

Primary Market Bulletin

Newsletter from the FCA for primary market participants

August 2014 / No. 08

About this edition

Welcome to the eighth edition of Primary Market Bulletin (PMB). 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.

We are making changes to the Knowledge Base following the feedback we received on our consultations. We have summarised the feedback and explained the actions we are taking on each of the Technical Notes and Procedural Notes consulted on.

We are also consulting on new and revised guidance to include in the Knowledge Base. This edition sets out the background information and summarises the proposed guidance. To see the full text of the proposed guidance go to the guidance consultation section of the FCA website.

What's new?

European updates

Minimum situations in which a supplement to the prospectus must be published

- The European Commission's Delegated Regulation (EU) No 382/2014 was published in the EU Official Journal and came into force on 5 May 2014. It supplements Directive 2003/71/EC and sets out a non-exhaustive list of the situations in which a supplement to the prospectus must be published.

The FCA Board has amended the FCA's Prospectus Rules (PR) to reproduce relevant extracts from this Regulation in PR 3.4.4 EU.

Languages accepted for prospectus review and summary translation

- The European Securities and Markets Authority (ESMA) published its report 'Languages accepted for the purpose of the scrutiny of the prospectus and requirements of translation of the summary' (ESMA/2014/342) on 1 April 2014.

ESMA prospectus database

- ESMA has a prospectus database which sets out the prospectuses and supplements which have been notified to it by the national competent authorities of the European Economic Area (EEA).

ESMA prospectus webpage

- When we review draft prospectuses, we refer to material published by ESMA. You may find ESMA's [prospectus webpage](#) useful in keeping up-to-date on ESMA's prospectus related materials.

Enhancing the effectiveness of the Listing Regime

The FCA proposed a suite of changes to the Listing Regime in November 2013 (in our consultation CP13/15 '[Enhancing the effectiveness of the Listing Regime and further consultation](#)'). This responded to investor concerns over the governance of premium listed companies with a controlling shareholder, and the need to protect the interests of minority shareholders. The new Rules, amended following consultation, were published on 2 May 2014 and came into effect on 16 May 2014. The related policy statement ([PS14/8: Response to CP13/15 – Enhancing the effectiveness of the Listing Regime](#)) includes our response to industry feedback.

While we have made amendments, the now formalised package is broadly the same as that presented in CP13/15. It includes:

- Targeted measures that provide protections for minority shareholders by:
 - placing requirements on the interaction between a premium listed company and a controlling shareholder, where one exists, via a mandatory agreement, and imposing enhanced oversight measures where such an agreement is not entered into or complied with
 - providing additional voting power for minority shareholders when electing or re-electing independent directors for a premium listed company where a controlling shareholder is present
 - enhancing voting power for the minority shareholders where a premium listed company with a controlling shareholder wishes to cancel or transfer its premium listing.
- Other measures that, when combined with the entry requirements and continuing obligations, act as a restatement of the high standards of governance required of premium listed companies. The new Premium Listing Principles describe the types of companies that are appropriate for a premium listing and ensure that its protections cannot be circumvented. The changes also apply some of the original Listing Principles to standard listed issuers.
- Greater transparency over the application of the free float provisions.

This final package of rules will lead to increased confidence for investors, promoting greater access to capital for businesses and facilitating growth. It is therefore fully in line with our strategic objective of making relevant markets function well and will advance both our consumer protection and market integrity objectives.

Listing Rule 8 update

Since our last edition of PMB we have consulted on proposals to amend the Listing Rule 8 (and introduce associated guidance in the Knowledge Base) on sponsor competence. We also asked for your views on the future of joint sponsor arrangements, as part of our actions to advance our market integrity and consumer protection objectives.

The consultation period for [CP14/2: Proposed amendments to the Listing Rules in relation to sponsor competence and other amendments to the Listing Rules and Prospectus Rules](#) closed

on 30 April 2014 and, subject to continuing consideration of the responses and FCA Board approval, we intend to publish our response to your feedback and the final rules in the last quarter of 2014. The feedback statement will also include some consultation on relevant joint sponsor rules following the discussion in CP14/2. For further information on our proposals, please see the consultation paper.

Consultation feedback and changes to the Knowledge Base

In PMB No.7, we consulted on proposed new guidance and also invited you to comment on how we plan to pursue our operational objectives. While we did not receive any direct feedback in relation to the manner in which we intend to advance of our objectives, the general tone of feedback received was supportive.

Ongoing guidance review

Retail bonds

In PMB No. 7, we described our consumer protection objective and how we intended to pursue that objective. We explained that the definition of consumer for this purpose includes investors in securities and that as a result we would tailor our approach to vetting prospectuses by taking into account the end investor targeted by a prospectus.

We considered the distinction between wholesale and retail investors and proposed guidance in a Technical Note in relation to the prospectus disclosure requirements for retail investors in non-equity securities. The proposed guidance, which is set out in UKLA/TN/632.1, addresses the Prospectus Directive requirement that a prospectus should be 'easily analysable and comprehensible'.

We received a wide range of responses to our proposed guidance. Respondents generally agreed with the principles underpinning the guidance. However, they also raised issues which we believe warrant further consideration. We are currently engaging with our respondents and other stakeholders on the issues raised and we are therefore not finalising this guidance at this time. We intend to provide a substantive response to our consultation on this Technical Note in the next edition of PMB.

Sponsors

In PMB No.7, we also set out details of how we intend to pursue our market integrity objective, and with reference to this, presented for consultation a new Technical Note (UKLA/TN/713.1) addressing sponsors' obligations under the Listing Rules to deal with the FCA in an open and cooperative way. We are still considering the feedback received and we expect to be in a position to finalise this Technical Note or, if appropriate, re-consult, in the next edition of PMB.

Published guidance

We are updating the Knowledge Base with the following guidance that we consulted on in PMB No.7 (October 2013):

- one new Procedural Note and one new Technical Note to explain the practical aspects of our new powers in relation to sponsors and

- two amended Technical Notes and one amended Procedural Note to reflect the new sponsor powers

We are also publishing the guidance that we consulted on in PMB No.6 (July 2013):

- one new Technical Note on Listing Principle 2 – Dealing with the FCA in an open and co-operative manner and
- one amended Technical Note relating to reverse takeovers

Here, we summarise the feedback we received on the notes that are being published and our responses.

Procedural Notes

UKLA/PN/910.1 – Additional powers to supervise sponsors

We received feedback on this Note from two respondents who raised concerns with the use of the FCA's statutory notice procedure to effect, among other things, a voluntary request by a sponsor to suspend its approval. Concerns raised included the following:

- by using what is essentially a disciplinary procedure, the process could become adversarial (e.g. if a voluntary suspension request is refused)
- should the process not be adversarial but inferred by market participants to be so, given the nature of the process, it could be detrimental to a firm's sponsor or corporate finance advisory business and
- whether we could make clear whether final notices would be published in certain circumstances, given the view expressed that final notices could be seriously detrimental to a sponsor's business

Not all statutory notices issued by the FCA are disciplinary. We believe that stakeholders are familiar with the distinction between disciplinary and non-disciplinary statutory notices and supervisory notices as used by the FCA in circumstances such as variations and cancellations of Part 4A permissions. However, in light of the above feedback, we have sought to clarify the nature of the notices we are required to issue under sections 88 and 88E of the Financial Services and Markets Act 2000 (FSMA).

Where we have published notices that limit or restrict the approval of a sponsor, we have highlighted in the wording of the notices that they are non-disciplinary in nature. We expect to take this approach to all voluntary restrictions, limitations or suspensions. This should ensure that market perception of this route is not one that would prejudice the reputation of any sponsor in receipt of a final notice. As section 391 FSMA provides a framework applicable to the publication of information relating to the final notice we have revised the Note in light of the above feedback to include references to FSMA and the FCA's Enforcement Guide (EG) in order to provide further information on the parameters applying to the publication of statutory notices.

UKLA/PN/909.2 – Sponsor firms – ongoing requirements during reorganisations

We received no comments on this Note and have published the Note in the form consulted on.

Technical Notes

Category: Sponsors

UKLA/TN/712.1 – Additional powers to supervise and discipline sponsors

We received feedback from one respondent on this Note, who raised concerns in relation to our approach to restricting and limiting sponsor approvals. The respondent also raised concerns with the need for a sponsor's experience to be "continuously refreshed" and, in particular, asked us to consider, with reference to our competition objective, the impact this requirement may have on smaller sponsors and sponsors that have been restricted or suspended.

Our intended approach to the use of our powers to restrict and suspend sponsor approvals, and the various distinctions that we considered could be drawn between sponsor services and transactions in this regard, were set out in [CP12/37: The Financial Services Bill: Implementing markets powers, decision making procedures and penalties policies](#) and then formalised in [PS13/5: The new FCA handbook: Feedback on Regulatory reform proposals relating to the FCA Handbook](#). Further, in January 2014, we published a consultation paper (CP14/2), which included proposals to amend the Listing Rules and Guidance on sponsor competence. We will consider the comments raised by this respondent as part of the consultation process on CP14/2, but do not intend to comment further on these matters at this time.

Other than a small number of minor clarification amendments, this Note is being published in the form consulted on.

UKLA/TN/705.2 – Sponsors – uncertain market conditions

We received feedback from one respondent who asked us to include some context to the additional reference to new powers to suspend, limit or restrict sponsors and clarify why this reference was relevant. We have added some further drafting to the Note in order to address this.

UKLA/TN/709.2 – Sponsor transactions – adequacy of resourcing

One respondent raised concerns on areas of this Note that were not open to consultation. Their concerns related mainly to considerations around LR 8.6.5R (2) and sponsor competence. We intend to consider this feedback as part of the consultation process on CP14/2.

Category: Governance and conduct

UKLA/TN/209.1 – Listing Principle 2 – Dealing with the FCA in an open and co-operative manner

We received no comments on this Note. However, due to changes made to the Listing Rules on 16 May 2014, we have updated the Note to reflect that the relevant Listing Principle has been re-numbered as Listing Principle 2. Apart from the amendment, we have published the Note in the form consulted on.

Category: Transactions

UKLA/TN/306.2 – Reverse takeovers

Due to changes made to the Listing Rules on 16 May 2014, we have updated this Note to reflect that the relevant Listing Principle has been re-numbered as Listing Principle 2. As we received no comments on this Note, no further amendments have been made.

Proposed guidance

We are consulting on the proposed new and revised Procedural and Technical Notes summarised below.

We want to hear what you think. Please send us your comments by 1 October 2014.

Having considered the feedback we receive, we intend to publish the new and revised guidance in the Knowledge Base in due course.

Please send comments by email to primarymarketbulletin@fca.org.uk.

Alternatively, send comments in writing to:

Victoria Spencer
UKLA Department
Financial Conduct Authority
25 The North Colonnade
Canary Wharf
London E14 5HS

Procedural Notes

UKLA/PN/908.2 – UKLA decision making and individual guidance processes

Under SUP 9.5, a person who did not agree with individual guidance they received in relation to part 6 FSMA could ask for the guidance to be reviewed by the Listing Authority Review Committee (LARC). LARC was a committee of the Financial Services Authority (our predecessor regulator) and, until recently, the FCA. However, in January 2014, following consultation in CP13/9, we abolished LARC and the guidance in SUP 9.5 was deleted from the FCA Handbook.

We are proposing to revise this note to reflect the abolition of LARC and SUP_9.5. In its proposed form, the content of the note has also been expanded to explain the procedure for UKLA decision making more generally. Given the extensive nature of the changes proposed, we felt that it would be more appropriate to provide a clean (as opposed to blacklined) version of this note.

Technical Notes

Category: Eligibility for listing

UKLA/TN/101.2 – Restrictions on transferability

Due to changes made to the Listing Rules on 16 May 2014, we are proposing to update this Note to reflect that the relevant Listing Principle has been re-numbered as Premium Listing Principle 5.

Category: Prospectus content

UKLA/TN/621.3 – Risk factors

Due to changes made to the Listing Rules on 16 May 2014, we are proposing to update this Note to reflect that the relevant Listing Principle has been re-numbered as Listing Principle 1.

UKLA/TN/633.1 – Pro forma financial information

When preparing a prospectus relating to shares, item 20.2 of Annex 1 of the PD Regulation (copied out in PR Appendix 3) requires a description of the impact of the transaction on the issuer's assets and liabilities and earnings. Until 28 January 2014, in the UK this requirement was normally addressed by producing a pro forma statement of net assets to show the impact on assets and liabilities and a narrative statement to address the impact on earnings.

However, the European Securities and Markets Authority (ESMA) published revised Q&A in October 2013, one of which (Q&A 51) deals with pro forma financial information. The answers presented in this Q&A for four illustrative scenarios were re-drafted to reflect a harmonised approach to pro forma profit and loss accounts and a 'flexible approach' to the period for which pro forma information is required. This revised Q&A became effective on 28 January 2014 and its implementation has given rise to changes in the way that pro forma financial information is typically presented.

In this Technical Note, we are proposing to address a number of issues that this revised approach might pose to market participants in the UK. We have also taken this opportunity to consult on guidance on other pro forma financial information related issues, including its definition.

Category: Sponsors

UKLA/TN/704.2 – The Sponsor's role on working capital confirmations

We are consulting on amendments to Technical Note UKLA/TN/704.1 to reflect the new records management rules set out in LR 8.6.16AR, LR 8.6.16BG and LR 8.6.16CG, that came into force on 31 December 2012. No substantive changes have otherwise been proposed.

UKLA/TN/708.2 – Sponsor's obligations on financial position and prospects procedures

We are consulting on amendments to Technical Note UKLA/TN/708.1 to reflect the new records management rules, LR 8.6.16AR, LR 8.6.16BG and LR 8.6.16CG, that came into force on 31 December 2012 and that, due to changes made to the Listing Rules on 16 May 2014, the relevant Listing Principle has been re-numbered as Listing Principle 1. No substantive changes have otherwise been proposed.

Proposed deletion of Notes from this category:

UKLA/TN/703.1 – Sponsors: Creation and maintenance of records

We are proposing to delete this Note because it relates to LR 8.6.12G(5), which has now been deleted. However, we would remind sponsors that they are still required under the Listing Rules to maintain accessible records which are sufficient to be capable of demonstrating that they have provided sponsor services and otherwise complied with their obligations under LR8, including the basis of any opinion, assurance, confirmation or declaration given to the FCA or any guidance given to a premium listed company. We would remind sponsors that records should be maintained in accordance with LR 8.6.16AR, LR 8.6.16BG and LR 8.6.16CG.

Category: Closed-ended investment funds

UKLA/TN/404.1 – Related party transactions by closed-ended investment funds – amendment of an existing investment management agreement to cover new money

We have seen several examples recently of premium listed closed-ended investment funds increasing their pool of investable capital by issuing a new class of shares, rather than issuing further shares of the same class as are currently listed. In these circumstances, a revision to the investment management agreement is often made. We are consulting on a Technical Note to help issuers and their sponsors with what we consider to be the correct treatment of such revisions under the related party transactions rule (LR 11).

Category: Specialist companies

UKLA/TN/422.2 – Scientific based research companies

We are proposing to amend references made in this note to LR 6.1.7G which was deleted with effect from 1 October 2012. No substantive changes have been otherwise proposed.

Category: Transactions

UKLA/TN/310.1 – Share buybacks – novel/complex approaches and Premium Listing Principle 5

Share buybacks are often used by companies to return cash to shareholders. The same economic effect can be achieved in a number of different ways and we have seen an ever increasing variety of approaches as companies try to structure the return in the most beneficial manner for their shareholders.

We are consulting on a Technical Note which addresses some of the questions that have been posed to us regarding such structures in order to provide greater clarity and certainty for premium listed companies and their advisers when structuring share buybacks.

UKLA/TN/311.1 – Discounted share issues and standard of disclosure in circulars

The requirement in LR 9.5.10R that non-pre-emptive fundraisings by premium listed companies should only be undertaken at a discount no greater than 10% to the prevailing share price is an important shareholder protection. A consequence of this is that where a company is seeking its shareholders' approval to increase the level of this discount, it should be clear to them why this is being sought.

We have seen instances where draft documents have been presented to us where there is little, if any, disclosure to shareholders, other than the text of the shareholder resolution itself. While we have sought to rectify this deficiency via our vetting process, such shareholder resolutions are often added late in the vetting process, since a clear sense of the potential price for shares only becomes apparent near the actual offer date. We are conscious that time is particularly critical at this stage of a transaction and so we are consulting on guidance on this issue which we hope will enable premium listed companies and their advisers to address this issue more efficiently.

Category: Governance and conduct

UKLA/TN/203.2 – Compliance with the Listing Principles and Premium Listing Principles

Due to changes made to the Listing Rules on 16 May 2014, we are proposing to update this Note to reflect the amendment of the Listing Principles and the introduction of the Premium Listing Principles.

UKLA/TN/207.2 – Equality of treatment – Premium Listing Principle 5

Due to changes made to the Listing Rules on 16 May 2014, we are proposing to update this Note to reflect that the relevant Listing Principle has been re-numbered as Premium Listing Principle 5.

UKLA/TN/210.1 – Cancellation of listing or transfer between listing categories – requests to waive the 20 business day notice period

Cancellation of listing or transfer between listing categories requires, in certain circumstances, a 20 business day notice period to elapse. We are often contacted by the advisers of listed companies seeking our approval for reducing this period. We are consulting on a Technical Note which clarifies that we are generally very reluctant to allow a reduction of that period and why.

We believe that our stakeholders will find this clarification of our approach to waivers in this area useful and that the increased clarity will help inform dialogue when such issues appear on future transactions.

Category: Regulatory announcements including Inside Information

UKLA/TN/521.2 – Assessing and handling inside information

Due to changes made to the Listing Rules on 16 May 2014, we are proposing to update this Note to reflect the new Listing and Premium Listing Principles.

UKLA/TN/522.1 – Disclosure of 'lock-up' agreements

Over recent months we have become aware of a variety of concerns raised by equity market participants regarding the use of and disclosure of lock-up agreements. A key concern seems to have related to the disclosure of the circumstances in which the shareholder is able to dispose of some or all of their holding before the lock-up term expires. We are consulting on a Technical Note on applying relevant disclosure provisions of the Listing Rules and Disclosure and Transparency Rules to this issue. We also take the opportunity to remind readers of the Technical Note that the Prospectus Rules, to the extent these apply, contain specific disclosure requirements in respect of lock-up agreements.

Equality and diversity

We are confident that our proposals do not give rise to equality and diversity implications but we would welcome your comments should you have any concerns.

Useful links

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

PMB No. 6 consultation:

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

PMB No. 7 consultation:

www.fca.org.uk/news/guidance-consultations/gc13-6-primary-market-bulletin-no-7

PMB No. 8 consultation:

www.fca.org.uk/news/guidance-consultations/gc14-5-primary-market-bulletin-no-8

PMB No. 8 published guidance:

www.fca.org.uk/news/finalised-guidance/fg14-07