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Issue No. 5

Primary Market Bulletin

Newsletter from the FSA for primary market participants

This fifth edition of *Primary Market Bulletin* presents new technical and procedural guidance for inclusion in the UKLA Knowledge Base. It also provides some general informational updates from the UKLA.

The bulletin sets out relevant background information and summarises the proposed guidance. The full text of the proposed guidance is set out separately in the guidance consultation section of the FSA website. The consultation can be accessed using this link: www.fsa.gov.uk/library/policy/guidance_consultations/2013/consultation-bulletin-no5

We are consulting on 11 items of guidance consisting of:

- amendments to two Procedural Notes;
- introduction of five new Technical Notes;
- amendments to three Technical Notes; and
- the deletion of one Technical Note.

Subject to the feedback we receive, we intend to publish the Notes in the UKLA Knowledge Base. The new Notes will be assigned a new UKLA Knowledge Base reference number and the amended Notes will have their reference numbers revised to reflect that the fact they have been updated. The Notes published following the consultation process will constitute FSA guidance. Please see our Reader's Guide (www.fsa.gov.uk/pages/Handbook/readers_guide.pdf) for a summary of the legal effect of guidance.

We invite your comments on the proposed guidance. You may submit comments by email to primarymarketbulletin@fsa.gov.uk. Alternatively, please send comments in writing to:

Hanna Teshome
UK Listing Authority
Financial Services Authority
25 The North Colonnade
Canary Wharf
London E14 5HS

Please send us your comments by 8 April 2013.

UKLA updates

The 2012 Financial Services Act received Royal Assent on 19 December 2012. The 2012 Act comes into force on 1 April 2013. From 1 April, the FSA's UKLA functions will be performed by the new Financial Conduct Authority and its UKLA department and staff will be part of the FCA.

The consultation period on CP12/25 Enhancing the effectiveness of the Listing Regime has now closed. We received feedback from various respondents and are very grateful to those stakeholders who took the time to do so. We are currently reviewing and considering the comments received. We intend to publish our feedback in due course.

Overview of proposed guidance

Changes to how we review eligibility for listing

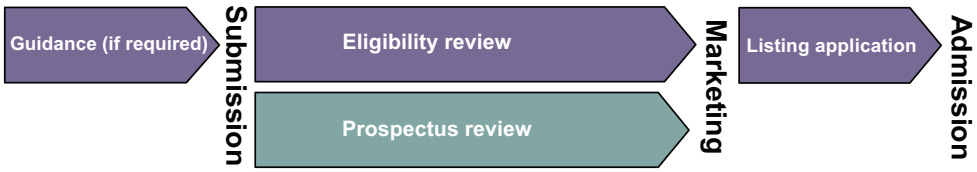
As all practitioners will be aware, we regard the decision to admit securities to listing for the first time as crucial for maintaining the integrity of the listing regime. We think it is important we maintain a robust and credible review process to ensure a new applicant's eligibility for listing is properly scrutinised.

We have been looking into how we review eligibility and are now proposing changes to the process with the intention of making the process more efficient and effective.

Currently, we usually review eligibility first and then the prospectus (or other document). We receive an eligibility letter with the applicant's advisors addressing how the applicant meets the relevant conditions for listing. We then stage discussions around the key issues the letter presents and communicate our view to the applicant. The applicant goes on to submit a draft prospectus for review.

We propose to change this so that the eligibility review process happens at the same time as the review of the prospectus. We will also try to allocate the same staff to the eligibility review and prospectus review cases so that they are more joined up.

The following diagram illustrates the new sequence of processes:



We think running the eligibility and prospectus review exercises in parallel will improve the overall admission process, both from our and the applicant's perspective. Some advisors have told us that, when we review eligibility and the prospectus sequentially, they find the outcome of the eligibility exercise unclear.

In a sequential review process, we generally qualify what we say about the outcome of the eligibility exercise. For example, we might say we have found the applicant is eligible for listing subject to review of the prospectus. This is because at that stage we would not have reviewed a key piece of evidence, the prospectus. Some advisors have questioned whether the eligibility review phase therefore has much value, arguing that it simply gets repeated in the prospectus review exercise, sometimes by different staff, thereby lengthening the overall process. Our proposed changes address these points.

We have described the revised eligibility process in a new version of our Procedural Note on eligibility, UKLA/PN/901.2, on which we are now consulting. As the Note explains, we retain provision for submitting an eligibility letter and discussion of eligibility ahead of submitting a prospectus. This is potentially a useful option to advisors in a minority of cases although it is not recommended for all cases and will mean the process is lengthier.

We also clarify in the Note that we conduct eligibility reviews for non-equity issuances, for example new debt issuers or new securitised derivatives issuers. This may not have been particularly apparent to some practitioners previously as we generally considered the small number of listing rules that apply for standard listing, together with the question of whether admission is detrimental to the interests of investors during the review of the programme, only occasionally drawing their attention to eligibility matters. We will not change practice in terms of requiring an eligibility letter (as we do for share and GDR issuers) and nor are we changing our fees following these changes.

The changes to the eligibility review process also necessitate consequential changes to our Procedural Note on Document Review and Approval (UKLA/PN/903.2) which applies to all prospectuses including public offer prospectuses. We are therefore also consulting on a new version of UKLA/PN/903.2.

Applying the Listing Rules to guarantees under section 479C of the Companies Act 2006

We are proposing guidance to clarify the position regarding the guarantee of subsidiaries by a parent company under section 479C of the Companies Act (as amended) (the Act) and the implications for listed companies under LR 10.2.4 R(1). Under section 479C of the Act, where a parent company guarantees a subsidiary, the subsidiary is exempt from producing mandatory audited accounts even if it falls outside the scope of other exemptions in the Act, such as being a small company or a dormant company. The guidance we are proposing is intended to clarify the UKLA's views on whether the guarantee is classifiable as a class 1 transaction under LR 10.2.4(1)R and the implications for issuers of debt instruments.

The proposed guidance is set out in a new Technical Note – Indemnities, guarantees and similar arrangements (UKLA/TN/310.1).

Disclosing inside information in the context of periodic financial reporting

We have noticed that some issuers experience a significant price movement following an announcement of a periodic financial report. Under such circumstances, we may enquire whether the announcement was made on a timely basis if we suspect that it contains any inside information. It has come to our attention that, in some cases, issuers may have possessed inside information for a considerable amount of time before the announcement of a periodic financial report. We are proposing guidance to remind issuers that the requirement to disclose inside information under DTR 2.2.1R also applies during the period when issuers are in the process of preparing their financial reports.

The proposed guidance is set out in a new Technical Note – Periodic financial information and inside information (UKLA/TN/506.1).

Our approach to supplementary prospectuses

Article 16 of the Prospectus Directive (PD) sets out the requirement to produce a supplementary prospectus (SP). An SP is required if, during a relevant period, there arises – or is noted – a significant new factor, material mistake or inaccuracy concerning information contained in the prospectus. What constitutes a significant new factor, material mistake or inaccuracy is clearly a matter of judgement. It is not appropriate for an issuer to use the provisions in Article 16 to circumvent the need for a new prospectus where it is required under the PD. Equally, an SP should not be used to make non-material amendments, or amendments that are not relevant to the investor, as this undermines the integrity of the SP regime.

As the advisory community has interpreted Article 16 in different ways, we have had to consider the parameters within which an SP can be produced and what it may be used for. Given the number of issues we have encountered in relation to SPs, we are now proposing this guidance to provide transparency on our approach. The European Securities Market Authority (ESMA) is soon to undertake work on SPs. Therefore, we may update or amend our guidance, if appropriate, once ESMA has completed its review.

The proposed guidance is set out as an amendment to our existing Technical Note – Supplementary Prospectuses (UKLA/TN/605.2).

This Technical Note has also been revised to incorporate provisions in the PD Amending Directive regarding withdrawal rights.

Issues surrounding risk factor disclosures

The amendments to the Prospectus Directive (made by 2010/73/EU) and the Prospectus Directive Regulation (made by 2012/486/EU) (PD Reg), which came into force on 1 July 2012, introduced a requirement for prospectus summaries to disclose only key information on key risks to the issuer, its industry and its securities (Annex XXII, section D of the PD Reg). This disclosure reflects the

requirement that a summary should be read as an introduction to the prospectus, be concise and provide the reader with key information.

ESMA has indicated that this requirement to identify certain risks as being key for inclusion in the summary, as opposed to those which are not, has drawn feedback from market participants. In particular, there is a concern that this distinction could deemphasise the significance and materiality of those risks not identified in the summary as being key and thereby impact on the issuer's potential liability.

The issuer's potential liability is not an acceptable ground for including non-key risks in a prospectus summary; however, we believe that additional disclosure may be included in the Risk Factors section of the prospectus to address this concern. The additional wording that we propose to accept is set out in our revised Technical Note – Risk Factors (UKLA/TN/621.1).

This Technical Note has also been revised to clarify our view on the inclusion of information regarding mitigating factors in risk factor disclosures.

Information that can be included in base prospectuses and final terms

Amendments to the PD Reg came into force on 1 July 2012 and introduced some significant changes regarding how final terms and base prospectuses can be used by issuers. The European Commission had been concerned that information that should have been reviewed by Competent Authorities was being included in final terms, instead of the base prospectus. Amendments have been made to the PD Reg to stop this practice.

The new approach set out in the PD Reg introduces the concept of categorising information (Article 2a and Annex XX of the PD Reg). The categorisation determines whether the information must be included in the base prospectus or can be included the final terms.

There has been some confusion in the market regarding these new requirements and a degree of reluctance over their adoption. We held a roundtable with some of our stakeholders to discuss these problems. The proposed guidance sets out the areas discussed and details the approach we propose to adopt for each. We hope that this will provide clarity on what information can and cannot be included in base prospectuses and final terms.

The proposed guidance also highlights drafting considerations for retail prospectuses and wholesale prospectuses. We have noted that there is little difference in the drafting of a retail prospectus when compared to a wholesale prospectus. We are therefore clarifying how information may be presented for retail denominated securities and for complex derivative securities respectively.

The proposed guidance is set out as an amendment to our existing Technical Note on Final Terms. The revised text is set out in UKLA/TN/629.2.

PD disclosure issues relating to non-equity securities

We are proposing to add a new Technical Note on the UKLA Knowledge Base to address PD disclosure issues that arise for issuers of non-equity securities. At this time, the Note only addresses specific issues relevant to zero coupon bonds. As this is an area of rapid product development, we expect to add to this Note as new products develop or as clarification in respect of existing products is required. The new Note is set out in UKLA/TN/631.1.

Issues relevant to sponsor services

We discussed the scope of the definition of sponsor services with some of our stakeholders. In light of the changes made recently under CP12/25, including the introduction of LR 8.3.12AG which clarifies that conflicts management principles are applied for as long as the sponsor provides sponsor services, we believe further detail should be provided to our stakeholders regarding the application of this definition.

We are proposing guidance to address the application of this definition to LR8, particularly when a sponsor is providing sponsor services and when it stops providing sponsor services.

The proposed guidance is set out in a new Technical Note – Sponsor services (UKLA/TN/710.1).

Sponsor notifications requirements

In October 2012, further to CP12/11 and Handbook Notice 123, LR8.7.7R was amended to require all sponsors to submit Annual Notification Forms confirming their compliance with the criteria for approval as a sponsor (LR8.6.5R) in January each year. In addition, LR8.6.17R was deleted. In light of these changes, we propose to delete an existing Technical Note -Sponsor: Regular review and annual confirmation for sponsors (UKLA/TN/702.1) in its entirety as it is no longer relevant.

CP12/25 amended the general notifications that sponsors are required to submit under LR8.7.8R. We are proposing guidance to address practical considerations for sponsors in complying with these requirements.

The proposed guidance is set out in a new Technical Note – Sponsor notification requirements (UKLA/TN/711.1).