

DRAFT FOR CONSULTATION (VERSION 2)

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Primary Market Technical Note

Hostile takeovers

The information in this note is designed to help issuers and practitioners interpret our UK Listing Rules (UKLR), Prospectus Rules: Admission to Trading on a Regulated Market (PRM) Prospectus Regulation Rules, Disclosure Guidance and Transparency Rules (DTR), and related legislation. The guidance notes provide answers to the most common queries we receive and represent FCA guidance as defined in section 139A FSMA

Rules

UKLR 7 Annex 12; UKLR 7.5.3R; UKLR 10.4.1R; UKLR 10.4.4R; UKLR 10 Annex 1 and 2; PRR Appendix 2 PRM App 2 Annexes; FCA Guidelines on disclosure requirements under the PRM; regulation 23 of the Public Offers and Admissions to Trading Regulations 2024 (POATR)

Non-recommended offers / limited access

The following sets out our approach to non-recommended offers and covers their treatment in certain areas of the UK Listing Rules and Prospectus Regulation Rules the PRMs. Such offers are characterised by restrictions on access to information on the offeree business, assets or undertaking to be acquired.

The general principle underpinning our approach is that where a listed offeror cannot gain access to the relevant offeree information, the offeror should seek out and publish the best information available to it.

In these circumstances, the offeree information contained in prospectuses or circulars can be based on published sources.

Reverse takeover circulars

The following items cover some of the typical issues we have encountered in hostile and limited access situations under the UK Listing Rules:

Responsibility statement

UKLR 10.4.4R-(1) allows information on the offeree to be disclosed on the basis of information published (or made available) by the offeree and that the issuer is aware of and free to disclose.

Accordingly, we have accepted examples of modifications to responsibility statements such as:

'The (issuer) and offeror's directors and proposed directors accept responsibility for the information contained in this document, except that the only responsibility accepted by the (issuer) and offeror's directors and proposed directors in relation to (offeree), which has been compiled from published sources (or made available), is to ensure that such information is correctly and fairly produced and presented. To the best of the knowledge of the (issuer) and offeror's directors and proposed directors the information contained in this document (other than the information contained in this document relating to (offeree)) is in accordance with the facts and the document makes no omission likely to affect its import.'

UKLR 10 Annex 2 statements

UKLR 10 Annex 2 statements for material contracts, litigation and significant change required on the offeree are also usually modified using the phrase:

'As far as (offeror) is aware, having regard to published information...'

Pro forma financial information

We would not normally expect to see pro forma financial information included in a circular where a listed offeror does not have access to the

relevant offeree information. In these cases, we would expect that UKLR 7 Annex 2 1.1R(8) is addressed via a narrative description covering the expected effect of the takeover or merger on the earnings or assets and liabilities of the group rather than through the use of pro forma financial information.

Revised offers

Finally, we come to hostile or contested bid situations where shareholders have approved the original terms of the offer. If the offer terms are revised or consideration increased, UKLR 7.5.3R may require further shareholder approval if the revision or increase is material. If this occurs before the date of the general meeting, UKLR 7.5.5R may require a supplementary circular. We encourage the offeror's sponsors to contact us as soon as possible to discuss the circumstances in this situation.

Similarly, where a previously non-recommended offer becomes recommended – or where access to information is granted – please consult us as soon as possible to discuss timetable implications for approving the documents and what additional requirements will apply.

Prospectuses

The following items cover some of the typical issues we encounter in hostile and limited access situations under the ~~Prospectus Regulation~~ Rules PRMs:

Working capital statements

~~PRR Appendix 2.1 Annex 11 item 3.1~~ PRM App 2 Annex 8.3R, Item 3.1, which requires the issuer to make a statement regarding the sufficiency of working capital for the next 12 months from the date of a prospectus, presents a particular difficulty where issuers have limited (or no) access to non-public information on offeree companies. This statement would take into account the impact of any material acquisition by the issuer.

Our technical note Primary Market/TN/619 (FCA Guidelines on disclosure requirements under the ~~Prospectus Regulation~~PRM and Guidance on specialist issuers) states clearly that a working capital statement in a prospectus must be 'clean' or 'qualified' and the

decision is 'binary'. In coming to a clean statement, paragraph ~~132~~ 132 of the FCA Guidelines on disclosure requirements under the PRM does not permit issuers to disclose in a prospectus any assumptions, sensitivities, risk factors or caveats to the statement. This is because adding such disclosures detracts from the value of the statement and, in effect, seeks to transfer risk to investors.

In making a working capital statement, issuers are required to take into account a wide range of variables and sensitivities that may affect an issuer's working capital over the following 12-18 months. This analysis also involves taking into account the impact of any material acquisitions. In some hostile takeovers, offerors will be able to come to a clean working capital statement in compliance with paragraph ~~132~~ 132 of the FCA Guidelines on disclosure requirements under the PRM after following procedures normally used to support this confirmation, even though no access to non-public information on the offeree is given to offerors and their advisers. This will be possible because such an offeror will have comfortable financing headroom that can be used to support a clean statement, even though they cannot fully assess the offeree's current and future working capital requirements.

However, in other hostile takeovers, undertaking the normal procedures to support a clean confirmation on the sufficiency of working capital is not generally possible due to the limited access to information on the offeree. It has been brought to our attention that, in these cases, offerors cannot make a qualified statement confirming the offeror does not have sufficient working capital either. This is because an offeror will not know the underlying working capital position of the offeree, so this statement is potentially misleading.

Having considered this matter internally, we intend to take a purposive approach to the application of the ~~Prospectus Regulation~~ PRMs in these circumstances, concluding that an offeror may either:

- Include a clean or qualified working capital statement complying strictly with the FCA Guidelines on disclosure requirements under the PRM.
- State that the offeror is not able to undertake appropriate procedures to support a statement on the sufficiency of its working capital, when taking into account the acquisition. The reason for this must be given, i.e. the offeror does not have access to non-public information on the offeree that allows those procedures to be undertaken. Offerors would then be required to give a 12-month

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working capital statement on the offeror on an unenlarged group basis. It must be clear from this statement that the acquisition has not been taken into account. We would expect the prospectus to state that if the offeror is granted access by the offeree before the close of the offer and access is sufficient for the purpose of making an enlarged group statement, the offeror will produce a supplementary prospectus containing an updated enlarged group working capital statement.

Pro forma financial information

We would not normally expect to see pro forma financial information included in a prospectus where an offeror does not have access to the relevant offeree information. This is because it is not normally possible for the reporting accountants to confirm, as required by ~~of PRR Appendix 2.1 Annex 20 section 3~~ PRM App 2 Annex 15.3R section 3 that the information is compiled on a basis consistent with the accounting policies of the issuer. In these cases, we would expect ~~PRR Appendix 2.1 Annex 1 item 18.4~~ PRM App 2 Annex 1.18R Item 18.4 to be addressed via a narrative description covering the expected effect of the takeover or merger on the earnings or assets and liabilities of the group, rather than through the use of pro forma financial information.

Responsibility statement

As per ~~PRR 5.3.2R~~ PRM 3.1.4R, the directors and the company are required to take responsibility for the whole prospectus. This includes taking responsibility for information sourced from third parties. The ~~Prospectus Regulation~~ PRM does not provide for split-responsibility statements or any type of carve-out of responsibility. As such, the responsibility statement should track the wording in PRR Appendix 2.1 Annex 1 item 1.2 PRM App 2 Annex 1.1R Item 1.2 and ~~Annex 11 item 1.2~~ Annex 8.1R Item 1.2 and should not be modified to limit responsibility. In addition, issuers should be mindful of not including other disclosure in the document, which could be seen to qualify the responsibility statement.

Third party information

As with the responsibility statement, the ~~PRR Appendix 2.1 Annex 1 item 1.4~~ PRM App 2 Annex 1.1R Item 1.4 wording regarding the

reproduction of third party information should track the rule's wording. Issuers should be careful not to modify the wording to imply they are limiting or qualifying the responsibility statement.

Risk factors

It is common in these types of documents for issuers to include a risk factor relating to the limited access situation. In reviewing risk factors, our primary concern would be to ensure that the risk factor does not limit responsibility. An example of the type of wording that issuers have previously may included in a limited access situation is:

'The issuer and its advisers have not had access to the target's information or documentation and have been unable to perform any due diligence on such information or documentation. The information in relation to the target has been sourced from publicly available information and has not been subject to comment or verification by the target or the issuer or their respective directors. Nothing in this risk factor limits or qualifies the issuer or the directors' responsibility under ~~PRR 5.3~~ PRM 3.1 or ~~Part 6 FSMA~~POATR.

Information on the target

~~Section 87A(2) FSMA~~ Regulation 23 POATR requires that all 'necessary information' is included within the prospectus or equivalent document. In deciding whether target information should be included, issuers should take into account the specific factors, such as the relative size of the target to the issuer and circumstances surrounding the transaction, as well as the level of publicly available information. As such, we would urge any advisers or issuers preparing a prospectus in a limited access situation to contact us as early as possible to discuss the exact disclosure requirements.

As part of the vetting process, we will ask the issuer to confirm to us that they consider the information included within the document is sufficient to meet the disclosure requirements under the ~~Prospectus Regulation~~ PRMs and regulation 23 POATR~~section 87A(2) FSMA~~. Unless the issuer is happy that these tests have been met, we will not be in a position to approve the prospectus.

Access granted

If an issuer is granted access and the offer is still open, issuers tend to consider this to be a significant new factor, requiring the production of a supplementary prospectus (SP). The SP should include, where relevant, additional information on the target and the enlarged group (such as the enlarged working capital statement).