FCA PUBLISHES NEW RULES TO REFORM AVAILABILITY OF INFORMATION DURING UK EQUITY IPO PROCESS

Over the last 18 months, the FCA has published a series of consultation and discussion papers looking at a number of potential enhancements to the current UK primary capital markets regime to ensure that it continues to remain effective for both issuers and investors. On 26 October 2017, the FCA published final rules to reform the availability of information during the UK equity IPO process (Policy Statement 17/23) and to clarify and enhance a number of elements of the listing rules (Policy Statement 17/22).

Alongside these policy statements, in Feedback Statement 17/3 the FCA has identified three areas that it believes merit further consideration: (i) the positioning of standard versus premium listing; (ii) the provision of patient capital to companies requiring long term investment; and (iii) retail access to debt markets.

This briefing focuses on the FCA's new rules to reform the availability of information during the UK equity IPO process.

Key reforms

- New COBS rules to ensure that before any connected research is published: (i) an issuer must publish an approved prospectus or registration document; and (ii) unconnected analysts are provided with access to the issuer's management.
- New COBS guidance clarifying the FCA's expectations in relation to connected analysts' interactions with an issuer's management and their corporate finance advisers around the time an underwriting or placing mandate and subsequent syndicate positioning is under consideration.
- The development, in due course, of industry guidelines for providers of unconnected research setting out the terms of access to an issuer's management on an equity IPO.
- The new COBS rules and guidance will take effect on 1 July 2018.

Background

In its 2016 discussion paper, DP 16/3, and its March 2017 consultation paper, CP 17/5, the FCA identified some areas of the typical UK IPO process that could be improved. Of particular concern to the FCA is the late timing of the publication of the approved prospectus which, in its opinion, fails to allow sufficient time for meaningful and considered analysis by investors, increasing their reliance on research published by analysts at the investment banks engaged to underwrite the proposed IPO, which is itself, in the FCA's opinion, at risk of bias due to potential pressure on such connected analysts to produce favourable research. This problem is further exacerbated by the fact that the late publication of the approved prospectus does not facilitate the preparation of independent unconnected analysts' research before closing of the IPO transaction.

In CP 17/5, the FCA proposed the introduction of new Conduct of Business (**COBS**) rules, intended to ensure that before any connected research is published an approved prospectus or registration document has been

published by an issuer and unconnected analysts are given access to the issuer's management.

In PS 17/23, the FCA confirmed its intention to introduce new COBS rules, broadly in the form consulted upon in CP 17/5. The FCA is also introducing new COBS guidance to address issues relating to conflicts of interest which arise where analysts within the prospective syndicate banks are able to interact with the issuer and/or its advisers prior to the underwriting or placing mandate and subsequent syndicate position being confirmed.

New COBS 11A rules intended to improve the availability and range of information during the UK equity IPO process

The text of the new COBS rules (COBS 11A) is set out in Appendix 1 of PS 17/23 and has the effect of ensuring that an approved registration document or prospectus is published much earlier in the UK IPO process.

Under the new rules, issuers and their syndicate banks will retain a degree of flexibility over timing depending on whether they permit unconnected analysts to attend the analysts' presentation at the same time as the connected analysts. Where this is the case, connected analysts may publish their research one day after publication of the approved registration document or prospectus.

Where unconnected analysts are not permitted to attend the connected analysts' briefing, the connected analysts will not be permitted to publish their research until seven days after publication of the approved registration document or prospectus. The seven day period is to enable the unconnected analysts to be capable of publishing their research sufficiently early in the public phase of the IPO process. In addition, a range of unconnected analysts must be permitted access to the issuer's management team in a way that ensures that they receive, or are given access to, all the information given by the issuer to the connected analysts which is relevant for the purposes of preparing investment research on the issuer. The information that each of the unconnected analysts receives or can access must be identical. The burden for ensuring that an appropriate range of unconnected analysts are granted access to the issuer's management and that they are given the same information as the connected analysts falls upon the syndicate banks.

Where connected and unconnected analysts are not briefed at the same management meeting, new COBS 11A will require the syndicate banks to maintain written records of all information provided by the issuer to both the connected analysts and the unconnected analysts and maintain such records for five years.

New COBS 11A requires firms to undertake an assessment of the potential range of unconnected analysts and use that assessment to ensure that the range of analysts given the opportunity to participate is one that, in the firm's reasonable opinion, has a reasonable prospect of enabling potential investors to undertake a "better-informed" assessment of the present or future value of the relevant securities, based on a more diverse set of substantiated opinions. Firms must make a detailed written record of the assessment underpinning the judgement they make, which the FCA anticipates will assist them in supervising compliance with this rule. The FCA also anticipates collaborating with relevant trade associations that represent potential producers of unconnected research, such as independent research providers, to develop industry guidelines to help make this judgement. It is expected that potential

producers of unconnected research will be offered the chance to sign up to the guidelines, and in doing so, would become eligible to be offered management access on any UK equity IPO. Any restrictions placed on unconnected analysts as a condition of access to management on an IPO must not "unreasonably prevent" them from producing or disseminating research on the issuer and the syndicate banks must keep a written record of any such restrictions. A restriction would be unreasonable if it prevents an unconnected analyst from producing and disseminating research in circumstances in which a connected analyst would be able to produce and disseminate research.

CLIFFORD CHANCE VIEW:

- We expect that these new rules will lead to UK issuers using tri-partite prospectuses, with an approved registration document containing information about the issuer and its prospects (but not about the proposed IPO) being published at the end of the "private phase" of the IPO process, prior to the intention to float announcement (**ITF**) being issued and research being published.
- The issuer will then subsequently publish an approved securities note and a summary document which, taken together with the approved registration document, will constitute the prospectus.
- The FCA has indicated in PS 17/23 that it expects the securities note and the summary document to be approved and published at the beginning of the management roadshow, with the investment banking community indicating their preference to bind the three constituent parts together so that investors receive a single document containing all of the relevant information.
- It remains to be seen whether the practice develops of publishing the approved securities note and summary document after the conclusion of the management roadshow and bookbuilding process once the final offer price has been agreed (with the roadshow being conducted with an unapproved "pathfinder" comprising the approved registration document, bound together with drafts of the securities note and summary document containing blobs for the pricing information). If adopted, this approach would remove the need to include a formal price range in the approved documentation at the beginning of the roadshow and preserve the greater pricing flexibility which the current use of unapproved pathfinder prospectuses provides.
- It is helpful that the FCA has retained the ability for the issuer and the syndicate banks to choose the means by which unconnected analysts can access the same information as the connected analysts.
- If the desire is to keep the public phase of the IPO process as short as possible, unconnected analysts can be given access to the issuer and its management at the same time as the connected analysts.
- We think it more likely, however, that syndicate banks will encourage issuers to delay providing unconnected analysts with management access until publication of the registration document due to concerns about compromising the confidentiality of the IPO. This would mean a minimum seven day period between publication of the registration document and the release of connected analysts' research, possibly increasing execution risk.

- The FCA has suggested a number of ways which any such increased execution risk could be mitigated (i.e. shortening the 14 day pre-deal investor education period, undertaking pilot fishing and gauging investor interest before publication of the registration document, not distributing any connected research or not providing connected analysts with access to the issuer's management).
- Most of these suggestions, however, seem in our view to run contrary to the feedback from the buy-side i.e. that more information should be made available and at an earlier stage in the process. Hence shortening the period of pre-deal investor education or not making connected research available (or not providing management access to the connected analysts) would, in our view, seem to hinder rather than help investors make informed investment decisions.
- Investment banks continue to seek ways to solicit better feedback from investors before any public announcement of an intention to float, and we expect the trend towards supplementing "early look" and "pilot fishing" meetings with more granular "deep dive" meetings and limited distribution of "pink" versions of the draft prospectus to continue.
- As part of its desire to ensure a level playing field between connected and unconnected analysts, the FCA has amended the new COBS rules to require that, where it is decided that unconnected analysts are only given access to the issuer's management after publication of the registration document, the information given to each unconnected analyst must be identical and be the same as that given to connected analysts.
- Syndicate members will need to consider the practical issues in ensuring compliance with this rule. For example, care will need to be taken that any information conveyed in the voiceover from the issuer's management is also made available to the unconnected analysts. Does this mean the analyst presentation and any Q&A should be recorded and/or a transcript be prepared? Similarly, any information given by or on behalf of the issuer in response to follow-up questions from the connected analysts will also need to be given to the unconnected analysts.
- The publication of an approved registration document at a much earlier stage in the IPO process increases the likelihood of an issuer having to update or amend its disclosure. Any updates or amendments can be reflected in the securities note, although once all the provisions of the Prospectus Regulation (known as "PD3") take effect in July 2019, any significant new factor, material mistake or material inaccuracy must be reflected in a supplement to the registration document which can be submitted for approval at the same time as the securities note and the summary.

Application of new COBS 11A rules to IPOs on MTFs

Given the perceived risks of lengthening the public phase of an IPO on an MTF and uncertainty regarding whether unconnected research would emerge as a result of applying the rules, the FCA has decided not to apply the new COBS 11A rules to IPOs on MTFs. It does however, encourage firms providing underwriting or placing services to larger companies raising capital through an IPO on an MTF to consider applying the new COBS 11A rules.

Time frame for implementation

In order to minimise disruption to existing or potential IPOs, the FCA acknowledges the need for an implementation period and, as such, the COBS 11A rules will take effect on 1 July 2018. The FCA has clarified that this means that the rules will only apply if all the key events governed by them (i.e. analyst presentations, publication of a prospectus or registration document or the release of connected research) take place after this date.

CLIFFORD CHANCE VIEW:

The implementation date of 1 July 2018 gives the market eight months to prepare for these changes. However, this may result in a fairly congested execution window in the months immediately prior to the implementation date as issuers seek to ensure that their deal does not slip into a post-summer timeline which would require their public documentation to be re-drafted to comply under the new rules (with the associated cost and timing implications that would flow from this).

New COBS 12 guidance to address conflicts of interest in the production of connected research

Existing guidance in COBS 12.2.9G states that an analyst should not become involved in activities which are inconsistent with the maintenance of their objectivity, for example, participating in pitches for new business. Due to concerns raised in DP 16/3 regarding particular times during the IPO process where analysts are coming under pressure to produce favourable research, in CP 17/5 the FCA consulted on proposals to supplement this existing guidance.

In PS 17/23, the FCA has confirmed its intention to introduce, with effect from 1 July 2018, new COBS 12 guidance to clarify that participating in pitches for new business would include where an analyst interacts with the issuer prior to the firm accepting an underwriting or placing mandate for the issuer and before the firm's position in the syndicate has been confirmed in writing between the firm and the issuer.

Concerns were raised during the consultation about the guidance prohibiting interactions between an analyst and an issuer with securities already admitted to trading that the analyst covers as part of ordinary course research coverage, where such issuer is contemplating a further issue of securities. The FCA has included additional guidance which recognises that, in limited circumstances, it may be appropriate for analysts to communicate with such issuers. However, the FCA is clear that where the analyst becomes aware of the fact that his or her ECM colleagues are pitching for new business from that issuer, then the guidance will apply.

The FCA has also confirmed in its feedback that the new COBS 12 guidance is aimed at producers of investment research, not non-independent research, and provided any such research is clearly labelled as a marketing communication, producers of non-independent research are not prohibited from attending pitches for new business to manage a securities offering.

Whether the handling of information on an IPO is consistent with the Market Abuse Regulation?

In line with the pronouncement by ESMA on 1 September 2017 regarding the scope of the market sounding regime, the FCA has now confirmed its view

that the securities that are in scope for the purposes of the market sounding regime (Art. 11 MAR) are those set out in Art. 2 MAR:

a) financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made;

b) financial instruments traded on an MTF, admitted to trading on an MTF or for which a request for admission to trading on an MTF has been made;

c) financial instruments traded on an OTF; and

d) financial instruments not covered by points (a), (b) or (c) above, the price or value of which depends on or has an effect on the price or value of a financial instrument referred to in those points.

This clarification is helpful as the FCA's previous interpretation would have brought an issuer with existing listed debt that was contemplating an equity IPO in scope, regardless of whether the proposed new equity issuance would have any effect on the price or value of the existing debt securities.

In CP 17/5, the FCA also sought views on whether information prepared for inclusion in the analysts' presentation constitutes inside information and, if so, whether it is being disclosed in accordance with the carve out to the prohibition on unlawful disclosure of inside information (Art. 10 MAR). The FCA does not agree with the view, expressed by some respondents, that in the unlikely event that inside information is disclosed, provided it is limited to information on the transaction itself, there should be a legitimate reason for delaying announcement to the public and, for the purposes of Art. 10, disclosure would be assessed as being made in the normal exercise of employment, profession or duty. This is clearly an area of continuing focus for the FCA and, as such, where an issuer is in scope for the market sounding regime under MAR, very careful consideration needs to be given to what information can be disclosed in the analysts' presentation.

Policy Statement 17/22: enhancements to the listing regime

The FCA has also published PS 17/22, in response to its February 2017 consultation, CP 17/4, on enhancements to the listing regime. In CP 17/4 the FCA consulted on changes to:

- Chapter 6 of the Listing Rules, in particular, improving the clarity of eligibility requirements for new applicants seeking a premium listing, and the removal of the implication that financial track record and working capital statement requirements are routinely waived;
- the concessionary routes to premium listing for certain types of applicants, namely mineral companies, scientific research-based companies and property companies;
- rules on classifying transactions by premium listed issuers which allow certain types of transactions that would otherwise be classified as a Class 1 transaction, not to be classified as Class 1, thereby removing the need to comply with the additional requirements, including the need to obtain shareholder approval, without prior consultation with the FCA; and
- its guidance in the case of a reverse takeover, in order to remove the presumption of insufficient information which may lead to a suspension.

The FCA proposed to deal with these issues by means of the introduction of new technical notes and rule changes. The FCA is pressing ahead with these changes in the form presented in CP 17/4 (save for some minor amendments). These changes will take effect on 1 January 2018. Companies seeking admission to premium listing after this date must ensure any submission regarding eligibility is made on the basis of the new requirements set out in PS 17/22.

FCA's continued review of the UK primary markets

Separately, the FCA has also published Feedback Statement 17/3, in which the FCA has identified three areas that it believes merit further consideration: (i) the positioning of the standard versus premium listing; (ii) the provision of patient/scale-up capital to companies requiring long term investment (in particular, in the context of supporting the growth of science and technology companies), and (iii) retail access to debt markets.

In its February 2017 discussion paper, DP 17/2, the FCA sought views on the positioning of the standard versus premium listing and on whether it should consider the creation of an international segment for companies wishing to observe higher standards, but not the whole suite of UK corporate governance traditions. Feedback on DP 17/2 was mixed, but there was broad support for the premium listed segment. Views on standard listings were more mixed, with some respondents highlighting the flexibility it offers, whilst others raised concerns that the "standard label" is unhelpful. The majority of respondents were not in favour of different requirements for international and UK companies.

Given the divergent views, the FCA intends to continue to engage with stakeholders on the above topics, with a view to publishing proposals for consultation in due course. Stakeholders are asked to contact the FCA if they are interested in discussing any of the issues set out above.

Next Steps

If you would like to discuss any of the new rules and guidance and their potential impact for your business or the IPO market generally, please contact any of the authors of this note.

For additional background to these new rules, see our earlier briefings:

The two faces of the FCA's review of UK primary equity markets (February 2017)

FCA publishes consultation on reforming the availability of information in the UK IPO process (March 2017)

To access the FCA policy and feedback statements referred to in this briefing click here.

CONTACTS

Adrian Cartwright
Partner

T +44 207006 2774
E adrian.cartwright
@cliffordchance.com

Iain Hunter
Partner

T +44 207006 1892
E iain.hunter
@cliffordchance.com

Simon Thomas
Partner

T +44 207006 2926
E simon.thomas
@cliffordchance.com

Chris Roe
Senior Associate

T +44 207006 4609
E christopher.roe
@cliffordchance.com