

UKLA Primary Market Technical Note

Prospectus Regulation Advertisement regime

The information in this note is designed to help issuers and practitioners interpret our Listing Rules, Prospectus Regulation Rules, Disclosure Guidance and Transparency Rules, 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

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—Guidance
Consultation
PR 3.3R

Prospectus
Regulation
Article 2(k),
Article 17,
Article 22,

Prospectus RTS
Regulation,
Article 14(1),
Article 15(1)
and (3),
PRR 3.3

Types of communication caught

An advertisement is defined in Article 2(k) of the Prospectus Regulation as: ‘a communication with both of the following characteristics: (1) relating to a specific offer of securities to the public or to an admission to trading on a regulated market; and (2) aiming to specifically promote the potential subscription or acquisition of securities.’

The scope of the advertisement regime is wide and likely to include the following types of oral and written communication, as long as they aim to specifically promote the subscription or acquisition of securities:

- investor or analyst roadshows, briefings and presentations;
- television interviews;
- ‘pathfinders’;
- key features brochures;
- discussions or comments made at a general meeting;
- discussions with potential placees or subscribers for securities;
- discussions with existing or potential shareholders;
- discussions with underwriters or potential underwriters of securities; and
- discussions between brokers/sales staff in an investment bank.

An advertisement is defined in Article 2(9) of the PD Regulation as: ‘announcements: (1) relating to a specific offer to the public of securities or to an admission to trading on a regulated market; and (2) aiming to specifically promote the potential subscription or acquisition of securities.’

Article 34 of the PD Regulation also sets out a non-exhaustive list of the types of advertisements covered by the provisions in PR 3.3. From this list it is clear that advertisements can be in either written or oral form, and would cover investor presentations, audiocasts, and analyst conference calls. Comments made by an issuer to the media could also fall within these rules.

Requirements relating to advertisements

An advertisement (whether it is an oral or written communication) must not be issued unless it complies with Article 22 of the Prospectus Regulation (see also PRR 3.3.1) and the provisions of Chapter IV of the Prospectus RTS Regulation (see also PRR 3.3.2).

Under Article 14(1) of the Prospectus RTS Regulation, a written advertisement disseminated to retail investors should also contain the word "advertisement" in a prominent manner and the other statements specified in Article 14(1). In practice, a prominent manner would mean a heading inserted on the front page of the document entitled 'Advertisement' followed closely by any other statement that is stipulated by Article 14(1).

Multiple communications

We would like to remind issuers and their advisers to ensure that any advertisements issued concerning an offer or admission to trading for which a prospectus is required must not be inaccurate or misleading. Information in the advertisement must be consistent with the information contained in the prospectus, if already published, or with the information to be in the prospectus, if the prospectus is published afterwards.

It is likely that when issuing securities, an issuer may release several communications falling within the advertisement regime. We believe that each separate communication is capable of constituting a separate advertisement, in which case each must comply independently with the ~~PR 3.3 requirements~~ applicable requirements. It would not be sufficient for the advertisements only to comply with the requirements of PR 3.3 when taken together as a group.

For example, an issuer holds an investor meeting where a slide pack is presented to the audience, and an oral commentary on the slides is provided by members of the issuer's management team. Investors not physically attending the presentation are invited to listen to the oral commentary by telephone dial-in, and the slide pack is subsequently reproduced on the issuer's website.

Our view is that where the audiocast and the slides can be accessed independently both the written material and the oral commentary must comply independently with PRR 3.3 provisions, and it would not be sufficient for them to be deemed compliant only when taken together. So we would recommend that issuers and their advisers bear this in mind when undertaking due diligence on their advertising materials.

Roadshows and dissemination of amended advertisements

Under Article 15(1) of the Prospectus RTS Regulation (see PRR 3.3.2), advertisements disseminated to potential investors must be amended where a supplement to the prospectus is subsequently published and the information in the supplement renders the advertisement materially inaccurate or misleading. Such amended advertisement must be disseminated through at least the same means as the original advertisement, except where the original was disseminated orally (Article 15(3) of the Prospectus RTS Regulation).

It is not necessary to organise a new roadshow in order to deliver an amended version of the information provided in the original roadshow. This also applies to roadshows in which visual or printed elements (e.g. slides, handouts) are used, as the overall nature of the advertisement is that it is delivered in an oral context.

However, the general requirement to amend the roadshow advertisement still applies. Therefore, the issuer, offeror or person asking for admission to trading on a regulated market should disseminate an amended version of the information provided in the roadshow through the means which it considers most suitable to reach the participants of the roadshow. Depending on the type of roadshow conducted and the nature of the participants, this might for example be by way of a press release, publication on the website of the issuer, offeror or person asking for admission to trading or by direct correspondence with the roadshow participants.

Pathfinders

Issuers ~~often~~ sometimes prepare marketing documents known as 'pathfinders'. These typically precede a prospectus being published and aim to establish investor interest in a securities offer. While pathfinders often do not activate the actual offer of securities, the content closely resembles the final format of the prospectus. As a pathfinder is prepared and distributed for marketing purposes, it appears to fall within the advertisement regime.

Where an offer (no admission to trading) is proposed to be made to the public, and before making such an offer, a pathfinder is sent to institutional places only, we are likely to regard this as an advertisement relating to a public offer. This is despite the fact that the institutional placing itself does not trigger the requirement for a prospectus. Finally, it should be noted that a price range prospectus prepared in accordance with Article 17 of the Prospectus Regulation (see also PRR 2.3.2R) constitutes a valid prospectus and is not an advertisement.

When considering the use of a pathfinder, market participants are reminded to consider all their obligations under our Conduct of Business rules, including those relating to relating to the availability of information in the UK requirements for information flows during equity IPOs process. As noted when these rules were introduced, which we envisage envisages that an FCA-approved price range prospectus or an FCA-approved securities note and summary will be published in advance of the management roadshow and book-building [In particular, where issuers choose to publish an FCA approved registration document ahead of the release of any connected research, it issuers should then publish either an FCA-approved price range prospectus or an FCA-approved securities note and summary, as opposed to an unapproved pathfinder document being used.]

Requirements relating to advertisements

An advertisement (whether it is an oral or written communication) must not be issued unless it complies with PR 3.3.2R.

Under PR 3.3.3G, a written advertisement should also contain a bold and prominent statement to the effect that it is not a prospectus but an advertisement, and that investors should not subscribe for any transferable securities referred to in the advertisement, except on the basis of information in the prospectus. In practice, a broad and prominent statement would mean a heading inserted on the front page of the document entitled 'Advertisement' followed closely by the warning required by this guidance and any other statement that is stipulated by PR 3.3.2R(1).

Investment research and the PD Prospectus Regulation advertisement regime

Market participants have also enquired whether an investment analyst research report published in the context of a new issue would trigger the advertisement regime in the PD Prospectus Regulation. In the PD, advertisements are defined as announcements: (a) relating to a specific offer to the public of securities or to an admission to trading on a regulated market; and (b) aiming to specifically promote the potential subscription or acquisition of securities.

Whether investment research issued in the context of a new issue triggers the PD Prospectus Regulation advertisement regime depends on the facts and circumstances of the particular case. The only indication provided by ESMA on this issue was provided in a Feedback Statement published in December 2003 (CESR/03-400) where it was stated that research which was not related to a specific offer or admission would be outside the PD advertisement regime's scope.

Firms may want to should consider the circumstances of the production of their investment research (such as the presence of chinese walls, the use of blackout periods, or other factors) in judging whether a particular piece of research falls within the above definition of an advertisement. However, firms will need to make the ultimate judgement on this matter in light of the definition and the particular facts and circumstances. Market participants are reminded to consider all their obligations under our Conduct of Business rules including those relating to communications between the issuer and research analysts in equity IPOs, financial promotions and investment research.