

FCA publishes Primary Market Bulletin 40 and finalises guidance on prospectus regime

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The FCA has published Primary Markets Bulletin No. 40 ([PMB 40](#)) which sets out feedback received following a consultation in the earlier [PMB 34](#) from June 2021 regarding changes to the Knowledge Base (which comprises procedural notes and technical notes designed to help issuers and practitioners interpret these FCA rules) comprising updates to one existing procedural note and ten existing technical notes, as well as the introduction of four new technical notes – the main aim of which is to adapt and incorporate ESMA's Guidelines on prospectus disclosure requirements into the FCA's Knowledge Base. The key changes and additions to the Knowledge Base are summarised below.

Prospectus disclosure guidelines

The FCA is introducing a new technical note ([TN/619.1](#)) which sets out guidelines on disclosure requirements under the UK Prospectus Regulation and guidance on specialist issuers. On 4 March 2021, ESMA published its updated guidelines on prospectus disclosure (the [ESMA Guidelines](#)) in respect of the EU Prospectus Regulation. The ESMA Guidelines do not apply formally in the UK as publication occurred after the expiry of the Brexit transition period. However, the FCA participated in the initial drafting of these guidelines and they are regarded as useful by market participants in interpreting and complying with disclosure requirements under the current UK prospectus regime. Through this new technical note, the FCA has adapted and imported the ESMA Guidelines into its Knowledge Base.

The FCA has made two key modifications to the ESMA Guidelines:

- **Pro forma financial information (Guideline 18)** – the ESMA Guidelines contained a policy change to the pro forma financial information requirements in instances where an issuer has completed/committed to complete a number of transactions, requiring pro forma information for *all transactions* in cases where the transactions collectively but not individually constitute over 25% of the issuer's business, and where only one such transaction, among several, constitutes over 25% of the issuer's business. However, the FCA will continue with the approach to pro forma financial information requirements previously applied to these scenarios, requiring pro forma information only in

respect of any *individual transaction* constituting over 25% of the issuer's business. The FCA notes that issuers should nonetheless consider their obligations in relation to necessary information under Article 6 of the Prospectus Regulation.

- **Working capital (Guideline 33)** – the FCA will make an addition to reflect an existing UK market practice of relying on the minimum net proceeds of an offer for the calculation of working capital for new issuers that are closed-ended investment funds if it is an explicit condition of the offer that the minimum net proceeds are raised and if that condition is not met, the offer will lapse and admission will not occur (whereas generally, issuers should only count the proceeds of an offering to calculate working capital if the offering is underwritten on a firm commitment basis or if irrevocable undertakings have been given, and proceeds should not be counted when calculating working capital if investors will be exposed to the risk that the issuer continues with an offer after the underwriting agreement has been cancelled or the irrevocable undertakings are withdrawn).

The original recommendations of the Committee of European Securities Regulators regarding consistent interpretation of prospectus disclosure regulation (the CESR Recommendations) were carried forward into the ESMA Guidelines. However, the CESR Recommendations concerning specialist issuers (namely property, mineral, scientific research, start-up and shipping companies) were not imported. The FCA has opted to include this historic guidance on specialist issuers in its new technical note (at Part III of [TN/619.1](#)).

Procedural and technical note updates

Alongside the newly imported guidelines on prospectus disclosure outlined above, the FCA is making consequential changes to one existing procedural note and a series of existing technical notes. The FCA has also made updates where applicable to reflect: (i) changes arising from the Prospectus Regulation when it repealed and replaced the Prospectus Directive (which applied fully in the EU, including the UK, from 21 July 2019); and (ii) changes as a result of the UK's withdrawal from the EU.

The FCA is updating its procedural note in relation to drafting and approval of public offer prospectuses ([PN/904.4](#)) to accommodate, amongst other things: (i) Article 23(a) of EC Regulation 2019/980 as adopted by UK domestic law by virtue of the European Union (Withdrawal) Act 2018 (the PR Regulation) setting out acceptable reporting standards for historical financial information; (ii) the approach to working capital mentioned above in respect of closed-ended investment entities; and (iii) the restriction in the PR Regulation on capitalisation and indebtedness statements being provided as of a date no earlier than 90 days prior to the date of the prospectus.

Certain technical notes are being updated, in particular: (i) [TN/320.2](#) to assimilate guidance on working capital statements (in particular regarding the approach to working capital statements for closed-ended investment entities described above); (ii) [TN/321.2](#) to assimilate guidance on working capital in respect of risk factors with ESMA's corresponding guidelines on risk factors; (iii) [TN/340.3](#) regarding the basis on which profit forecasts are prepared; and (iv) [TN/633.2](#) to reflect the changes regarding pro forma financial information described above.

Incorporation of ESMA Q&As into the Knowledge Base

Before the end of the Brexit transition period, the FCA confirmed it would continue to have regard to ESMA's Questions and Answers on Prospectuses (the [ESMA Q&As](#)), where relevant. Following its recent consultation (and because the ESMA Q&As remain relevant to the UK prospectus regime), the FCA is incorporating elements of the ESMA Q&As into its Knowledge Base. It has done so through the introduction of three new technical notes ([TN/607.1](#) regarding global depository receipts, [TN/636.1](#) regarding the order of information in prospectuses and [TN/637.1](#) regarding the level of disclosure for securities subject to conversion or write-down powers) and updates to several other existing technical notes. The ESMA Q&As relating to pro forma financial information have been superseded by the ESMA Guidelines, which have been adapted and incorporated into the Knowledge Base through the new technical note ([TN/619.1](#)) described above. Only ESMA Q&As not superseded by the ESMA Guidelines and those which are relevant to the UK following Brexit have been incorporated.

Overview of Knowledge Base updates

A full list of the new and updated technical notes and procedural note is shown below.

Number	Title	New
TN/320.2	Working capital statement – basis of preparation	
TN/321.2	Working capital statements and risk factors	
TN/340.3	Profit forecasts and estimates	
TN/601.3	Public offers	
TN/602.4	Exemptions from the requirement to produce a prospectus	
TN/604.2	Prospectus Regulation advertisement regime	
TN/605.4	Supplementary prospectuses	
TN/607.1	Global Depositary Receipts (GDRs)	?
TN/619.1	Guidelines on disclosure requirements under the Prospectus Regulation and Guidance on specialist issuers	?
TN/623.2	Documents available for inspection	
TN/627.2	Prospectus content – financial information	
TN/633.2	Pro forma financial information	
TN/636.1	Order of information in the prospectus	?
TN/637.1	Level of disclosure for securities subject to conversion or write-down powers	?
PN/904.4	Public offer prospectus – drafting and approval	

Following supportive feedback in response to the FCA's consultation, the changes to the Knowledge Base took effect from 27 May 2022. These changes further consolidate regulatory guidance on the UK prospectus regime by adapting and importing the ESMA Guidelines and implementing other post-Brexit updates consistent with UK market practice.

Some responses to the FCA's consultation suggested further, more wide-ranging changes to the Knowledge Base in the context of the recommendations made by Lord Hill's UK Listing Review report of 3 March 2021 (see our client update [here](#)); however, the FCA has said it will consider such proposals where relevant as part of its work under the broader review of the UK's prospectus regime (see our client update [here](#)).

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