

# Primary Market Bulletin

Newsletter from the FCA for primary market participants

## About this edition

Welcome to the 18<sup>th</sup> edition of the Primary Market Bulletin (PMB).

We begin this edition as usual with general news and information, moving on to the latest changes we have made, or are proposing to make, to our [Knowledge Base](#).

In particular, this edition focuses on our proposed new guidance for sponsors on their obligations to ensure directors understand their responsibilities and obligations under the listing rules, disclosure requirements and transparency rules, and that directors have established procedures to enable an issuer to comply with its obligations on an ongoing basis and that these are not adversely impacted when an issuer undertakes certain transactions.

## What's new?

### Changes to the structure of the FCA's UKLA functions

We recently carried out a re-organisation of our UKLA functions aimed at achieving optimal spans of management control and greater efficiency. The UKLA Department has been split into two separate departments:

- The new Primary Market Oversight (PMO) Department is responsible for the specialist supervision of sponsors and primary information providers, real-time and post-event monitoring of listed issuers and companies traded on MTFs, the short-selling regime and the post-event review of compliance with certain aspects of the UK Listing Regime. The PMO Department is led by Clare Cole.
- The new Listing Transactions Department encompasses our transaction review functions and the management of the Official List through our Listing Applications team. The Listing Transactions Department is led by Jim Moran.

The changes will streamline the management of our UKLA functions, enabling more agile and efficient ways of working.

The two new departments will continue to work closely alongside one another as part of the FCA's Market Oversight directorate. Existing arrangements for contacting and doing business with us are undisturbed.

## **Sponsors' obligations for directors of listed companies, established procedures and no adverse impact**

We are proposing to publish three new technical notes that outline the FCA's expectations of sponsors and their obligations under LR 8.3.4R, LR 8.4.2R(3) and LR 8.4.12R(2).

We are also proposing to update our existing technical note UKLA/TN/708.2, which sets out our expectations of sponsors regarding financial position and prospects procedures (LR 8.4.2R(4)), to align the language with the proposed new notes. We're not proposing to change the approach outlined in the previous technical note, however, since we believe this workstream is well established and understood by sponsors.

Under LR 8.3.4R where, in relation to a sponsor service, a sponsor gives any guidance or advice to a listed company or applicant on the application or interpretation of the listing rules or disclosure requirements and transparency rules (together, the relevant rules), the sponsor must take reasonable steps to satisfy itself that the director or directors of the listed company understand their responsibilities and obligations under the relevant rules.

Under LR 8.4.2R, a sponsor must not submit to the FCA an application for admission to the premium list unless it has come to a reasonable opinion, after having made due and careful enquiry, that (amongst other things) the directors have established procedures which:

- enable the applicant to comply with the relevant rules on an ongoing basis (LR 8.4.2R(3));
- provide a reasonable basis for them to make proper judgements on an ongoing basis as to the financial position and prospects of the applicant and its group (LR 8.4.2R(4)).

For a class 1 circular or a circular for a reconstruction, re-financing or purchase of own shares (that is required to include a working capital statement), under LR 8.4.12R(2) a sponsor must come to a reasonable opinion, after having made due and careful enquiry, that (among other things) the transaction will not have an adverse impact on the listed company's ability to comply with the relevant rules.

The sponsor obligations imposed by LR 8.3.4R, LR 8.4.2R(3), LR 8.4.2R(4) and LR 8.4.12R(2) form a vital part of the assurance sponsors give the FCA.

Based on our review of work by sponsors to meet these obligations, we believe it would be useful to provide guidance to sponsors to help them fully understand our expectations.

Our focus is on ensuring that there is a consistent approach by sponsors and, in particular, that they can demonstrate that due and careful enquiry has been undertaken for each separate declaration. As our proposed technical notes state, this includes the sponsor not relying on generic documents and the work done by other advisers (such as reporting accountants and lawyers). The proposed technical notes also state that sponsors should not adopt a 'one size fits all' approach, without recognising the background and experience of the directors, the circumstances of the company, or the complexity of the transaction.

### ***Interaction of these sponsor obligations with the Listing and Premium Listing Principles***

The Listing Principles and Premium Listing Principles are statements of the fundamental obligations of listed companies and, if applicable, premium listed companies – they ensure that listed companies pay due regard to the fundamental role they play in maintaining market confidence and ensuring fair and orderly markets.

Listing Principle 1 and Premium Listing Principle 1 are reflected in the sponsor regime by sponsors providing assurances to us under LR 8.3.4R, LR 8.4.2R(3), LR 8.4.2R(4) and LR 8.4.12R(2) that boards understand the nature of their responsibilities under the relevant rules and that issuers have procedures, systems and controls in place to comply with these rules on an ongoing basis. In order for sponsors to discharge their obligations to us, we expect issuers to cooperate with sponsors and allow them to carry out their work.

Sponsors and their advisers have informed us about instances where issuers have not allowed sponsors to attend board meetings, even though attendance can be integral to a sponsor being able to satisfy LR 8.3.4R. This is concerning to us and we would remind issuers of the requirement under LR 8.5.6R to cooperate with their sponsor by providing all information reasonably requested by the sponsor for the purpose of carrying out the sponsor service in accordance with LR 8. As referenced in our proposed technical note (UKLA/TN/718.1), this is likely to include access to relevant meetings with directors and, where applicable, senior management.

### ***The role of the sponsor***

Our proposed technical notes provide guidance to sponsors on the type of work we expect them to carry out to fulfil their obligations. Throughout the notes, we have emphasised the need for the sponsor to assess the nature of the company and the circumstances of the sponsor service in order to determine what steps it should take. We have also provided guidance on circumstances that a sponsor may encounter on transactions, such as where a company has undertaken initial public offering (IPO) preparatory work prior to a sponsor's engagement or where a takeover is conducted on an accelerated timetable.

Under LR 8.6.16AR(1), sponsors are required to create and retain accessible records that demonstrate the basis of each declaration submitted to the FCA, including those set out above. Our proposed technical notes provide guidance on when we expect a sponsor to record its work, although we have not provided detailed guidance on this area given our existing technical note [UKLA/TN/717.1](#) on record-keeping requirements. We would advise sponsors to consult this technical note and our proposed new technical notes if uncertain on the records to create.

### ***Enhancements to our document review process***

In our UK Debt Market Forum report ('Practical measures to improve the effectiveness of UK primary listed debt markets') published in April 2016, we shared our intention to run a feasibility study on potential technology enhancements, focusing particularly on improving how we handle comments on documents submitted for review.

Since then we have been working to improve this process, building a new improved technology platform based on the existing ESS system used by external parties to submit documents for review. The enhanced ESS system will now also permit the secure exchange of comments on draft documents.

The new ESS system significantly improves the review process and will replace the current process relying on the use of faxes. It goes live on 4 September 2017.

More information is on our website including a [presentation](#) (PDF) giving a preview of the new comments functionality and what the change means for you.

### **Consultation Paper regarding proposed new premium listing category**

On 13 July 2017 we launched a consultation paper (CP17/21) on proposals to create a new category within our premium listing regime to cater for companies controlled by a shareholder that is a sovereign country. Responses to the consultation are due by 13 October 2017.

### **Prospectus Regulation**

The EU published its Regulation (EU) No. 2017/1129 (Prospectus Regulation) on 30 June 2017. It entered into force 20 days later on 20 July 2017. It includes measures that apply immediately, which are addressed below.

#### ***Prospectus Rules (Miscellaneous Amendments) Instrument 2017***

We published our [Prospectus Rules \(Miscellaneous Amendments\) Instrument 2017](#) FCA 2017/40 on 7 July 2017. It implements in the UK, from 20 July measures in the Prospectus Regulation which have immediate application. We consulted on our proposed changes to the Prospectus Rules and the Glossary in Chapter 5 of our [Quarterly Consultation Paper No. 16](#) (CP17/6; March 2017) and provided feedback in our [Handbook Notice No. 46](#).

#### ***ESMA consultation under the Prospectus Regulation***

The European Securities and Markets Authority (ESMA) published three consultation papers on 6 July 2017, which can be accessed from ESMA's [prospectus webpage](#). ESMA is making its consultation in response to the European Commission's Request to ESMA for technical advice on possible delegated acts concerning the regulation on prospectus.

### **Shareholder Rights Directive**

The revised Shareholder Rights Directive [No. 2017/828/EU](#) has now completed its formal approval process and was published in the EU Official Journal on 20 May 2017. The Directive entered into force on 10 June 2017 and Member States have until 10 June 2019 to implement the Directive.

## Consultation feedback and changes to the Knowledge Base

### Ongoing guidance reviews

In PMB No. 13, we explained we were consulting on amendments to [UKLA/TN/604.2 – PD Advertisement regime](#) as a result of the [Commission Delegated Regulation \(EU\) No. 2016/301](#) regarding the approval and publication of prospectuses and advertisements (the OD2 RTS Regulation) and changes made to the Prospectus Rules. We are postponing the amendment of this note given it is likely to be impacted by our consultation paper regarding the availability of information in the UK equity IPO process.

In PMB No. 16, we explained we were consulting on amendments to [UKLA/TN/202.2 – Share buy-backs with mix and match facilities](#). We are continuing to consider feedback received as part of this consultation.

In PMB No. 16, we explained that we were consulting on amendments to a number of notes following the implementation of MAR. We are postponing the publication of [UKLA/TN/506.2 – Periodic financial information and inside information](#), given further work we are undertaking in this area which we expect to be addressed by forthcoming consultations. We will take the feedback received to date into account in preparing further guidance on this topic.

### Published guidance

We have made the following changes to the Knowledge Base, which we proposed in [PMB No. 16](#) and [PMB No. 17](#):

- the addition of one new procedural note
- the amendment of two existing technical notes

Here, we summarise key feedback received on our proposals, and our response to that feedback.

#### ***Procedural notes***

[UKLA/PN/911.1 – Substitution of issuer of debt securities](#) (New)

In response to feedback received, we have added clarifications to this procedural note surrounding the expected timing of a response from the FCA, the fact that no fees are due, and the fact that no eligibility checklist is required in relation to a request for issuer substitution on the Official List.

#### ***Technical notes***

We did **not** receive any feedback on our proposals for the following notes, which we have amended as proposed in [PMB No. 16](#) and [PMB No. 17](#).

**Category: Disclosure of positions held by issuers, investors and management**

UKLA/TN/543.3 – Shareholder obligations (Amendment)

This note is published in the form set out in PMB No. 17.

**Category: Sponsors**

UKLA/TN/701.3 – Sponsors: conflicts of interest (Amendment)

This note is published in the form set out in PMB No. 17.

**Proposed changes to our guidance**

We are consulting on the following further proposed changes to the Knowledge Base:

- the amendment of three existing technical notes
- the addition of five new technical notes

**Technical notes**

**Category: Transactions**

UKLA/TN/315.1 – Quantified Financial Benefits Statements (New)

We are seeing an increased number of prospectuses and supplementary prospectuses containing reports from reporting accountants and financial advisers on quantified financial benefits statements prepared for the purposes of Rule 28.1(a) of the City Code on Takeovers and Mergers (the Code), or confirmatory statements from reporting accountants and financial advisers relating to previous reports on quantified financial benefits statements given for the purposes of Rule 27.2(d)(ii) of the Code. This technical note sets out our approach to the inclusion of these reports and statements based on these reports in prospectuses and class 1 or related party circulars.

**Category: Profit forecasts and estimates**

UKLA/TN/340.2 – Profit forecasts and estimates (Amendment)

We propose adding a new section to this technical note discussing when a profit forecast may be considered invalid. We have seen a number of cases where issuers (or the acquisition targets of issuers) have made profit forecasts which at the date of the prospectus or class 1 circular they have stated are no longer valid. If a forecast is no longer valid, the issuer is not obliged to state the assumptions behind the forecast, and, in the case of a prospectus, is not required to have an accountant report on the forecast.

In the proposed amendments to the technical note, we set out a number of reasons we have seen, along with some considerations on when they are more or less likely to be considered credible reasons for invalidity.

**Category: Public offers, admission to trading and the marketing of securities**

UKLA/TN/602.2 – Exemptions from the requirement to prepare a prospectus (Amendment)

The amendments to this technical note reflect changes to the exemptions made by the new Prospectus Regulation that came into force on 20 July 2017. Under the new Prospectus Regulation, issuers who are admitting securities to trading on a regulated market that are fungible with securities already admitted to trading on the same regulated market, and that represent, over a period of 12 months, less than 20% of the number of securities already admitted to trading on the same regulated market, are exempt from the requirement to produce a prospectus.

**Category: Prospectus content**

UKLA/TN/635.1 – FRS 102 Cash Flow Statement Exemptions (New)

FRS 102, which took effect in 2015, exempts investment funds that meet certain conditions from preparing cash flow statements. However, Annex 1 Part 20.1 of Prospectus Rules Appendix 3 requires that audited financial information in a prospectus prepared according to national accounting standards must include a cash flow statement. This technical note considers the interaction of these requirements.

**Category: Sponsors**

UKLA/TN/708.3 – Sponsors' obligations on financial position and prospects procedures (Amendment)

We are proposing to update the existing technical note on a sponsor's obligations on financial position and prospects procedures to align the language with our proposed new technical notes listed below. However, we have not sought to change the approach outlined in the previous technical note because we believe this workstream is well-established and understood by sponsors. Due to the extent of drafting amendments and to allow easier readability, we have presented the technical note as a clean version rather than showing the changes in blackline.

UKLA/TN/718.1 – Sponsors' duty regarding directors of listed companies (New)

We have set out in this proposed new technical note guidance on the work we expect a sponsor to carry out in order to comply with its obligations under LR 8.3.4R to ensure directors understand their responsibilities and obligations under the listing rules, disclosure requirements and transparency rules. Please refer to 'Sponsors' obligations regarding directors of listed companies, established procedures and no adverse impact' above for further background to this technical note.

UKLA/TN/719.1 – Sponsors' obligations on established procedures (New)

We have set out in this proposed new technical note guidance on the work we expect a sponsor to carry out in order to comply with its obligations under LR 8.4.2R(3) to ensure the directors of an applicant have established procedures which enable it to comply with the listing rules and the disclosure requirements and transparency rules on an ongoing basis. Please refer to 'Sponsors' obligations regarding directors of listed companies, established procedures and no adverse impact' above for further background to this technical note.

*UKLA/TN/720.1 – Sponsors' obligations on no adverse impact (New)*

We have set out in this proposed new technical note guidance on the work we expect a sponsor to carry out in order to comply with its obligations under LR 8.4.12R(2) to ensure that a listed company's ability to comply with the listing rules or the disclosure requirements and transparency rules are not adversely affected when an issuer undertakes certain transactions. Please refer to 'Sponsors' obligations regarding directors of listed companies, established procedures and no adverse impact' above for further background to this technical note.

**We want to hear what you think**

Please send your comments on our latest proposals by 11 October 2017 to [primarymarketbulletin@fca.org.uk](mailto:primarymarketbulletin@fca.org.uk).

**Legislative and Regulatory Reform Act 2006 (LRR)**

We consider that the proposals here have regard to the five LRR principles – that regulatory activities should be carried out in a way which is transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed. We have also had regard to the Regulators' Code, in particular the requirement for proportionate and targeted regulatory activity. The amendments to the Knowledge Base explained in this PMB seek to provide and update guidance to primary market practitioners on specific technical and procedural aspects of the Listing Rules, Prospectus Rules and Disclosure Guidance and Transparency Rules.

**Equality and diversity**

We are confident that our proposals do not give rise to equality and diversity implications, but we welcome comments should you have any concerns.

**Useful links**

To access the guidance referred to in this edition of the PMB, see our website: [PMB No. 18 guidance consultation](#).