



GUIDELINES ON THE DISCLOSURE REQUIREMENTS UNDER THE PROSPECTUS REGULATION, AND GUIDANCE ON SPECIALIST ISSUERS, TN/619.1

Issued 30 July 2021

ICAEW welcomes the opportunity to comment on the consultation on TN/619.1 in *GC21/1: Primary Market Bulletin No. 34* published by the Financial Conduct Authority on 24 June 2021, a copy of which is available from this [link](#).

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SCOPE

1. ICAEW welcomes the opportunity to provide feedback on changes to FCA technical guidance set out in GC21/1. Our comments relate to new Technical Note TN/619.1 *Guidelines on disclosure requirements under the Prospectus Regulation and Guidance on specialist issuers*. Some of our comments on TN/619.1 have consequences for other existing technical notes that are subject to amendment in GC21/1.

COMMENTS ON NEW TECHNICAL NOTE TN/619.1

General observations

2. The individual Guidelines in TN/619.1 appear to be drafted as obligations rather than as guiding commentary; for example, ‘The persons responsible for the prospectus should ensure / should disclose’ (text underlined for emphasis). This is very different to the language of the existing Technical Notes which is more consistent with the status of FCA Guidance¹, ie that it ‘is not binding and need not be followed to achieve compliance with the relevant rule or requirement’. Would the FCA please confirm the status of its Guidance in the response statement, and provide the reasons for any changes?
3. The Guidelines adopt terminology used in the **ESMA Guidelines on disclosure requirements under the Prospectus Regulation**. This means that there is some misalignment between the Guidelines and terminology in ICAEW’s *Guidance for preparers of prospective financial information (TECH 04/20CFF)* which reflects market practice. When developing its guidance, ICAEW took care to ensure that TECH 04/20CFF incorporated the spirit of the ESMA guidelines while retaining terminology used in the market. It would be more efficient if the Guidelines also retained drafting and terms that are familiar in the market.

II. Legislative references, acronyms and definitions

4. Users would find the three tables easier to navigate if the items were listed in alphabetical order.

V.4. Profit forecasts and estimates

5. Guideline 10. We think that this Guideline should focus on process, as expanded on in paragraphs 48-49. We suggest that Guideline 10 is amended to:
‘The persons responsible for the prospectus should apply due care and diligence when compiling profit forecasts and estimates, and should ensure that ~~profit forecasts and estimates are not misleading to investors~~ the process adopted is sufficiently robust.’
6. Paragraph 48. Item (iii). We suggest changing ‘an acquisition or disposal’ to ‘a recent acquisition or disposal’, to prevent mistaken application in forecasts in Class 1 transactions.
7. Paragraph 49. We do not consider it appropriate to suggest that forecasts or estimates can be characterised as ‘correct’, as is the case in the 2nd and 3rd sentences. They can however be misleading, eg if they do not reflect the latest available information, and we suggest replacing ‘correct’ with ‘not misleading’.
8. In the same paragraph, we think that the amendment below will better reflect the options available:
‘If they are no longer valid, the persons responsible for the prospectus should consider amending the profit forecasts or estimates, as of the date of approval of the prospectus, by filing a supplement or amendment.’

¹ Reader’s Guide: an introduction to the Handbook (fca.org.uk)

9. Guideline 11. The guidance in paragraph 51 contains no reference to what an acceptable level of detail, or depth of disclosures, is. Are extensive disclosures likely to be acceptable providing they are not complex?
10. Paragraph 53. In TECH 04/20CFF, the attribute of 'comparable' is with reference to the outcomes (future reporting of historical financial information) not just to existing interim or historical financial information. The reasons why a forecast has not been met, if applicable, can be explained by the underlying assumptions and accounting policies used. As mentioned in paragraph 3 above, it would be more efficient if TN/619.1 were aligned, in the absence of a policy change, with recent market guidance (see eg paragraph 38 of TECH 04/20CFF).
11. Paragraph 54. It would be helpful if examples of 'additional financial information' were included in the TN. We also strongly believe that clarifications are needed about 'pro forma forecasts' - the current commentary contradicts paragraph 52 which states that 'Reliable' forecasts are based on factual rather than hypothetical information. As pro forma information is hypothetical or illustrative, a forecast based on such information will not be reliable. It should also be reiterated that the preparation principles for a profit forecast are different to those for pro forma financial information.
12. Paragraph 56. We think the last sentence is unhelpful and should be omitted; if a forecast or estimate has been audited or subject to review, then the associated opinion should be published. Moreover, there are no UK audit or review standards for profit forecast and estimates - only an assurance standard for public opinions².
13. Guideline 12. We observe that the omission from Guideline 11 of a steer on the detail and depth of disclosures may contrast with the expectation that the statement is 'clean' and the prohibition of caveats in paragraph 60.
14. Guideline 13. Please refer to our comment in paragraph 7 above about describing a forecast as 'correct'. Moreover, what does the FCA consider to be a 'material undertaking' (also in paragraph 62)?
15. Also in paragraph 61, more prescriptive actions than are currently proposed in the Guideline (eg, 'should consider') would normally be required regarding an outstanding forecast or estimate of an acquired entity.

V.6. Pro forma financial information

16. Guideline 18. Would the FCA consider aligning the terminology for line items with the Class tests in the Listing Rules?
17. Paragraph 90. Does the FCA define a 'significant financial commitment' as in clause 4, Article 18 in Commission Delegated Regulation (EU) 2019/98, and can this be included in the TN?
18. Guideline 24, paragraph 115. The phrase in the last sentence 'depending on the use of the pro forma information and after discussion with the FCA' appears superfluous and can be omitted.

V.8. Working capital statements

19. Guideline 29. The commentary ought to refer to the temporary practice on working capital statements adopted by the FCA in its [Statement of Policy](#) and Technical Supplement published on 8 April 2020. Otherwise, this TN may be assumed to supersede the Technical Supplement.
20. Paragraph 131. We suggest that the amendments below better reflect audit report contents: 'Where the auditor's report contains a statement including uncertainty relating to 'going concern', and the working capital statement is clean, the persons responsible for the prospectus should provide explanation for this in the prospectus.'

² [Standard for Investment Reporting 3000](#), published by the Financial Reporting Council

21. Paragraph 133. Disclosure of whether the proceeds of the offer have been included in the calculation of an issuer's working capital is a matter of market practice rather than a requirement, and we suggest that 'should disclose' be replaced with 'can disclose'. This disclosure also applies to committed banking facilities, so they should be referred to in this paragraph (this is also consistent with Procedural Note 904.3).
22. Guideline 30. It is worth explaining that the risk of challenge relates to the basis of preparation of the working capital statement, by inserting 'the basis of' before 'the statement'.
23. Guideline 33. Paragraph 151A. We question why this exception is available for investment funds only and not also for commercial companies with a price range prospectus, and also SPACs.

V.9. Capitalisation and indebtedness

24. Paragraph 169. In the first sentence, it is the profit and loss reserve that is not included in '*Legal reserve(s)* and *Other reserves*', and we suggest deleting 'of the reporting period'.

V.16. Statements by experts

25. Guideline 46. The drafting of Paragraph 216 potentially provides for disclosure of more than the factors stipulated for disclosure in the Guideline. Is that the FCA's intention?
26. Paragraph 216. The explanation of 'Connections to financial intermediaries' could be improved including with illustrations.