

UKLA Primary Market Procedural Note

Public offer prospectus – Drafting and approval

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.

PR 2 and PR 3 Prospectus Regulation Articles 1, 19, 27; PR Regulation Articles 18, 24-25, 42-44 and Annexes 1 & 11

Drafting and approval of public offer prospectuses under the Prospectus Directive Regulation – important information for issuers who are not admitted to the Official List

If you are an issuer undertaking a public offer of securities that requires a prospectus or equivalent exemption document under the Prospectus Regulation Prospectus Directive Regulation (PDP Reg), a prospectus or equivalent exemption document (in certain circumstances) will have to be reviewed for compliance with the relevant disclosure requirements and approved by the UKLA FCA. This note provides information about a number of areas which frequently present problems for non-listed issuers.

For the purposes of this note, issuers should be aware that our practices and procedures in relation to document contents, vetting and approval of equivalent exemption documents produced under Prospectus Regulation Art. 1(6a) Prospectus Rule (PR) 1.2.2R are, in most cases, identical or very similar to that of a formal prospectus. Until HM Treasury makes regulations specifying the minimum contents of the exemption document under Article 1(7) of the Prospectus Regulation, when approving exemption documents, we will have regard to the relevant published EU regulations relating to the content of exemption documents under the EU version of the Prospectus Regulation.

How should we submit the Prospectus?

The requirements relating to the submission of a prospectus for approval are set out in PR 3.1 and in Articles 42, 43 and 44 of PR Regulation Commission Regulation (EU) 2016/301.

As set out in PR 3.1.1 EU Art. 42(1) of the PR Regulation, the draft prospectus should be submitted in a searchable electronic format via electronic means (this would include a searchable Word document or PDF document submitted via the UKLA's FCA's ESS system). As set out in PR 3.1.1 EU Art. 42(2) of the PR Regulation and PR 3.1.3 R6R, it should also be accompanied by the following (please note that all forms referred to below are on our website).

Form A

Among other things, ~~T~~this asks for confirmation that the prospectus contains the required information and that all relevant UK documents have been supplied. ~~is the issuer's Home Member State under the PDP Reg.~~ It should be completed and signed.

Publication form

You should complete the form with the information which will be published by the FCA following the approval of the prospectus.

Issuer contact details form

Issuers need to give us relevant details so we can contact you if necessary when carrying out our obligations under the Prospectus Rules. Please complete the form and submit it together with the other documentation discussed in this section.

Cross-reference lists

If the order of disclosure items in the prospectus does not coincide with the order of information in the schedules and building blocks in the ~~PD~~ PR Regulation, then you must send us a cross reference list (Articles 24(5) and 25(6) of the PR Regulation~~PR3.1.1AR~~). These cross-reference lists are available on our website.

Omission of information request

If you are asking us to authorise the omission of information from a prospectus, you must submit a reasoned request to this effect with the draft prospectus as per Art. 42(2) of the PR Regulation (please refer to PRR 2.58.3G2G).

Passporting request

If you intend to passport the approved prospectus to another Member State, you should include a request to this effect. Please see UKLA / PN / 905.2 for further information on passporting.

Information incorporated by reference

Where information is being incorporated by reference into the draft prospectus but it is not information that has been approved by, ~~or filed with~~ the FCA, you should also provide that information with the initial draft prospectus.

Fee

The relevant fee should also be submitted. Information on fees is available on our [website](#).

Document vetting procedures

We have separately produced a procedural note covering the [UKLA FCA](#) document allocation procedures and timetables ([UKLA Primary Market / PN / 903.43](#)), which can be found on our website.

In what format should we produce the Prospectus?

Tripartite prospectuses

A prospectus may comprise either a single document or three separate documents (registration document, securities note and summary). If you draw up the prospectus as a single document, it must be prepared in accordance with the format set out in Article 2524.1 of the [PD PR](#) Regulation. If it is drawn up as separate documents, it must be prepared in accordance with the format in Article 2524.2 of the [PD PR](#) Regulation (see [PRR 2.2.4EU10R](#)).

If you adopt the approach of a combined summary and securities note, you must clearly identify the combined document. The summary and ~~security~~securities note must be separate parts within the combined document – and clearly identifiable as such. The summary should also appear at the start of the document.

Incorporation by reference

In its prospectus, an issuer may incorporate information by reference where it has been previously or simultaneously published electronically, drawn up in a language fulfilling the requirements of Prospectus Regulation Art. 27 (see PRR 4.1) and where it is contained in one of the documents prescribed in Art. 19 of the Prospectus Regulation.

~~only refer to information elsewhere if we hadve approved that information or it had's filed it with us (– or with another competent authority if they were the issuer's competent authority at the time), in accordance with the PD. As non-listed companies will not have filed information with us or had it approved by us, they will generally not be permitted to incorporate information into their prospectuses by reference. However, once non-listed companies have had a prospectus approved by us, it may be possible to incorporate information from this document into subsequent prospectuses, subject to the requirements of PR 2.4 (for example, the information in the document must be the latest available to the issuer or offeror).~~

Cross-referencing

Cross-referencing must be specific when it relates to information required to be disclosed under the PRProspectus Regulation. For example, it is not sufficient to say 'save as disclosed elsewhere in the document'. Where a significant change is being disclosed, we would expect any cross-reference to be precise and to clearly disclose an actual change. Please note that the summary should not contain cross-references to other parts of the prospectus.

What historic financial information is required?

The historic financial information requirements for prospectuses are complex and this section provides only a brief overview of some of the main requirements. The primary purpose of including financial information in a prospectus is to enable investors to understand the financial position of the issuer. We would advise issuers preparing public offer prospectuses to contact us to discuss the financial information requirements before submitting their prospectus for review.

Track record

The historic financial information requirements of a prospectus are determined by the appropriate annex of the PRPR Regulation. For example, for equity securities, Annex 1 requires you to include three years of historic financial information in the prospectus – the last two years of which must be prepared on a consistent basis and be comparable with the issuer's next published accounts. This may mean you potentially have to restate earlier periods if you are changing accounting standards in the next published accounts (such as moving to IFRSUK-adopted IAS). Third country issuers (~~i.e. non-EEA countries~~) may use either (see also Article 23a as replicated in PRR 2.3.1UK):

- EU-endorsed IFRS UK-adopted international accounting standards
- IFRS, as it applies in the EU
- IFRS, provided that the financial statements include an explicit and unreserved statement in the notes to that the financial information that the information complies with IFRS in accordance with IAS 1. (This is likely to apply to Australian, New Zealand and South African IFRS, among others), or
- the GAAPs of Japan, USA, China, Canada and Korea
- an equivalent standard (see below) national accounting standards of a country that HMT have deemed equivalent to UK-adopted international accounting standards.

Equivalence of third country standards

~~GAAPs currently deemed equivalent are those of Japan, USA, China, Korea, Canada and, subject to the EU Commission's proposed extended transitional period until 1-~~

April 2016, India. We would encourage issuers and their advisers to contact us at an early stage if they are intending to present financial information under an equivalent standard in a prospectus.

Complex financial histories

Normally, the historical financial information of the issuer reflects the business of the issuer as a whole throughout the required period, including significant acquisitions or disposals. However, there may be circumstances when the issuer has not prepared its historical financial information as a single business during the whole of the period for which the historical financial information is required under the PD PR Regulation (these types of issuers are therefore considered to have a 'complex financial history').

Article ~~4(a)~~18 of the PD PR Regulation, set out within PRR 2.3.1, gives detailed criteria by which the FCA will determine whether additional financial information is required in the prospectus.

New Holding Company

Where a new holding company has been inserted on an issuer's group, we will normally look through to the underlying group/business as opposed to looking simply at the corporate issuer to determine what financial information is required in the prospectus. Accordingly, the issuer may be required to present three years' financial information on the issuer's group as a whole.

Significant acquisitions

For significant acquisitions, or where the financial information provided does not properly reflect the business of the issuer as a whole throughout the required period and could therefore be misleading (i.e. where the significant gross change calculations as set out in the ESMA Recommendations are more than 25%), it may be appropriate to provide up to three years' financial information on the target as if it were part of the issuer's historical group. The nature and extent of the additional financial information required will depend on both the size of the acquisition and the timing of the acquisition in the three-year period, and should be discussed in advance with the UKLA FCA.

We would encourage issuers and their advisers to contact us at an early stage if they have any concerns over the requirements for financial information under the PD Prospectus Regulation.

What contents should we include in the Prospectus?

ESMA Update of Recommendations

You and your advisers should consider the ESMA Recommendations when drafting a prospectus. The guidance provides additional detail and clarification in relation to issues such as working capital disclosure, profit forecasts, capitalisation and indebtedness and also on the detailed disclosure items under Annexes 1 and 3. A significant proportion of non-listed companies making offers to the public are start-up companies and should therefore also comply with the ESMA Recommendations on start-ups.

In determining whether the PD Regulation has been complied with, we will take into account whether the ESMA Recommendations have been followed.

Securities being issued

It is not uncommon for non-listed companies to issue a new line of securities, such as A Ords or B Ords, which have different rights from the company's existing ordinary shares. Where the rights attached to the securities being offered confer subordinated voting or dividend rights, you should clearly disclose this in the document.

If this is a sufficiently material matter, you may be required to disclose it in the summary.

Annex 1 item 1.1 – Responsibility

For equity issues, we require both the company and each director to take responsibility for the contents of the document. Other persons may also be responsible for the contents.

For example, if another party/expert has consented to information being included in the document (such as an accountant's report), in accordance with Annex 1 item 1.323-1; they will then be required to take responsibility for that part of the document. Any such responsibility will be additional to that of the company and its directors, who must still take responsibility for the document as a whole.

Annex 3 11 item 3.1 – Working capital

The requirement of the regulation PR Regulation is to provide a statement that the issuer has sufficient working capital for its present requirements (a 'clean' statement) or, if not, to explain how additional working capital will be provided. Under ESMA Recommendation 108; Guidelines 29-37 of the FCA Guidelines on prospectus disclosure set out the requirements around the preparation and disclosure of the working capital statement. In line with the Guidelines, we would interpret 'present requirements' as being for at least the next 12 months from the date of the prospectus. To comply with the requirements, no reference should be made to 'due

and careful enquiry' in the statement, and the words 'is' or 'has' should be used rather than 'will have' or 'will be'.

When making a working capital statement, issuers are expected to have undertaken appropriate robust procedures to support the statement being made –ESMA Recommendation 125 outlines what those procedures might normally include. Where a clean working capital statement is provided, the prospectus should not detail any assumptions underlying the working capital statement.

Only guaranteed funds should be taken into account in the working capital exercise, which, in the context of fundraising, means that only proceeds which are underwritten on a firm commitment basis or are covered by irrevocable undertakings funds can be included. New issuers that are closed-ended investment funds may also count minimum net proceeds when calculating their working capital, but only if the conditions set out in paragraph 151A of Guideline 33 are complied with. ~~Where the fundraising has not been underwritten, minimum subscription proceeds may be taken into account only where:~~

~~it is an explicit condition of the offer that the minimum net proceeds are raised, and that if the condition is not met, the offer will lapse and the proceeds will be returned to investors~~

Any financing facilities relied on by the issuer to make the statement should exist at the date of the prospectus. If any of the conditions highlighted above cannot be satisfied, the issuer will be required to make a statement that it does not have sufficient working capital for the next 12 months, and also explain how additional working capital will be provided.

Annex 3 11 item 3.2 – Capitalisation and Indebtedness

~~The capitalization and indebtedness statements should be provided within as of a date no earlier than 90 days prior to of the date of the document, but the capitalisation statement does not have to be provided within 90 days. If any of the information is more than 90 days old and there has been a material change since the most recently published financial information, If there has been a material change in the capitalization or indebtedness position of the issuer within the 90-day period, you should provide additional information, either by presenting a narrative description of such changes, or to through the updating of those figures. If any of the information is more than 90 days old, but there has not been any material change since the most recently published financial information, you should include a statement to that effect. Please also note the ESMA Recommendations in relation to capitalisation and indebtedness:~~