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Plausibility of Non-Factual Information, Protected Forward-Looking Statements in Public Offers, Private Placements and Public Offer Platforms

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In 2025 the FCA will introduce new rules that will launch the concept of Public Offer Platforms, or "POPs", as they are referred to. POPs will make it easier for growth companies, which are admitted to a POP by its FCA authorised operator to raise capital, as those who stand on a platform stand above the crowd. The idea of POPs, therefore, makes sense even if the acronym "POP" is somewhat unfortunate.

As one might expect, a POP operator must undertake its due diligence on aspirant POP companies and the draft FCS Conduct of Business Sourcebook text ("**COBS**") provides guidance on how a POP operator should go about this. A POP operator is told that:

> "*Non-factual information is that information* ***which cannot be objectively verified*** *as it is reliant on the occurrence of a future event,* ***including growth forecasts and expected rates of return****"*
>
> Draft FCA COBS text 23.4.2 G (Published 2024)

This FCA guidance, helpfully confirming that the future cannot be predicted, sits oddly alongside the FCA's additional guidance to a POP operator, that it should

> *"**take reasonable steps to:***
>
> (a) *verify factual information that it receives under COBS 23.3; and*
>
> (b) ***assess the plausibility of non-factual information*** *in relation to a proposed qualifying public offer."*
>
> Draft FCA COBS text 23.4.1 G (Published 2024)

If non-factual information is that which cannot be objectively verified, what are the reasonable steps that could ever be taken to **assess the plausibility of non-factual information**?

The philosophical answer, beauty being in the eye of the beholder, may be that the FCA would consider those steps which any particular POP operator would regard as being reasonable as

reasonable even if others, whether a POP operator or not, might not regard the steps actually taken as being reasonable, or sufficiently reasonable.

This subjective approach to the conundrum of how one might ever verify the strength of future predictions with any confidence is possibly affirmed by the FCA rule itself which, very helpfully, only requires that before facilitating a qualifying public offer a POP operator:

> *"… must take reasonable steps **to satisfy itself** that non-factual information about the issuer or qualifying public offer is plausible"*
>
> Draft FCA COBS text 23.4.4 (Published 2024)

So there we have it. A POP operator need only ever satisfy itself. However, there are two possible alternative interpretations of this rule.

The first interpretation is that this is ultimately a test of honesty which nevertheless admits the possibility of a POP operator being negligent in the judgment of its peers or just plain stupid; but who will discharge its duty as a POP operator if it takes all those steps that it alone regards as sufficient to satisfy itself that certain events are more likely than not to occur in the future, *'including growth forecasts and expected rates of return'*.

The second alternative interpretation is that the steps that are taken must be reasonable in the eyes of others.

I prefer the first interpretation given the FCA guidance referred to above that non-factual information is that information which cannot be objectively verified. If something cannot be objectively verified its discovery is not susceptible to steps being taken that are reasonable in the eyes of others, particularly if the context is that of a POP operator who is easily satisfied.

It would be prudent to assume that, if future predictions go awry, the FCA will want to apply the second interpretation.

What does 'plausible' mean in any event?

To add complexity to the philosophical quagmire of when the happening of future events can be regarded as probable, likely, more likely than not, about as likely as not, unlikely or exceptionally unlikely, the FCA intends that directors of companies raising capital on a listed market or on a multi-lateral trading facility should be free to make 'protected forward looking statements', but not so, it seems, those directors raising capital on a POP.

On whom should one rely? And as an investor, on this point alone, should I prefer POPs over regulated markets and MTF platforms where forward looking statements are protected?

First, though, the new ground rules for raising capital.

On 30th January 2024 The Public Offers and Admissions to Trading Regulations 2024 ("**POATRS**") came into force. Under these new rules a company can raise any amount by way of an offer extended to no more than 150 persons in the UK in total; and/or by an offer where the minimum investment per share is at least £50,000; and/or by an offer where the minimum investment per investor will be at least £100,000 (a "**Private Placement**").

Beyond these limits (and a few other exemptions) an offer to the public is now restricted so that within any rolling period of 12 months a company cannot, by one or more offers, seek to raise more than £5m (a "**Public Offer**"). Before the introduction of the POATRS it was possible, BrewDog style, to seek FCA approval for a prospectus to be published in connection with an offer of shares to raise more than £5m. This is no longer the case, except for shares that will be listed on a regulated market, a multi-lateral trading facility or a POP.

The new POP rules will allow more than £5m to be raised by a non-listed, non MTF Public Offer of shares if the offer will be made on a designated POP and is one in respect of which the operator of that platform will accept a degree of responsibility, along with the directors, for what is said in the offering document.

These new POP rules have been the subject of an FCA consultation and so the final POP rules are yet to be published and, additionally, as yet, there will be no persons authorised by the FCA to act as a POP operator. 2025 will therefore be a year of regulatory development. Our own regulated company, Paxiot Limited, may apply to the FCA in due course for authorisation as a POP operator once the final POP rules for operators are published.

This means that, at the moment, any fund raising by unlisted or non MTF companies is restricted to a £5m Public Offer plus whatever might be raised by way of a Private Placement.

There are also rules which govern and restrict how any Private Placement or Public Offer can be marketed. An unauthorised person must not communicate an invitation or inducement to engage in investment activity (a "**Financial Promotion**") unless either: the content of the communication is approved by an FCA authorised approver; or it is exempt.

I am pleased to say that Paxiot obtained an FCA approver permission in the first wave of these permissions being issued by the FCA a few months ago in respect of listed shares, unlisted shares, units and debentures.

The basis on which a Public Offer of non-readily realisable securities can be approved by an authorised approver is regulated by the FCA in its Conduct of Business Sourcebook ("**COBS**").

Private Placements are often dealt with under exemptions contained in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 SI 2005/1529 ("**FinProm**"). These obviate the need for an authorised approver, but whilst a Financial Promotion marketed under FinProm is not currently regulated by the FCA, the FCA has been given the power under the POATRS to make new rules which will be introduced in due course and which will govern how unauthorised persons market shares that will not be listed on a regulated market or on a multi-lateral trading facility.

These various marketing rules, grit in the machinery of capital raising, are not the subject of this article. What I want to draw attention to are the differing liabilities and levels of liabilities of those who assume or are deemed to assume responsibility for a Financial Promotion.

It sounds eminently reasonable that any Financial Promotion, whether made as part of a Public Offer or a Private Placement, should provide investors with sufficient and reliable information so they can make an informed decision before they invest but on what basis can future predictions of growth and expected rates of return ever be sufficient and reliable?

Probability is an elusive phenomenon, incapable of direct observation and measurement for, as David Spielgelhalter tells us, in the introduction to his book *The Art of Uncertainty – How to Navigate Chance, Ignorance, Risk and Luck* (Published 2024):

> *"[Uncertainty is not a property of the world] but of our relationship with the world. This means that two individuals or groups can, quite reasonably, have different degrees of uncertainty about exactly the same thing, due to them having different knowledge or perspectives."*

Mr Spielgelhalter also tells us that one of the most widely used 'translations' of how one should interpret what is '*likely*' was developed by the Intergovernmental Panel on Climate Change ("**IPCC**") which expressed its degrees in terms of a percentage probability:

Term	*'Likelihood' of the outcome (probability)*
Virtually certain	99-100%
Extremely likely	95-100%
Very likely	90-100%
Likely	66-100%

More likely than not	50-100%
About as likely as not	33-66%
Unlikely	0.33%
Exceptionally unlikely	0.1%

Where, on this scale, does the FCA concept of plausibility sit?

The thing is, this is such an odd word to choose as any measure of reliability. The Cambridge English Dictionary defines the word ‘plausible’ as that which is seeming likely to be true, or able to be believed but which might or might not happen. On the IPCC scale this might suggest a probability outcome percentage of 50-100%. The Oxford English Dictionary is more circumspect and contains a number of definitions regarded as current and when used in respect of an argument, an idea, or a statement, that which is ‘plausible’ is that which is ‘seeming reasonable but which may have a false appearance of reason or veracity; that which is specious’. On the IPCC scale the OED definition might rank that which is plausible at only 33-66%.

My advice to POP operators would be to undertake due diligence until they are 50-100% satisfied that *growth forecasts and expected rates of return* are likely to be achieved, but if ever challenged by the FCA a POP operator should argue that the standard only required them to be satisfied that *growth forecasts and expected rates of return* were about as likely as not to be achieved, 33-66%.

It is a key policy objective of the FCA that sufficient due diligence checks are carried out on companies issuing shares in order to assess their appropriateness and mitigate risks of fraud to promote genuine capital raising and support market integrity and investor confidence. Any statements in a prospectus or MTF admission prospectus should be made carefully, must not omit any material information and must be capable of verification by reference to available documentation.

It follows that it is not enough for a business plan to merely contain a summary of the vision and mission and the nature of the intended trade. In order to convert this into a Financial Promotion that can be published it needs to contain a lot of background detail on the experience and expertise of the directors and managers of the proposed business, the material facts regarding the establishment and costings of the business and its financial prospects (which means its growth forecasts and expected rates of return).

If the FCA finds that a listed or MTF company is failing or has failed to comply with its obligations then, under the POATRS, it may impose a penalty of such amount as it considers appropriate.

If the FCA considers that a person who was at the material time a relevant officer of a listed or MTF company and was knowingly concerned in a contravention, it may impose on that person a penalty of such amount as it considers appropriate. For these purposes, if the affairs of the company are managed by its members, they may also be penalised.

These POATR rules in general apply a negligence liability standard and so there are steps that directors can take to avoid or mitigate their potential liability, for example by placing reliance on the statements of experts.

If one applies a negligence standard of responsibility for predictions of future *growth forecasts and expected rates of return* this might deter issuers from including forward-looking statements in a Financial Promotion. This can include issuers contemplating an initial public offer in the near future given the need to publish outstanding profit forecasts in a prospectus or an MTF admission prospectus.

To redress this, the POATRs will introduce a lower level of responsibility for what is termed a "protected forward-looking statement". This will be a threshold level of responsibility that is based on fraud or recklessness, with the burden of proof placed on investors claiming a loss.

A "forward-looking statement" includes: a statement containing a projection, estimate, forecast or target; a statement giving guidance; a statement of opinion as to future events or circumstances; or a statement of intention.

To shelter within this new safe harbour from potential negligence claims a "protected forward-looking statement" must be one of a kind as yet to be specified by the FCA and which, additionally, is accompanied by a statement which identifies a forward-looking statement as one that is 'protected'.

Accordingly, under the POATRS a person responsible for a prospectus will not incur any liability in respect of any investor loss caused by a protected forward-looking statement, and is not subject to any other liability in respect of any loss caused by such a statement, unless they knew the protected forward-looking statement to be untrue or misleading or were reckless as to whether it was untrue or misleading, or knew the omission from the protected forward-looking statement to be a dishonest concealment of a material fact.

This new lower risk liability standard for forward-looking statements will reduce the prospect of successful investor claims. On this basis it may be logical to assume that it will encourage

the inclusion of forward-looking information in prospectuses. Is this helpful? Well that depends. If a forward-looking statement turns out to be correct, then with the benefit of hindsight it will be said that this new approach better informed valuations and pricing. If a forward-looking statement proves to be wide of the mark, what then will be said?

The FCA propose to use a general definition that will apply to all protected forward-looking statement disclosures, category-specific criteria, and specific exclusions on the basis that protected forward-looking statements can be divided into two categories, either financial or operational information. There will also be specific exclusions for forward-looking statements that the FCA considers should remain subject to the existing prospectus negligence liability standard and which are not excluded by the category-specific criteria. So, issuers and their advisers will need to consider what is or is not a protected forward-looking statement and show how a possible statement can be verified as qualifying for the new reduced liability standard of responsibility.

What is the ground being argued over in all of this? What is the difference between a statement that is legitimately made under these new FCA rules albeit negligently in the eyes of one's peers and one that is made with reckless abandon? The OED defines what is reckless as being 'heedless of or indifferent to the consequences of one's actions; lacking in prudence or caution, willing or liable to take risks; rash, foolhardy, irresponsible'.

It might be predicted with some certainty, say 90-100% on the IPCC scale, that a significant increase in forward-looking statements in prospectuses may also have an impact on the UK securities litigation landscape.

A final word about POPs.

The POATRS don't deal with Directors' liability for offers of non-readily realisable shares issued on a POP, though new FCA rules may change this. So POP operators, whose toes will be held to the fire as to what is plausible, perhaps on an IPCC scale of 50-100%, are likely still to require directors to give warranties and indemnities based on a negligence standard.

Ultimately, the judgment of what is plausible is one for investors to take according to their knowledge and perspective, not a judgment that a POP Operator should be expected to take on behalf of all potential investors. That investors ought to be able to rely on factual information is one thing, but as to the future, investors should be on their own. Uncertainty is personal and our own knowledge can mean we have very different uncertainty to someone else.

In the absence of a market-based price discovery mechanism, the valuation of securities is an art, not a science, particularly for companies whose prospects are uncertain because their businesses are not yet established, let alone stable. There can be no objective measure of

whether a value proposition is properly aligned with a company's financial objectives and POP operators and directors should not be expected to provide regulatory protection to investors who make an investment decision to acquire securities whose ultimate value does not meet their expectations.

In any final analysis, it is reputation that counts. It can only be hoped that these new FCA rules will be interpretated in a way which allows this truth to prevail.

Reputation is all.

Roger Blears
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