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FCA Adopts Changes to Rules Governing Availability of Information for IPOs

The UK Financial Conduct Authority (the "FCA") recently published a policy statement[1] (the "Policy Statement") that addresses the availability of information as part of the initial public offering ("IPO") process in the United Kingdom. The Policy Statement introduces a number of new Conduct of Business Sourcebook ("COBS") rules intended to improve the quality and timeliness of key information made available to investors in advance of an IPO.

The Policy Statement follows on from an earlier consultation[2] and discussion[3] paper that were released as part of a wider FCA market study of investment and corporate banking, launched in May 2015, to examine the availability of information during the IPO process. The study found that the existing UK IPO process served to undermine the centrality of prospectuses in informing the investment decision of investors, in particular as the prospectuses are currently made available too late in the process. Moreover, the late availability of prospectuses, coupled with the lack of access to management for unconnected research providers (*i.e.*, non-syndicate bank analysts and other research providers), means that unconnected research on issuers during the IPO process, which may be beneficial to investors by providing another perspective, has been practically non-existent in the United Kingdom. The new COBS rules seek to restore the central role of a prospectus and enhance standards of conduct in the IPO process.

This Client Memorandum provides a brief overview of the new COBS rules and related guidance that will become effective on July 1, 2018.

Existing UK IPO Process

Under current practice, the announcement by the issuer of its intention to float (the "ITF") and the related syndicate research are published simultaneously. This is followed typically by a 14-calendar day blackout period,[4] after which, assuming there is no retail offering component,[5] an (unapproved)

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1 Reforming the availability of the information in the UK equity IPO process (PS17/23), October 2017, available here.

2 Reforming the availability of the information in the UK equity IPO process (CP17/5), March 2017, available here.

3 Availability of the information in the UK equity IPO process (DP16/3), April 2016, available here.

4 During the blackout period (which is a result of longstanding market practice and not a legal requirement), connected analysts use their research to provide select institutional investors with their views on the issuer in a process known as "investor education." The investor education period is used to determine the initial price range within which the offer price is expected

pathfinder prospectus with an offer price range is made available to investors and the formal book-building process begins.[6] Following completion of this book-building process, the FCA-approved prospectus is published, which occurs a further 14 days after the date of the pathfinder prospectus.

The FCA believes that this current typical sequence of events raises several key concerns, including:

- investors do not have access to the prospectus, which should be the primary source of information on the issuer, sufficiently early in the IPO process for it to play a proper role in informing their investment decisions;
- connected analysts for syndicate banks have unrestricted access to meetings with the issuer's management and their corporate finance advisers, which heightens the risk of bias being imparted to their research;
- unconnected analysts lack access to the issuer's management and necessary information about the issuer, resulting in connected research being the only source of information available to investors when investors may choose to make their investment decisions; and
- market participants have begun to engage in certain practices that may be inconsistent with the requirements of EU Market Abuse Regulation ("MAR").

Summary of COBS Amendments

The FCA has made the following changes to the COBS rules to address the above concerns and to ensure that market integrity is not compromised and consumer protections remain effective.

Timing of the publication of IPO research

In an effort to restore the centrality of a prospectus and increase the likelihood that the prospectus will be the basis on which investors make their investment decisions, IPO research will not be permitted to be published until at least *one or seven* days after the publication of an FCA-approved prospectus or registration document (the registration statement is a component of a prospectus that contains

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to be set, which is then circulated to certain institutional investors along with a draft price range prospectus (this is the "pathfinder" prospectus).

5 IPOs in the UK are often marketed only to institutional investors.

6 The pathfinder is shared with potential institutional investors to assess the anticipated level of demand for the offer before a further 14-day period of active marketing (which includes a management roadshow) takes place. By separating the publication of research and the publication of the pathfinder prospectus, the blackout period is designed to reduce the likelihood that investors would attribute an investment decision to a research report rather than the prospectus.

information about the issuer[7]). The exact timing of the publication of IPO research (both connected and unconnected) will depend on when unconnected analysts have been provided with an opportunity to be in communication with the issuer's management.

The following two options are available for issuers and syndicate banks for scheduling the release date of the IPO research:

- if unconnected analysts are provided with an opportunity to be in communication with management on equal terms with connected analysts, then the research will be permitted to be released beginning one day after an FCA-approved prospectus or registration statement is published (COBS 11A.1.4FR(2)(a)), or

- if unconnected analysts are in communication with the issuer at a later stage than connected issuers, then connected research will be permitted to be released beginning at least seven days after an FCA-approved prospectus or registration statement is published and after the issuer's communication with unconnected analysts is substantially completed (COBS 11A.1.4FR(2)(b)).

It is anticipated that this resequencing of the publication of the prospectus or registration document and IPO research will effectively result in the publication of the prospectus or registration document towards the end of the "private phase" of the IPO process and before the issuance of the ITF announcement and release of any IPO-related analyst research.

The Policy Statement notes that syndicate banks are likely to encourage issuers to provide unconnected analysts with management access separately from connected analysts, triggering the seven-day gap between the publication of the prospectus or registration document and the release of connected research.[8] Following this approach, issuers are likely to publish a prospectus or registration document seven days before the ITF announcement and release of the connected research. A briefing for unconnected analysts would likely follow shortly after the prospectus or registration document is published in order to allow time for follow-up questions before the connected research is released.

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7 In effect, the registration document would include a description of the business, risk factors, the Operating and Financial Review, historical financial information and certain portions of the additional information section, but would exclude offering-related information. The balance of the prospectus would include information about the securities being offered, the particulars of the offering (including the price range) and the plan of distribution (all set forth in the securities note) and a summary of the offering. The final element is ultimately the price. The securities note and summary would be published upon completion of the investor education and price discovery process; the management road show and the book-building process would follow.

8 Incidentally, there was concern raised during the consultation process that the involvement of unconnected analysts prior to the publication of a prospectus or registration document might compromise the confidentiality of the IPO, notwithstanding the use of nondisclosure agreements.

In response to concerns raised by some industry participants, the Policy Statement suggests that syndicate banks may engage in the following practices to mitigate the execution risk for an issuer that the seven-day gap may produce (as a result of an extension of the "public phase" of the IPO process): (i) reduce the length of the investor education phase from the now typical 14 days to seven days, (ii) carry out additional meetings with prospective investors at an earlier stage (such as pilot fishing or "early look" meetings), (iii) choose not to distribute connected research so that the prospectus would not need to be published seven days before the ITF announcement, or (iv) choose not to provide connected analysts with access to management (in which case there would be a natural time lag while the connected analyst prepares research on the basis of the FCA-approved prospectus or registration document, similar to an unconnected analyst).

Creation of level playing field between connected and unconnected analysts

To ensure that a sufficient number of unconnected analysts are made aware of opportunities to be in communication with the issuer's management, the new COBS rules require syndicate banks to provide a "range" of unconnected analysts with an opportunity to be in communication with the issuer's management. The rules require that such range be one that, in the bank's opinion, creates a reasonable prospect of enabling investors to make a better-informed assessment of an issuer (COBS 11A.1.4BR(3)(a)).

If syndicate banks impose any restrictions on access by unconnected analysts to the issuer's management, they must ensure that such restrictions do not unreasonably prevent, limit or discourage those unconnected analysts from producing or disseminating research about the issuer or the relevant securities (COBS 11A.1.4CR). In other words, the Policy Statement provides that unconnected analysts should not face terms of access that are any more restrictive than those imposed on connected analysts. Syndicate banks are required to make and maintain a record of their determinations as to the range of unconnected analysts to be granted access to management and any restrictions placed as a result of such access (COBS 11A.1.4BR/CR). As discussed in the Policy Statement, in practical terms, the FCA envisages working with trade associations representing syndicate banks and independent researchers to develop a form of common "research guidelines" for unconnected analysts. The guidelines would specify the "reasonable terms" that would govern the access of unconnected analysts to the issuer's management and would help determine the appropriate "range" of analysts to be afforded such access.

In addition, the new rules also require that the information that unconnected analysts receive regarding the issuer be the same as that received by connected analysts and that each unconnected analyst receive identical information. These requirements could be satisfied through the provision of a single communication channel to all unconnected analysts. The information shared with both connected and unconnected analysts is to be recorded in writing and retained for a period of five years. (COBS 11A.1.4ER).

Application to IPOs on MTFs of new COBS rules on analyst research

The FCA has decided not to apply the new COBS rules on publication of IPO research to IPOs conducted on multilateral trading facilities ("MTFs") as it is currently unclear whether unconnected research in connection with such offerings will be likely to emerge. The FCA, however, encourages investment banks that provide syndication services to larger companies raising capital through an IPO on an MTF to follow new COBS 11A rules as a matter of best practice.

Conflicts of interest in production of connected research

The FCA has updated and supplemented COBS Rule 12, which provides guidance on managing potential conflicts of interest in relation to connected analysts and corporate finance advisers and other relevant persons responsible for underwriting activities. The existing COBS guidance states that connected analysts should not get involved in activities that could compromise their objectivity and provides examples of activities that would normally be viewed as inconsistent with the analysts' objectivity, such as participation in investment banking activities and participation in pitches for new business. The new guidance clarifies that the term "participating in pitches for new business" would include situations where an analyst interacts with the issuer's management, shareholders or corporate finance advisers before (i) the bank accepts a mandate to carry out underwriting or placing services for the issuer and (ii) the bank's position in the syndicate is confirmed in writing (COBS 12.2.21AG). The new guidance aims to mitigate the risk of bias being imparted to connected research.

In the Policy Statement, the FCA also highlights the provisions of new COBS 12.2.21EU adopted pursuant to the EU Markets in Financial Instruments Directive ("MiFID II") that requires syndicate banks to introduce a physical separation between analysts and other persons whose responsibilities or business interests may conflict with the interests or the recipients of the research.

Consistency of the new COBS rules with MAR

In the Policy Statement, the FCA also highlights the need for issuers and their advisers to consider their compliance with MAR. In particular, careful consideration and assessment of information included in analyst and other presentations (especially strategic and forward looking information) should be made to ensure that the dissemination of such information is done in a manner consistent with MAR requirements.

While IPO candidates that have not yet made a request for admission[9] to trading on a regulated market or an MTF in connection with the IPO would not come within the scope of MAR due to the IPO process

[9] While there is no official EU guidance available clarifying at which point an issuer is considered to have made a request for admission to trading, based on the relevant exchange's applicable admission procedures, it has been generally accepted that an

itself, such issuers may nonetheless have existing MAR obligations due, for example, to having issued debt or other securities that are admitted to trading or being subsidiaries of a parent company with securities admitted to trading (but only in relation to the securities already admitted to trading).

Once it is determined that an IPO candidate is within the scope of MAR, proper consideration of the obligations of Article 10 of MAR[10] (disclosure of insider information) and Article 11 of MAR (setting forth the market sounding regime) should be made, in particular in relation to information that may be disclosed to analysts during analyst presentations. Depending chiefly upon the mix of information already publicly available, the fact an IPO is under consideration may itself constitute inside information in relation to any securities of the issuer or its parent company already admitted to trading (*e.g.*, high yield bonds of the issuer). The remaining information in an analyst presentation may or may not constitute inside information. A determination would still need to be made as to whether any such other information is inside information. The FCA suggests that these issues will continue to be assessed.

Tripartite prospectus model

In the Policy Statement, the FCA has confirmed that issuers that choose to use an FCA-approved registration document (as opposed to a single prospectus) during the "private phase" of the IPO process and prior to the release of any IPO research, may later choose to follow the FCA-approved registration document with either a securities note and a summary document or a single prospectus. Under either route, the documents that would follow the standalone, approved registration document would also need to be approved by the FCA prior to their publication. With respect to the obligation to update an already approved registration document, the FCA has clarified that (i) in situations where a tripartite prospectus model (consisting of a registration document, a securities note and summary) is used, the securities note should be used for any required updates (*i.e.*, where there has been a material change or recent development since the latest registration document was approved that could affect an investor's assessment), and (ii) in situations where a single approved prospectus is used, the integrated document would contain updates to the approved registration document.

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issuer would be viewed as having requested an admission to trading of the securities at the time it submits the relevant application form to a stock exchange.

[10] Article 10 of MAR prohibits unlawful disclosure of inside information, which will generally arise where a person possesses inside information and discloses the information to any other person, except where the disclosure is made in the normal course of employment, profession or duties. Moreover, if disclosure of inside information has been identified, Article 17 of MAR requires such information to be disclosed to the public as soon as possible unless specified circumstances exist under which the disclosure can be delayed.

Implementation issues

Due to the greater emphasis placed on the registration document (as opposed to the prospectus) in the FCA's rules, the FCA provided further clarification on the following implementation issues.

With respect to the sponsor regime, the FCA confirmed that, as a registration document can form a constituent part of a prospectus, its preparation and the related application for premium listing requires a sponsor to be appointed at the point in time when an eligibility letter is submitted in respect of the IPO. When a registration document is prepared as a standalone document and the issuer is not applying for a premium listing at that point in time, there is no requirement for a sponsor to be appointed. Should the issuer publish a standalone registration document and subsequently decide to apply for premium listing, a sponsor will be required to be appointed for the purpose of that application for listing. Whether work on a registration document prepared as a standalone document could be regarded as "preparatory work" and therefore potentially within the definition of "sponsor services" will depend on the circumstances in which the registration document is prepared.

In addition, with respect to the eligibility review process, the FCA confirmed that it would expect to continue to provide a preliminary view on eligibility for listing based on the information available at the time the registration document is submitted. The FCA also confirmed that for purposes of determining the age of financial statements (under Listing Rule 6.1.3(R)(1)), the relevant date will be the date of the prospectus, not the date of the registration document.

Where an accountant's report or other information (such as historical or pro forma financial information) included in a registration document is superseded, the FCA would expect updated reports to be included in the securities note or in the prospectus.

Additional Considerations

The new process is intended to provide investors with more time to digest information about the issuer and its business and increase the likelihood that investors will place greater emphasis on the prospectus and less on research reports of connected analysts. At the very least, the publication of the prospectus or a registration document, rather than the ITF announcement as is currently the case, will provide the first public confirmation that an IPO is imminent. Due to its emphasis on the prospectus or registration document, the FCA's reforms will likely lead issuers and their advisers to focus first and foremost on the prospectus or registration document and use the prospectus drafting process to build the equity story and the disclosure profile rather than let the analyst presentation dominate the drafting process (as is often the case today). Under the current regime, all too often the pressure to start the "UKLA clock" means that versions of the prospectus go through multiple fundamental iterations as the equity story and other key elements of the disclosure evolve based on the analyst research process. It remains to be seen whether the

current focus on "early look" presentations will shift over time such that the prospectus in fact becomes the definitive basis on which investment decisions are made in practice.

The new timetable does not address concerns about liability based on statements made in research published in close proximity to publication of a registration document. These concerns are heightened where the gap between the two could be as little as a single day after the publication of the prospectus. This, combined with the general concern regarding the confidentiality of the IPO that may arise where unconnected analysts have concurrent access with connected analysts (particularly where the number of unconnected analysts given access could be significant), may well lead issuers to provide unconnected analysts with separate access to the management, which would result in the publication of research seven days or more after the publication of the registration document. This may prompt more "early look" efforts to pre-assess investor interest and provide greater certainty that the IPO will go forward. It may also shorten the investor education phase of IPOs (from 14 days to seven days), since investors will have had more time earlier in the process to review the registration document.

As suggested above, early (or earlier) engagement with investors will require consideration of the requirements under MAR to the extent that information provided would constitute inside information for purposes of MAR.

Access by unconnected analysts on "reasonable terms" raises the question of whether geographical restrictions will be necessary, particularly to avoid research being distributed into the United States, though under COBS 11A, any such restrictions would need to apply equally to connected and unconnected analysts. This assumes, however, that unconnected analysts will, in fact, seek access and publish research. It is unclear whether or not this will be the case. Precedents in other jurisdictions cast doubt on whether access will be sought, and there remains the broader question of the scope of research as a result of the changes to unbundling of research to be implemented effective January 1, 2018 as part of MiFID II.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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