in ignoring, nevertheless goes on to do that act. A person is dishonest if they act in a way which they know ordinary people consider to be dishonest, even if they believe that they are justified in acting as they did.

Section 90 of the FS Act creates a separate offence relating to misleading impressions. It is an offence to do any act, or engage in any course of conduct, which creates a false or misleading impression as to the market in, or the price or value of, any relevant investments (which includes shares other than, among others, shares in an open ended investment company) if the person intended to create such an impression and:

- by creating such impression, they intend to induce another person to acquire, dispose of, subscribe for or underwrite investments or to refrain from doing so or to exercise or refrain from exercising any rights conferred by the investments; and/or
- they know that, or is reckless as to whether, the impression is false or misleading and intends, or is aware that creating the impression is likely, to produce either of the following results:
    - the making of a gain for themselves or another; or
    - the causing of a loss to another person or the exposing of another person to the risk of loss.

A person guilty of an offence under sections 89 or 90 of the FS Act is liable:

- to conviction on indictment for a maximum of seven years imprisonment or a fine or both;
- on summary conviction to a maximum of twelve months imprisonment or a fine or both.

3.2 Section 398 of FSMA

A Director may also incur criminal liability under section 398 of FSMA if, in purported compliance with any requirement imposed on them by or under FSMA, they knowingly or recklessly (i.e. no dishonest intent is needed) gives the FCA information which is false or misleading in a material particular.

A person guilty of an offence under section 398 is liable to a fine. Even if the offence is committed by the Company, a Director, secretary or "similar officer" may be liable if the

offence is found to have been committed with their consent or connivance, or to be attributable to any neglect on their part.

3.3 Theft Act

Under section 19 of the Theft Act, it is a criminal offence for any officer of a company to publish (or concur in the publishing of), with intent to deceive its members or creditors about its affairs, a written statement or account which "to their knowledge is or may be misleading, false or deceptive in a material particular". There must be an intention to deceive, but a literally true statement which gives a misleading impression may still lead to the commission of an offence. The offence is punishable by imprisonment for up to seven years or a fine or both. The courts interpret the section broadly; it would, for example, cover a misleading or deceptive statement or omission in the prospectus.

Under section 17 of the Theft Act, if a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another, destroys, defaces, conceals or falsifies any account, record or document made for accounting purposes or if, in furnishing information for any purpose, they produce or make use of any account, record or document made for accounting purposes which they know to be misleading, false or deceptive in any material particular they is liable to a maximum imprisonment of seven years. Criminal liability may also arise where it appears that any business of the Company has been carried on with intent to defraud creditors of the Company.

3.4 Fraud Act

Section 2 of the Fraud Act makes it an offence dishonestly to make a false representation with the intent of making a personal gain or a gain for another, causing loss to another or exposing another to a risk of loss. Representations can be in relation to facts or opinions and can be express or implied. Section 3 of the Fraud Act makes it an offence dishonestly to fail to disclose to another person information which they are under a legal duty to disclose (for example under FSMA) with the intention of making a personal gain or a gain for another, causing loss to another or exposing another to a risk of loss. If the Fraud Act offences are committed by a company then, by virtue of section 12(2), if it is shown to have been committed with the consent or connivance of a Director (or certain other officers) such person is also guilty of the offence. Those convicted can receive a fine or be sentenced for a period of up to 10 years or both.

3.5 Insider dealing

Part V of the CJA contains the criminal regime relating to insider dealing. The three offences covered by the CJA relate to:

- dealings in securities as an insider;
- encouraging another person to deal in securities who might reasonably be expected to do so; and
- disclosing inside information, to another person, other than in the proper performance of one's duties.

Dealings

For a transaction to be caught under any of the above offences it must have occurred on a "regulated market" (as such term is defined for the purposes of the CJA) or the person dealing must have relied on a "professional intermediary" or was himself acting as such.

Securities

The securities that are regulated by the CJA include shares, debt securities, depository receipts, options, futures and contracts for differences. They must be officially listed in a State in the European Economic Area or have their price quoted on, or under the rules of, a regulated market (as such term is defined for the purposes of the CJA).

Insider

The CJA restricts primary offences to individuals in two basic categories. These are:

- a "primary insider" – anyone who has inside information through being a Director, employee or shareholder of a company or other body that issues securities (not necessarily the securities affected by the information) or anyone else who has access to the information by virtue of their position; and
- a "tippee" – anyone else who has inside information from an insider or whose direct or indirect source was such an insider.

There does not have to be any clear connection between the insider and securities about which they have information. A person will qualify as an insider if they in fact obtain information through their job or through being a shareholder in a company, which they know is inside information. A "tippee" is anyone who obtains such information from someone they know is an insider or whose source is such an insider.

Inside information

To be “inside information” under the CJA, the information has to:

- relate to particular securities or to a particular issuer of securities and not to securities generally or to issuers of securities generally;
- be specific or precise;
- not have been made public; and
- if it were made public, be likely to have a significant effect on the price or value of any securities.

Section 58(2) of the CJA deems information to have been made public if it is:

- officially published as required by a regulated market (e.g. through an RIS or the equivalent overseas);
- contained in statutory required records (Companies House or the Official Gazette);
- readily available to those likely to deal in the relevant securities; or
- derived from information that has been made public (e.g. analysis of company accounts).

Section 58(3) of the CJA further states that information may be treated as having been made public even though:

- it can be acquired only by persons exercising diligence or expertise;
- it is communicated to a section of the public and not to the public at large;
- it can be acquired only by observation;
- it is communicated only on payment of a fee; or
- it is published outside the United Kingdom.

A Director should also note that the CJA does not require inside information to be confidential. Therefore Directors and employees may find themselves in a position of having specific knowledge, which although not confidential, may give them a basis for believing that the share prices in the market are wrong. Such a person should be very wary of dealing in the securities of the Company for which they work and also in the securities of other companies in the same sector. They should refrain from discussing such matters with analysts so as to avoid committing the crime of encouraging others to deal.

The defences

There are three general defences which apply to the offences of dealing and encouraging. An individual is not guilty of insider dealing by virtue of dealing or encouraging if they show:

- they did not expect the dealing to result in a profit attributable to the fact that the information in question was price sensitive information in relation to the securities;
- that in dealing they would have done what they did even if they had not had the information; or
- they believed on reasonable grounds that the information had been or would be disclosed widely enough to ensure that none of those taking part in the dealing would be prejudiced by not having the information.

An individual is not guilty of insider dealing by virtue of a disclosure of information if they shows:

- that they did not at the time expect any person, because of the disclosure, to deal in the securities; or
- that, although they had such an expectation at the time, they did not expect the dealing to result in a profit attributable to the fact that the information was price sensitive information in relation to the securities.

The CJA also provides three special defences where the individual will not be guilty of insider dealing:

- stabilising new issues – providing such stabilisation complies with the EU MAR rules on the subject;
- market making – market makers will have a valid defence if they can prove that in dealing, or encouraging others to deal (but not disclosing), they were acting bona fide as market makers; and
- the "market information" defence – an individual has to prove that in dealing or encouraging another to deal (but not disclosing), the inside information they had was about the actual or contemplated acquisition or disposal of securities and that their behaviour was reasonable.

Penalties

An individual found guilty of insider dealing is liable to unlimited fines and/or imprisonment (for a term not exceeding six months on summary conviction or seven years on a conviction on indictment).

3.6 Market abuse

MAR provides a civil regime relating to market abuse.

Article 14 of MAR prohibits insider dealing and unlawful disclosure of inside information.

To be "inside information" for the purposes of Article 7 of MAR, information must be:

- of a precise nature,
- which has not been made public,
- relating directly or indirectly to one or more issuers,
- and when, if it were made public,
- would be likely to have a significant effect on the price of the securities of such issuer[s].

The prohibitions apply to anyone who holds inside information as a result of being a Director or shareholder, having access to the information through their employment, profession or duties or being involved in criminal activities. They also apply where the person knows or ought to know that the information is inside information.

Insider dealing arises where a person possesses inside information and uses it by acquiring or disposing of, either directly or indirectly, financial instruments to which the information relates, whether on their own account or for another person. Where someone has placed an order before obtaining inside information, cancelling or amending the order using that information will also amount to insider dealing.

Recommending or inducing another person to engage in insider dealing is also prohibited.

A person in possession of inside information must not disclose it to any other person, except where the disclosure is made in the normal exercise of an employment, profession or duties.

Passing on recommendations or inducements to engage in insider dealing, knowing the recommendation or inducement was based on inside information, is also prohibited.

There are specific rules governing the conduct of market soundings: that is, communications of information, prior to the announcement of a transaction, in order to gauge the interest of possible investors.

Market manipulation

Article 15 of MAR prohibits market manipulation and attempted market manipulation. Market manipulation can be committed in a number of ways, including those described below.

A person may not enter into a transaction, place an order to trade or carry out any other behaviour that (other than for legitimate reasons and in conformity with accepted market practices accepted by the FCA):

- gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of the Company's securities; or
- secures, or is likely to secure, the price of the Company's securities at an abnormal or artificial level.

A person may not enter into a transaction, place an order to trade or carry out any other activity or behaviour which affects or is likely to affect the price of the Company's securities, which employs a fictitious device or any other form of deception or contrivance.

A person may not disseminate information through the media, including the internet, or by any other means, which gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of the Company's securities or secures, or is likely to secure, the price of the Company's securities at an abnormal or artificial level, including the dissemination of rumours, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading.

Safe harbours

There are exemptions from the prohibitions on insider dealing, unlawful disclosure and market manipulation for buy-back programmes and stabilisation measures where certain conditions are met.

In the context of public takeovers and mergers, it will not be deemed, from the mere fact that a person is in possession of inside information, that they had used that information and have thereby engaged in insider dealing, where they had obtained the inside information in the conduct of a takeover or merger and uses it solely for the purpose of proceeding with the takeover or merger, provided that at the point of acceptance of the takeover or approval of the merger any inside information has been made public or otherwise ceased to be inside information. This does not, however, apply to stakebuilding.

3.7 Wrongful trading

A Director may be guilty of wrongful trading if the Company has gone into liquidation and, prior to such liquidation, they:

- knew (or ought to have concluded, based both on their actual skill, knowledge and experience and the skill, knowledge and experience that a Director in their position ought to have) that there was no reasonable prospect of the Company avoiding an insolvent liquidation; and
- failed to take every step that a reasonably diligent person would have taken to minimise the potential loss to creditors.

A Director convicted of wrongful trading may be ordered to contribute to the Company's assets for the benefit of creditors.

Protection from liability for wrongful trading may be available, in certain circumstances:

- a Director must take positive action to mitigate the potential loss to creditors – merely claiming they had done nothing to cause loss will be no defence;
- the action must be taken at the right time (that is, when the Director knew, or ought to have concluded, that there was no reasonable prospect of the Company avoiding an insolvent liquidation) – they must neither act too late nor put the Company into liquidation too early;
- they cannot avoid liability by resigning when they realise that the Company is facing financial difficulty – resignation is unlikely to be a means of "minimising the loss to creditors"; and
- the Director should remain on the Board of the Company to ensure that their warnings are recorded, both for their own protection and so that at least one voice will be heard representing the interests of creditors, if their co-Directors refuse to act.

3.8 Steps the Directors should take to avoid liability

Checking the prospectus

Even though the preparation of the prospectus may be left in the hands of a specifically constituted team, every Director of the Company should satisfy themselves (to the best of their knowledge, having taken all reasonable care to ensure that such is the case) that:

- each item of information in the prospectus is in accordance with the facts and is not misleading in its context;
- all expressions of opinion are reasonably based and properly held; and
- the prospectus contains all information necessary to give a true and fair view of the Company's business and prospects, and that nothing has been omitted which is necessary to enable investors to make an informed assessment of the Company and its subsidiaries.

Each Director should be able to demonstrate that they exercised reasonable care and adopted adequate procedures to ensure that the documents used in connection with the Admission and any public statements do not contain any misstatements or omissions of facts material to the statements made in those documents. In view of this, each Director should carefully read proofs of the prospectus and such documents and statements (especially the later proofs), and in doing so should:

- consider each statement in the prospectus or other public document;
- satisfy themselves that the facts are true and not misleading, that all necessary information is included;
- satisfy themselves that each statement of opinion, belief or intention is reasonably based, that each forecast is fair and reasonably based and that any statement is true and not misleading; and
- satisfy themselves that, taken as a whole, the prospectus gives a true and fair impression of the history, business, financial and trading position and prospects of the Company.

Supporting documentation

All of the Company's Directors, including non-executive Directors, must accept responsibility in the terms of the responsibility statement, even though they may not all be involved in the

detailed drafting of the prospectus. To confirm acceptance of this responsibility, each of the Directors must sign a "responsibility statement", which will authorise the issue of the prospectus with the inclusion of the above statement.

4. **Verification procedures**

To minimise the risk of liability a process will be followed to provide confirmation of the accuracy of key statements of fact and opinion in the prospectus (and in public announcements made by the Company) and of inferences which may be drawn from those statements. This process is called "verification".

Written responses/comments of individuals within the Company, supporting evidence and source materials are collated and retained in order to provide a record of the verification undertaken.

In view of the extent of the possible liabilities of a Director arising out of the publication of an prospectus, it is obviously in the interests of all those concerned in the preparation of an prospectus to undertake a verification exercise, in order to ensure the accuracy, completeness and fairness of statements of fact and opinion which appear in the prospectus and that, as far as possible, the risk of potential criminal or civil liability is minimised.

The verification process will include the preparation of verification notes. These notes will form only part of the overall verification process; a significant amount of questioning of the basis of the statements included in the prospectus will take place as the document is being drafted and statements will be removed if it is obvious they cannot be supported.

The verification process is not limited to checking information stated in the prospectus is factually correct. It is also intended to check that no inferences may be drawn from statements that may be misleading (particularly if taken in isolation) and that no material matters have been omitted from the prospectus.

Verification notes comprise a series of questions, answers and details of supporting information and evidence and are designed to provide:

- a way of apportioning responsibility to check a particular statement;
- a formal record of the steps taken to check accuracy; and
- a way of making sure that all responsible persons focus on particular statements.

By taking the statements individually and out of their context, the intention is that the mind will be concentrated on the isolated statement and that one ensures that nothing is inaccurate or misleading; it also helps to ensure that there is no ambiguity.

To reduce the risk of potential criminal or civil liability, each Director should reasonably believe, having made such enquiries as are reasonable that:

- any inferences an investor might reasonably draw from the statements in the prospectus are fully justified;
- no incorrect statement is made;
- each material statement of fact or opinion in the prospectus is true, accurate and not misleading;

- taken as a whole, the document gives, so far as possible, a true, accurate and fair impression of the history, business and prospects of the Company; and
- nothing has been omitted so as to make the document misleading in any material respect, and that any matter which has been omitted should not have been included in order to satisfy the general duty of disclosure.

It is not necessarily sufficient that a particular statement is strictly true; it is also essential to check that it is not misleading in its context (in other words, that it does not encourage the reader to reach a conclusion which is incorrect).

Verification questions are normally prepared and circulated by solicitors and answers to these questions produced by the Directors, with the assistance of the professional advisers. These notes are then signed by the Directors.

The existence of verification notes will not of itself mean that appropriate standards of care have been met during the production of the prospectus. This will be a question of fact to be determined in all the circumstances and the onus will therefore remain on the Directors to ensure that the prospectus satisfies the requisite standards. The verification procedure focuses on what is in the prospectus but cannot (and does not seek to) ascertain whether there are any material omissions.

Before the prospectus is published, each Director accepting responsibility should have read it in its entirety, should have considered each statement in it and should have satisfied himself that each statement has been the subject of sufficient verification to afford them reasonable grounds for believing that the information contained is true, accurate and not misleading and that no relevant information is omitted.

It is acknowledged that each Director cannot be expected personally to verify every detail in the prospectus. The idea of the verification notes is to permit a Director, in appropriate cases, to rely upon the detailed work of others to check particular statements. Nevertheless, each Director must be satisfied:

- where relying on others to check particular statements in the prospectus, that the person on whom they are relying is a person on whom it is reasonable for them to rely in relation to the information in question; and
- there are reasonable grounds for the Director to believe that the person on whom they are relying has properly verified the statement and is competent so to do.

If, despite the verification process, incorrect information is contained or material information is omitted from the prospectus, each of the Directors can still incur personal liability. The verification process is not, in itself, a defence, but is intended to provide the evidentiary basis for establishing that reasonable care has been taken by the persons responsible for the prospectus. Any verification process carried out should not be viewed as a substitute for each Director satisfying himself that the prospectus is accurate and adequate. The Directors will appreciate that a defence to any claim may be more difficult to establish if this detailed approach has not been adopted.

Insurance cover for certain liabilities in respect of the prospectus may be available, although it is generally expensive and subject to exclusions and conditions. The desirability of seeking such insurance should nonetheless be considered.

The Directors will be expected formally to approve the final version of the prospectus and the verification notes at a Board meeting to be held shortly before publication of the prospectus. It is customary that all of the Directors, illness or other unavoidable cause apart, will be available for this meeting.

If a Director becomes aware between the time of publication of the prospectus and the commencement of dealings in the Company's securities of any significant new matter or change affecting any matter required to be contained in the Prospectus, they must notify the Company and the Company's advisers accordingly.

Even after dealings have commenced, should any inaccurate or misleading statement or omission from the prospectus become known to a Director, they must immediately raise the matter with the Company and the Company's advisers.

A Director may be able to seek an indemnity from the Company in respect of matters covered by the indemnity provision in the Company's articles of association if they has been granted such an indemnity in their service contract or under a separate deed of indemnity. The scope of such indemnities is restricted by statute, but such restrictions do not prevent Directors and other officers of the Company from being indemnified out of the assets of the Company against any liability incurred by them in defending any civil or criminal proceedings in which judgment is given in their favour or in which they are acquitted.

5. **Liability under placing agreement**

The Directors and the Company will usually be required to give warranties and/or indemnities in a placing agreement to be entered into with the Company's broker and/or placing agent (as the case may be). The warranties will relate to the accuracy and completeness of financial and other information relating to the Company as contained in the prospectus, compliance by the Company with other relevant legal requirements and other specific matters relating to the Company. The indemnities will be in respect of liability incurred by the Company's broker and/or placing agent (as the case may be) to third parties as a result of performing their respective duties in those roles.

If a claim is brought against either of them by subscribers for, or purchasers of, shares in the Company to be issued or sold as part of the placing, they may rely on the warranties and indemnities in the placing agreement to institute actions against the Company and the relevant Directors of the Company who give the warranties and indemnities for the loss they suffer as a result of the claim.