

UKLA Technical Note

PD Advertisement regime

Ref: UKLA / TN / 604.12 – Guidance Consultation

PR 3.3R

Types of communication caught

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.

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. We would remind issuers to take into account the provisions of Article 12 of Commission Regulation (EU) 2016/301 (‘PD RTS Regulation’) which is reproduced in PR 3.3.7EU.

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 and the provisions of the PD RTS Regulation. 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 PR 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.

Pathfinders

Issuers often 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 PR 2.3.2R constitutes a valid prospectus and is not an advertisement.

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 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.

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 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 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 relating to financial promotions and investment research.