

Primary Market Bulletin

Newsletter from the FCA for primary market participants

July 2013 / No. 06

Welcome to the first *Primary Market Bulletin* we are publishing as the Financial Conduct Authority (FCA). As before, we publish *PMB* to inform our readers of any updates to the UKLA's online guidance repository – the Knowledge Base – and to provide general news and information to our readers.

As we are now part of the FCA, the Knowledge Base has a new look but you will find that the content (other than as described below) remains the same as before.

About this edition

We begin this edition with general news and information. The remainder is dedicated to the Knowledge Base – the changes we are making and the changes we are proposing to make.

We have made changes to the Knowledge Base following the feedback we received on our consultations. We have summarised the feedback and explained the actions we have taken on each of the technical notes and procedural notes consulted on (together the 'Notes') including whether or not a Note has been added to the Knowledge Base.

We are also proposing new guidance for the Knowledge Base. *PMB* sets out the background information and summarises the proposed guidance. The full text of the proposed guidance is set out in two technical notes (the 'Consultation Notes'). The Consultation Notes can be found in the guidance consultation section of the [FCA website](#).

What's new?

More guidance for sponsors

We recognise that there may be areas where additional guidance or policy consideration would be helpful to sponsors. One area that we are planning on looking at in greater detail is conflict identification and management by sponsors.

LR8.3.7A sets out the principles for sponsors in relation to identifying and managing conflicts of interest. The purpose of these rules is primarily to ensure that a conflict of interest does not adversely affect the ability of the sponsor to perform its functions properly and to maintain market confidence in sponsors.

We recognise that identifying and managing conflicts is a complex area and that it can often result in difficult judgement calls. For this reason, we recently published a technical note in the Knowledge Base to try to address some of the common queries we receive in this area.¹

¹ Please see technical note in Knowledge Base – Sponsors: identifying and Managing Conflicts – UKLA/TN/701.1

We would welcome feedback from sponsors on issues that they face identifying and managing conflicts. Other ideas on areas where sponsors feel additional guidance or policy consideration is required or needed would also be welcome.

To provide us with feedback or examples of recent issues that you have encountered, please contact Clare Cole on Clare.Cole@fca.org.uk.

Supervision of sponsor

The FCA was granted new powers on 1 April 2013 relating to the supervision and discipline of sponsors. More information can be found in the Financial Service Authority's (FSA) Consultation Paper, CP12/37 *The Financial Services Bill: Implementing markets powers, decision making procedures and penalties policies*, which was published in December 2012 and the subsequent Policy Statement, PS13/5 *The new FCA Handbook – Feedback on Regulatory Reform proposals relating to the FCA Handbook, including final Handbook rules*, which was published in March 2013. Sponsors with any queries or concerns about how this might apply to them should contact their Sponsor Supervision Team relationship manager.

ESMA updates

- The European Securities and Markets Authority ("ESMA") recently closed its consultation on draft regulatory technical standards (RTS) to specify situations where a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus requires a supplement to the prospectus to be published. The consultation paper "Draft Regulatory Technical Standards on specific situations that require the publication of a supplement to the prospectus" can be found on ESMA's website. ESMA will now consider all the feedback received and submit draft RTS to the European Commission by 1 January 2014 for endorsement.
- ESMA published the "19th updated version of its Questions and Answers on Prospectuses". In this publication ESMA sets out a series of questions and answers ("Q&As") aimed at clarifying certain Prospectus Directive rules and requirements. The Q&As included in this update address profit estimates, estimate expenses charged by a financial intermediary in a retail cascade and the age of financial information include in prospectuses.
- EMSA published a Report to the European Commission titled "Comparison of liability regimes in Member States in relation to the Prospectus Directive". The Report covers factual information on national liability regimes in EEA States. One of the stated objectives for this Report is to provide some clarity to market participants about the different regimes in place in each of the member states.

Consultation feedback and changes to the Knowledge Base

In our *PMB No. 2* consultation (July 2012), we introduced a new procedural note on block listings. We did not publish this Note in the Knowledge Base following our consultation because we believed we needed to consider the issues raised by respondents in the feedback we received.² We have now had the opportunity to further engage with our stakeholders and are ready to take action on this procedural note.

The *PMB No. 5* consultation (February 2013) presented 12 items of guidance for consultation.

² See *PMB No. 4* for our initial response to the consultation on the procedural note on block listings.

We received written feedback from 10 respondents.

We have summarised the feedback we received on those Notes and the action we have taken on each below.

Having considered the feedback received, we have updated the Knowledge Base as follows:

- Four new Notes added
- Three existing Notes amended
- One Note deleted

We are continuing our assessment of the feedback received on four technical notes.

Procedural notes

UKLA/PN/901.2 – Eligibility review process and UKLA/PN/903.2 – Review and approval of documents

We proposed revisions to two of our existing procedural notes to reflect the changes we made to our eligibility review procedures. We received feedback from three respondents on this proposed change, all making a similar point, on our procedural note *UKLA/PN/901.2 – Eligibility review process*. The respondents were all concerned that running the eligibility review process in parallel with the prospectus review process would remove a 'useful window of opportunity', as one respondent put it, to hold early discussions with us on eligibility before substantial costs were incurred.

It was always our intention to retain provision for those who want to discuss eligibility with us before submitting a prospectus. Although we felt the consultation version of the note made this point, in light of feedback received, we have made amendments to make the point clearer. We have revised our suggestion that advisers may wish to submit an eligibility letter to us before submitting the prospectus 'in a small number of cases' with the more neutral 'in some cases...' We are very happy to confirm that, if an applicant wishes to interact with us in this way, we will be willing to allocate staff to discuss their case and we will not seek to limit the applicants who use this arrangement.

We have made these and other minor amendments to *UKLA/PN/901.2 – Eligibility review process*. There are no amendments to *UKLA/PN/903.2 – Review and approval of documents*.

UKLA/PN/907.1 – Block listings

We published the consultation version of this procedural note in July 2012 as part of our consultation in *PMB No. 2*, with the intention of providing market participants with a clear explanation of our policy on block listings and of giving issuers guidance on how to make an appropriate application for a block listing.

The feedback we received from the consultation raised a variety of practical concerns. We believed it was appropriate to consider the concerns in the feedback and to engage further with our stakeholders. Having now done so, we are including a procedural note on block listings in the Knowledge Base. We believe this procedural note, as amended, clarifies our current policy and provides market participants with a clear and practical guide to applying for a block listing.

Technical notes

Category: Transactions

UKLA/TN/310.1 – Indemnities, guarantees and similar arrangements

Our rationale for proposing this guidance was to clarify our views on the Listing Rule implications of guarantees under section 479C of the Companies Act. We also addressed the implication of these guarantees for issuers of debt instruments under the Prospectus Directive. Although we believe our proposal reflects the correct interpretation of both the Listing Rules and the Prospectus Directive, the issues raised in the feedback (such as the extent to which a guarantee relating to a non-wholly owned subsidiary should always be regarded as being a class 1 transaction), warrant further consideration and perhaps additional consultation. Accordingly, this technical note will not be included in the Knowledge Base at this time.

Category: Periodic financial information

UKLA/TN/506.1 – Periodic financial information and inside information

We received feedback from two respondents on this technical note. The feedback broadly related to making the technical note clearer. An example is the request to add a cross-reference to our existing technical note UKLA/TN/521.1, which provides useful guidance on inside information. One respondent, however, suggested that our proposed guidance was inconsistent with the Listing Rule provisions on the timing of the publication of preliminary statements of annual results. We disagree with this suggestion but, as a result of this feedback, we have clarified the technical note to specifically address the impact of announcing 'preliminary results'.

We have made changes to this technical note in response to the comments received and the Note, as revised, is now included in the Knowledge Base.

Category: Public offers, admission to trading and the marketing of securities:

UKLA/TN/605.2 – Supplementary prospectuses

We are not finalising our guidance on supplementary prospectuses at this time as we are still considering the issues raised in the feedback to the consultation. We are also considering the work currently before ESMA on this subject. We intend to respond to the feedback and take action on this Note in the next edition of *PMB*.

Category: Prospectus content

UKLA/TN/621.2 - Risk factors

We proposed revisions to this technical note to accommodate the introduction of Annex 22 of the Prospectus Directive Regulations. Two respondents provided feedback on our proposed revisions. The respondents noted the potential for liability as a result of distinguishing between key risks in the summary and material risks in the body of the prospectus. They asserted that issuers are best placed to assess the key risks relevant for disclosure in a summary. We do not disagree with this assessment; indeed, this point was acknowledged and considered by ESMA.³ The respondents also suggested that the proposed 'preamble' text would be more helpful if it were placed in the summary section rather than the risk factors section of the prospectus as we proposed. The permitted content of prospectus summaries is restricted by the Prospectus Directive Regulation and it is not therefore possible to include the 'preamble' text there. Accordingly, we have not made any changes on these points.

Lastly, in response to feedback regarding the application of Annex 22 to issuers of debt securities, we have revised this technical note to allow the preamble to refer to relevant transferable securities to which the prospectus applies. Apart from this amendment, this Note has been published in the Knowledge Base in the form in which we consulted.

UKLA/TN/629.2 – Final terms

We are not finalising our guidance on final terms at this time. As with our technical note on supplementary prospectuses, we intend to respond to the feedback and take action on this Note in the next edition of *PMB*. We recognise the significance and impact that our guidance may have on market participants and therefore believe additional time to engage with our stakeholders is necessary before publishing our views as formal FCA guidance.

In the meantime, issuers and advisers may want to refer to ESMA's advice and feedback on final terms in "*Final report – Advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU*" published 4 October 2011.

UKLA/TN/631.1 – PD disclosure issues relating to non-equity securities

We received positive feedback on this new technical note, which provides guidance on the use of the derivative securities note annex when issuing zero coupon notes. Two respondents suggested the guidance would be more helpful if it was extended to cover more securities than specified in the note. The respondents did not provide details on the specific features of these additional securities. We are willing to revise this guidance further in the future to address additional, more specifically described securities, but we cannot provide blanket confirmation in the interim.

In light of our on-going consideration of the technical note on final terms, we have decided to postpone publishing this Note in the Knowledge Base. We intend to take action on it in the next edition of *PMB*.

³ Please refer to paragraph 194 of ESMA's publication ESMA/2011/323 (4 October 2011): "*Final report – Advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU*".

Category: Sponsors

UKLA/TN/710.1 – Sponsor services

Seven respondents provided feedback on this Note. The feedback was broadly supportive of the overall aim of the technical note, which is to clarify when an approved sponsor is conducting sponsor services. However, concerns were raised over the practical implications of specific statements within the Note.

We were asked to clarify the period that sponsor declarations on application for listing or transfer of listing category are to remain subject to the requisite standards of care. We have revised the Note to specify the date up to which the sponsor declaration is 'live'.

Respondents raised issues surrounding the practicalities of our guidance on the obligation to inform us of any further information before admission to listing or effective date of transfer. It was not our intention, directly or indirectly, to impose obligations on advisers to issuers or sponsors. Typically, sponsors are provided with 'comfort letters' that require issuers and advisers to inform or discuss with the sponsor any matter which would or might affect the confirmations given (in line with existing standards regarding reports and representations made by advisers concerning transactions requiring sponsors). There is no intention to comment on this practice nor, indeed, to seek to broaden it. Accordingly, we have amended the drafting to clarify the nature of this obligation.

Some respondents suggested that we clarify the technical note so that the obligation to inform becomes the issuer's directly. We believe the technical note, as revised, and the Listing Rules provisions set out in LR 8.5.6R, (which came into effect on 31 December 2012), provide Sponsors with sufficient support to enable them to discharge their obligations. Accordingly, we have not revised our guidance to address this point specifically.

Lastly, one respondent asked us to clarify the nature of the sponsor's obligation between a shareholder vote and the completion of the transaction which was the subject of the vote. The respondent told us that the proposed drafting implies that the sponsor is subject to an obligation to make continual due diligence up to completion. As this was not our intention, we have revised the technical note to address this concern. To this end, we have also clarified our expectations on the need for sponsors to retain appropriate systems and controls up to completion, and for issuers to have appropriate guidance on their obligations and access to sponsors up to completion, to enable sponsors to comply with their obligations under LR8.3.

We have published this note in the Knowledge Base with the above referenced changes and other minor amendments.

UKLA/TN/711.1 – Sponsor notification requirements

We received no comments on this technical note. Save for updating references to the "FSA" and corrections of typographical errors, we have published this note in the form consulted on.

UKLA/TN/702.1 – Sponsors: Regular review and annual confirmation

We have changed the sponsor section of the Knowledge Base by removing this Note in its entirety, as it is no longer relevant following the changes set out in CP12/11 "Quarterly consultation No. 33" and Handbook Notice 123.

Overview of proposed guidance

The items below are for consultation. We invite your comments on the Consultation Notes and ask that you send us your comments by 10 September 2013.

Following the feedback we receive, we intend to publish the Consultation Notes in the Knowledge Base.

You may submit comments by email to primarymarketbulletin@fca.org.uk. Alternatively, write to:

Hanna Teshome
UKLA Department
Financial Conduct Authority
25 The North Colonnade
Canary Wharf
London E14 5HS

Category: Governance and Conduct / Transactions

Listing Principle 6

As you may be aware, earlier this year, the Financial Services Authority (FSA) publicly censured and fined Prudential £14 million for failing to deal with the FSA in an open and co-operative manner, breaching Listing Principle 6, in relation to its aborted acquisition of AIA in 2010. There are a number of findings within the Final Notice that may be relevant to both sponsor firms and issuers. The full text of the Final Notice can be obtained here: www.fca.org.uk/your-fca/documents/final-notices/fsa-pru-plc

The warning notice highlights that LP6 requires issuers to contact the FCA at an early stage when they are contemplating a significant transaction. However, it is not necessary for Issuers to contact us in advance of all transactions. Following the publication of the Final Notice, we felt it appropriate to provide some additional guidance, in the form of a new technical note and an amendment to an existing technical note, to outline some factors that should be taken into account when trying to ascertain whether a transaction is significant and whether early contact with the FCA is necessary.

The proposed guidance is set out in a new technical note UKLA/TN/209.1 – Listing Principle 6 (LP6)– Dealing with the FCA in an open and co-operative manner, within the Governance and Conduct section of the Knowledge Base.

We are also proposing to amend our existing technical note UKLA/TN/306.2 – Reverse Takeovers, within the Transactions section of the Knowledge Base to remind issuers of the need for early engagement with the FCA when contemplating a reverse takeover.

Useful links

You may access the consultations referred to in this edition of *PMB* using these links:

PMB No. 2:

www.fsa.gov.uk/library/policy/guidance_consultations/2012/ukla-bulletin

PMB No. 5:

www.fsa.gov.uk/library/policy/guidance_consultations/2013/consultation-bulletin-no5

PMB No. 6:

www.fca.org.uk/news/guidance-consultations/gc13-04

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Alternatively, you may send comments to:

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