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NEW PUBLIC OFFERS AND ADMISSIONS TO TRADING REGIME: HIGHLIGHTS FROM A SUSTAINABILITY PERSPECTIVE

GOVERNANCE & SUSTAINABILITY
Part of the Horizon Scanning series

The FCA's consultation paper (CP24/12)[1] relating to the exercise of its powers under the new regime relating to prospectuses based on the Public Offers and Admissions to Trading Regulations (the Regulations)[2] closes on 18 October. The Regulations were made by Parliament in January 2024 to provide a new framework to replace the UK Prospectus Regulation and give the FCA greater discretion to set new rules in this area. Our previous briefings provide an overview of the Regulations[3], and set out the key highlights for debt capital markets[4] and equity capital markets[5].

The consultation includes three proposals that will be of specific interest to issuers from a sustainability perspective, which are set out in this briefing in three sections:

1. New requirements for sustainability-related disclosures in prospectuses generally;

2. New disclosure requirements for issuers of debt securities specifically; and

3. A 'protected forward-looking statement' (PFLS) regime designed to encourage issuers to include more forward-looking information in prospectuses, including information relating to transition plans and sustainability targets.

Overall, there appears to be a clear push from the FCA to encourage more decision-relevant disclosures in prospectuses, especially those based on quantitative information rather than narrative description, and to give additional protection to issuers of prospectuses in the form of the PFLS regime.

The recognition of the risks around forward-looking statements is welcome and, if the proposed approach is successful, it may be replicated in other areas as it is a prevalent issue in sustainability-related reporting.

New requirements for sustainability-related disclosures in prospectuses

The FCA's sustainability-related disclosure proposals consist of three parts: (i) a general climate-related disclosure rule; (ii) minimum information requirements; and (iii) at a later date, proposals to update the guidance in Technical Note 801.2 relating to how issuers should disclose ESG-related information to meet their disclosure obligations under the Listing Rules (including in annual reports), Disclosure Guidance and Transparency Rules (including annual and half-yearly financial results) and prospectus rules.

In respect of the proposed climate-related disclosure rule, where an issuer of equity securities, or depositary receipts representing equity shares, identifies climate-related risks as risk factors, or climate-related opportunities as material to its prospects, the prospectus would need to include

[1] CP24-12: Consultation on the new Public Trading Offers and Admissions to the Trading Regulations regime (POATRs) (fca.org.uk).
[2] The Public Offers and Admissions to Trading Regulations 2024 (legislation.gov.uk).
[3] UK Prospectus Regime Reforms Approach Next Milestone (slaughterandmay.com).
[4] New public offers and admissions to trading regime: FCA publishes further details - Highlights for Debt Capital Markets (slaughterandmay.com).
[5] New public offers and admissions to trading regime (slaughterandmay.com).

additional information about the issuer's management of the relevant risks and opportunities.[6]

This additional information would need to meet the proposed minimum information requirements and be presented broadly in line with the high-level categories used in the Task Force on Climate-Related Financial Disclosures (TCFD) Recommendations, and in the International Sustainability Standards Board Standards (ISSB Standards), namely: governance, strategy, risk management and metrics and targets. Guidance may be published on additional information to be included by mineral companies (including mining and oil and gas companies).

The proposed minimum information requirements include information relating to the following categories:

1. **Governance**: a description of the issuer's governance arrangements for assessing and managing climate-related risks and opportunities.

2. **Strategy**: a description of the actual and potential impacts of climate-related risks and opportunities on the issuer's businesses, strategy, and financial planning.

3. **Risk management**: a description of how the issuer identifies, assesses, and manages climate-related risks.

4. **Metrics and targets**: if material, a description of the metrics and targets used to assess and manage relevant climate-related risks and opportunities.

If the issuer has published a transition plan, and the contents are financially material, the prospectus will have to include a summary of key information in the transition plan.

Climate-related disclosures relating to strategy, transition plans and metrics and targets should qualify for protection as PFLS if the relevant criteria are met, but disclosures on governance and risk management will not qualify as PFLS (see the sections below on PFLS). This distinction is based on the FCA's recognition that there may be concerns about subjecting primarily forward-looking information to the stricter liability standard otherwise applied to prospectuses, and that this could detrimentally limit the level of detail provided to investors.

At this stage, the FCA does not intend to require disclosure of sustainability information that is not climate-related, e.g. in relation to biodiversity, but this position may be revisited after the ISSB Standards have been endorsed in the UK (which is expected to happen in or around Q1 2025). The FCA is also not proposing to apply the climate-related disclosure rule and minimum information requirements to issuers of general purpose debt securities.

New disclosure requirements for issuers of debt securities specifically

The FCA sets out specific proposals in relation to prospectuses relating to sustainability-labelled debt securities (both use of proceeds bonds and sustainability-linked bonds) in the form of additional disclosure rules which are aimed at corporate issuers only. The rules are framed as voluntary disclosures to 'preserve some flexibility for issuers' and are similar to the European Securities and Markets Authority's expectations in respect of sustainability disclosures in prospectuses under the EU prospectus regime.

These additional disclosures are broadly in line with best practice and include disclosures common to all types of sustainability-labelled debt securities (such as the availability of frameworks, whether any standards or principles have been followed in developing the framework and details of any external reviews) as well as specific disclosures related to use of proceeds bonds and sustainability-linked bonds (which includes information that would typically be included in bond frameworks).

For use of proceeds bonds, requirements include detail on project selection and evaluation, external reviews, management of proceeds and post-issuance information. For sustainability-linked bonds, requirements include information on selection of key performance indicators, sustainability performance targets and the financial consequences of failure to meet those targets.

There are no proposals to apply sustainability-related disclosure requirements to issuer-level disclosure for debt. However, the FCA flags that information on climate change and other ESG-related matters may

[6] Per new item 5.8 in Annex 1 to the new Prospectus Rules: Admission to Trading on a Regulated Market (PRM) sourcebook.

need to be provided in debt prospectuses where relevant to the issuer in line with the "necessary information" test (as set out in FCA's Technical Note TN/801.2)[7].

The FCA also highlights that it does not intend to create a bond standard for sustainability-labelled debt securities at present.

Protected forward-looking statements (PFLS)

The FCA has proposed rules for defining and setting certain safeguards around PFLS. These will be relevant to both regulated market and primary multilateral trading facility (Primary MTF) prospectuses. The proposed definitions and categories may be refined in due course as a result of the FCA's consultation process, and some push back in respect of the conditions that have to be met is expected.

The existing prospectus regime includes a negligence liability standard and reverse burden of proof, which can be one element that deters issuers from including forward-looking statements in prospectuses. The UK Listing Review recommended changing the prospectus liability standard for forward-looking statements to encourage disclosure and help investors make better informed investment decisions.

Whether issuers will in fact include a greater number of forward-looking statements in prospectuses remains a key question. The prospectus liability standard is only one consideration that issuers need to weigh against other risks (including risks associated with overseas securities laws and reputational issues[8]).

Under Regulation 30 of the Regulations (which will broadly replace section 90 of the Financial Services and Markets Act 2000), a person responsible for a prospectus will be liable to pay compensation to an investor claiming a loss in relation to a PFLS, only if the person responsible:

i. knew the statement to be untrue or misleading;

ii. was reckless as to whether it was untrue or misleading; or

iii. in the case of an omission, knew the omission to be a dishonest concealment of a material fact.

Under this new liability standard, the burden of proof sits with the investor claiming a loss in relation to a PFLS, and this shift in emphasis may lead to more forward-looking statements being made.

Four core elements of PFLS

The FCA plans to use a general definition that will apply to all PFLS disclosures, along with criteria that apply specifically to financial or operational information (both of which can include sustainability information). Certain types of statement will not be capable of being PFLS. All PFLS in prospectuses must be clearly marked by way of a general statement that covers all the PFLS in a prospectus, as well as content-specific statements:

1. **General definition that applies to all PFLS**: PFLS must relate to future events or sets of circumstances, meaning the statement must be verifiable by reference to something that happens after it is published. The language used will not determine whether the statement is considered forward-looking or not.

   PFLS must also include an estimate of when the event or set of circumstances is expected to happen, and whether the statement is likely to be useful to investors, as determined by the 'reasonable investor' test. The reasonable investor test should be familiar to issuers from when, for example, they have to ensure compliance with their continuing disclosure obligations, such as under the Market Abuse Regulation.

2. **Category-specific criteria for financial and operational information**: some criteria will relate specifically to whether the information is financial or operational[9], and how it is prepared, in order to exclude (i) overly aspirational targets and (ii) narrative disclosures. Sustainability-

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[7] Primary Market Technical Note 801.2: Disclosures in relation to ESG matters, including climate change (fca.org.uk).

[8] Greenwashing: Meet risk with action (slaughterandmay.com).

[9] Operational information means statements relating to a company's activities, which could include information about its products, services, and the facilities that support the company's business.

related disclosures can fit into either of the financial or operational categories depending on the nature of the information.

The criteria for financial information to be PFLS are based on the FCA's existing definition of a profit forecast, combined with established accounting principles. That is, the statement must expressly or impliedly indicate a figure or range for the financial information, or contain data from which such a figure can be calculated. It must also be understandable, reliable, and comparable with the actual future result.

This is to discourage (although not outright prohibit) the kinds of narrative statements that are often included in prospectuses under the existing regime. The qualitative criteria will be set out in related guidance and be based on established accounting practices for the preparation of financial information.

As with financial information, operational information can benefit from the PFLS liability standard if it provides a figure or information sufficient to allow for calculation of a figure. Given that certain types of operational information cannot be expressed purely numerically, the FCA also proposes that statements containing objectively verifiable information (e.g. achieving a milestone by a certain date) would be capable of qualifying as PFLS.

3. **Statements that are excluded from being PFLS**: certain types of statements will not be capable of qualifying as PFLS. In particular: (i) aspirational targets; (ii) purely narrative statements; (iii) statements relating to use of proceeds; (iv) any information that must be included in an MTF admission prospectus; and (v) most of the specific items of information that must be included in a prospectus.

   However, statements made in connection with the following items will qualify if the statements otherwise meet the PFLS criteria: (i) selected items in the Business Overview (including certain climate-related items); (ii) the Operating and Financial Review; (iii) Trend Information; and (iv) any profit forecasts.

4. **Labelling of PFLS**: the FCA envisages that prospectuses will include, as needed, a general statement applying to all PFLS in the prospectus, that informs investors about the risks that apply to PFLS disclosures, and lists where PFLS can be found in the document. Prospectuses containing PFLS would also include content-specific statements that identify a particular disclosure as being a PFLS and provide specific contextual information, such as any significant factors taken into account during the preparation of the PFLS that could cause it to be inaccurate.

Next steps

The FCA’s consultation closure date is 18 October 2024. The FCA aims to finalise the rules for the new regimes based on the Regulations by the end of the first half of 2025. There will be a further period prior to the new rules coming into force, so we may not see the new UK prospectus regime in place until the second half of 2025.

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This briefing is part of the Slaughter and May Horizon Scanning series

Click here for more details. Themes include Capital Flows, Governance & Sustainability, Energy Transition, Digital and Crisis Management. Governance & Sustainability explores how, with ever increasing regulation, businesses are expected to shift towards the implementation of sustainability strategies with pressure from stakeholders to demonstrate progress. A focus on transparency and accountability underpins the latest legislation, which seeks to combat greenwashing, corporate crime, and human rights abuse, calling attention to the impact business has on people and planet. In the UK, the audit and corporate governance reforms are starting a new chapter.