

The new UK public offers and admissions to trading regime

An overview

Question

Response

Overview

What categories of securities are in scope under the new public offers regime?

- Although the types of securities that are subject to, and excluded from, the new public offers regime are similar to those under the UK Prospectus Regulation, the Regulations expand the scope to include certain non-transferrable securities. In particular, the Regulations apply to ‘relevant securities’, which comprise (i) transferable securities (such as shares, bonds, other forms of securitised debt and depositary receipts) and (ii) debentures, debenture stock, loan stock, and certificates of deposit and any other instrument creating or acknowledging indebtedness as specified in article 77 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the **RAO 2001**). The expanded scope means that so-called minibonds, as well as other non-transferrable types of debt instruments, will be subject to the new regime.
- Securities excluded by the Regulations include, units issued by a collective investment undertaking (other than the closed-end type), non-equity securities issued by a government or local or regional authority of any country or territory, a public international body of which any state is a member, or the European Central Bank or any central bank and money market instruments with a maturity of less than 12 months. Also outside the scope of the Regulations are over-the-counter derivatives, the shares of building societies, credit unions and cooperative and mutual benefits societies.

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Question

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What are 'designated activities' under the new regime?

- The FSMA 2023 establishes a new designated activities regime which is intended to bring certain activities within the scope of UK regulation once retained EU law has been revoked. It is important to note that designated activities under the FSMA 2023 is a distinct concept from regulated activities under the FSMA 2000. Specifically, a person carrying on a designated activity will not need to be authorised by a UK financial services regulator for the purposes of the FSMA 2000 but will instead need to comply with the conditions laid out by the FCA in its designated activity rules for carrying on the relevant activity.
- The Regulations establish the following designated activities relating to public offers and admissions to trading in the UK:
 1. Designated activities relating to public offers:
 - offering relevant securities to the public in the UK;
 - communicating an advertisement relating to the same; and
 - disclosing (other than by way of advertisement) information relating to an offer of relevant securities.
 2. Designated activities relating to admissions to trading on regulated market:
 - requesting or obtaining admission of transferable securities to trading on a regulated market;
 - communicating an advertisement relating to the same;
 - disclosing (other than by way of advertisement) information relating to regulated market admission; and
 - admitting transferable securities to trading on a regulated market.
 3. Admissions to trading on a primary MTF:
 - requesting or obtaining the admission of transferable securities to trading on a primary MTF;
 - communicating an advertisement relating to the same, disclosing (other than by way of advertisement) information relating to primary MTF admission; and
 - admitting transferable securities to trading on a primary MTF.
- Through the designated activities regime, the FCA will be given enhanced rulemaking responsibilities regarding admissions of securities to trading on UK-regulated markets, which will allow the FCA to, among other things, specify when a prospectus is required and what it should contain. FCA rulemaking responsibilities will also cover other matters that currently sit in the UK Prospectus Regulation. The FCA is currently consulting on the exercise of its rulemaking powers under the Regulations through six engagement papers that it has published here.

Question	Response
	<ul style="list-style-type: none">— A primary MTF for the purposes of the Regulations is a multilateral trading facility (or ‘junior market’) that operates as a primary market and allows companies to issue new capital rather than only trading existing instruments (for example, AIM and the AQSE Growth Market). The Regulations grant rulemaking powers over primary MTFs to the FCA, which will allow the FCA to require the issuance of an MTF admission prospectus where securities are being admitted to trading on primary MTFs that are open to retail investors (i.e., non-professional investors). In addition to the FCA’s powers, primary MTF operators will be able to require publication of an MTF admission prospectus in relation to the admission of transferable securities to trading on their markets and will have broad discretion over the content and approval of such documents.
How does the new regime deal with public offers?	<ul style="list-style-type: none">— The default position under the Regulations is that it is unlawful to offer relevant securities to the public in the UK (the Public Offer Prohibition), unless one or more exceptions apply. In contrast, the UK Prospectus Regulation does not prohibit or restrict the offer of securities to the public, but instead mandates that an FCA-approved prospectus is required where securities are offered to the public, absent an applicable public offer exemption.— Prospectuses will remain an important feature of the new public offers regime in the Regulations where the offer of transferable securities is conditional on admission to trading on a regulated market or certain types of primary MTF or the securities are already admitted to trading on one of those markets, with the requirement to produce a prospectus or MTF admission prospectus in those circumstances being determined by the FCA’s designated activity rules and the rules of the relevant primary MTF operator.
How does the new regime deal with admissions to trading?	<ul style="list-style-type: none">— Unlike for public offers, the new regime does not prohibit or restrict the admission of securities to trading. Instead, admission to trading of transferable securities represents an exception to the Public Offer Prohibition. However, reliance upon the admission to trading exception will necessitate consideration of the FCA’s designated activity rules and the rules of the relevant primary MTF operator to determine whether a prospectus or MTF admission prospectus is required.— The UK Prospectus Regulation similarly does not prohibit or restrict the admission to trading of securities; however, the act of admitting securities to trading on a regulated market requires publication of an FCA approved prospectus, absent an applicable admission to trading exemption.
Are there any exceptions to the Public Offer Prohibition?	<p>There are 13 exceptions to the Public Offer Prohibition which are set out below, many of which mirror existing exemptions in the UK Prospectus Regulation:</p> <ul style="list-style-type: none">— De minimis offers

Question

Response

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- An offer of relevant securities where the total consideration is £5 million or less (or an equivalent amount).
 - Qualified investors
 - An offer of relevant securities made solely to qualified investors.
 - 150 persons or less
 - An offer of relevant securities made to less than 150 persons in the UK, other than qualified investors.
 - £50k minimum denomination (wholesale regime)
 - An offer of relevant securities whose denomination per unit is at least £50,000 (or equivalent amount).
 - £100k minimum consideration
 - An offer of relevant securities made to persons who acquire securities for a total consideration of at least £100,000 (or equivalent amount), per investor, for each separate offer.
 - Admission to trading
 - An offer of transferable securities is conditional on admission to trading on a regulated market or primary MTF, or the transferable securities are already so admitted.
 - Share exchanges
 - An offer of shares made in substitution for shares of the same class already issued, provided no increase to issued share capital.
 - Dividends
 - Dividends paid out to shareholders in the form of (a) shares of the same class as the class in respect of which the dividend is paid or (b) cash which may be elected to be applied to the acquisition of further shares of the same class in respect of which the dividend is paid.
 - In either case, a written statement must be made on the number and nature of the shares and the reasons for and details of the offer.
 - Persons already connected

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- An offer of equity securities made in writing by or on behalf of a company to persons already connected with the offering company (i.e., existing shareholder; family member of an existing shareholder; a trustee of a trust established for the benefit of an existing shareholder), and the equity securities are not admitted to trading on a regulated market or primary MTF and the offer is not conditional on such admission.
 - Takeovers, etc.
 - An offer of relevant securities made to some or all persons holding a particular class of another company's equity securities in exchange for those equity securities (i.e., an exchange offer), provided such relevant securities offered are not admitted to trading on a regulated market or primary MTF and the offer is not conditional on such admission and provided further that the offer is accompanied by a written statement containing a description of the offeror (and its group), the terms of the offer and the relevant securities, any fees and expenses, the impact on the offeror, the intention for the business being acquired and any defined benefit pension scheme.
 - Directors or employees
 - An offer of relevant securities made to existing or former directors or employees by their employer, an undertaking in the same group as their employer or a trustee of an employee share scheme, provided the offer is accompanied by a written statement on the number and nature of the securities and the reasons for and details of the offer.
 - Special resolution regime
 - An offer of relevant securities resulting from the conversion or exchange of other securities, own funds or other liabilities under the resolution regimes contained in the Banking Act 2009 (banks) or the FSMA 2023 (central counterparties).
 - Regulated platform
 - An offer of relevant securities made by means of a regulated platform. For further information see *Electronic systems and regulated platforms* below.
 - Note that whilst a single exception will avoid contravention of the Public Offer Prohibition, multiple exceptions may be triggered or relied upon in combination.

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Electronic systems and regulated platforms

What is an 'electronic system for public offers of relevant securities'?

- The Regulations amend the RAO 2001 to create a regulated activity under new Article 25DB covering the operation of an electronic system for qualifying public offers.
- Qualifying public offers are public offers of relevant securities (made by persons other than the operator of the electronic system) made by means of a regulated platform (see exception above) which do not benefit from any other exemption under the Regulations.

What are 'regulated platforms' and when will they be used?

Regulated platforms are platforms which have Part 4A permission to carry out the regulated activity specified in Article 25DB (discussed above) and are intended to capture, for instance, crowdfunding platforms. Their intended use will be for public offers of relevant securities which do not benefit from any other exception under the Regulations (such as public offers falling below the £5 million *de minimis* threshold and those of unlisted securities).

How is the FCA expected to regulate regulated platforms?

- The FCA is consulting on its proposed regime to regulate operators of public offer platforms in [FCA Engagement Paper 5 – The Public Offer Platform](#).
- As a starting point, the FCA has stated the new framework will impose requirements on platform operators in the following areas:
 - due diligence requirements, including systems and controls to ensure platform operators undertake appropriate due diligence on companies and prospective offers and that investors are clear about the due diligence that has been undertaken and the risks that remain;
 - disclosure requirements for platform operators to provide or ensure a company provides key information to ensure that investors get the information they need to assess the securities;
 - liability for, and the potential redress from, platform operators; and
 - the role of the financial services compensation scheme.

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Disclosure and prospectuses

How is disclosure of information addressed under the new regime?

- If an offer benefits from an exception (other than the special resolution regime exception) and total consideration is at least £1,000,000 (when combined with any other offer by the same offeror in the previous 12 months), it will be subject to the disclosure requirements of the Regulations. The new regime states that if material information is disclosed by, or on behalf of, an issuer and addressed to one or more investors, in written or oral form, such information must either:
 - i. be disclosed to all other investors to whom the offer is addressed; or
 - ii. (where the offer benefits from the admission to trading exception and the admission to trading rules of the FCA or primary MTF require a prospectus or MTF admission prospectus) be disclosed in such prospectus or MTF admission prospectus.
- The disclosure regime is deliberately broad and is intended to capture nearly all permitted public offers, ensuring there is, as a minimum standard, equivalence of information for all investors to whom the offer is addressed. Effectively, this restates the equality of information requirement set out in the UK Prospectus Regulation.
- The content requirements of any required prospectus or MTF admission prospectus will be determined by a combination of the 'necessary information' test (see *What is the 'necessary information' test for prospectuses and MTF prospectuses?* below), and the FCA's designated-activity rules (in the case of a prospectus), and the rules of the relevant primary MTF operator (in the case of an MTF admission prospectus). The 'necessary information' test specifies the key information that issuers must provide in a prospectus or an MTF admission prospectus.
- The Regulations provide the FCA with broad powers to authorise the omission of information from a prospectus on grounds disclosure would be contrary to the public interest.

When is a prospectus or MTF admission prospectus required?

- Whether a prospectus or MTF admission prospectus is required will be determined by the admission to trading rules to be promulgated by the FCA (referred to in the Regulations as the regulated market admission rules) or the relevant primary MTF operator, respectively. As noted above, an issuer will only need to determine if a prospectus or MTF admission prospectus is required if the transferable securities being offered are already admitted to trading on a regulated market or primary MTF or if admission to trading on a regulated market or primary MTF is sought (i.e., the admission to trading exception to the Public Offer Prohibition is triggered).

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	<ul style="list-style-type: none">— The nature, scope and content of the admission to trading rules are currently the subject of several FCA engagement papers (see <i>What are 'designated activities' under the new regime?</i> above), informed, among other things, by recommendations made in the UK Secondary Capital Raising Review (see our article here). There is considerable discussion in these papers on the scope of the exceptions to the requirement for a prospectus, including in particular what the trigger for a prospectus should be in the context of further issuances and, in circumstances where the FCA's regulated market admission rules will not require a prospectus to be published (for example, because the offer size is below a percentage threshold), if an alternative type of offering document with specific content requirements should be required instead.
What is the 'necessary information' test for prospectuses and MTF prospectuses?	<ul style="list-style-type: none">— Under the Regulations, a prospectus or MTF admission prospectus (if required by the admission to trading rules) must contain the necessary information material to an investor making an informed assessment of the following:<ul style="list-style-type: none">▪ the assets and liabilities, profits and losses, financial position, and prospects of the issuer and any guarantor;▪ the rights attaching to the transferable securities; and▪ the reasons for the issuance and its impact on the issuer.— Such information may vary depending on a number of factors, including the nature of the issuer, the type of transferable securities, the circumstances of the issuer, and whether transferable securities issued by the issuer have already been admitted to trading.— The necessary information test is largely consistent with that in the UK Prospectus Regulation. However, the new regime diverges in two respects. The first is that the Regulations clarify that, for an issuance of debt securities, the phrase 'prospects' of the issuer and any guarantor should be read as a reference to their creditworthiness. The second point of divergence is that the Regulations offer greater flexibility for the purpose of varying the necessary information test. Specifically, variation is permitted under the new regime for offers of all categories of transferable securities (i.e., including both equity and debt) already traded on a regulated market or primary MTF, whereas the UK Prospectus Regulation permits variation for wholesale debt securities (with a minimum denomination of €100k) or those traded on a regulated market (or segment) open only to qualified investors (such as the PSM).
What accounting standards does the new regime permit for financial information in a prospectus?	Where a non-UK issuer is required to publish a prospectus in accordance with the FCA's regulated market admission rules, the historical financial information contained in that document must be presented (or reinstated) in accordance with UK IAS, EU

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IFRS, GAAP (Japan, the United States, China, Canada, Republic of Korea) or international accounting standards of a country considered equivalent to UK IAS.

Responsibility and liability

Who will have responsibility for a prospectus or MTF admission prospectus?

- Under the new regime, the FCA will determine the identity of persons responsible for a prospectus or MTF admission prospectus, which will be codified in the FCA's designated activity rules. This marks a departure from the current position, where the persons responsible for a prospectus are identified at a statutory level in the UK Prospectus Regulation (repeated in the FCA's Prospectus Regulation Rules).
- The FCA expects to retain the existing position with regard to prospectus responsibility since it is accepted by the market and any change may create legal uncertainty. However, the FCA has requested feedback on this topic as part of its engagement process and therefore confirmation of its final position remains to be confirmed. In the context of primary MTFs, the FCA expects to maintain the current rules regarding prospectus responsibility and apply these requirements to MTF admission prospectuses. However, it remains to be seen if operators of primary MTFs choose to specify in their rules additional persons who are responsible for an MTF admission prospectus.

What is the liability regime for untrue or misleading statements and omissions in prospectuses?

- The Regulations maintain broadly the same liability regime that applies currently under section 90 (and schedule 10) of the FSMA 2000 such that persons responsible for the prospectus will be liable to pay compensation to investors for losses suffered by investors as a result of any untrue or misleading statements in, or omissions from, the document. It applies generally to information in the prospectus, save for certain forward-looking information, which is discussed in more detail below – see *What is the liability regime for forward-looking information?*
- The defences for prospectus liability (other than for certain forward-looking information) are also consistent with the current regime, including, among other factors: (a) where a person reasonably believed, having made reasonable enquiries, that a statement in a prospectus was true and not misleading or the omission was properly omitted; (b) where the untrue or misleading statement in a prospectus was made by an expert and the person reasonably believed the expert was competent to make the statement and had consented to its inclusion in the prospectus; and (c) where the statement was corrected before the investor acquired the securities.
- Unlike under the current regime, the Regulations apply the same liability regime to MTF admission prospectuses also.

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What is the liability regime for forward-looking information?

- The Regulations create a separate liability regime specifically for certain forward-looking statements, which are known as ‘protected forward-looking statements’ (**PFLS**), such that persons responsible for the prospectus or MTF admission prospectus will only be liable in respect of PFLS (identified as such in the document) if they knew or were reckless as to whether the statement was untrue or misleading or they knew that any omission was a dishonest concealment of a material fact (i.e., a recklessness or fraud standard instead of a negligence standard of liability).
- The Regulations provide that the FCA’s designated activity rules will specify what statements comprise PFLS in detail, with the Regulations defining them loosely as including statements containing a projection, estimate, forecast or target; giving guidance; of opinion as to future events or circumstances; or of intention.
- In its engagement paper on the topic, the FCA considers, among other things, that PFLS should include both quantitative and qualitative information as well as financial and non-financial information; and that minimum criteria for defining PFLS could include those used in the accounting standard IAS 1, which relates to the presentation of information in financial statements. The FCA has proposed that PFLS liability standard should not apply to working capital statements and certain types of forward-looking information published by specialist issuers, both of which tend to be covered by expert opinions and assurance processes.

Advertisements

What are the rules around advertisements?

- Communicating an advertisement relating to either: (a) an offer of relevant securities to the public in the UK; or (b) admission or proposed admission to trading on a regulated market or primary MTF, will be a designated activity under the Regulations. Consequently, this activity will need to comply with the relevant conditions set out in the FCA’s designated activity rules (or, if the FCA further delegates this power, in the rules of the relevant primary MTF operator). The FCA is seeking feedback on the advertisement regime in its engagement papers (including [FCA Engagement Paper 6 – Multilateral trading facilities](#)).
- The definition of advertisement in the Regulations remains similar with that used in the UK Prospectus Regulations save that under the Regulations it now covers communications that relate to a specific offer of *relevant securities* to the public and also that relate to admission to trading on a primary MTF.

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Withdrawal rights

What withdrawal rights will investors have under the new regime?

The Regulations do not explicitly set out the withdrawal rights afforded to investors and instead leaves this to the FCA's designated activity rules. As part of its engagement papers, the FCA is seeking feedback on the nature of withdrawal rights, including with respect to the rules it will impose on operators of primary MTFs, but has suggested the new regime will apply such rights more broadly than under the UK Prospectus Regulation. Whereas under the UK Prospectus Regulation the availability of withdrawal rights depends on the existence of a prospectus (i.e., they are not available for fully exempt offers), the FCA contemplates the new regime will make such rights available in connection with all permitted public offers, irrespective of the existence of a prospectus or MTF admission prospectus (or supplement).

Enforcement

What powers will the FCA have in the case of non-compliance with the regime?

- The FCA will have broad powers to monitor and compel compliance with the new regime under the Regulations, which will capture not only identified breaches, but also suspected breaches. Such powers include the following:
 - the power to refuse applications for the approval of a prospectus for up to five years if a person 'repeatedly and seriously' contravenes the provisions of the Regulations, the FCA's designated activity rules (including those pertaining to admission to trading), Part VI of FSMA or any other relevant legislation (each an **Applicable Provision** and together, the **Applicable Provisions**);
 - the power to suspend, restrict or prohibit offer to the public if the FCA has reasonable grounds for suspecting a public offer has contravened an Applicable Provision, is likely to contravene an Applicable Provision or finds that an Applicable Provision has been contravened;
 - the power to suspend, restrict, or prohibit admission to trading on a regulated market or other trading venue if the FCA has reasonable grounds for suspecting the admission to trading of securities has contravened an Applicable Provision, is likely to contravene an Applicable Provision, or finds that an applicable provision has been contravened; and
 - the powers to public censure and/or impose penalties of such amount as the FCA considers appropriate if any person issuing or offering securities to the public or requesting admission to trading of securities is failing or has failed to comply with an Applicable Provision. Financial penalties may also be imposed on officers of the person issuing or offering securities.

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- The powers described above are broadly consistent with those under the UK Prospectus Regulation.

Timing

When do the Regulations enter into force?

Parliamentary time permitting, HM Treasury intends to legislate for the new regime by the end of 2023. However, the legislation will not fully enter into force until after the FCA has made the related new designated activity rules through its rulemaking powers. It is expected that the FCA will respond to feedback on its engagement papers later in 2023 and consult on these draft rules in 2024. In the meantime, HM Treasury will consider technical rather than policy-related comments on the Regulations. Comments must be submitted by no later than 21 August 2023.
