

Engagement Paper 3

Protected forward-looking
statements

May 2023

Contents

| | |
|---|----|
| Summary | 3 |
| Background | 4 |
| Definition of PFLS | 5 |
| Presentation of PFLS in a prospectus | 11 |
| Annex 1 | |
| Prospectus liability: High level comparison between liability approaches in FSMA and POATRs | 13 |

Public Offers & Admissions to Trading

This paper is part of the FCA series of Engagement Papers on the draft Public Offers & Admissions to Trading Regime (as published on 9 December 2022), which set out our emerging policy thinking on how we may use our rule-making powers under the new regime. Feedback on these papers will inform further development of our proposed rules, which we will consult on formally during 2024.

Other papers in the series are available on the FCA's website:

www.fca.org.uk/markets/new-regime-public-offers-and-admissions-trading

We would welcome comments and suggestions in response to this paper regarding the approach and potential rules we will make in relation to protected forward-looking statements.

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Summary

- 1.** Forward-looking statements, such as projections of future profitability, are useful for investors when making investment decisions. The existing prospectus regime, however, has a negligence liability standard and reverse burden of proof that may deter issuers from including forward-looking statements in their prospectuses. The government intends to reduce this deterrent by establishing a recklessness/dishonesty liability standard, with the burden of proof on investors, for certain categories of forward-looking statements in prospectuses that will be specified by our rules. The Financial Services and Markets Act 2000 (Public Offers and Admissions to Trading) Regulations 2023 (**POATRs**) will create a concept of “protected forward-looking statements” (**PFLS**), which we will define and will be subject to the amended liability standard.
- 2.** This change is designed to encourage issuers to include forward-looking statements in their prospectuses, which will provide investors with more useful information on which they can base their investment decisions. Such information may currently be provided through third-party communications, for example via ‘connected research’ produced by banks advising on a deal, but this might not be available to all investors.
- 3.** We consider that the inclusion of such information in a prospectus could reduce information asymmetries and improve market integrity. PFLS may provide the following benefits:
 - a.** consolidating more information into the prospectus, reducing risks of selective disclosure via other channels that have no clear liability attached to them; and
 - b.** providing more useful information by encouraging issuers to include forward-looking statements that may be more informative to investors’ or market analysts’ valuation models.
- 4.** This paper sets out our initial considerations regarding the rules we will make to specify what types of information can be considered PFLS, any conditions as to how it is prepared, and how it is presented within a prospectus. In doing so, we will seek to achieve the potential benefits noted above, while ensuring investors understand the risks and limitations that PFLS may have in informing their investment decisions due to its inherent uncertainty and the amended liability standard.

Request for comments and suggestions

We would welcome comments and suggestions regarding how we should define PFLS and how it is presented. In particular, we would welcome views on the following questions:

1. What types of forward-looking statements should we allow as PFLS, and how should we define them (e.g. broadly or more specifically)?
2. Should we set certain minimum criteria or expectations for how PFLS is produced?
3. Should certain types of forward-looking statements be excluded from the definition of PFLS?
4. Should we consider including sustainability-related disclosures as PFLS and, if so, what types?
5. How should PFLS be presented or labelled within a prospectus document?
6. More broadly, we are interested in any data which stakeholders may be able to give us which may provide insight into the likely costs and benefits of any changes which we may consider in this area. An example may be the typical costs of preparing and publishing a prospectus or specific elements of such a document.

Background

PFLS liability standard

5. The POATRs will establish the prospectus liability and compensation scheme for PFLS. In accordance with the illustrative POATRs, persons responsible for a prospectus will be subject to a recklessness and dishonesty liability standard for PFLS. Specifically, a person responsible for a prospectus will not incur liability for any loss caused by PFLS unless the person:
 - knew the PFLS was untrue or misleading or was reckless as to whether it was untrue or misleading; or
 - knew the omission from the PFLS was a dishonest concealment of a material fact.
6. Currently, concerns about liability may deter issuers from including forward-looking statements in prospectuses, except where such information is mandated by specific disclosure requirements. The revised liability treatment under the POATRs is intended to encourage issuers to include PFLS in their prospectuses by lowering the risk of successful investor claims compared with the existing prospectus liability standard. Investors are expected to benefit if this leads to the inclusion of additional information in prospectuses. However, investors will need to understand they will have a reduced chance of success in any future legal claim (relative to other information contained in the prospectus) if they suffer harm as a result of omissions or untrue or misleading statements with respect to PFLS, which may impact the extent to which investors rely on such information when making investment decisions.

7. The amended liability standard for PFLS will be derived from existing liability standards in the Financial Services and Markets Act 2000 (**FSMA**) (see Box 1). Persons responsible for a prospectus will be subject to recklessness and dishonesty standards that mirror those under section 90A/schedule 10A liability in FSMA. Annex 1 to this paper provides a high level comparison table between the existing liability and compensation schemes in FSMA and the PFLS liability and compensation scheme in the illustrative POATRs.

Box 1: Liability standards in FSMA

Prospectus liability

Section 90 and schedule 10 of FSMA establish the current liability and compensation scheme for information included in a prospectus. Section 90 of FSMA provides a basis for investors to bring legal claims for untrue or misleading statements in prospectuses or listing particulars and the omission of necessary information from such documents.

The existing section 90/schedule 10 liability in FSMA will be transposed into the POATRs and applied to general prospectus content.

Liability in connection with other published information

Section 90A and schedule 10A of FSMA establish the liability and compensation scheme for information published via a recognised information service and information whose availability is announced via a recognised information service. Section 90A and schedule 10A of FSMA provide a basis for investors to bring legal claims for recklessly untrue or misleading statements, dishonest omissions of required information, or dishonest delays in disclosing required information.

Definition of PFLS

8. The illustrative POATRs define “forward-looking statement” as either (a) a statement containing a projection or estimate; (b) a statement of opinion as to future events or circumstances; or (c) a statement of intention. This definition is the foundation for defining PFLS. It may be updated prior to the finalisation of the statutory instrument. This paper, however, relates to the illustrative POATRs as published in December 2022.
9. The POATRs will give us the power to define the types of forward-looking statements that will be subject to the PFLS liability and compensation scheme.
10. As a starting point, we consider it may be beneficial to be permissive as to the types of information that can be considered PFLS, as long as such information is likely to be useful to investors when making investment decisions, is clearly presented and explained, and investors are aware of the risks and limitations attached to such disclosures. Minimum criteria could provide a degree of investor protection by

discouraging the inclusion in prospectuses of unsupported or irrelevant information that could nonetheless influence investor decisions.

11. This section sets out general factors we are currently considering as we formulate the definition of PFLS. We are considering the applicability of different criteria and the extent to which they can be combined to define PFLS. This section also addresses the specific sustainability-related information that could be included in the definition of PFLS.

General considerations

12. Starting from the definition of "forward-looking statement" in the illustrative POATRs, we recognise that certain types of information may be informative and usefully treated as PFLS. Such information may be routinely prepared by issuers and support investor understanding and inform valuation models. Profit forecasts and other similar projections related to a company's likely future performance, as well as statements around medium-term targets or business plans, are obvious types of information to consider including in the definition of PFLS.
13. We do not intend to be unduly prescriptive around the types of information that can be considered PFLS as long as such information can be useful to investors when making investment decisions. We also consider, however, that the use of minimum criteria could provide a degree of investor protection. In broad terms, we could therefore use one or more of the following approaches:
 - a. set broad criteria to define PFLS, potentially with non-exhaustive examples;
 - b. set no criteria except for certain targeted exclusions for regulated markets; or
 - c. set prescriptive requirements, perhaps through a list of specific types of information that can be treated as PFLS.
14. Setting broad criteria offers greater flexibility, but could result in ambiguity. Alternatively, setting no criteria would maximise the scope of the PFLS definition, but may result in the inclusion in prospectuses of unsupported or irrelevant information that could nonetheless influence investor decisions. A prescriptive formulation, such as a list of specific key performance indicators, that issuers could choose from according to the nature of their business, might provide more certainty. However, such a rigid approach would necessarily limit the types of disclosures that could be made, which could limit the extent to which investors might benefit from the disclosure of PFLS.
15. To maximise the scope and use of PFLS, we currently consider that PFLS should include both quantitative and qualitative information as well as financial and non-financial information.
16. Quantitative information can help investors to undertake further analyses and derive additional insights into a company's business, especially if it reflects internal data or modelling from the company and/or contains certain assumptions that investors or analysts can use to inform their own valuation models. The accuracy of quantitative forward-looking statements can also be established by comparison with actual events.

17. Qualitative information, by contrast, can be less specific and may not inform more data-driven analysis. Nonetheless, qualitative statements may be useful to investors, such as future strategic plans, notwithstanding they may be less easily verified or measured in terms of future outcomes depending on how specific they are. However, because of their nature, qualitative statements may pose less legal risk for issuers, so treating them as PFLS may not encourage their disclosure.

Potential criteria for defining the limits of PFLS

18. We are considering whether the definition of PFLS should be limited through the application of minimum criteria. For example, we could adopt similar criteria as those used in the accounting standard IAS 1, which relates to the presentation of information in financial statements. Such information is considered to be presented fairly if it is (a) understandable (not too complex for investors to understand); (b) reliable (supported by a thorough analysis of the issuer's business); (c) comparable with the historical information in the prospectus; and (d) relevant (have an ability to influence economic decisions of investors and assist in confirming or correcting past evaluations or assessments). Our guidelines on the disclosure requirements under the Prospectus Regulation currently use these criteria for profit forecast disclosures in prospectuses.
19. Although IAS 1 relates to the presentation of financial information, we consider that non-financial information could also be held to the same standard. These criteria could discourage the disclosure of baseless statements not likely to have any relevance to investors and provide a basis by which the PFLS can be evaluated in relation to the mandatory disclosures in the prospectus. At the same time, however, the concept of "reliability" would need to allow for the inherent uncertainty in predicting future events.
20. An alternative to "relevant" might be to use the reasonable investor test, which is a key feature of the ongoing obligations of issuers. This approach would create a degree of harmony between PFLS and information disclosed through recognised means (e.g., via RNS), which is also subject to a recklessness/dishonesty liability standard. In either case, relevance or the reasonable investor test would provide a basis to ensure prospectuses continue to focus on useful information to inform investment decisions, and would also allow us to challenge any disclosures that don't appear to support investors or market integrity.
21. We welcome views on whether these criteria or other concepts may be useful in setting minimum requirements for PFLS.

Potential exclusionary criteria for regulated markets

22. The liability standard for PFLS is intended to encourage the inclusion of forward-looking statements in prospectuses. Consequently, our starting assumption is that PFLS disclosures will be optional and that PFLS should not include most information that issuers are already required to include in their prospectuses under the current regime, as this would simply shift the liability treatment more favourably towards issuers for no wider benefit.

- 23.** Our rules will specify the detailed content requirements for prospectuses relating to admissions to trading on regulated markets. MTF operators will specify the detailed content requirements for prospectuses relating to admissions to trading on Primary MTFs, subject to the statutory necessary information test and our rules relating to PFLS.
- 24.** As discussed in Engagement Paper 1, we do not currently intend to make significant changes to the content requirements for regulated markets. As a result, companies producing a prospectus for admission to trading on a regulated market will remain subject to the existing disclosure requirements until we have consulted further on the detailed requirements of the new regime. Under the current regime, prospectus content is typically either historical information (including financial information) or statements of fact regarding matters that exist at the time the prospectus is produced, which is not per se information that can be considered forward-looking. Such information would therefore not be considered PFLS. We are, however, considering to what extent certain mandatory disclosures could be considered PFLS for regulated markets where they are, or have an element of, forward-looking content or where non-mandatory information is closely related to required information.

Working capital statement

- 25.** While working capital statements are inherently forward-looking, as they confirm that an issuer considers it has sufficient capital to meet commitments for the next 12 months, as suggested by HMT in its UK Prospectus Regime Review, we propose that the PFLS liability standard will not apply to the working capital statement in a prospectus, which will continue to be subject to a negligence standard. Working capital statements are a key information source for investors and an existing process of production and assurance for working capital statements already exists, such that there appears to be no benefit or need to change the existing liability standard.

Other existing forward-looking prospectus content

- 26.** In the Operating and Financial Review section of a registration document, equity issuers are currently required to give an indication of their likely future development to the extent such information is necessary for an understanding of the issuer's business as a whole. Risk factors are also a key element of existing prospectuses that are inherently forward-looking.
- 27.** Changing the liability standard for these statements may appear unnecessary because these disclosures are already required. However, issuers may be disincentivised from providing more than a bare minimum on aspects such as future business plans – or be less likely to offer quantitative projections alongside such statements – due to the current liability regime, which may suggest treatment as PFLS could encourage more and better information to be included in a prospectus. While we are not seeking to undermine the reliability and rigour of current prospectus information, there may be a net benefit for allowing some PFLS that overlaps with current required prospectus content, particularly around business plans and strategies.
- 28.** Meanwhile, for profit forecasts, which are required only where an equity issuer has previously published a profit forecast (which is still outstanding and valid), and are

otherwise often not included in a prospectus, we consider that inclusion in the definition of PFLS would be appropriate. That said, the same does not appear to be appropriate for profit estimates, which relate to a financial period that has expired (so has already happened) but for which results have not yet been published. Otherwise, we would propose to be permissive in treating as PFLS any other forward-looking guidance or statement from an issuer on other financial metrics, such as the outlook for earnings, revenue, or capital expenditure etc.

29. We welcome further views on whether certain existing prospectus disclosures may benefit from being considered PFLS or where we may need to clarify the boundary between certain content requirements and PFLS to encourage effective use of the new regime.

Specialist issuers

30. Our rules currently require certain types of specialist issuers to include forward-looking statements in their prospectuses. For example, mineral companies are required to include indications of the current and anticipated progress of mineral exploration and/or extraction and processing. We consider that these types of forward-looking statements should continue to be subject to a negligence standard. Such expert opinions are important to the valuation of these types of issuers and are already required. Therefore, treating such information as PFLS would not appear to have any clear benefit. Rigour and assurance in the production of these reports, which liability helps to discipline, is an important safeguard against over-optimistic assumptions. However, as with the other mandatory disclosures, we would welcome views on this.

Prescriptive criteria

31. We could define PFLS using a prescriptive formulation, such as a list of specific key performance indicators that issuers could choose from according to the nature of their business. Alternatively, key performance indicators could be defined more broadly, using categories. This might provide more certainty as to what is acceptable as PFLS. However, an unduly rigid approach would necessarily limit the types of disclosures that could be made and therefore such an approach may limit the extent to which investors can benefit from the disclosure of PFLS. Alternatively, we could provide non-exhaustive examples of specific types of information that can be treated as PFLS. This may lead to frequent requests to us for guidance on what is permitted as PFLS, as it would be difficult for us to capture all conceivable key performance indicators. In turn, this could create uncertainty and/or time delays in preparing prospectus documents, reducing flexibility for issuers and advisors to make their own judgements versus more general criteria.

Sustainability-related information

32. One area which it may be appropriate to include within the scope of PFLS is forward-looking sustainability-related information. There are numerous types of forward-looking sustainability-related information that could potentially be relevant to investors seeking to understand an issuer's prospects. For example, issuers could provide more detail in their prospectus on their climate goals and the anticipated effects on their business, as

well as the mitigating actions they intend to take, in line with existing or future reporting frameworks (see Box 2).

33. However, while forward-looking statements on financially material sustainability issues may be of relevance to investors, issuers might be reluctant to provide detailed disclosure under a negligence-based liability standard, particularly given the uncertainty and long-term nature of some of the matters being considered. Where an issuer has discretion to consider the level of detail they provide in their disclosures, they may therefore be less forthcoming.
34. By extending liability protection to some categories of forward-looking statements on sustainability, we consider that issuers may be more willing to elaborate on their plans and the anticipated impact within a prospectus. This may benefit investors by having more comprehensive and forward-looking disclosures to inform their investment decisions.
35. Any protections for issuers and directors on their forward-looking statements, must be balanced against the need for investor protection. We therefore expect there to be areas of forward-looking information on sustainability which would not be eligible for inclusion as PFLS. For example, disclosure of sustainability issues which are prominent risk factors, or commitments made about activities to be carried out in the short term (such as those in the next year), could be excluded from the definition of PFLS, and remain subject to a negligence liability standard.
36. We would also need to consider the investor protections alongside any new minimum content requirements relating to sustainability-related information in the prospectus, as discussed in Engagement Paper 1: Admission to trading on a regulated market.

Box 2: Existing sustainability disclosures

There are several areas of sustainability-related reporting that are currently required of listed issuers in the annual report or that are in development which may be relevant in identifying types of forward-looking information to include in a prospectus.

The Listing Rules currently require premium listed commercial companies (LR 9.8.6 R (8)) and standard listed commercial companies (LR 14.3.27 R (1)) to provide a statement in their annual financial report on whether and how they have provided climate-related financial disclosures in line with the recommendations of the Task Force on Climate-Related Financial Disclosures (TCFD).

Building on these requirements, the Government's 2023 Green Finance Strategy reiterated the UK's support for IFRS Sustainability Disclosure Standards being developed by the International Sustainability Standards Board, and the government and FCA's intention to require reporting against the standards, subject to a UK assessment and endorsement process. This would extend reporting beyond climate to wider forms of sustainability-related risks and opportunities.

In April 2022, the Government also launched a Transition Plan Taskforce to develop a gold standard for private sector climate transition plans. Once the recommendations of the Taskforce are finalised, it is anticipated that the Transition Plan Taskforce Disclosure Framework and guidance may be used by issuers in future reporting on their transition plans.

Examples of the types of forward-looking statement included in these standards which it may be relevant to introduce in the prospectus in future include:

- Descriptions of future sustainability-related risks.
- Descriptions of future sustainability-related opportunities.
- Projections of the financial effects of risks and opportunities.
- Analysis of the resilience of the organisation's strategy or business under different scenarios, which can be quantitative or qualitative.
- Planned actions to mitigate sustainability-related risks and take advantage of opportunities - for example, issuers' climate transition plans.

Presentation of PFLS in a prospectus

- 37.** The illustrative POATRs specify that a forward-looking statement in a prospectus is PFLS if it is of a kind specified by us and is accompanied by a statement, in such form as may be required by our rules, which identifies the information as PFLS.
- 38.** HMT's UK Prospectus Regime Review consultation noted that the accompanying statement should be a disclaimer that warns investors about inherent uncertainty as to whether the PFLS will prove to be accurate. It should also state explicitly that a different liability standard applies.
- 39.** We consider that PFLS disclosures in a prospectus could either be: (a) included amongst the general content of the prospectus, with each PFLS disclosure accompanied by a disclaimer, or (b) contained within a separate and clearly labelled PFLS section in the prospectus. The persons responsible for the prospectus could choose which approach to use. Either way, we consider that it may be appropriate for the accompanying disclaimer to:
- identify the information in question as PFLS;
 - state that there is uncertainty about whether the forward-looking statement will prove to be accurate;
 - describe any significant factors that could cause the forward-looking statement to be inaccurate; and
 - state that the information in question is subject to a different liability standard compared with other information in the prospectus, which will make it more difficult for investors to claim for damages in the event of losses.
- 40.** For certain types of PFLS disclosures, we could also require that any key assumptions or inputs are included in the accompanying statement. This could be similar to the approach currently used for profit forecasts and estimates, whereby any principal

assumptions used to create the PFLS, including distinguishing between those within the control of the directors and those outside of their control, are disclosed. This may encourage greater oversight by company directors of any PFLS that is included in a prospectus.

- 41.** Where relevant, we are also considering whether to require the inclusion of an explanation of the relationship between the PFLS and the mandatory disclosures that are required by the necessary information test. This would ensure there are no obvious contradictions or inconsistencies in such statements, for example explaining any difference between historical financial information and PFLS such as issuer guidance on future earnings/revenue.
- 42.** Also, if the definition of PFLS does not incorporate the reasonable investor test (as proposed in paragraph 20 above), we consider that it would be helpful if the disclaimer could also warn investors that the issuer may not be obliged to update the market if the PFLS proves to be inaccurate. This will depend on the ongoing obligations under MAR to disclose inside information.
- 43.** We would welcome views on how to best delineate PFLS from other prospectus content (or whether to leave this choice to issuers provided the distinction is prominent) and whether there are any other aspects that the disclaimer should highlight.
- 44.** We would also welcome views on whether we should specify precise wording to be used or if a general description of what a risk warning/disclaimer should contain is sufficient. If we were to set specific wording, we may consider evidence from existing behavioural research on the use of disclosures to ensure such disclosures are effective.

Annex 1

Prospectus liability: High level comparison between liability approaches in FSMA and POATRs¹

| | FSMA Section 90/Schedule 10 liability | FSMA Section 90A/Schedule 10A ² liability | Illustrative POATRs PFLS liability |
|--|--|---|--|
| Persons subject to liability | Any person responsible for a prospectus (or supplementary prospectus). | Issuer | Any person responsible for a prospectus (or supplementary prospectus). |
| Liability standard for untrue or misleading statements | <p>Negligence</p> <p>If the claimant can prove loss as a result of an untrue or misleading statement, the negligence standard means the defendant has the burden of proving, amongst other things, they had a reasonable belief the information in the prospectus was accurate. Other defences, which are set out below in relation to the burden of proof, are also available.</p> | <p>Recklessness</p> <p>This standard requires the claimant to prove the person in question did not care about the truth of the statement such as to lack an honest belief in its veracity. Honest belief in the truth of a statement defeats a claim of recklessness, no matter how unreasonable the belief (though the more unreasonable the belief the less likely the finder of fact is to accept it was genuinely held).</p> | <p>Recklessness</p> |

¹ Please note the above comparison table sets out a high-level comparison between the liability approaches in the FSMA and POATRs and summary of the existing provisions in FSMA. For more details, please refer to the relevant legislative provisions.

² See also Autonomy & Ors v Lynch & Anr [2022] EWHC 1178 (Ch).

| | FSMA Section 90/Schedule 10 liability | FSMA Section 90A/Schedule 10A ² liability | Illustrative POATRs PFLS liability |
|---|---|--|---|
| Liability standard for omissions | <p>Negligence</p> <p>If the claimant can prove loss as a result of an omission, the negligence standard means the defendant has the burden of proving, amongst other things, they had a reasonable belief the information in question was properly omitted. Other defences, which are set out below in relation to the burden of proof, are also available.</p> | <p>Dishonesty</p> <p>Under section 90A/schedule 10A liability, a person's conduct is dishonest only if:</p> <p>(a) the conduct is regarded as dishonest by persons who regularly trade on the securities market in question; and (b) the defendant was aware (or must be taken to have been aware) that it was so regarded.</p> | <p>Dishonesty</p> |
| Burden of proof for untrue or misleading statements | <p>Claimant must prove loss as a result of an untrue or misleading statement. To avoid liability, the defendant must prove they are able to rely on a defence in Schedule 10 FSMA. For example, that the defendant was not negligent, the statement was made by a competent "expert" who had agreed to the statement's inclusion, the information in question was derived from an official statement or document, or the claimant knew the information was false or misleading when they completed their acquisition etc.</p> | <p>Claimant must prove loss as a result of an untrue or misleading statement. The claimant must also prove that a person discharging managerial responsibilities (PDMR) within the issuer knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading.</p> | <p>Claimant must prove loss as a result of an untrue or misleading statement. The claimant must also prove that the defendant knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading.</p> <p>To avoid liability, the defendant may rely on relevant defences in Schedule 2, Part 1 of the POATRs, which are broadly equivalent to the defences available under Schedule 10 FSMA.</p> |

| | FSMA Section 90/Schedule 10 liability | FSMA Section 90A/Schedule 10A² liability | Illustrative POATRs PFLS liability |
|-------------------------------|--|---|---|
| Burden of proof for omissions | Claimant must prove loss as a result of an omission. To avoid liability, the defendant must either prove they are able to rely on a defence in Schedule 10 FSMA. For example, the defendant was not negligent, or the claimant knew the information was false or misleading when they completed their acquisition etc. | Claimant must prove loss as a result of an omission. The claimant must also prove that a PDMR within the issuer knew the omission to be a dishonest concealment of a material fact. | Claimant must prove loss as a result of an omission. The claimant must also prove that the defendant knew the omission to be a dishonest concealment of a material fact. To avoid liability, the defendant may rely on relevant defences in Schedule 2, Part 1 of the POATRs, which are broadly equivalent to the defences available under Schedule 10 FSMA. |
| Reliance | Claimant is not required to prove they relied on the information in question. | Claimant must prove they relied on the information in question. | Claimant is not required to prove they relied on the information in question. |

