

UKLA Procedural Note

Public offer prospectus – Drafting and approval

Ref: UKLA / PN / 904.12 Guidance Consultation

PR 2 and PR 3

Drafting and approval of public offer prospectuses under the Prospectus Directive – important information for issuers who are not admitted to the Official List

If you are an issuer undertaking a public offer of securities which that requires a prospectus or equivalent document under the Prospectus Directive (PD), a prospectus or equivalent document will have to be reviewed for compliance with the relevant disclosure requirements and approved by the UKLA. 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 equivalent documents produced under Prospectus Rule (PR) 1.2.2R isare, in most cases, identical or at least very similar to that of a formal prospectus.

How should we submit the Prospectus?

Form A

Issuers initially submitting a prospectus for review will need to complete Form A. Among other things, this asks you to confirm that the UK is the issuer's Home Member State under the PD. Form A is not within the Prospectus Rules, but is on our website (www.fca.org.uk/static/documents/ukla/forms/form-a.pdf).

Checklists

If the order of disclosure items in the prospectus does not coincide with the order of information in the schedules and building blocks in the PD Regulation, then you must send us a cross-reference list. These checklists are available on our website (www.fca.org.uk/firms/markets/ukla/checklists). Please refer to PR 3 for information about the approval and publication of a prospectus.

Document vetting procedures

We have separately produced a procedural note covering the UKLA document allocation procedures and timetables, 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 Article 25.1 of the PD Regulation. If it is drawn up as separate documents, it must be prepared in accordance with the format in Article 25.2 of the PD Regulation (see PR 2.2.10R).

If you adopt the approach of a combined summary and securities note, you must clearly identify the combined document. The summary and security 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 only refer to information elsewhere if we have approved that information or it has filed it with us, – or with another competent authority if they were the issuer’s competent authority at the time, in accordance with the PD. As non-listed companies will not have filed information with us, or had it approved by us, they will generally not be permitted to incorporate information into their prospectuses by reference. However, once non-listed companies have had a prospectus approved by us, it may be possible to incorporate information from this document into subsequent prospectuses, subject to the requirements of PR 2.4 (for example, the information in the document must be the latest available to the issuer or offeror).

Cross-referencing

Cross-referencing must be specific when it relates to information required to be disclosed under the PD. 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. 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 restate earlier periods if you are changing accounting standards

in the next published accounts (such as moving to IFRS). Third country issuers (i.e. non-EEA countries) may use either:

- EU-endorsed IFRS;
- IFRS, provided that the financial statements include an explicit statement that the financials comply with IFRS (this is likely to apply to Australian, New Zealand and South African IFRS, amongst others); or
- an equivalent standard (see below):

Equivalence of third country standards

GAAPs currently deemed equivalent are those of Japan, USA, China, Korea, Canada and, subject to the EU Commission's proposed extended transitional period until ~~at least 31 December~~ April 2014~~6~~, India. We would encourage issuers and their advisers to contact us at an early stage if they are intending to present financial information under an equivalent standard in a prospectus.

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

~~ESMA has provided guidance on the provisions of the regulation when considering complex financial histories in 'ESMA update of the CESR's recommendations for the consistent implementation of the European Commission's Regulation on Prospectuses no 809/2004' (ESMA Recommendations). This guidance can be found under 'documents' at www.esma.europa.eu. Issuers should consider the following when addressing the complex financial history requirements: Article 4(a) of the PD Regulation, set out within PR 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 as set out in the ESMA Recommendations 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 ~~both~~ 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 UKLA.

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 PD.

What contents should we include in the Prospectus?

ESMA Update of Recommendations

You and your advisers should consider the ESMA Recommendations when drafting a prospectus. The guidance provides additional detail and clarification in relation to issues such as working capital disclosure, profit forecasts, capitalisation and indebtedness and also on the detailed disclosure items under Annexes 1 and 3. A significant proportion of non-listed companies making offers to the public are start-up companies and should therefore also comply with the ESMA Recommendations on start-ups.

In determining whether the PD Regulation has been complied with, we will take into account whether the ESMA Recommendations have been followed.

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. ~~In addition, o~~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 23.1; they will then ~~they will also~~ 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 3 item 3.1 – Working capital

The requirement of the regulation is to provide a statement that the issuer has sufficient working capital for its present requirements (a 'clean' statement) or to explain how additional working capital will be provided. Under ESMA Recommendation 108, 'present requirements' is taken 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 appropriate procedures to support the statement being made – ESMA Recommendation 125 outlines what

those procedures might normally include. 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 a fund-raising, means that only underwritten funds can be included. Where the fund-raising has not been under-written, minimum subscription proceeds may be taken into account only where:

1. it is an explicit condition of the offer that the minimum net proceeds are raised; and
2. that if the condition is not met, the offer will lapse and the proceeds will be returned to investors.

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 3 item 3.2 – Capitalisation and Indebtedness

The indebtedness statement should be provided within 90 days of the document, but the capitalisation statement does not have to be provided within 90 days. If any of the information is more than 90 days old and there has been a material change since the ~~last~~most recently published financial information, you should provide additional information to update those figures. If any of the information is more than 90 days old, but there has not been any material change since the ~~last~~most recently published financial information, you should include a statement to that effect. Please also note the ESMA Recommendations in relation to capitalisation and indebtedness.