

# Primary Market Bulletin

Newsletter from the FCA for primary market participants

January 2015 / No. 10

## About this edition

Welcome to the tenth edition of Primary Market Bulletin (PMB). In this edition we highlight the publication of two new Technical Notes in the Knowledge Base, which set out our approach to sponsor competence. We consulted on these Technical Notes in CP14/21, *Feedback and Policy Statement on CP14/02\*\**, *consultation on joint sponsors and call for views on sponsor conflicts*.<sup>1</sup> We summarise below the feedback received and the amendments we have made to the original notes.

## Consultation feedback and changes to the Knowledge Base

### *Background*

In January 2014 the FCA published CP14/02, *Proposed amendments to the Listing Rules in relation to sponsor competence and other amendments to the Listing Rules and Prospectus Rules*<sup>2</sup>, which consulted on some changes to the Listing Rules around sponsor competence. In September 2014 we published CP14/21, *Feedback and Policy Statement on CP14/02\*\**, *consultation on joint sponsors and call for views on sponsor conflicts*, which contained our final rules on sponsor competence.

To assist sponsors in complying with our new sponsor competence proposals, we consulted on two new Technical Notes, which were set out in CP14/21. The consultation period in respect of these Technical Notes closed on 7 November 2014. We received seven responses from sponsor firms and representative bodies. We have made some minor changes to the Technical Notes to reflect some of the feedback. All of the amendments that we have made to the Technical Notes can be seen in the blacklined versions. We explain below the material issues raised during the consultation and our response.

The changes made to LR 8 in relation to sponsor competence and the two new Technical Notes will be effective from 1 February 2015.

<sup>1</sup> [www.fca.org.uk/news/cp1421-feedback-and-policy-statement-on-cp1402-](http://www.fca.org.uk/news/cp1421-feedback-and-policy-statement-on-cp1402-)  
<sup>2</sup> [www.fca.org.uk/static/documents/consultation-papers/cp14-02.pdf](http://www.fca.org.uk/static/documents/consultation-papers/cp14-02.pdf)

## Technical Notes

### Category: Sponsors

*UKLA/TN/714.1 – Guidance on the competence requirements set out under LR 8.6.7R(2)(b)*

*UKLA/TN/714.1*

LR 8.6.7R(2)(b) requires a sponsor to have a sufficient number of employees with the skills, knowledge and expertise for it to demonstrate an understanding of specific 'competency sets'. This note is designed to provide sponsors with an explanation of the types of skills, knowledge and expertise that we expect sponsors to consider when assessing whether they understand each of the 'competency sets'.

### Feedback and our response

We set out below some of the main points that respondents made about the Technical Note. We have highlighted where changes to the text have been made. Where appropriate, we have also made similar amendments to Section B of this Technical Note.

#### **(1) Rules guidance and ESMA publications directly relevant to sponsor services**

Within the description of the first competency set 'Rules, guidance and ESMA publications directly relevant to sponsor services' some respondents suggested that the text should refer specifically to the ability of a sponsor to seek advice, potentially externally, if required. We do not consider it appropriate for this guidance, which sets out our expectation of the level of knowledge required to meet the competency set, to refer to particular steps a sponsor may consider necessary to meet this requirement. We expect sponsors to have a working knowledge of the areas identified within the competency set sufficient to allow them to perform their role. As with the other competency sets, sponsors are required to comply with this on a firm rather than an individual basis. We recognise, however, that before providing a sponsor service, particularly on a complex transaction, a firm may determine that it would be appropriate to obtain additional external advice in order to supplement its own knowledge.

Some respondents suggested that we maintain a list of the ESMA publications and their locations on the ESMA website. PR 1.1.6G sets out a list of documents that need to be considered to determine the effect of the prospectus directive. As we have recently consulted on updating this list in CP14/18, *Quarterly Consultation Paper No.6* (September 2014)<sup>3</sup> we consider there is sufficient clarity on this area and therefore have not made any changes to our Technical Note.

Our text originally referred to the fact that we would expect sponsors to be aware of 'market commentary and practice' around the application of relevant rulebooks. One respondent suggested that this reference was not sufficiently clear. We agree and have amended the text to refer only to 'market practice'.

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<sup>3</sup> See paragraphs 3.55 to 3.61 in CP14/18, *Quarterly Consultation No.16*: [www.fca.org.uk/news/cp14-18-quarterly-consultation-no6](http://www.fca.org.uk/news/cp14-18-quarterly-consultation-no6)

### **(3) The due diligence process required in order to provide sponsor services in accordance with LR 8.3 and LR 8.4**

In providing guidance about this competency set we described the actions we would expect of sponsors when undertaking due and careful enquiry. We received several comments on this section and we have set out below the main points raised during the consultation.

- ‘ensuring the scope of the due diligence and basis of engagement is appropriate’

One respondent suggested that the reference to ‘basis of engagement’ as well as scope suggested that we expect a sponsor to consider issues such as the suitability of the terms on which the adviser is engaged. This was not our intention and so we have removed this reference. The same respondent suggested that we should recognise that there are some areas where a sponsor may not have specialist expertise, and therefore the guidance should be qualified so that it is ‘based on the sponsor’s experience’. We do not think that it would be appropriate to limit our expectations of a sponsor in this way, in such a fundamental part of the role. We have redrafted the text so that the scope of due diligence is referred to as ‘sufficient to allow sponsors to meet their obligations under LR 8.3 and LR 8.4’. We think this clarifies our expectations.

- ‘reviewing drafts of any reports intended to be addressed to them and challenging any findings therein’

One respondent noted that a sponsor may seek to rely directly or indirectly on reports commissioned in connection with a sponsor service. We agree and have amended the text to reflect this.

There was a divergence of views expressed by respondents: some suggested that the requirement to ‘challenge’ should refer instead to a need to ‘review’; some preferred a reference to the need to ‘comment’. We have retained the original text as we consider it is an appropriate approach for sponsors to take in relation to reports on which they are relying when making their declarations to us. We believe that if this text is read in the context of the guidance on this ‘competency set’ as a whole, it is clear that we are not seeking to imply that sponsors should become experts.

We have however amended the text to refer to the consideration of ‘any relevant’ findings.

- ‘considering their own knowledge and experience of the issuer and its operating environment and ensuring that conclusions reached are appropriate given the circumstances’

One respondent requested clarification of this part of the note, in particular around what conclusions should be the subject of consideration by a sponsor. The conclusions referred to in this paragraph are those of the expert, contained in a commissioned report. We expect sponsors to consider reports and their conclusions in the context of what they know and understand in order to reach a reasonable opinion for the purposes of their sponsor declaration. We have therefore amended the note to clarify the scope of their considerations.

- ‘considering industry guidance issued by relevant governing bodies’

Respondents asked if we could clarify further and provide examples of what was intended by ‘relevant governing bodies’. Some queried whether we were referring to all industry guidance, recognised governing bodies within particular industries or whether this referred only to industry guidance for the sponsor firms themselves. ESMA provides guidance on the nature of reports of certain specialist industry sectors. We expect sponsors to understand and apply this guidance in their review of the contents of any such reports contained in documents submitted with a sponsor’s declaration. We do not expect sponsors to become experts in these areas however we expect sponsors to be sufficiently knowledgeable about what is required of these

reports in order to consider the appointment of an expert and the scoping of its report in light of a sponsor's obligations to carry out due and careful enquiry. Accordingly we have amended the text and have referred to examples such as the Accounting Practices Board (APB), the Financial Reporting Council (FRC), the Royal Institution of Chartered Surveyors (RICS), the Joint Ore Reserves Committee (JORC) and the Petroleum Resources Management System (PRMS) in order to clarify our expectations.

#### **4) The responsibilities and obligations of a sponsor set out in LR 8**

In providing guidance in relation to this 'competency set', we set out our expectation that sponsors have a good understanding of their firm's risk appetite when agreeing to provide sponsor services to a premium listed issuer, or an applicant for premium listing, an understanding of what constitutes a sponsor service and the application of LR 8 to the service. One respondent was concerned that the reference to a firm's risk appetite was too broad. We have rephrased the requirement so that it is clear that this is consideration of the risk appetite in light of LR 8 obligations.

#### **(5) Specialist industry sectors, if relevant to the sponsor services it provides or intends to provide**

We received a few comments on the list of specialist sectors that we set out in this section of the note, including a query as to why we have included 'start-up companies' and 'shipping companies'. The list reflects Annex XIX of the Prospectus Regulation and corresponding guidance issued by ESMA regarding 'specialist issuers'.

The ESMA Recommendations on the consistent application of the Prospectus Regulation refer to oil, gas and mining companies as 'mineral companies', however as one respondent suggested the inclusion of oil and gas companies specifically, we have deleted the reference to mineral companies and included references to both oil and gas and mining companies to clarify the scope of what we mean by 'specialist industry sectors'.

We also received comments querying whether this list should be definitive. We have amended the text to clarify that we expect all stated sectors to be regarded as specialist for these purposes but that it is non-exhaustive and is not necessarily limited to those stated.

#### **Category: Sponsors**

*UKLA/TN/715.1 – Practical implications of competence requirements for sponsors and applicants*

#### *UKLA/TN/715.1*

This note is designed to answer some of the queries sponsors or applicants for sponsor approval may have when considering the practical application of the new provisions.

#### **Feedback and our response**

We set out below some of the main points that respondents made in respect to the Technical Note. We have highlighted where changes to the text have been made.

Within the 'Competence Requirements' section, the final paragraph refers to LR 8.6.20G and explains that this provision sets out our expectation that a key contact will have experience of carrying out sponsor services in the previous three years. One respondent was concerned that this represented a move towards the Suitably Experienced Employee (SEE) regime. As noted in our feedback to CP14/02<sup>4</sup> in developing our sponsor competence proposals we have been mindful of the issues encountered by sponsors and the FCA with earlier approaches to competence, such as the SEE regime, and have sought to ensure these proposals relate to the collective experience within a firm, not to single individuals. In particular under the new policy we will not 'approve' individuals, and individuals will not have to 'claim' transactions. These were the key characteristics of the SEE regime. In our view the new policy strikes the right balance between firm-wide assessment of competence and the need to establish an appropriate way in which sponsors can provide us with assurances on which we can rely. We are therefore satisfied that the guidance set out in this note does not require sponsors to revert to practices that would have been required to provide confirmations on employees under the SEE rules. We have also amended text in this note to suggest that sponsors provide an explanation rather than an analysis of their ability to meet the requirements of LR 8.6.19R.

**(a) We haven't submitted a sponsor declaration of the type specified in LR 8.6.7R(1) in almost three years. Can we rely on other declarations? What action should we take?**

One respondent suggested that the guidance in this section placed too onerous an expectation on the sponsor to foresee a breach. We have redrafted the text to refer to the requirements of LR 8.7.8R(1)(a) to clarify that no new requirement should be inferred.

**(c) What should we take into account when considering LR 8.6.7R(2)(a)?**

Within this section of the note we summarised the requirements of LR 8.3.5AR. Some respondents were concerned about the implications so we have redrafted the guidance so that it reflects the rule.

Within this section we set out the considerations we expected sponsors to make when assessing the appropriate number of skilled employees for the purposes of LR 8.6.7R(2)(a), including consideration of the sponsor function's staffing model. One respondent suggested that this was too narrow a consideration. Our reference to the staffing model was in the context of adequate resources and not conflicts management as a whole. Accordingly, we have retained the original text subject to minor changes.

**(h) How do we comply with LR 8.6.7R(2)(b)(v), which requires a sponsor to have an understanding of specialist industry sectors, where relevant to the sponsor's business?**

In this section of the note, we indicated that it may be necessary for the sponsor to draw together specialists from other areas of the firm. One respondent highlighted that this should only be done where appropriate, and we have amended the text to reflect this point.

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<sup>4</sup> See page 19, 'Our response to question 11' in CP14/21, \* *Feedback and Policy Statement on CP14/02\*\**, consultation on joint sponsors and call for views on sponsor conflicts: [www.fca.org.uk/news/cp1421-feedback-and-policy-statement-on-cp1402-](http://www.fca.org.uk/news/cp1421-feedback-and-policy-statement-on-cp1402-)

**(j) What is the minimum number of employees a new applicant needs to retain in order to be approved as a sponsor?**

In light of a request from one respondent for clarity, we have amended the text to explain that the requirement in LR 8.6.7B for adequate skilled resource cannot necessarily be satisfied by employing two individuals meeting the key contact requirements in LR 8.6.19R. It will very much depend on the business proposal of the applicant as to whether resource can be considered as adequate. This will need to be considered in light of the factors set out in LR 8.6.7CG.

**(n) Can we have more than one key contact on a transaction?**

A few respondents raised concerns with the guidance in this section around various practical issues for sponsors when considering key contacts.

A number of respondents wanted the ability to nominate an alternate key contact up front rather than coming to the UKLA with an alternate on an 'as and when' basis. We have added some text to clarify that a sponsor should notify the UKLA of an alternate key contact when they consider it appropriate provided that they are able to comply with LR 8.6.19R during the provision of a sponsor service.

One respondent wanted the ability for a sponsor to nominate a second key contact where there is a foreseeable need for a specialist in a particular area. However we consider our approach to this is clear from our feedback to CP14/21<sup>5</sup> where we stated that 'the proposals in relation to the competency sets recognise that a sponsor will need to draw on other experience within the firm during the course of the sponsor service. Therefore we anticipate key contacts involving other colleagues where necessary.' As this text already addresses this point, we have not made any changes here.

**(p) What level of involvement do you expect from a 'key contact' on a sponsor service?**

Within this section we state: 'In selecting an individual to act as a key contact on a sponsor service, we would expect a sponsor to consider the person best placed to meet the requirements of LR 8.6.19R in relation to that particular service.'

Some respondents were concerned as to the implications of the reference to 'best placed'. We have amended the text to clarify our expectations around appropriate staffing.

**(q) What happens if employees providing sponsor services, including key contacts, leave the firm? Will we still be competent?**

One respondent queried whether a sponsor who retains a sufficient number of skilled employees to meet LR 8.6.7R(2) but loses key contacts could continue to provide a sponsor service to their client. We agree that it may be possible for a larger sponsor to lose some key contacts but still be able to meet the requirements of LR 8.6.7R(2). However, this would need to be considered on a case-by-case basis in light of guidance in LR 8.6.7CG, to ensure a sponsor is still able to demonstrate competence.

**Annual Notification Form and New Applicant Form**

As a result of the changes to LR 8, we have also amended the Annual Notification Form (AN) to assist sponsors in their record-keeping obligations in relation to competence (LR 8.6.16AR(4)).

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<sup>5</sup> See page 19, 'Our response to question 11' in CP14/21, \* *Feedback and Policy Statement on CP14/02\*\**, consultation on joint sponsors and call for views on sponsor conflicts: [www.fca.org.uk/news/cp1421-feedback-and-policy-statement-on-cp1402](http://www.fca.org.uk/news/cp1421-feedback-and-policy-statement-on-cp1402)

These new provisions have also required changes to be made to the application form for those seeking approval as sponsor (New Applicant Form). The revised AN is effective from 1 February 2015 and should be used for all annual notifications submitted to the FCA in January 2016. The revised New Applicant Form should be used for any applications for sponsor approval on or after 1 February 2015.

**Please note that January 2015 submissions should be made on the existing Annual Notification Form. If you have any questions regarding the submissions of these forms please contact the Sponsor Supervision team directly.**

## Ongoing guidance review

### Guidance presented for consultation in PMB No.8 and PMB No.9

We are still considering the feedback we received on the consultations in PMB No.8 (August 2014) and PMB No.9 (November 2014) and we intend to respond to it in the next edition of PMB.

### Sponsors' obligation to deal with the FCA in an open and cooperative manner

In PMB No.7 (October 2013), we consulted on a new Technical Note (UKLA/TN/713.1), addressing sponsors' obligations under the Listing Rules to deal with the FCA in an open and cooperative way. We are still considering the feedback received and we expect to be in a position to finalise this Technical Note or, if appropriate, re-consult, in the next edition of PMB.

### Useful links

To access the guidance referred to in this edition of PMB, see our website:

UKLA/TN/714.1

[www.fca.org.uk/your-fca/documents/ukla/technical-note-714-1](http://www.fca.org.uk/your-fca/documents/ukla/technical-note-714-1)

UKLA/TN/715.1

[www.fca.org.uk/your-fca/documents/ukla/technical-note-715-1](http://www.fca.org.uk/your-fca/documents/ukla/technical-note-715-1)

To access the amended Annual Notification Form and New Applicant Form, see our website:

[www.fca.org.uk/firms/markets/ukla/forms](http://www.fca.org.uk/firms/markets/ukla/forms)