

UKLA Technical Note

Supplementary prospectuses

Ref: UKLA / TN / 605.2

PR 3.4

A supplementary prospectus (SP or supplement) is required if, during the relevant period, there is a significant new factor, material mistake or inaccuracy concerning the information in the prospectus (S.87G(1) of FSMA).

S.87G(3) and (3A) of FSMA implement Article 16 of the Prospectus Directive (PD) and set out the period during which an SP may be required. The 'relevant period' begins when the prospectus is approved and ends either with the closure of the offer, or when trading the securities on a regulated market begins – whichever occurs later.

We believe that Article 16 requires us to consider whether the matter presented in a supplementary prospectus is indeed a significant new factor, material mistake or inaccuracy [...] capable of affecting the assessment of the securities, and also whether the matter relates to the information included in the [original] prospectus.

We will challenge the use of a supplementary prospectus when we are aware that the matter presented is not factually accurate or where the matter presented cannot be credibly considered to be a significant factor.

A prospectus must relate to a specific offer and/or admission of securities (or for a base prospectus, specific offers/admissions). An SP cannot be used to launch a new offer or create a new admission event unrelated to the one anticipated in the original prospectus (see ESMA Q&A 34).

For a base prospectus this means an issuer can do numerous different offers/admissions using one prospectus, but the Terms and Conditions (T&Cs) relating to the securities subject to the offer /admission must have been included in the relevant base prospectus. We will allow some limited changes to an offer or admission prospectus to be made by an SP, but only where we are satisfied that it still clearly relates to the matter described in the prospectus that was previously approved.

We have set out below how this may apply in certain common scenarios.

Examples

1. Amendments relating to drafting

These types of amendments may occur:

- when a supplement is issued solely to clarify the drafting of the original prospectus;
- when a supplement is issued for appropriate uses but includes general drafting changes; or
- when a supplement is issued potentially relating to a significant new factor but the drafting is unclear about why the new matter is relevant to a security holder.

It is not appropriate to publish a supplement simply to clarify or revise drafting, nor should drafting changes be made as part of a genuine supplement (see ESMA Q&A 23). Furthermore, the new matter in the supplement should be relevant for a security holder and fall within Article 16. We would not approve a supplement where neither materiality nor relevance to the investor can be established.

2. Amendments to terms and conditions

An SP should relate to the securities for which the prospectus was originally drafted. It is not appropriate to:

- add entirely new securities to a prospectus via an SP, nor
- change the terms and conditions of the securities

This is because the original prospectus will have been drafted for a specific offer (or offer(s) for base prospectuses) and/or admission event(s) (and should contain all necessary information). Fundamental to the description of a specific offer is what security is being offered.

There are, however, certain circumstances where we accept amendments to the terms and conditions; where following the amendment or change to the T&C, the securities are manifestly the same securities.

In assessing whether a security is manifestly the same, we would take into account factors such as whether the change is a response to external events, nature of the security, economic impact of the proposed changes, and whether the proposed changes are purely technical.

When a fundamentally new security is being created, a new prospectus will have to be produced.

3. Amendments relating to events

- A supplement may be produced to describe external events, such as a factory burning down, etc. Informing investors of such events, if material, is what the SP regime envisages. To determine whether ancillary changes can be made to the terms of an offer/admission in this circumstance, issuers should consider the examples set out in this note.
- An issuer may make certain changes to a transaction and in some circumstances it would be legitimate to amend the terms of the original offer or admission, as long as the new proposals clearly relate to the transaction described in the original document.

For example, an issuer may want to increase the number of shares to be admitted for the acquisition of a target via a supplementary prospectus, as the original prospectus clearly related to the admission of shares in connection with the takeover of that target.

- A supplement may be required for events to inform investors of a material new factor, etc, but it would not be appropriate to amend the terms of the original offer/admission without a new prospectus being produced.

For example, if the issuer sought to buy an unrelated entity, it would not be possible to amend the number of shares to be admitted to account for shares to be issued for that separate acquisition. This is because the change would be for a transaction outside the one anticipated in the original prospectus (similar to 'amendments to terms and conditions' above). This does not preclude the issuer from issuing an SP on this matter to update the information in the original prospectus; indeed it may be required to do so under the PD.

4. Amendments relating to the offer period or the offer amount

A supplement may be issued to amend the period or amount of the original offer and/or amend the number of shares to be admitted. Where an issuer seeks to increase the size and/or extend the offer period (not exceeding 12 months from the date of the original document), this could generally be done via an SP.

For example, issuers of an investment fund securities or convertible securities may wish to amend the total number to be issued (up or down). It is important that the changes relate to the same securities as described in the original prospectus and that the original prospectus remains valid. So:

- an offer can be extended with an SP if the original offer had not yet closed;
- it is possible to extend an offer to further jurisdictions (noting the requirement for a passport request), or to add a new regulated market via an SP if the original document was for an admission provided the prospectus is still 'live', i.e. the offer has not closed or admission has not yet occurred; and
- it may be possible to decrease an offer; however, whether this amounts to a fundamental change should be considered.

When assessing whether an offer/admission can be amended through an SP, we will consider whether the fundamental premise of the original document still stands. That is whether the SP relates to a matter in the original prospectus. For example, if the use of proceeds for an equity issue changes significantly as a result of the amendment, a new prospectus rather than an SP is likely to be required.

PR 3.4.1R Timing of supplementary prospectuses

Section 87G(2) of FSMA does not provide an express time limit for the submission of draft supplementary prospectuses to the UKLA for approval. This led us to introduce PR 3.4.3 that requires supplementary prospectuses to be submitted to us as soon as practicable after the new factor, mistake or inaccuracy arose or was noted.

Furthermore, even though no express time limit is stipulated, the failure to produce a supplementary prospectus in a timely manner may expose an issuer to the compensation provisions of Section 90 of FSMA in relation to any loss suffered as a result of such a failure.

There are two additional points worth noting. Firstly, we consider it to be best practice in offer situations for the offer to be suspended between the trigger event and the publication of a supplementary prospectus in certain circumstances e.g. where the offer is actively marketed or where securities are allotted immediately such that any investors that completed their purchase before the supplementary prospectus was published would not benefit from the withdrawal rights. This ensures investors are not unconditionally allotted shares based on incomplete disclosure. Secondly, the UKLA recognises the importance of publishing supplementary prospectuses as soon as possible and endeavours to fast track the approval process to facilitate early publication.