

UKLA Technical Note

Public offers

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s. 102B of
FSMA

What constitutes a 'public offer'?

The definition of what constitutes an offer of transferable securities to the public (a public offer) is set out in section 102B FSMA. While we will be happy to discuss particular circumstances, it is our policy not to provide formal binding guidance on whether a particular set of circumstances amounts to a public offer that requires a prospectus to be published. Contravening sections 85(1) or (2) FSMA (prohibition of dealing, etc, in transferable securities without approved prospectus) is a criminal offence.

Where a person may be subject to the legislation concerning public offers, they should take legal advice on applying the legislation to their own particular circumstances. It is only in the full knowledge of all the relevant facts –including how the potential offer may be conducted – that it would be possible to come to any definitive view on whether their activities amount to a public offer that requires a prospectus to be published. Ultimately, it will be a question of law for the courts to determine.

However, after our investigation into the impact of Lehman's collapse on the UK structured investment market published its findings on 27 October 2009, in its publication 'Quality of advice on structured investment products'.

One of the findings, regarding whether a communication is an offer of transferable securities to the public under section 102B FSMA, was that some market participants believed that withholding information (such as the identity of the issuer of the underlying security that would be issued to persons accepting an offer) would alone be sufficient to ensure that the communication is not an offer under section 102B FSMA. As was made clear in the October 2009 publication, the FSA strongly disagreed with this view.

Since publishing these findings, we have become aware that providers have given a number of other explanations about why their communications do not constitute offers under FSMA or why their communications fall within a specified offer exemption detailed in FSMA. There are a number of exemptions from the requirement to produce a prospectus set out in the Prospectus Directive and FSMA and it is not our intention to question these. However, we would urge issuers, offerors and advisers to carefully consider whether their activities, or the activities of others that repackage an issuer's structured securities to create an investment product, genuinely fall within one of the exemptions.