

UK IPO Reform Q&A in relation to COBS 11A

Prepared by the Association for Financial Markets in Europe (AFME)

The amendments to the Conduct of Business sourcebook (“COBS”) made by the Financial Conduct Authority (“FCA”) in PS 17/23 came into force on 1 July 2018. They set out new COBS 11A rules (the “Rules”) and new COBS 12.2 guidance. This Q&A (“Q&A”) has been prepared by the Association for Financial Markets in Europe (“AFME”) following discussions with the FCA and addresses certain commonly asked questions in relation to the practical implementation of the Rules.

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Q1. *COBS 11A.1.4FR(1) contains timing restrictions for disseminating research on IPOs. It makes it clear that a firm must not disseminate independent or non-independent investment research on an issuer client or relevant securities until after the ‘relevant time’, with that time being either one day or seven days after publication of the ‘relevant document’, depending on whether COBS 11A.1.4BR(2)(a) is followed. The ‘relevant document’ is either an approved prospectus regarding the relevant securities or an approved registration document regarding the issuer. It is anticipated that in the vast majority of IPOs the ‘relevant document’ for these purposes will be an approved registration document. The rules do not though go on to say what the next approved document to be published by an issuer would need to be in those circumstances, which has led to some queries in the market on the point. If the IPO involved a retail offer of any nature, then of course an approved price range prospectus would have to be the next approved document to be published and it would be published at the start of the management roadshow.*

In the context of an institutional only offer, where retail was not involved, it has been queried whether the next approved document could be a final prospectus that is published following pricing at the end of the management roadshow -- and with a draft ‘pathfinder’ provided to potential institutional investors on the roadshow, as is currently the case -- or whether in that scenario the FCA would expect issuers to publish an approved price range prospectus at the start of the management roadshow. While legally it would be possible to use a pathfinder if the offer was institutional only, is it a correct understanding that, in line with the tenor and underlying philosophy of the new rules, as a starting presumption at the beginning of the roadshow, the FCA would expect to see an approved price range prospectus made available publicly rather than a pathfinder circulated to institutional investors only?

A1. While legally a pathfinder prospectus could be used on the roadshow if the IPO was being offered to institutional investors only, commentary in CP17/5 and PS17/23 makes it clear that the FCA's default expectation is that, where issuers choose to publish an FCA approved registration document ahead of the release of any connected research, it should then publish either an FCA-approved price range prospectus or an FCA-approved securities note and summary, as opposed to an unapproved pathfinder document being used.

Q2. Will the FCA be prepared to review the registration document and a consolidated prospectus / discrete securities note and summary in parallel? In addition, will it be prepared to give a 'cleared for comments' confirmation in relation to the prospectus /discrete securities note and summary before the registration document is published?

A2. Yes, a registration document and a consolidated prospectus / discrete security note and summary can be reviewed by the FCA in parallel.

If considered appropriate, the FCA should be able to give the issuer a 'cleared for comments' confirmation in relation to a prospectus / discrete security note and summary before the registration document is published. This would be on the basis of the information provided at that time. If this information changes or new information subsequently comes to light this will be subject to review and comment by the FCA as normal.

Q3. Assuming that a prospectus / discrete security note and summary is submitted for review to the FCA prior to the approval of the registration document, what would be the FCA's review timetable?

A3. Assuming that a registration document and a prospectus / discrete security note and summary is submitted to the FCA at the same time, the FCA is likely to provide the issuer with initial comments within 10 working days. If a prospectus / discrete securities note and summary is submitted after a registration document has been submitted, while the FCA will reserve the right to take 10 working days to review and revert with initial comments, a shorter review period, which would at a minimum be five working days, may be possible depending on the extent of the differences in content between the registration document and prospectus / discrete securities note and summary. Any shorter review period will need to be agreed with the FCA reader team and when considering the request they will take into account factors such as, amongst others, if a corporate restructuring is taking place, financing is being put in place or if additional directors are joining the board.

Q4. In order to give such a 'cleared for comments' confirmation on a prospectus / discrete securities note and summary, will the FCA need to know all information that may in due course be disclosed in the document – e.g., would the prospectus / discrete securities note and summary need to contain the identity of all the directors and the precise nature of any pre-IPO reorganisation for example?

A4. The FCA provides 'cleared for comments' confirmations on the basis of the information available to it at the time. Any subsequent information which comes to light, or any changes to information previously provided, would be subject to review and comment in line with the FCA's standard turnaround times.

Q5. Which aspects of the content requirements for the registration document will the FCA not expect issuers to comply with given that final preparations for any IPO may not have been made at the point of registration document publication? For example:

- **Directors who are being appointed as part of the IPO (para 14 of Annex I)**

- *Board practices, including in particular corporate governance regimes with which the issuer is not yet in compliance and board committees that have not yet been created (para 16)*
- *Major shareholders (para 18)*
- *Pro forma financial information without any primary issuance (para 20.2 / Annex II)*
- *Share capital, which may be prior to any pre-IPO reorganisation (para 21)*

A5. In order for the FCA to approve a registration document, it must accurately reflect all of the required Annex I information as at the date of approval and publication. The registration document will also need to contain the reason why the registration document is being published. The FCA does not have a prescribed form for this. The following formulation is an example that has been used previously in FCA-approved registration documents:

“This Registration Document may be combined with a securities note and summary to form a prospectus in accordance with the Prospectus Rules. A prospectus is required before an issuer can offer transferable securities to the public or request the admission of transferable securities to trading on a regulated market. However, this Registration Document, where not combined with the securities note and summary to form a prospectus, does not constitute an offer or invitation to sell or issue, or a solicitation or an offer or invitation to purchase or subscribe for, any securities in the Company in any jurisdiction, nor shall this Registration Document alone (or any part of it), or the fact of its distribution, form the basis of, or be relied up in connection with, or act as any inducement to enter into, any contract or commitment whatsoever with respect to any offer or otherwise.”

If information in a registration document changes or is updated after the document has been approved, the FCA will expect the material changes to be made clear in any later prospectus.

The FCA does not have a firm view on the format or positioning of the information and has seen different approaches taken by different issuers. Some, for example, have included a Schedule of Changes as a stand-alone section at the back of the prospectus while others have included a section earlier in the prospectus, for example in Presentation of Information, that details the principal changes to the registration document.

To the extent it is known that information contained in the registration document will have become out-of-date or will have been changed by the time any prospectus is published, the FCA will accept forward-looking information being included in the registration document to make that clear, so as to avoid confusion on the part of potential investors. For example, if it is known that the board of directors that is in place at the date of the registration document will change so as to become one appropriate for a publicly listed company by the time any prospectus is published, that can be noted in the registration document. The same may, for example, also apply to the corporate governance framework generally, or the structure of the group if a required pre-IPO capital reorganisation has not yet taken place or in relation to material contracts that it is known would fall away should an IPO proceed.

Q6. *Could a ‘pre-eligibility letter’ be submitted to the FCA by the sponsor(s) at the time that a draft registration document is initially submitted for review? The letter could include details about the issuer and the expected timetable as well as potentially any initial issues on which the FCA’s views may be sought but would not necessarily contain a formal analysis of the Chapter 2 or Chapter 6 eligibility requirements. This could then be followed by a full*

eligibility letter being submitted with the first draft of the prospectus / discrete securities note and summary that is submitted to the FCA for review?

A6. The process outlined above could be and has been followed but the FCA does not wish to be prescriptive. Of course, the earlier in the process that key information and analysis relating to the issuer's eligibility for listing is provided to the FCA, the sooner the FCA will be able to provide substantive comments and highlight any specific early stage issues/concerns that it may have and ultimately this approach is less likely to have an impact on the issuer's timetable than if eligibility points are provided later in the process. As is existing practice, eligibility will of course not be formally confirmed until the prospectus/securities note and summary is approved by the FCA.

Q7. *If an issuer publishes a registration document without having appointed a sponsor but later decides to pursue a premium listing and appoints a sponsor, would the sponsor have any obligations in relation to the previously approved registration document?*

A7. No. The sponsor will be expected to be aware of the contents of the registration document and will need to be able to engage with the FCA on it going forward, including in relation to any disclosure in the document that needs to change given the passage of time / given the confirmation of transaction details and any eligibility or other sponsor-relevant issues that may arise as a consequence. Irrespective of when a sponsor is appointed, the FCA continues to expect the sponsor to carry out the required due diligence as well as meet all of its other requirements under Listing Rule 8

Q8. *Could an issuer refer to a possible future offer in a standalone registration document and/or the announcement giving details of its publication without that registration document being considered to be a financial promotion or advertisement?*

A8. The FCA stated in PS 17/23 that provided the registration document contains only the minimum disclosure requirements of Annex I and does not communicate an invitation or inducement to engage in investment activity (as envisaged under section 21 of FSMA) and does not contain anything which can be objectively regarded as inciting a person to engage in investment activity, it will not constitute a financial promotion under that section.

It was further stated in PS 17/23 that provided the registration document contains only the minimum disclosure requirements of Annex I and does not relate to a specific offer to the public of securities or to an admission to trading on a regulated market, or aim specifically to promote the potential subscription or acquisition of securities, it will not constitute an advertisement as defined in article 2(9) of the Prospectus Regulation.

As noted above, a registration document should include an explanation of why it is being published. The inclusion of the same or similar text to that noted in answer 5 above in a registration document will not change the financial promotion or advertisement analysis.

Q9. *[Intentionally blank]*

Q10. *Following publication of a price range prospectus, in what circumstances, particularly in relation to the pricing of the offer, would the FCA expect a supplementary prospectus to be published?*

A10. The requirement to produce a supplementary prospectus is contained within section.87G FSMA which states that a supplementary prospectus is required where there is a significant new factor,

material mistake or inaccuracy relating to the information included in the prospectus during the relevant period.

Separately, the Prospectus Rules permit the omission of the final offer price and amount of securities from a prospectus provided certain information on the process is disclosed and, in some circumstances, investors get a right to withdraw. The final offer price and amount of securities must later be filed with the FCA and made available to the public (PR2.3.2R).

Q11. *To the extent that a consolidated price range prospectus is used, one approach to highlighting any material changes made to the registration document disclosure from that in the previously published registration document would be to include a ‘Recent Developments’ or similar section at the back of the prospectus. Would the FCA be happy with that approach and would it anticipate providing comments on that section as part of the approval process for the price range prospectus? Would it expect to see a blackline against the original registration document as part of its review?*

A11. Yes, as noted above this approach can be taken. Ultimately it will be a choice for the issuer and its advisers as to the form of the material changes disclosure. Regarding a blackline, the FCA would clearly find it helpful but it would not be mandatory. The more efficient the review process is made, the more likely it is that the FCA review process would be less than 10 working days on first submission of the prospectus (assuming it was not submitted at the same time as the registration document).

Q12. *COBS 11A.1.4BR(2) provides that, prior to a connected firm’s analysts being in communication with an issuer team, the firm must ensure that a range of unconnected analysts will have the opportunity either (a) to join the firm’s analysts in any communication with the issuer team that is made or received before the firm disseminates any research, or (b) where COBS 11A.1.4BR(2)(b) is followed and so research is published seven days after publication of the approved registration document, to be “in communication” with the issuer team in a way that means that the communication results in the unconnected analysts receiving or being given access to all the information that is given by the issuer team to the firm’s analysts and relevant for the purposes of the firm producing research on the issuer. It is understood that, in scenario (b), the FCA would consider the requirements to have been met if the slides used for the connected analysts’ presentation and a written transcript of any questions asked by the connected analysts as well as the answers given were made available to the unconnected analysts.*

If following their review of the slides and the written Q&A with the connected analysts, an unconnected analyst had follow-up questions, the question arises of how that access to an issuer team would have to be provided, given that the new COBS rules are silent on the point. It is noted that PS17/23 makes it clear, on page 13, that “the rules permit access to be offered through alternatives to a physical meeting, e.g. web-based conference calls or e-mail exchanges” and that “if these alternative modes of communication were adopted, costs are likely to be reduced significantly”. Would it therefore be possible for any questions from unconnected analysts following their review of the slides and Q&A to be submitted and answered by e-mail if an issuer team wished to take that approach? Clearly any questions from and answers given to an unconnected analyst would have to be shared with all other unconnected analysts who had accessed the slides and Q&A and also with the connected analysts.

A12. Yes, the approach set out in the first paragraph above is consistent with COBS 11A.1.4BR(2)(b), which allows information to be shared through alternatives to a physical meeting between

unconnected analysts and the issuer, provided that the documents provided reflect all the information given to connected analysts.

In relation to the second paragraph above, it is for the issuer and its advisers to determine how to share any additional information with unconnected analysts. The approach of submitting questions by e-mail and answers being given by the issuer by e-mail is consistent with the FCA's comments on page 13 of PS17/23.

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