

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.

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 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 exemption document under the Prospectus Regulation, a prospectus or exemption document (in certain circumstances) will have to be reviewed for compliance with the relevant disclosure requirements and approved by the 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 exemption documents produced under Prospectus Regulation Art. 1(6a) 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 PRR3.1 and in Articles 42, 43 and 44 of the PR Regulation.

As set out in Art. 42(1) of the PR Regulation, the draft prospectus should be submitted in a searchable electronic format via electronic means. In practice this means a searchable Word document or PDF document submitted via the FCA's ESS system. As set out in Art. 42(2) of the PR Regulation and PRR3.1.6R, it should also be accompanied by the following (please note that all forms referred to below are on our website).

Form A

This asks for confirmation that the prospectus contains the required information and that all relevant documents have been supplied.

Cross-reference lists

If the order of disclosure items in the prospectus does not coincide with the order of information in Annexes to the PR Regulation, then you must send us a cross reference list (Articles 24(5) and 25(6) of the PR Regulation). 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 2.8.2G).

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 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 FCA document allocation procedures and timetables (Primary Market / PN / 903.4), 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 Art. 24.1 and Art. 25.1 of the PR Regulation. If it is drawn up as separate documents, it must be prepared in accordance with the format in Article 24.2 and Art. 25.2 of the PR Regulation (see PRR 2.2.4G).

If you adopt the approach of a combined summary and securities note, you must clearly identify the combined document. The summary and 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.

Cross-referencing

Cross-referencing must be specific when it relates to information required to be disclosed under the Prospectus 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 PR 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 UK-adopted IAS). Third country issuers may use either (see also Article 23a as replicated in PRR 2.3.1UK):

- 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 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
- national accounting standards of a country that HMT have deemed equivalent to UK-adopted international accounting standards

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 PR Regulation (these types of issuers are therefore considered to have a 'complex financial history').

Article 18 of the 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 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 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 Prospectus Regulation.

What contents should we include in the Prospectus?

Content – general

When considering the content requirements for a prospectus, issuers' attention is drawn to PRR 1.1.5G which sets out the documents which the FCA considers are relevant to the prospectus regime.

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 1.3, 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 11 item 3.1 – Working capital

The requirement of the 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. 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 robust procedures to support the statement being made. 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 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. 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 11 item 3.2 – Capitalisation and Indebtedness

The capitalisation and indebtedness statements should be provided as of a date no earlier than 90 days prior to the date of the document. 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 through the updating of those figures.