

Preparing for Brexit – The FCA Publishes Important Updates for Listed Companies

October 15, 2019

Background

On 3 October 2019, the Financial Conduct Authority (“FCA”) published **Primary Market Bulletin No. 24** (“PMB 24”).

PMB 24 provides an important update on the FCA’s preparations for Brexit, and reminds firms of certain key changes under the Listing Rules, Disclosure Guidance and Transparency Rules and Prospectus Regulation Rules in the event that the UK leaves the EU without a withdrawal agreement (a “**no-deal scenario**”).

PMB 24 also includes:

- an update on the Prospectus Regulation, which came into force on 21 July 2019, and consequential changes for the FCA’s **Knowledge Base**;
- an overview of the FCA’s proposals in relation to the European single electronic format requirements, which will apply to issuers on EU regulated markets from 1 January 2020; and
- recent changes to the FCA’s Knowledge Base and further proposed changes under consultation.

Regulatory Changes Following a No-Deal Brexit

In anticipation of the UK’s planned departure from the EU on 29 March 2019, the FCA published two special edition **Primary Market Bulletins No. 21** (“PMB 21”) and **No. 22** (“PMB 22”) in February and March this year, outlining certain regulatory changes which would apply in the event that the UK left the EU in a no-deal scenario.

With the new Brexit deadline of 31 October 2019 approaching, in PMB 24 the FCA takes the opportunity to remind firms of the new regulatory obligations, which will apply from 31 October 2019 in a no-deal scenario, and provides an update on subsequent developments since 29 March 2019.

Changes under the Disclosure Guidance and Transparency Rules (“DTRs”), the Prospectus Rules (“PRs”) and the Listing Rules (“LRs”) (update on PMB 22)

The overall approach taken in the “Official Listings SI” (the legal framework related to listing of securities, prospectuses and transparency requirements that will apply from exit day) is that, in a no-deal scenario, the UK’s primary markets regime will apply to all issuers that (i) have securities admitted to trading, or have applied to admit securities to trading, on a UK regulated market or admitted to listing in the UK, or (ii) are making a public offer in the UK, **regardless of the country the issuer is incorporated in**. As such, certain issuers will have to make disclosures or do things according to the FCA’s rules where they currently only follow their home competent authority’s rules.

PMB 24 reminds issuers of the impending changes under the DTRs, the PRs and the LRs in the event of a no-deal scenario. The key changes are summarised in the table below:

DTRs	<ul style="list-style-type: none"> • Issuers preparing consolidated accounts will have to use International Financial Reporting Standards (IFRS) as adopted by the UK for all financial years commencing on or after exit day, instead of IFRS as adopted by the EU. HM Treasury has determined that EU-adopted IFRS is equivalent to UK-adopted IFRS for the purposes of the Transparency Directive and the prospectus regime, meaning that issuers will be able to continue to use EU-adopted IFRS for these purposes • Auditors based in the EEA will become subject to the requirements currently applicable to third-country auditors, including registration with the Financial Reporting Council (to be replaced by the Audit, Reporting and Governance Authority) • Holders of voting rights in any issuer with shares admitted to trading on a UK regulated market will have to notify holdings to the FCA using a TR-1 form, which currently only applies in respect of issuers for which the UK is the home competent authority
PRs	<ul style="list-style-type: none"> • After Brexit, EEA issuers will no longer be able to passport prospectuses into the UK • Prospectuses passported into the UK before exit day will remain valid for use in the UK until their validity expires, even if this is after exit day • Where a supplement is required for such a prospectus after exit day, the issuer must apply to the FCA for approval of the supplement
LRs	<ul style="list-style-type: none"> • Security holders from any jurisdiction will be counted in the calculation of whether a company has at least 25% of its securities distributed to the public (i.e., meets the “free float” requirements). Currently the requirement only takes into account securities distributed to the public in one or more EEA states

Changes under the UK Short Selling Regulation (“SSR”) and the Market Abuse Regulation (“MAR”) (update on PMB 21)

In PMB 24, the FCA reminds market makers and issuers of new regulatory obligations that will need to be implemented to meet the requirements of the SSR and MAR in a no-deal scenario, as outlined in PMB 21. The FCA notes that this is particularly important for firms using the market maker exemption under the SSR, who should take action as soon as possible if they wish to benefit from that exemption under UK SSR in the future.

The FCA also notes that it will be publishing the UK list of exempted shares on exit day on its UK SSR webpage, which will comprise (i) the FCA’s list of exempted shares (constituting all shares admitted to trading on UK trading venues where their principal trading venue is outside the UK); and (ii) ESMA’s list of exempted shares as of exit day (which shares will remain exempt from some of the requirements in UK SSR for two years after exit day). Market participants will then have this information on time for their net short position submissions to the FCA.

The key changes under the SSR and MAR in the event of a no-deal scenario are summarised in the table below:

SSR	<ul style="list-style-type: none"> • Any notifications that UK and non-EU market makers give to the FCA for instruments traded in the UK before exit will remain valid • In all other cases, market makers that want to use the exemption for instruments traded in the UK will be required to join a UK trading venue and either (i) provide the FCA with a copy of any notification made to another competent authority at least 30 days before exit day, or (ii) submit a notification to the FCA at least 30 days before they intend to use the exemption
MAR	<ul style="list-style-type: none"> • Issuers which are registered in an EU Member State with financial instruments admitted to trading or traded on a UK trading venue will now be required to: <ul style="list-style-type: none"> – send the FCA notifications of delayed disclosure of inside information – obtain the FCA's consent when delaying disclosure under Article 17(5) of UK MAR • Persons discharging managerial responsibilities (PDMRs) in respect of such issuers will now be required to send their PDMR transactions reports to the FCA

Updates Relating to the Prospectus Regulation

The new Prospectus Regulation came into full effect on 21 July 2019 and the FCA published its final Prospectus Regulation Rules on 11 July 2019. Following this:

- the FCA has replaced its Prospectus Rules sourcebook with the Prospectus Regulation Rules sourcebook. The FCA is currently consulting on certain further changes to the Prospectus Regulation Rules sourcebook and related changes to the LRs and other sourcebooks arising from EU withdrawal;
- the Prospectus (Amendment etc.) (EU Exit) Regulations 2019 were published on 5 September 2019 to ensure that the UK has a coherent and functioning prospectus regime if the UK leaves the EU in a no-deal scenario, and accommodates new features of the Prospectus Regulation such as the universal registration document;
- the FCA is preparing to update its Knowledge Base materials and website to reflect the new Prospectus Regulation, in lieu of the UK national law implementing the old Prospectus Directive. In the meantime, the existing guidance should be applied to prospectuses and other listing documents drawn up under the Prospectus Regulation to the extent compatible;
- on 12 July 2019, ESMA published 25 new Q&As on the Prospectus Regulation – three of which give new clarifications on Prospectus Regulation issues that were not covered in, or did not apply to, the Q&As under the Prospectus Directive, and 22 of which are pre-existing Q&As which have been updated for the Prospectus Regulation. ESMA will continue to publish the existing Prospectus Directive Q&As during the period in which prospectuses that have been approved under the Prospectus Directive may continue to be valid, which is until 21 July 2020; and
- on 12 July 2019, ESMA published consultation paper “*Draft Guidelines on disclosure requirements under the Prospectus Regulation*”, under which ESMA intends to update the existing CESR recommendations on complying with disclosure requirements in the Prospectus Directive to make them more consistent with the Prospectus Regulation, while at the same time converting them into guidelines.

European Single Electronic Format

PMB 24 notes that, in its [quarterly consultation paper](#) published on 6 September 2019, the FCA proposes a new rule in the DTRs sourcebook to implement requirements for annual corporate reporting in the European single electronic format (“ESEF”) under the Transparency Directive. This proposal would only be relevant in the scenario where the UK remains subject to EU law on 1 January 2020.

Currently, companies with securities admitted to trading on a regulated market in the UK must publish their annual financial report (“AFR”) in the FCA’s National Storage Mechanism via the upload of a PDF file. Under the proposed new rule, for accounting years beginning on or after 1 January 2020, issuers will instead be required to prepare and submit their AFR to the NSM in the new electronic reporting format in accordance with a regulatory technical standard of the European Commission. This will also include additional requirements for issuers filing audited, consolidated IFRS financial statements such as “tagging” certain disclosures in their financial statements using structured data formatting processes. The FCA notes that there will be various options available to issuers transitioning to the production of their AFR in the new format, and ESMA has published guidance materials to assist issuers and their service providers prepare for ESEF.

The consultation period in respect of the FCA’s ESEF proposals closes on 1 November 2019.

Changes to FCA’s Knowledge Base

Published Guidance

The FCA has made the following changes to its Knowledge Base following consultation in [Primary Market Bulletin No. 20](#) (“PMB 20”), in each case in the form proposed in PMB 20:

- *Compliance with the Listing Principles and Premium Listing Principle (FCA/TN/203.4) (Amendment to Technical Note)* – to remind issuers that the FCA expects them to cooperate with their sponsor(s) by providing all information the sponsor(s) reasonably requests to carry out the sponsor service in line with LR 8;
- *Primary Market Oversight and Listing Transactions – decision-making and individual guidance process (FCA/PN/908.2) (Amendment to Procedural Note)* – procedural note 908.2 summarises how the FCA decision-making powers in relation to its responsibilities under Part VI of FSMA are delegated to and exercised by FCA staff. The note has been updated to reflect FCA organisational changes and new procedures for individual guidance, appeals and complaints;
- *Sponsor Service Enquiry Line (FCA/PN/912.1) (New Procedural Note)* – a new procedural note which replicates the “Sponsor Service Enquiry Line” terms of use and clarifies the FCA’s expectations around its use by a sponsor’s “Key Contacts” or individuals under their supervision;
- *Schemes of Arrangement (FCA/PN/913.1) (New Procedural Note)* – a new procedural note which sets out potential approaches for issuers implementing transactions under a scheme of arrangement when listing and cancelling securities from the Official List; and
- *UKLA standard comments (FCA/PN/906.2) (Deletion of Procedural Note)* – a deleted existing procedural note as the FCA no longer uses comment sheets and now handles the comment process via its Electronic Submission System.

Proposed New Guidance

The FCA is consulting on the following further changes to its Knowledge Base:

- *Master-feeder structures (FCA/TN/409.1) (Amendment to Technical Note)* – a proposed amendment to clarify that where there is only one fund acting as a “feeder” for a specific master

fund, the FCA would not consider this as a genuine master-feeder structure for the purposes of determining whether a fund complies with the risk diversification requirements in LR 15; and

- *Class testing changes to an investment management agreement where there are unquantifiable benefits (FCA/TN/411.1) (New Technical Note)* – a proposed new technical note setting out the FCA's approach to classifying changes to existing investment management agreements where the benefit of the transaction may be unclear and the class tests are difficult to apply, for the purposes of applying the related party transaction rules in LR 11.

The consultation period for these proposals closes on 14 November 2019.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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