**Supplementary prospectuses**

This element outlines when a supplementary prospectus is required and how and when it should be prepared.

**Circumstances which give rise to requirement**

PRR 3.4.1/Art. 23(1) UK Prospectus Regulation provides that every:

significant new factor

material mistake

material inaccuracy

…relating to the information included in a prospectus which may affect the assessment of the relevant securities and which arises or is noted between (i) the time when the prospectus is approved; and (ii) the closing of the offer period or the time when trading on a regulated market begins, whichever later occurs, shall be mentioned in a supplement to the prospectus (ie a supplementary prospectus) without undue delay.

**Minimum circumstances in which a supplementary prospectus would definitely be required**

PRR 3.4.2/Art. 18(1) UK Prospectus RTS Regulation sets out a number of minimum circumstances in which a supplementary prospectus would definitely be required. These include the situation where an issuer publishes new annual audited financial statements, is obliged to change the profit forecast in its prospectus, is subject to a new takeover bid or undertakes a new significant financial commitment, in each case following publication of the original prospectus.

**Note**: the determination of the share price following the publication of a price range prospectus does not require a supplementary prospectus to be published so long as the final price falls within the specified price range, as there will be no new factor or inaccuracy.

**Obligation to notify**

Any person responsible for a prospectus who is aware of any new factor, mistake or inaccuracy that may require the submission of a supplementary prospectus must give notice of it to (i) the issuer; and (ii) the person on whose application the prospectus was approved (ie the sponsor) (see s 87G(5) FSMA). In practice, a director who becomes aware of such a matter would call a full board meeting as soon as possible in order to consider the issue.

**Approval of supplementary prospectus by the FCA**

The supplementary prospectus must be approved by the FCA in the same way as a prospectus in a maximum of five working days from the discovery of the fact which triggers the supplementary prospectus. It must then be published in accordance with at least the same arrangements as were applied when the original prospectus was published (PRR 3.4.1/Art. 23(1) UK Prospectus Regulation).

**Timing**

**Before approval** of the prospectus

· **Amend the draft prospectus being reviewed by the FCA**

Where the new factor, mistake or inaccuracy comes to light before approval of the prospectus - even if this is after the publication of the standalone registration document - the company should amend the draft prospectus that is being reviewed by the FCA if the information needs to be disclosed under PRR 2.1.1/Art. 6(1) UK Prospectus Regulation and/or the Annexes. The version of the final prospectus approved by the FCA will in this way reflect the most up to date position in relation to the issuer.

**After approval** of the prospectus and prior to admission

· Submit supplementary prospectus to FCA for its approval

The requirement to produce a supplementary prospectus under PRR 3.4.1/Art. 23(1)UK Prospectus Regulation applies only if the significant new factor, material mistake or material inaccuracy relating to the prospectus “arises or is noted” within the period of time running from the approval of the prospectus to the later of the close of any public offer and the admission of the relevant securities. On an IPO, this period will always run from approval of the prospectus to admission of the shares, as any offer will always close before admission. Therefore, if a significant new factor arises after a prospectus has been approved but before admission, or a material mistake/inaccuracy is noted in the approved prospectus itself during this period, a supplementary prospectus must be submitted to the FCA for its approval, containing details of the new factor, mistake or inaccuracy.

**After admission**

· No longer any obligation to publish a supplement. Consider UK MAR.

Once admission has occurred (on the basis that this will be later than the closure of any offer in an IPO), there is no longer any obligation to publish a supplement to the prospectus. However, liability could still be incurred in respect of inaccurate or misleading statements in or omissions from the prospectus. The issuer should consider whether the significant new factor, or the material mistake/inaccuracy in the prospectus, constitutes “inside information” that would require disclosure to investors and the market in accordance with UK MAR.

**Consequences - effect on the issue**

Companies will be reluctant to publish a supplementary prospectus unless absolutely necessary due to the additional work required in a time-pressured situation and the negative perception in the market which is likely to result from its publication. The withdrawal rights referred to in the following page provide a further disincentive.

This may mean that the issuer and sponsor will take the decision to pull the issue, at least in the medium term, which will mean that no supplementary prospectus needs to be published. Note that the sponsor typically reserves a unilateral right of termination in the placing/underwriting agreement if a supplementary prospectus is triggered.

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**Consequences – withdrawal rights**

Pursuant to PRR 3.4.1/Art. 23(2) UK Prospectus Regulation, a person who has accepted a public offer of shares may withdraw their acceptance within a period of two working days after the publication of a supplementary prospectus, provided that the new factor, mistake or inaccuracy arose or was noted before the closing of the offer period or delivery of the securities, whichever occurs first. The period of two working days may be extended by the issuer (though this is unlikely in practice), and the final date of the right of withdrawal must be stated in the supplementary prospectus itself, along with a prominent statement explaining the rights and how they can be exercised.

As these provisions provide that withdrawal rights apply only where the prospectus relates to an offer of transferable securities to the public, this means that withdrawal rights will not arise in the context of an institutional only offer where a prospectus is produced only for the purposes of admission.

**Consequences – liability**

Persons responsible for the original prospectus have the same range of potential liabilities in relation to any supplementary prospectus, for which they will also have to take responsibility. In particular, s. 90 FSMA also covers a supplementary prospectus in the same way as it does a prospectus.

In addition, any person who fails to comply with the requirement to produce a supplementary prospectus if one is required is liable under s. 90(4) FSMA to compensate any person who acquires the shares and suffers a loss as a result of the failure to publish a supplementary prospectus.

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**Defence against liability**

However, the publication of a supplementary prospectus can also act as a defence against liability under s. 90 FSMA for the original prospectus, if it comes to light that there is/was any untrue or misleading statement in, or an omission from, the original prospectus. This is because the directors may be able to protect themselves against potential liability if they can rely on one of the exemptions in Schedule 10 FSMA. In particular, under Paragraph 1(2) of Schedule 10 FSMA, a director may be exempt from liability if they held a reasonable belief that the prospectus was correct at the time it was published and, once they became aware of the error, they took all reasonable steps to secure that a correction was brought to the attention of prospective investors. The publication of a supplementary prospectus should satisfy this requirement to bring the correction to the attention of investors.

**Supplementary prospectuses and advertisements**

Under PRR 3.3.2/Art. 15 UK Prospectus RTS Regulation, the publication of a supplementary prospectus will also require an issuer to amend and re-issue any advertisements previously disseminated in relation to the offer/admission to listing that have as a result been rendered materially inaccurate or misleading.

**Supplementary prospectuses summary**

• Significant new factors, or the discovery of a material mistake / inaccuracy in a prospectus, may require a supplementary prospectus.

• A supplementary prospectus must be approved by the FCA in the same way as a prospectus.

• If the development arises after admission has occurred there is no obligation to publish a supplement to the prospectus (but consider UK MAR).

• A supplementary prospectus may give a person who has accepted an offer of shares the right to withdraw.

• A failure to publish a supplementary prospectus when required to do so can give rise to liability to compensate those suffering loss as a result.

• The publication of a supplementary prospectus can be significant in allowing a ‘person responsible’ to defend a claim for compensation in relation to an error / omission in the original prospectus.