Financial Conduct Authority

Primary Market Bulletin

Newsletter from the FCA for primary market participants

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About this edition

Welcome to the seventh edition of *Primary Market Bulletin*, the second we have published as the FCA.

The changes to the UK regulatory system that came into effect on 1 April 2013 significantly changed the framework, powers and objectives of the UK Listing Authority (UKLA).

In the first section of this edition we explain how these changes affect our work.

The next section is dedicated to our Knowledge Base. We set out the guidance we are consulting on and the guidance we have now published.

We end this edition with a brief section updating you on items of interest.

The UKLA Department as part of the FCA

The Financial Services Act 2012 amended the Financial Services and Markets Act 2000 ("FSMA") and the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) replaced the Financial Services Authority (FSA) as the body that regulates the financial services industry in the UK. The FCA is responsible for implementing and enforcing the Listing Rules, the Prospectus Rules and the Disclosure and Transparency Rules under Part VI FSMA, and discharges these responsibilities through the UKLA Department. For more on this, see our Consultation Paper CP12/37.

Before the Financial Services Act 2012 was implemented, the general objectives of the FSA did not apply to the regulatory responsibilities of the UKLA Department. Instead, the Treasury set regulatory objectives for the Part VI functions, which were also subject to a modified set of factors to which the UKLA Department should 'have regard' under FSMA.[1]

The amendments to FSMA, which came into effect on 1 April 2013, changed this statutory framework and the FCA's strategic and operational objectives now apply directly to Part VI functions. These amendments also give the FCA a range of new statutory powers in relation to sponsors and primary information providers. We explain these here.

1 FSMA Section 2; FSMA Schedule 7 (as in force before 1 April 2013).

The FCA's objectives

The overarching strategic objective of the FCA is 'ensuring that the relevant markets function well'.[2] We also have three operational objectives: –

- consumer protection
- market integrity, and
- competition

When carrying out our general functions, we must, so far as reasonably possible, also act in a way that advances one or more of our operational objectives.

Consumer protection

We are charged with 'securing an appropriate degree of protection for consumers'.[3] The definition of consumer for these purposes is very broad and includes retail investors in financial instruments (such as shares and bonds), and wholesale consumers (such as regulated firms making investments and issuers looking to raise capital or when using the services of a sponsor or a primary information provider).[4]

Given the breadth of this definition, FSMA also details the considerations we must 'have regard to' in considering the appropriate degree of protection for consumers. These include the amount of risk involved in different kinds of investment, the experience and expertise that different consumers may have and consumers' potential expectations for different kinds of investments.

So when we are vetting prospectuses, we must now consider how wholesale and retail investors use the documents we approve. We therefore intend to tailor our vetting approach to more clearly take account of the end-investor targeted by each prospectus. When vetting documents targeted at retail investors for instance, we will pay particular attention to the requirement in the Prospectus Directive that documents should be "easily analysable and comprehensible".[5]

We think these documents should look significantly different from similar documents aimed at wholesale investors. We are proposing new guidance in the form of a technical note for the Knowledge Base which directly addresses the prospectus disclosure requirements for retail investors in non-equity securities. This guidance is set out in UKLA/TN/632.1 – non-equity retail prospectuses.[6] If this proposal is implemented following consultation, we intend to change the document review period for retail non-equity securities so that comments on the first draft and subsequent drafts of these documents are returned in five days and three days respectively rather than the current four days and two days.

We understand that a different approach is appropriate for a prospectus targeted at wholesale investors due to the knowledge and sophistication of these consumers. Therefore, we intend to tailor our review of wholesale non-equity prospectuses by concentrating on the Prospectus Directive disclosure requirements we believe are most relevant to wholesale investors.[7] We will also view the requirement for prospectuses to be easily analysable and comprehensible differently where wholesale investors are concerned. In doing so, we expect to raise fewer comments and review fewer drafts where the end-consumer is a wholesale consumer.

2 FSMA Section 1B.
3 FSMA Section 1C.
4 FSMA Section 1G.
5 Prospectus Directive Article 5.1.
6 Please refer to Section II – Knowledge Base Guidance, of this PMB.
7 Wholesale denominated debt securities have denominations of Euro 100,000 or greater under the Prospectus Directive definitions.

Given the way in which the consumer protection objective requires us to recognise the different needs of different types of consumer, it is likely that wholesale and retail denominated prospectuses may contain significantly different disclosures. We are asking issuers and their advisers to keep this in mind when using previously approved documents as the basis for the drafting of their own prospectuses.

Market integrity

This objective is 'protecting and enhancing the integrity of the UK financial system'.[8]

In the context of our Part VI functions, we see the Listing Rules and the various European Directives underpinning the Part VI handbooks to be essential to ensuring the integrity of the primary market for securities.

We also recognise that primary information providers (PIPs) occupy a key position in the market as a result of their role in ensuring regulated information is communicated to the market promptly. We now have, for the first time, a statutory framework to govern the approval and supervision of PIPs including powers of limitation, restriction and suspension and the power to write rules in relation to PIPs. This is set out in new handbook chapters (DTR 1C and 8) which, as discussed in detail in **CP12/37**, update and clarify many of the existing informal provisions. We recently published our policy statement on these provisions, together with a re-consultation on one aspect of the regime. This can be found in **CP13/8 'Arrangements for the Disclosure of Regulated Information'** published 28 August 2013.

We also see the sponsor regime as an important part of ensuring the integrity of the premium listed market. Given our reliance on sponsors and the significance of the sponsor's role within the listing regime, we are proposing guidance that specifically deals with sponsors' obligations under the Listing Rules to deal with the FCA in an open and cooperative way. The guidance explains the application of this obligation and provides commentary around when this regulatory obligation may impact on contractual negotiations with third parties. This new guidance is set out in a new technical note **UKLA/TN/713.1.**[9]

Competition

The competition objective is 'promoting effective competition in the interest of consumers in the markets for regulated financial services or services provided by recognised investment exchanges in carrying on certain regulated activities'.[10]

For this objective, regulated financial services include both the provision of sponsor services to an issuer, and the provision of PIP services to an issuer. Ensuring that both the sponsor regime and the new PIP regime are effective in promoting competition will therefore be an important new focus for us under our new objectives. The issuing of securities by issuers is not covered by the competition objective. It is important to note, however, that we have a further responsibility known as the competition duty. This duty requires us to promote effective competition in the interests of consumers when meeting our consumer protection and integrity objectives.[11] Unlike the competition objective itself, this broader competition duty is not drafted in a way which excludes the issuing of securities by issuers.

8 FSMA Section 1D.
9 Please refer to Section II – Knowledge Base Guidance, of this PMB.
10 FSMA Section 1E.
11 FSMA Section 1B(4) states "(T)he FCA must, so far as is compatible with acting in a way which advances the consumer protection objective or the integrity objective, discharge its general functions in a way which promotes effective competition in the interests of consumers."

The regulatory principles

Section 3B FSMA sets out a series of regulatory principles to which the FCA must have regard when carrying out its general functions. These replace some of the 'have regards' that existed under the previous statutory framework. In particular, the FCA is no longer required to have regard to the international competitiveness of the UK market for listed securities. This means that the statutory regime no longer sees the attractiveness of the UK market as a listing venue for overseas issuers to be an end in itself. The principles do however refer to the desirability of sustainable growth in the UK economy in the medium or long term. They also include a principle that the burdens or restrictions applied by the FCA should be proportionate to the benefits which are expected to result.

New statutory powers under Part VI

The amendments to FSMA give the FCA new powers with effect from 1 April 2013. These new powers, which include a new statutory oversight of PIPs and the ability to supervise and discipline sponsors, seek to align our statutory framework with our stated functions and our objectives.

For example, in relation to sponsors, we are now able to:

- make Listing Rules providing for the restriction or limitation of services performed by sponsors, both on and post-approval;
- make Listing Rules providing for a sponsor to request its approval to be suspended;
- suspend a sponsor's approval or limit or restrict the services a sponsor may perform for such a period as we consider appropriate to advance one or more of the FCA's operational objectives; and
- fine, suspend, restrict or limit the sponsor's range of services for a maximum period of 12 months and/or publicly censure the sponsor if it has contravened the Listing Rules relating to sponsors.

There are practical aspects of these new powers which we are proposing to address in guidance. This guidance is set out in a new technical note and a new procedural note: UKLA/TN/712.1 – Additional powers to supervise and discipline sponsors and UKLA/PN/910.1 - Additional powers to supervise sponsors. We are also proposing amendments to our existing guidance in the sponsor area in order to reflect these new provisions: UKLA/TN/705.2 - Sponsors: uncertain market conditions; UKLA/TN/709.2 -Sponsor transactions – Adequacy of resourcing and; UKLA/PN/909.2 – Sponsor Firms – Ongoing requirements during reorganisations.[12]

Other amendments relate to our decision-making powers.[13] The Decision Procedure and Penalties Manual (DEPP) has been amended to reflect the additional powers. Broadly, the process for giving statutory notices, for imposing penalties (including amounts) and for imposing suspensions or restrictions, has been revised. Whilst these changes have been reflected in DEPP, FSMA has also been amended such that the period within which an action for breach of Part VI FSMA may be brought is increased from two years to three years.[14]

12 Please refer to Section II – Knowledge Base Guidance, of this PMB.
13 Please see CP12/37 – The Financial Services Bill: Implementing markets powers, decision making procedures and penalties policy (December 2012)
14 FSMA Section 88A(8) and 91(e).

Regarding the cancellation or suspension of securities, the UKLA now has more flexible notification procedures. Instead of being required to give an issuer written notice, the UKLA will be able to give a written or oral notification to an issuer. Regardless of how the notification is given, it will continue to be classified as a statutory notice.

Co-ordination between the FCA and the PRA

Although the PRA and the FCA have now split into their discrete regulatory roles, a statutory duty to co-ordinate with PRA continues to apply when carrying out the FCA functions. This duty is also set out in a Memorandum of Understanding between the FCA and the PRA, which explains how we will work together.[15]

The MOU specifically addresses how the UKLA and PRA are to co-ordinate their functions.[16] In general, the PRA and the UKLA will actively offer information to the other if the information gathered or held by one is considered to be of material interest to the other. PRA-regulated firms should anticipate that the UKLA will engage with their PRA supervisor when the UKLA is considering a listing, a fundraising or a significant transaction, or when the UKLA is considering the firm's obligations under the Disclosure and Transparency Rules. We will also continue to liaise separately with the conduct supervisor within the FCA.

For more information on what firms and consumers can expect from the FCA and how the FCA intends to deliver its statutory responsibilities, please refer to The FCA's approach to advancing its objectives: www.fca.org.uk/static/documents/fca-approach-advancing-objectives.pdf

Knowledge Base Guidance

We are consulting on new guidance (Proposed guidance) and we are also adding new guidance to the Knowledge Base (Finalised guidance).

Proposed guidance

As indicated above, we are proposing new guidance as a result of our new objectives and our new statutory powers as follows:

- One new technical note to explain the prospectus disclosure requirements for retail investors in non-equity securities.
- One new procedural note and one new technical note to explain the practical aspects of our new powers in relation to sponsors.
- Two amended technical notes and one amended procedural note to reflect the new sponsor powers.
- One new technical note to explain the application of a sponsor's obligation to deal with the FCA in an open and co-operative manner.

15 www.fca.org.uk/static/fca/documents/mou/mou-pra.pdf
16 See MOU paragraphs 37 to 40.

The full text of the proposed guidance can be accessed on the FCA's guidance pages:

www.fca.org.uk/news/guidance-consultations/gc13-6-primary-market-bulletin-no-7

We are consulting on this guidance and invite your comments. Please send us your comments by 19 November 2013.

Depending the feedback we receive, we intend to publish this guidance in the Knowledge Base.

Finalised guidance

The Knowledge Base has been updated with the guidance we presented for **consultation in PMB No. 5** (February 2013).[17] We are currently considering the feedback received on the **consultation in PMB No.6** (July 2013) and we intend to respond to that feedback in the next edition of PMB.

Having considered the feedback received, the Knowledge Base now includes:

- two amended technical notes (UKLA/TN/605.2 and UKLA/TN/629.2)
- one new technical note (UKLA/TN/631.1)

Outlined below is a summary of the feedback we received on these notes and our response to the comments received.

Knowledge Base category: Public offers, admission to trading and the marketing of securities: UKLA/TN/605.2 – Supplementary prospectuses

The feedback on this technical note covered a variety of issues. We have made some small changes to the drafting of the text proposed and we clarified our approach on specific issues in light of the feedback received.

ESMA guidance – Our respondents asked us to revise this technical note to include references to the European Securities and Markets Authority (ESMA) consultation on supplementary prospectuses.[18] We did not include the reference at this time given that ESMA is currently considering the comments received on the consultation and will submit draft regulatory technical standards to the European Commission by 1 January 2014 for endorsement.

Responsibility – We were also asked to clarify that the supplementary prospectus is the issuer's responsibility. We did not revise the technical note to reflect this feedback because the responsibility requirements are already set out in the Prospectus Rules and we do not believe it is necessary to include further guidance on this point. However, as the feedback seemed to suggest that any matter put forward as a significant new factor, material mistake or inaccuracy should be accepted by the competent authority without question, we revised the technical note to make it clear that, whilst the issuer is responsible for the document, as competent authority we have a responsibility to challenge the appropriateness of the information presented in a supplementary prospectus.

17 See PMB No. 6 for our initial response to the consultation in PMB No. 5.
18 The consultation paper ESMA/2013/316 (15 March 2013) 'Draft Regulatory Technical Standards on specific situations that require the publication of a supplement to the prospectus' can be found on ESMA's website.

Changes to terms and conditions – We also received feedback on our position of only accepting changes to the terms or conditions where, following such changes, 'the securities are manifestly the same securities' as originally intended when the prospectus was first published. The feedback suggested that there is no basis in law for this position and that, in any event, this position was not being correctly applied by the UKLA. We disagree with the analysis in the feedback and we still believe that the PD implies that a prospectus is produced to cover specific securities. Whilst we do not believe a supplementary prospectus can be used to create or add new lines of securities to a prospectus, we do intend to take a more purposive approach where the amendments to be included are such that the securities remain fundamentally the same. We have amended the technical note to reflect this. However, we would also remind issuers and their advisers of the need to consider whether the supplementary prospectus they are proposing to draft is indeed intended to carefully make a change to a security originally anticipated by the prospectus. We would not, for example, accept a supplementary prospectus created solely to circumvent the final terms regime (discussed below).

Withdrawal rights – The feedback also asked us to comment further on the revisions to the technical note relating to withdrawal rights. As indicated in PMB No. 5, the consultation version of this amended note does not include the section on withdrawal rights, following the implementation of the Prospectus Directive amending directive (2010/73/EU). This is because further consideration of the interpretation of the amendment to the Prospectus Directive at Article 16(2) is required before we publish formal FCA guidance on this matter. Ultimately, however, withdrawal rights raise matters of law which would be for the courts to decide.

Other changes – In response to the feedback, we made some changes to this technical note, primarily to enhance the clarity of the note. We also made a small change under the heading 'Timing of supplementary prospectuses' to clarify our statement on best practice relating to offer situations. We were advised that our stated position could be misinterpreted, for example, to suggest that acceptance letters for a previously marketed but still open offer would have to be returned.

Knowledge Base category: Prospectus content: UKLA/TN/629.2 – Final terms

We received feedback from two respondents, both of whom raised similar concerns.

Market practice – The overarching message to us was that the guidance in the consultation technical note is not in line with market practice and that changes to market practice would be required to in order to accommodate this guidance. We believe this concern was considered by ESMA in conjunction with amending the Prospectus Directive Regulation.[19] Indeed, the reason we proposed this guidance was to assist market participants in applying the new requirements of these Regulations, which came into effect on 1 July 2012.

The respondents also raised more specific issues in their feedback primarily relating to drafting and presentation. The respondents suggested that not allowing 'drafting notes' in final terms could result in final terms that are incorrectly completed, which could harm the investor. Article 22(4) of the PD Regulation states that final terms can only include information required by the various securities notes schedules that have been used to draw up the base prospectus. Drafting notes are generally included in final terms as an aid to the individual responsible for completing the final terms for submission to the UKLA and the relevant exchange for listing.

19 Please refer to Section 3 of ESMA/2011/323 (4 October 2011): "Final report – Advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU" available on ESMA's website.

We do not believe including drafting notes for convenience provides sufficient justification for departing from the clear provisions of the requirement. Accordingly, we have not made any changes to this technical note regarding this point.

Combined documents – On our proposed guidance relating to 'combined documents' that comprise documents that have an offering document for securities not subject to the Prospectus Directive (PD exempt securities) and a prospectus subject to the Prospectus Directive, the respondents stated that our approach was overly burdensome and complex as it required documents to be redrafted. They suggested that the requirement for the prospectus to be presented in an easily analysable and comprehensible form can be achieved by 'clear demarcation of information' rather than by segregation into different sections.

We considered this suggestion and we have modified our approach in response. We agree that the clear demarcation approach can result in a prospectus that is easily analysable and comprehensible to wholesale investors given their detailed understanding of the securities and documentation. Accordingly, we have revised the guidance so that it now indicates that wholesale debt issuers can use the clear demarcation approach suggested by the respondents. We do not believe the clear demarcation approach is suitable for retail investors however. Accordingly, retail debt issuers will be required to use the segregated approach we initially proposed.

Single documents – The respondents also provided feedback on our guidance relating to single documents that comprise both a retail base prospectus and wholesale base prospectus. In our guidance we explained how the PD provisions apply to the 'summary' for a retail prospectus and the 'overview' for a wholesale base prospectus. The feedback suggested that we should extend the ability to use an overview section to the retail prospectus. We believe our approach correctly reflects the requirements of the Prospectus Directive; however, in light of the respondents' feedback, we have revised the technical note to make this point clearer.

Issue specific summaries – With respect to our guidance on 'issue specific summaries', the respondents indicated that inclusion of distinct 'base prospectus summaries' and 'issue-specific summary pro-formas' in the base prospectus' should be allowed. We do not believe this is appropriate under the Prospectus Directive provisions. Although we have not revised our guidance to address this concern, we are willing to engage with ESMA to discuss this issue further.

Knowledge Base category: Prospectus content: UKLA/TN/631.1 – Zero-coupon notes

This technical note was previously titled 'PD disclosure issues relating to non-equity securities' when we presented it for consultation. It provides guidance on the use of the derivative securities note annex when issuing zero coupon notes. We received positive feedback on this note and there is a clear desire for more guidance over a wider range of securities. We have not revised the text of the guidance but we have renamed this technical note 'Zero-coupon notes' to address other types of securities in separate technical notes in due course. Thus, apart from the name change, this technical note has been added to the Knowledge Base as it was consulted on.

Updates

- The European Commission **Delegated Regulation** (EU) No 759/2013 of 30 April 2013, amending Regulation (EC) No 809/2004, was published in the EU Official Journal on 8 August 2013 and came into force on 28 August 2013. The Delegated Regulation is directly applicable EU legislation addressing the disclosure requirements for convertible and exchangeable debt securities. The FCA's Prospectus Rules have been amended to reflect these requirements

- As you know, we refer to material published by European Securities and Markets Authority (ESMA) when we vet prospectuses. Given that new or updated material is regularly published, you may find ESMA's Prospectus webpage useful for keeping up-to-date on ESMA's most recent pronouncements.

Comments

We want to know what you think about how we plan to pursue our objectives and proposed guidance for the knowledge base.

Please send comments by email to **primarymarketbulletin@fca.org.uk**.

Alternatively, send comments in writing to:
Hanna Teshome
UKLA Department
Financial Conduct Authority
25 The North Colonnade
Canary Wharf
London E14 5HS

Useful links

You may access the guidance referred to in this edition of PMB using these links:

PMB No. 5 consultation:
www.fsa.gov.uk/library/policy/guidance_consultations/2013/consultation-bulletin-no5

PMB No. 6 consultation:
www.fca.org.uk/news/guidance-consultations/gc13-04

PMB No. 7 consultation:
www.fca.org.uk/news/guidance-consultations/gc13-6-primary-market-bulletin-no-7

PMB No. 7 finalised guidance:
www.fca.org.uk/news/fg13-9-primary-market-bulletin-no-7