

# Primary Market Technical Note

## Public offers

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 Art  
2(a) (d) and (zc);  
PR Regulation  
Annex 11, 4.8;  
Annex 11, 7.4

### 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 and article 2 (d) of the Prospectus Regulation. 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 an 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 the investigation into the impact of Lehman's collapse on the UK structured investment market the FSA 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 and now Art 2 (d) Prospectus Regulation), 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 (and now the Prospectus Regulation) or why their communications fall within a specified offer exemption detailed in FSMA (and now the Prospectus Regulation). There are a number of exemptions from the requirement to produce a prospectus set out in the Prospectus Regulation 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.

### **Restrictions on the transfer of securities**

There are a number of circumstances where restrictions may be imposed on an investor's ability to transfer securities. These include selling restrictions applicable in a specific country or a lock up agreement between an issuer and existing shareholders in which shareholders agree not to sell their shares for a defined period. In general, securities subject to such restrictions remain "securities" falling into the scope of the Prospectus Regulation.

Securities are within scope of the Prospectus Regulation if they are transferable securities, which is defined as meaning those classes of securities which are negotiable on the capital market (Article 2(1)(24) of Regulation (EU) 600/2014 on markets in financial instruments (MiFIR), (Article 2(a) and (zc) of the Prospectus Regulation and sections 102A(3) and 417 FSMA).

The PR Regulation requires disclosure of information in relation to restrictions on the transferability of the securities (Annex 11, 4.8) and lock-up agreements of selling securities holders (Annex 11, 7.4). This reinforces the view that restrictions on transferability do not necessarily mean that the securities are not transferable securities for the purposes of the Prospectus Regulation.

Nevertheless, this needs to be considered on a case by case basis. Some restrictions may be so broad that they result in securities no longer falling into the scope of the Prospectus Regulation.