

CP11/28**

Financial Services Authority and HM Treasury

UK implementation of Amending Directive 2010/73/EU

Simplifying the EU Prospectus and
Transparency Directives



HM TREASURY

December 2011



Financial Services Authority

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The Financial Services Authority and HM Treasury invite comments on this joint Consultation Paper. Comments should reach us by 13 March 2012.

Comments may be sent by electronic submission using the form on the FSA's website at: www.fsa.gov.uk/Pages/Library/Policy/CP/2011/cp11_28_response.shtml.

Alternatively, please send comments in writing to:

Jonathan Rees
Market Infrastructure and Policy
Financial Services Authority
25 The North Colonnade
Canary Wharf
London E14 5HS

Telephone: 020 7066 2726

Fax: 020 7066 2727

Email: cp11_28@fsa.gov.uk

It is the policy of both the FSA and HM Treasury to make all responses to formal consultation available for public inspection unless the respondent requests otherwise. A standard confidentiality statement in an email message will not be regarded as a request for non-disclosure.

A confidential response may be requested from us under the Freedom of Information Act 2000. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Information Commissioner and the Information Tribunal.

Copies of this Consultation Paper are available to download from the website – www.fsa.gov.uk. Alternatively, paper copies can be obtained by calling the FSA order line: 0845 608 2372.

Abbreviations used in this paper

CBA	cost benefit analysis
DTRs	Disclosure and Transparency Rules
EEA	European Economic Area
ESMA	European Securities and Markets Authority
EU	European Union
FSA	the Financial Services Authority
FSMA	the Financial Services and Markets Act 2000
LRs	Listing Rules
MiFID	Markets in Financial Instruments Directive
SMEs	small and medium sized enterprises
PRs	Prospectus Rules

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Overview

Introduction

- 1.1 On 24 November 2010, the European Parliament and Council adopted the Amending Directive 2010/73/EU, which revised the Prospectus Directive (2003/71/EC) and Transparency Directive (2004/109/EC). The Amending Directive was published in the Official Journal of the European Union on 11 December 2010 and came into force on 31 December 2010. **Member States have until 1 July 2012 to implement the Directive in national legislation.**
- 1.2 This consultation sets out the way in which the UK intends to take forward the implementation of the Amending Directive. Responsibility for this is shared between HM Treasury, which has the power to make changes to the Financial Services and Markets Act 2000 (FSMA), and the Financial Services Authority, under its Prospectus Rules (PRs), Listing Rules (LR) and Disclosure and Transparency Rules (DTRs). This joint consultation paper clearly delineates the relevant areas of responsibility for each body through the provision of separate commentary, legal drafting, and impact assessments. A single response can be made to both bodies, however, using the contact details provided in this consultation paper.

Background and purpose of the review

- 1.3 The Prospectus Directive first came into force on 1 July 2005. It provides the EU framework that governs the preparation of prospectuses for public offers of securities, and for the admission of securities to trading on a regulated market. Its objectives are to enhance investor protection and improve the efficiency of the single market. The key innovation brought about by the introduction of the Prospectus Directive was the creation of a passport across the European Union's capital markets – allowing a prospectus approved in one Member State to be valid across the EU. The Transparency Directive sets out ongoing disclosure requirements that issuers must make once their securities are admitted to trading.

- 1.4 Under Article 31 of the Prospectus Directive, the European Commission was required to undertake a review of the effectiveness of the Prospectus Directive five years after its entry into force. The Commission's assessment, following a review in 2009, found that the prospectus regime was broadly operating well and that the quality and appropriateness of information given to investors had improved. However, the review identified a need to increase legal clarity and the overall efficiency of the prospectus framework, as well as an opportunity to simplify the regime for the benefit of issuers, without compromising investor protection.
- 1.5 An issue of duplication was also examined. The Amending Directive made changes to both the Prospectus and Transparency Directives to ensure that issuers were not required to duplicate their disclosures under the two regimes and to ensure the two regimes are aligned. Implementation of the modifications to the Transparency Directive, to be set out in the Disclosure and Transparency Rules (DTRs), is the responsibility of the FSA and considered in Chapter 3.
- 1.6 In brief, the key changes that have been made to the Prospectus Directive fall into the following categories:
- **Proportionate disclosure regime:** This was introduced for small companies admitted to trading on a regulated market; pre-emptive offers of equities; and for offers of debt securities by lenders (totalling up to €75 million per year). The requirements of the proportionate disclosure regime will be set out in Level 2 legislation developed by technical work conducted by the European Securities and Markets Authority (ESMA) at Level 2.
 - **Prospectus summaries:** Improvements have been made to strengthen the format, content and comparability of the prospectus summary. The extent to which liability ought to attach to the prospectus summary has also been clarified. Further work is being undertaken at Level 2 to determine the specific contents and format of a summary.
 - **Final Terms and Supplementary Prospectuses:** The Amending Directive clarifies that final terms to a base prospectus should only contain information which is specific to the issuance. The specific demarcation of information between final terms and a supplementary prospectus is being undertaken at Level 2.
 - **Exemptions and thresholds:** Revisions have been made as to the scope of provisions and exemptions which determine when the Prospectus Directive applies and whether a prospectus is needed. These generally involve increases in the threshold and exemption amounts. The Amending Directive also extends the current exemptions from producing a prospectus for employee share schemes to benefit non-EEA companies with employees in the EEA.
 - **Retail cascades:** The exemption from the obligation to publish a prospectus for subsequent resales of securities through intermediaries (known as the 'retail cascade') has been formalised.

- **Supplementary prospectuses and withdrawal of rights:** Clarification is provided as to the period for which a supplement must be produced. Additionally, the rights of investors to withdraw from an offer have been clarified.
- **Alignment with other EU regulation:** Disclosure requirements which overlap with the Transparency Directive have been repealed. Additionally, the definition of a ‘qualified investor’ has been brought into line with the Markets in Financial Instruments Directive (MiFID) definition.

Level 2 Prospectus Regulation

- 1.7** On 25 January 2011, the European Commission published its mandate to ESMA to provide advice on delegated acts concerning the Prospectus Directive, as amended by the Amending Directive. At Level 2 – Level 1 being the final text agreed following negotiation – ESMA undertakes technical policy work to make recommendations to the Commission to inform any subsequent implementing acts. ESMA published its first set of proposals for consultation on 15 June 2011. It was requested to deliver its advice by 30 September 2011 on three areas: the proportionate disclosure regime for small and medium sized issuers, prospectus summaries and final terms. On 4 October 2011 ESMA published its report¹ to the Commission setting out technical advice on possible delegated acts.
- 1.8** The European Commission has indicated that it wishes to adopt delegated acts by 31 December 2011. Allowing for two three-month objection periods by the European Parliament and Council, this takes the timetable to 1 July 2012. It is expected that the delegated acts will amend the Commission’s Prospectus Regulation², extracts of which are reproduced in the FSA’s Prospectus Rules. ESMA will deliver the remaining technical advice relating to the rest of the Commission’s mandate³ in due course.
- 1.9** In particular, in December ESMA is publishing its second consultation paper for technical advice on possible delegated acts. Its shortened consultation covers retail cascades and four issues relating to items in the Commission’s Prospectus Regulation.

UK implementation of the amendments to the Prospectus Directive

Early implementation of specific amendments

- 1.10** In 2010, the Government produced its *Financing a Private Sector Recovery* green paper to assess and, where possible, alleviate the obstacles to private sector growth. Part of this

¹ ESMA/2011/323

² Commission Regulation 809/2004

³ The mandate and request for advice from the European Commission to ESMA is available here: http://ec.europa.eu/internal_market/securities/prospectus/index_en.htm

review focused on the role of non-bank financing and the importance of increasing ease of access to equity finance for SMEs. As part of this review, the Government committed to take immediate steps to bring into effect deregulatory measures in the revised Prospectus Directive so that small companies could access capital markets more easily.

- 1.11** The two measures that the UK introduced early are changes to Articles 1(2)(h) and 3(2)(b) of the Prospectus Directive. They raise:
- a) the total size of the offer that may be made to investors before the offer falls within the scope of the prospectus regime. This rises from €2.5 million to €5 million; and
 - b) the threshold for the number of investors to whom an offer may be made before a prospectus is required, from 100 to 150 investors.
- 1.12** The Government published a consultation on early implementation measures in March 2011, which received universal support from industry. The savings envisaged for small companies, by reducing the number of offers that are caught by the prospectus regime, were estimated to be approximately £12m per year. The new regime came into effect on 31 July 2011, approximately a year ahead of the EU deadline. These changes were made by amending FSMA; the Prospectus Rules were subsequently changed to reflect the increased threshold for the number of investors to which an offer can be made.
- 1.13** As these measures and the cost-savings envisaged have already been subject to consultation and cost benefit analysis, they are not considered further here. A copy of the statutory instrument (SI 2011/1668) is included in Appendix 2.

Implementation of remaining amendments

- 1.14** Implementation of the remaining amendments is addressed in this consultation paper. Participants have three months to respond before the submission deadline of 13 March 2012. Your responses are important to us – and the FSA and HM Treasury would like to thank you in advance for contributing to our policy process.
- 1.15** Additionally, a small change is made in the statutory instruments to reflect the fact that we expect the European Economic Area (EEA) to sign up to the amended Prospectus Directive, meaning that the new regime will apply beyond the EU to Norway, Lichtenstein and Iceland. All measures in the Prospectus Directive that apply to the EU have been modified in the statutory instruments to cover the EEA. In the unlikely event that this does not happen by 1 July 2012, we will revert to the ‘European Union’ wording in the Directive.

CONSUMERS

This consultation paper will be of interest to consumers as investors – directly, or indirectly through institutions – as the Prospectus Directive raises issues concerned with the protection of investors.

INDUSTRY PARTICIPANTS

This consultation paper will be of direct interest to industry participants as the policy proposals addressed in Chapters 2 and 3 raise concerns with simplification and clarification of the prospectus regime and alignment with other directives.

2

FSMA implementation

Introduction

- 2.1** This section looks at the measures in the Amending Directive for which HM Treasury has responsibility. These measures will be implemented in to UK law through FSMA. A copy of the relevant draft statutory instrument can be found in Appendix 1.
- 2.2** The Government's 'better regulation' policy requires all instruments that are laid before Parliament to be subject to a statutory review five years after they come into force. This is to ensure that regulation is transposed efficiently into UK law, provides clarity to industry, and fairly reflects the underlying directive to which it relates. As the new prospectus regime comes into effect on 1 July 2012, the review of the UK's implementation will be concluded by 1 July 2017. Deregulatory measures in the Prospectus Directive that have been subject to early implementation in the UK will also be considered at the same time. The Government's better regulation policy also requires the principle of 'copy out' to be used, where possible. This means that wherever possible and where consistent with FSMA, EU legislation will be subject to direct 'copy out' into UK law. The FSA will also apply this principle with respect to amendments made to its Prospectus Rules.
- 2.3** We welcome comments on any aspect of the implementation and, in particular, we welcome information on the likely costs and benefits of the policy changes outlined. Where we are seeking views on a specific point, we have inserted a consultation question.

Exemptions and thresholds

- 2.4** The Commission's review of the Prospectus Directive included an assessment of the thresholds which determine if a prospectus needs to be published – whether because the offer or admission is outside the scope of the Prospectus Directive or because the Directive provides a specific exemption.

Deregulatory changes

- 2.5 Part of the Commission's objective in reviewing the Prospectus Directive was deregulatory, seeking to lift more offers outside the prospectus regime. In the UK, the Government's *Financing a Private Sector Recovery* green paper response committed to bringing forward certain deregulatory measures early.⁴ These were: an increase in the threshold for the number of investors to whom an offer may be made before a prospectus is required (from 100 to 150 investors), and an increase in the total size of the offer (from €2.5 million to €5 million). Bringing these measures into effect early in the UK has allowed small businesses to access the capital markets more easily.
- 2.6 Although not subject to early implementation in the UK, the Prospectus Directive also provided for an increase in the exemption threshold for debt securities issued in a continuous or repeated manner by credit institutions over a 12 month period, from €50 million to €75 million. The revision is made to Article 1(2)(j) of the Prospectus Directive.

Member State guarantees

- 2.7 A new provision was also introduced so that offers or the admission of securities to trading involving securities that are guaranteed by a Member State may omit information about the guarantor. This is set out in Article 8(3)(a) of the Prospectus Directive.

Providing certainty of scope

- 2.8 Changes were also made to provide issuers with greater jurisdictional certainty for international offers. Article 1(2)(h) of the Prospectus Directive specifies the maximum size of an offer that can be made before it falls within the scope of the prospectus regime. Another Article – Article 3(2)(e) of the Prospectus Directive – provides an exemption from the requirement to publish a prospectus. The revised Prospectus Directive clarifies that these two thresholds apply to offers *made in the EU*.

Stricter thresholds

- 2.9 While the Commission's objectives were to simplify and deregulate where possible, focusing on small issues at the lower end of the financing spectrum, one of the main purposes of the Prospectus Directive is to safeguard investor protection. For this reason, some *stricter* thresholds were also introduced as part of the review, for offers at the higher end of the financing spectrum. These were as follows:
- 2.10 The Amending Directive has increased the amount of capital a single investor must provide, in order for issuers to benefit from an exemption from producing a prospectus. This threshold is increased from €50,000 to €100,000 and is intended to correspond with offers

⁴ See: www.bis.gov.uk/assets/biscore/corporate/docs/f/10-1242-financing-business-growth-response.pdf

made to institutions and professionals who are sophisticated enough not to require a prospectus. This limit was increased to reflect concerns that retail investors may be committing €50,000 to a single investment, without necessarily having adequate understanding of the investment and associated risks or benefiting from the safeguards provided by being issued with a prospectus. The higher threshold means that issuers targeting investors between €50,000 and €100,000 will now not be able to use the exemption from publishing a prospectus. The amendment is made in Article 3(2)(c) of the Prospectus Directive.

- 2.11** A consequence of this increase is to also increase the ‘denomination per unit’ for an offer of securities, so that a security’s denomination must be at least €100,000 (as opposed to the previous €50,000) for the offer to continue to be exempt from the obligation to produce a prospectus. The amendment is made in Article 3(2)(d) of the Prospectus Directive.
- 2.12** A threshold increase was also made, from €50,000 to €100,000, for offers of non-equity securities. Only offers made at or above €100,000 will now continue to qualify for reduced disclosure under the prospectus regime. The amendment is made in Article 7(2)(b) of the Prospectus Directive.

Consultation questions

- Q1:** How significant are the various threshold increases for industry? Which of these will be most used by the UK market, and are any not relevant to UK practice?
- Q2:** Of the stricter thresholds introduced, what effect and what costs (if any) will be imposed on the UK market?

Retail cascade

- 2.13** One of the issues addressed in the Amending Directive was how the prospectus regime would apply in the subsequent resale of securities through a financial intermediary. This is commonly referred to as the ‘retail cascade’.
- 2.14** The Amending Directive confirmed that a new prospectus was not required so long as a valid prospectus was still available and the issuer agreed to its use in writing. The period for which a prospectus is valid remains as 12 months. The revision is made in Article 3(2) of the Prospectus Directive. In unusual cases where the issuer is not the person who drew up the prospectus, a question arises whether the issuer’s consent should be obtained in addition to the consent of the person who drew up the prospectus. The optimal approach is likely to be that the consent of both parties is obtained, but the Government is interested in hearing views on this matter.

Consultation questions

- Q3:** Do you believe the consent of the issuer, individual responsible for drawing up the prospectus (if not the issuer), or both of the above, should be sought for subsequent resales of securities through intermediaries?

Prospectus summaries

- 2.15** The review of the Prospectus Directive introduced three significant areas of change for prospectus summaries.
- 2.16** The first of these is to introduce a provision to facilitate comparability of the summaries of similar securities. The detail, to bring about a common format of summaries, will be set out at Level 2. The provision for summary comparability is set out in Article 5(2) of the amended Prospectus Directive. The common format will eventually be included in the Prospectus Rules.
- 2.17** The second change was to introduce the concept of ‘key information’. This stipulates that investors must be given ‘essential and appropriately structured’ information for them to understand the nature of the risks posed by the issuer (and any guarantors). This is set out in Article 5(2) and Article 2(1)(s) of the amended Prospectus Directive.
- 2.18** Further work has been undertaken by ESMA at Level 2 on summaries and key information, although the Amending Directive stipulates that key information includes:
- a) a short description of the risks associated with and essential characteristics of the issuer and any guarantor, including the assets, liabilities and financial position;
 - b) a short description of the risk associated with and essential characteristics of the investment in the relevant security, including any rights attaching to the securities;
 - c) general terms of the offer, including estimated expenses charged to the investor by the issuer or the offeror;
 - d) details of the admission to trading; and
 - e) reasons for the offer and use of proceeds.
- 2.19** The third change is to clarify the liability attached to summaries for issuers. Currently, no liability is attached to the summary (including translations) unless it is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus. The revised Prospectus Directive also makes a provision here relating to the new concept of key information. Liability will also not attach to the summary unless, when read with the other parts of the prospectus, it fails to provide key information. This is set out in Article 6(2).

Consultation questions

- Q4:** Will investor protection be increased in the prospectus regime through comparability and the creation of 'key information' for summaries?
- Q5:** Has summary liability altered significantly through the changes to the prospectus regime?

Final terms

- 2.20** The review of the Directive sought to clarify the relationship between final terms with the base prospectus, and the level of disclosure that must be contained in the prospectus. Level 2 technical work by ESMA has developed a framework for final terms.
- 2.21** Two policy changes are reflected in Article 5(4) of the revised Prospectus Directive. These are that:
- a) final terms may only contain information that relates to the securities note (and must not be used to supplement the base prospectus); and
 - b) in addition to filing final terms with the home competent authority and making these available to investors, the issuer must also share final terms with the competent authority of the *host* Member State.

Supplements, and the right of withdrawal

- 2.22** Changes have also been made to the provision of supplements to increase legal certainty and consistency. Article 16 of the revised Prospectus Directive specifies that an issuer must produce a supplement for any significant new factor, material mistake or inaccuracy that arises with respect to information in the prospectus, which might affect the investor's ability to assess the investment offered. Investors who have previously agreed to subscribe to an offer enjoy certain entitlements to withdraw their acceptance of an offer when presented with a supplement.
- 2.23** Under the existing prospectus regime, the time specified for producing a supplement is either between the time the prospectus was approved and the offer closed, or the point when the instruments start to trade on a regulated market. The new regime clarifies that whichever of the two events is *later* will apply.
- 2.24** Changes are also made to an investor's right to withdraw his acceptance of an offer. These are set out in Article 16(2) of the Prospectus Directive, and can be summarised as follows:

- a) the investor's right to walk away will only apply where an offer is made to the public;
- b) the investor's right to withdraw from an offer ends when the offer closes and the securities are delivered. If a supplement is required after this time (because admission of the securities to trading will take place at a later date) the right to withdraw will not arise;
- c) the final date on which investors enjoy the right to withdraw must now be printed in the supplement; and
- d) the *minimum* two working days previously given to an investor to withdraw from an investment is now *fixed* at two days to create a consistent regime across the EU. (The issuer is given discretion if it wishes to give investors longer to consider the offer.)

Consultation questions

- Q6:** Do the changes regarding supplements in the prospectus regime codify existing market practice, or will they have a more significant effect on issuers and investors?

Alignment with EU legislation

- 2.25** The Commission's review of the Prospectus Directive also sought to align the Prospectus Directive with subsequent legislation, in particular MiFID and the Transparency Directive. With respect to MiFID, the amended Prospectus Directive aligns the definition of a qualified investor with the professional investor classification in MiFID. For the Transparency Directive, areas of duplication have been removed and the two directives aligned for consistency.

MiFID

- 2.26** Under the existing prospectus regime, a prospectus is not required for offers made only to 'qualified investors'. As the Prospectus Directive predated MiFID, the client classification categories of the two Directives were not aligned.
- 2.27** In Article 2(1)(e) of the revised Prospectus Directive, the exemptions now apply to MiFID categories of investor, namely: professional clients; persons treated as professional clients; and persons recognised as eligible counterparties. The intention of the Commission was to reduce cost and complexity on financial intermediaries having to cross-reference the status of investors, who would be treated differently under the two regimes.

- 2.28** As the MiFID regime is slightly wider than that provided for under the old prospectus regime, it is expected that issuers will benefit, as more investors will now be eligible for inclusion in private placements of securities.
- 2.29** The revised directive also specifies that investment firms (also aligned with the definition in MiFID), must now communicate their classification of their clients as professional or non-professional. They must do this, on request, to the issuer, ‘without prejudice to the relevant legislation on data protection’ (Article 2(1)(e)).
- 2.30** The Government considers that this language is ambiguous and could have two possible meanings: ‘subject to the firm complying with relevant data protection legislation’ or ‘without the firm needing to comply with relevant data protection legislation’. The Government considers that the first meaning is correct as otherwise it would introduce an exception to having to comply with data protection legislation (which would likely have been made explicitly). This in turn raises a question as to what data protection legislation is relevant. Necessarily, the Data Protection Act 1998 will be relevant for UK firms and clients but the Government would like to establish if there are circumstances where other data protection legislation may be relevant, where one or more parties is not based in the UK.

Consultation questions

- Q7:** What data protection legislation is relevant to take into account when applying the duties on investment firms set out in the Prospectus Directive?
- 2.31** As a result of aligning the Prospectus Directive with MiFID, the need for a central register to be maintained by competent authorities of ‘qualified investors’ under the Prospectus Directive has been removed. This is currently provided for in Article 2.3 of the Prospectus Directive, and transposed into Part 6 of FSMA under sections 84(3) and 87R.

EU supervision

- 2.32** The Amending Directive and the Omnibus Directive⁵ made changes to Article 18, which details the notifications that must be made following the approval of a prospectus by a competent authority. These changes reflect the creation of a new EU supervisory structure, as a response to the financial crisis, specifying what must be disclosed to and published by the new European Securities and Markets Authority. The changes to Part 6 of FSMA introduced by the Omnibus Directive (which mainly introduces references to ESMA) will come into force by 31 December 2011 in line with the deadline for transposition across Member States. A small number of further amendments of the same nature are being made to the Prospectus Directive by Omnibus II, currently being negotiated.

⁵ Directive 2010/78/EU

- 2.33** The revised Prospectus Directive specifies that the competent authority must also notify ESMA when a prospectus is approved (currently, the regulator needs only to notify the host competent authority). Both the host competent authority and ESMA are instructed to publish on their websites a list of certificates of approval. Additionally, the revised Article 18 clarifies that the issuer should be notified of the approval, by the home competent authority, at the same time the host competent authority is informed.

Consultation questions

- Q8:** How will issuers be affected by the alignment of the Prospectus Directive with other EU legislation?

Proportionate disclosure regime/Level 2

- 2.34** One of the main revisions to the Prospectus Directive, following the Commission's review, was the creation of a proportionate disclosure regime. This applies to: small companies whose shares are admitted to trading on a regulated market; pre-emptive offers of shares; and debt securities offered by certain lenders (totalling no more than €75 million per year).
- 2.35** The precise framework and requirements of the proportionate disclosure regime will be determined by the Commission with the benefit of technical work undertaken by ESMA at Level 2, which is not considered here.
- 2.36** A new provision is introduced in FSMA, however, in order to recognise the technical work delegated to ESMA. This captures ESMA's responsibility in relation to the new proportionate disclosure regime, and other Level 2 work.

Costs and impact of the new regime

- 2.37** In 2005, when the Prospectus Directive first came into effect, a fairly small transitional cost of £2.3 million was estimated by the FSA for issuers familiarising themselves with the new regime.⁶ This figure was calculated on the basis of two days of compliance officer time, at a rate of £400/day, for the 2,910 companies then listed on the London Stock Exchange.
- 2.38** As the changes to the Prospectus Directive are essentially modifications to the existing regime, rather than introducing a new regime, the familiarisation process is expected to be shorter in 2011/12. Considering that the introduction of the Prospectus Directive required only two days of time in 2005, our assumption is that it will take two hours of Compliance Officer (or equivalent) time for issuers to familiarise themselves with the amended regime. This provides a transition cost of approximately £0.4 million, based on the 2,620

⁶ See: www.legislation.gov.uk/ukxi/2005/1433/pdfs/ukxiem_20051433_en.pdf

companies currently listed on the London Stock Exchange (as of 31 July 2011). Companies admitted to trading on the regulated market of the PLUS Markets Group will also be affected. The cost of the Compliance Officer has been updated by the FSA to £70/hour to reflect earnings inflation since 2005.

- 2.39** As Level 2 work is still to be completed, it is unclear where specific costs, and benefits, will be experienced by market participants. Current Level 2 work suggests that the proportionate disclosure regime for pre-emptive offers appears to offer the most scope for cost-saving for those raising capital under the prospectus regime.
- 2.40** Broad estimates of the cost reduction possible were provided to the Commission as a result of the work of the UK's *The Rights Issues Review Group*.⁷ The Commission's Impact Assessment drew on this work to suggest that a shorter, proportionate prospectus would save issuers approximately €233,000.⁸
- 2.41** This compares with a 'full' prospectus costing between £350,000 and £600,000 per offer in the UK. Applying this saving to rights issues on the London Stock Exchange, conducted between July 2005 and July 2011, suggests approximately 18 offers would benefit from the short form prospectus each year, saving UK industry £3.3 million annually. Further detail on the costs and benefits of the new regime is set out in the impact assessment in Annex 2.

Consultation questions

- Q9:** How significant are the changes being made to the prospectus regime, and in what areas?
- Q10:** Is the time and £0.4m familiarisation cost estimate accurate? Are there further costs incurred on UK business and on what scale – for example, non-wage costs, or costs faced by non-issuers in familiarising themselves with the new regime?
- Q11:** Do you consider the cost-saving for business of a proportionate disclosure regime to be in the region of the Commission's estimate? What level of cost saving will issuers experience?
- Q12:** Do you agree with the overall costs and benefits outlined in this consultation paper and the impact assessment? Are there further costs and benefits and of what scale?

⁷ See: 'A Report to the Chancellor of the Exchequer: by the Rights Issue Review Group', November 2008.

⁸ See the Impact Assessment provided by the European Commission on changing the Prospectus Directive: http://ec.europa.eu/internal_market/securities/docs/prospectus/proposal_240909/impact_assessment_en.pdf, September 2009

- Q13:** How helpful is the greater legal clarity being given to issuers? Will this reduce the costs or make equity finance more attractive, or do the changes simply codify current market interpretation of the Directive?
- Q14:** Has investor protection been altered or strengthened through changes to the Directive?
- Q15:** On balance, will investors and issuers benefit from the changes to the regime?
- Q16:** The Government's objective is to copy out EU legislation. Do you have any comments on the way the Amending Directive has been implemented in the draft regulations, taking into account the existing implementation of the Prospectus Directive in 2005?
- Q17:** Do you have any other comments on the changes to the prospectus regime?

3

Prospectus Rules implementation

- 3.1** This chapter sets out our proposals for those amendments made in the Amending Directive which will be implemented through the FSA's Prospectus Rules (PR), Disclosure Rules and Transparency Rules (DTR) and Listing Rules (LR), rather than via HM Treasury's legislative changes to FSMA. These proposals have been developed in close consultation with HM Treasury. A copy of our draft Handbook text is included as Appendix 3.
- 3.2** Our existing rules include copy out of relevant extracts of FSMA. These will be updated to reflect the amendments to FSMA for which HM Treasury has responsibility. They include, but are not limited to, changes to the Glossary, PR 1.2.1 on the requirements for a prospectus, PR 2.1.2 on the requirement for a summary to be included in a prospectus and PR 3.4.1 on supplementary prospectuses. All such copy out changes appear in our draft Handbook text in Appendix 3.
- 3.3** Because the Prospectus Directive is maximum harmonising, we have little discretion in making most of the rule changes. Therefore we have, where possible, sought to copy out the changes in the Amending Directive into our Prospectus Rules.
- 3.4** We encourage market participants to review and respond to this consultation by 13 March 2012.
- 3.5** The Amending Directive also requires the European Commission to adopt certain delegated acts. These include measures in relation to: final terms; summaries; proportionate disclosure; equivalence of third-country financial markets (in the context of exemptions from the requirement to publish a prospectus for employee share schemes); retail cascades; and a review of certain provisions in the Prospectus Regulation.⁹ The Commission published a mandate to the European Securities and Markets Authority (ESMA) in January 2011 requiring technical advice in these areas. ESMA has consulted on the first three measures and published its advice regarding them on 4 October 2011.¹⁰ In

⁹ EC/809/2004

¹⁰ ESMA/2011/323

December 2011 ESMA publishes its second consultation paper, which looks at retail cascades and the review of certain provisions in the Prospectus Regulation. This FSA/HM Treasury consultation paper does not cover the amendments that will result from ESMA's work. The amendments are expected to lead to changes to the Commission's Prospectus Regulation, relevant extracts of which we reproduce in our Prospectus Rules for the convenience of the reader.

Exemptions and thresholds

- 3.6** The Amending Directive reviews and amends thresholds in the exemptions which determine when a prospectus is not required. We will reflect the changes HM Treasury is consulting on where those FSMA provisions are set out in the Prospectus Rules.

Exempt securities

- 3.7** Changes are being made to PR 1.2.2R and PR 1.2.3R that explain when a prospectus is not required for an offer or admission of securities. These arise from Article 4 of the Prospectus Directive and include:

- a) exemptions from the requirement to publish a prospectus if a document which has been deemed to be equivalent by the FSA is available, are being extended to cover divisions as well as mergers – PR1.2.2R(3) and PR 1.2.3R(4); and
- b) an amendment to the exemption from producing a prospectus for dividends paid to existing shareholders in the form of shares. It removes the reference to shares that are allotted free of charge. This arises as such cases are already covered by the exemption deriving from Article 3.2(e) of the Prospectus Directive that a prospectus is not required for offers of securities with a total consideration of less than €100,000 – PR 1.2.2R(4).

- 3.8** Another amendment, to Article 19.4 of the Prospectus Directive, results in the increase in the minimum denomination in PR 4.1.4R from €50,000 to €100,000. The impact of this change is that where admission is sought for any non-equity transferable securities with a denomination per unit of €100,000 the prospectus must be drawn up in either the language accepted by the competent authorities of the Home State and Host States or in a language customary in the sphere of international finance.

Employee share schemes

- 3.9** Article 4 of the Prospectus Directive has also expanded the circumstances when a prospectus will not be required in relation to securities offered or allotted to an issuer's directors and employees. We are amending PR 1.2.2R(5) to reflect these changes.

- 3.10** The current exemption depends on the issuer's securities already being admitted to trading. This has been replaced with a range of less onerous requirements, which vary depending on whether and where the issuer's securities are traded. The effect of this is that an EEA issuer is no longer required to have securities admitted to trading in order to benefit from the exemption. The exemption will be available where the company:
- a) has its head office or registered office in the EU;
 - b) is established outside the EU and its securities are admitted to trading on a regulated market; or
 - c) is established outside the EU and its securities are admitted to trading on a third country market for which the Commission has adopted an equivalence decision regarding that third country market. The Commission's mandate to ESMA has sought technical advice on how the Commission might assess such third country markets.

Prospectus summaries

- 3.11** As highlighted in paragraph 2.15 to 2.19 of Chapter 2 of this consultation paper, there have been changes for prospectus summaries. The Prospectus Rules copy out these changes in PR 2.1.
- 3.12** In addition, the exemption to produce a summary for a prospectus relating to non-equity transferable securities of a denomination of at least €50,000 has been raised to €100,000 in line with changes made to thresholds and exemptions.

Format and validity of a prospectus

- 3.13** Where an issuer has a valid registration document in place, only a securities note and summary need to be drawn up. Article 12 (2) has been amended slightly to clarify the treatment in the securities note of an issuer's material developments. We propose to make the related change to our sourcebook at PR 2.2.5R.
- 3.14** The Prospectus Directive provides that prospectuses are valid for 12 months. The Amending Directive changes the start of this period from when the prospectus is published to when it is approved. This change is reflected in PR 5.1.1R.
- 3.15** Registration documents are also valid for 12 months and the Amending Directive has inserted wording to clarify that this period when the registration document is approved. This change will be reflected in PR 5.1.4R.

Alignment with EU legislation

- 3.16** As previously mentioned in this consultation paper, the Commission's review of the Prospectus Directive aligned the directive with EU legislation enacted after the Prospectus Directive, including the Transparency Directive¹¹ and MiFID.¹² HM Treasury has already discussed the consequential changes to FSMA as a result of these amendments in paragraphs 2.25 to 2.30.
- 3.17** In addition to these changes, Article 10 of the Prospectus Directive which required issuers with securities admitted to trading on a regulated market to publish an annual information update has been deleted as it essentially replicated requirements under the Transparency Directive. Therefore, we intend to delete PR 5.2 (annual information update) in its entirety.
- 3.18** Article 11 of the Prospectus Directive addresses incorporation by reference. It has been amended to replace its reference to the Consolidated Admissions and Reporting Directive¹³ (CARD) with a reference to the Transparency Directive. We are amending PR 2.4 to reflect this change. As a result only documents filed under the Prospectus Directive or Transparency Directive may be incorporated. However, as Transparency Directive Article 19.1 requires the filing of all 'regulated information', which includes inside information disclosed under the Market Abuse Directive, we do not think this represents a significant change. Also, a minor amendment is being made to PR 2.4.3R to clarify that this information must be the most recent available to the issuer, offeror or person requesting admission.
- 3.19** Additionally, PR 2.4.1R(2) currently allows issuers to incorporate by reference information published in an annual information update. As the requirements for the updates are to be removed we are proposing to delete PR 2.4.1 R (2).

Changes to the Disclosure and Transparency Rules

- 3.20** Article 2 of the Amending Directive makes consequential changes to the Transparency Directive to align it with the amendments to the Prospectus Directive. The draft rule changes to the DTR sourcebook are available in Annex D of the draft Handbook text in Appendix 3.
- 3.21** Most of the changes to the DTRs involve increasing the threshold for use of the exemptions from certain financial reporting and other requirements for issuers of high denomination debt from €50,000 to €100,000 in line with the exemption threshold for the Prospectus Directive.
- 3.22** At the moment issuers that issue exclusively debt securities with a denomination of at least €50,000 are not subject to certain disclosure requirements. These are: DTR 4.1 on annual financial reports; DTR 4.2 on half-yearly financial reports; and DTR 4.3 on interim management statements. DTR 4.4.2R is being amended to reflect the increase of this

¹¹ 2004/109/EC

¹² Markets in Financial Instruments Directive; 2004/39/EC

¹³ 2001/34/EC

threshold to €100,000. An identical increase in denomination of debt securities is made in DTR 6.1.15R which is concerned with the EEA State chosen as a venue for meetings for debt securities holders. Finally, an amendment regarding the use of languages for the disclosure of information in DTR 6.2.8R, has been made to take account of the increase of the threshold to €100,000.

- 3.23** New transitional provisions have been inserted into the DTR sourcebook which will allow issuers that had debt securities denominated at €50,000 admitted to trading on or before 31 December 2010 to continue to benefit from the exemptions described above for the remaining term of those securities. Issuers will however lose the benefit of the exemptions if they issue or have issued debt securities denominated at less than €100,000 after 31 December 2010.

Changes to the Listing Rules

- 3.24** Consequential changes are also being made to the Listing Rules for the increase in thresholds from €50,000 to €100,000. These are set out in Annex B to Appendix 3.

Further provisions

- 3.25** We are making two further amendments, to the provisions in PR 3.2 with regard to publication of a prospectus.
- a) Firstly, PR 3.2.4R (3) incorporates the changes to Article 14 of the Prospectus Directive giving issuers the option to publish their prospectus in an electronic form on either the issuer's own website *or* the website of the financial intermediary placing or selling the transferable securities as opposed to *both* websites.
 - b) Secondly, a new rule PR 3.2.4AR covers the new provisions in Article 14 of the Prospectus Directive which requires the issuer or person drawing up a prospectus to publish it electronically where the newspaper or printed form methods in PR 3.2.4R(1) and (2) have been used to make it available to the public.
- 3.26** We propose to delete our guidance at PR 2.1.5G that a summary to a prospectus should generally not exceed 2,500 words. This was derived from Recital 21 to the Prospectus Directive. In its technical advice to the Commission, ESMA noted that Recital 21 should be considered outmoded as the amended Prospectus Directive regime now requires comparability between summaries based on their format and content and the requirements for key information.¹⁴ The Commission will adopt new limits constraining the length of summaries as delegated acts.

¹⁴ Paragraphs 187 to 190; ESMA/2011/323

- 3.27** In addition to copying out the changes to FSMA in their final form as made by HM Treasury arising from the changes in definition of ‘*qualified investors*’ we are deleting PR 5.4R which set out the rules for the qualified investors register. This arises from the deletion of Article 2.3 of the Prospectus Directive and Recital 7 of the Amending Directive which states that no separate regime for registers should be maintained.

Consultation questions

- Q18:** Do you have any comments on our proposals relating to implementation of the amendments to the Prospectus Directive?
- Q19:** Do you agree with our transitional provisions for changes to the DTRs as set out in paragraph 3.23?

Annex 1

List of questions

HMT Questions

- Q1:** How significant are the various threshold increases for industry? Which of these will be most used by the UK market, and are any not relevant to UK practice?
- Q2:** Of the stricter thresholds introduced, what effect and what costs (if any) will be imposed on the UK market?
- Q3:** Do you believe the consent of the issuer, individual responsible for drawing up the prospectus (if not the issuer), or both of the above, should be sought for subsequent resales of securities through intermediaries?
- Q4:** Will investor protection be increased in the prospectus regime through comparability and the creation of 'key information' for summaries?
- Q5:** Has summary liability altered significantly through the changes to the prospectus regime?
- Q6:** Do the changes regarding supplements in the prospectus regime codify existing market practice, or will they have a more significant effect on issuers and investors?

- Q7:** What data protection legislation is relevant to take into account when applying the duties on investment firms set out in the Prospectus Directive?
- Q8:** How will issuers be affected by the alignment of the Prospectus Directive with other EU legislation?
- Q9:** How significant are the changes being made to the prospectus regime, and in what areas?
- Q10:** Is the time and £0.4m familiarisation cost estimate accurate? Are there further costs incurred on UK business and on what scale – for example, non-wage costs, or costs faced by non-issuers in familiarising themselves with the new regime?
- Q11:** Do you consider the cost-saving for business of a proportionate disclosure regime to be in the region of the Commission's estimate? What level of cost saving will issuers experience?
- Q12:** Do you agree with the overall costs and benefits outlined in this consultation paper and the impact assessment? Are there further costs and benefits and of what scale?
- Q13:** How helpful is the greater legal clarity being given to issuers? Will this reduce the costs or make equity finance more attractive, or do the changes simply codify current market interpretation of the Directive?
- Q14:** Has investor protection been altered or strengthened through changes to the Directive?
- Q15:** On balance, will investors and issuers benefit from the changes to the regime?

Q16: The Government's objective is to copy out EU legislation. Do you have any comments on the way the Amending Directive has been implemented in the draft regulations, taking into account the existing implementation of the Prospectus Directive in 2005?

Q17: Do you have any other comments on the changes to the prospectus regime?

FSA Questions

Q18: Do you have any comments on our proposals relating to implementation of the amendments to the Prospectus Directive?

Q19: Do you agree with our transitional provisions for changes to the DTRs as set out in paragraph 3.23?

Annex 2

HM Treasury impact assessment

Summary: Analysis & Evidence

Policy Option 1

Description: Implement changes to the Prospectus Directive in the UK in accordance with the EU deadline (1 July 2012)

FULL ECONOMIC ASSESSMENT

Price Base Year 2012	PV Base Year 2012	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: +£27m

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	-£0.4m	0	-£0.4m

Description and scale of key monetised costs by 'main affected groups'

As only small changes are being made to the Prospectus regime, a modest familiarisation cost for issuers is calculated. This updates previous FSA cost-benefit analysis when the Prospectus Directive was first introduced in 2005.

Other key non-monetised costs by 'main affected groups'

In terms of a tightening of the current regime, the Amending Directive increases the amount of capital a single investor must provide if the issuer is to benefit from an exemption from producing a prospectus. This threshold will rise from €50,000 to €100,000. The Commission viewed €50,000 as too low a threshold to ensure adequate consumer protection.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	0	+£3.3m	+£27m

Description and scale of key monetised benefits by 'main affected groups'

More proportionate disclosure requirements (based on the current regime) will now be permitted in certain instances, particularly for rights issues. This will reduce the weight of disclosure and cost of producing a prospectus by around £3.3m annually. This may benefit existing shareholders too by encouraging issuers to undertake more rights issues, rather than private placements, helping avoid shareholder dilution. No detrimental impact is expected on consumers from proportionate disclosure.

Other key non-monetised benefits by 'main affected groups'

In addition to the proportionate disclosure regime, the chief benefits of the amendments are increases in the thresholds that determine when the requirement to produce a prospectus applies. Additionally, the regime has been altered to provide greater legal certainty for issuers and financial intermediaries, which will help simplify and make more attractive the raising of equity capital. No detrimental impact is expected on consumers.

Key assumptions/sensitivities/risks

Discount rate (%) 3.5

(i) Transition costs will be low as the regime is already familiar to market actors and its basic structure is not being changed. (ii) In terms of practical impact, considerable detail will be determined at Level 2 which could affect the level of benefit enjoyed. (iii) An adequate balance has been struck in revising the PD, to enable investor protection to remain strong while reducing the regulatory burden on issuers.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO? Yes	Measure qualifies as OUT
Costs: £0m	Benefits: +£3.3m	Net: +£3.3m		

Evidence Base (for summary sheets)

A. Background & policy objectives

The Prospectus Directive first came into force in 2005. It is implemented in UK law through provisions in the Financial Services & Markets Act 2000, for which HM Treasury has responsibility, and Prospectus Rules, for which the Financial Services Authority (FSA) has responsibility. This Impact Assessment covers only the areas of implementation for which HM Treasury has responsibility. The FSA will provide its own separate cost/benefit assessment.

The Prospectus Directive provides for two scenarios where a prospectus is required: firstly, when an offer of securities is made to the public and, secondly, when securities are admitted to trading on a regulated market. The purpose of the Directive is to harmonise requirements for the drawing up, approval and distribution of the prospectus, establishing a series of requirements with which companies must comply in terms of the content and format of the documentation given to investors.

The Directive's principal objectives are to enhance investor protection through the provision of high-quality, consistent information to investors, and to improve the efficiency of the single market. The key innovation brought about by the Directive for companies is that a prospectus approved in one Member State is valid across the EU, giving issuers a 'passport' across the EU capital markets.

On 9th January 2009, the Commission undertook a three-month public consultation to help inform how the Prospectus Directive could be improved. On 24th September 2009, the Commission published its proposal to review the Prospectus Directive. A final text was agreed following EU negotiations, was published in the Official Journal of the European Union, and came into effect on 31st December 2010.

B. Rationale for review

The European Commission had a duty, under Article 31 of the Prospectus Directive, to review the effectiveness of the Prospectus Directive five years after it came into effect. Additionally, the Prospectus Directive was identified in the Commission's 'Action Programme' of January 2007 as an area where simplification was possible to alleviate the regulatory burden on companies seeking to raise capital.

The main objectives of the Commission in undertaking the review of the Prospectus Directive were to:

- Evaluate the overall success of the regime and the protection afforded to investors;
- Identify ways to reduce the obligation on companies, without compromising investor protection;
- Improve and simplify the regime to ensure greater clarity and legal certainty.

Changes to the Prospectus Directive are generally welcome in that the review has identified areas of cost reduction and given greater legal certainty to businesses seeking to raise capital. No detrimental impact on consumers is envisaged.

C. Policy options

- **Policy option 1: Implement changes to the PD in the UK in accordance with the EU deadline**

The Prospectus Directive is a maximum harmonisation directive, which means that Member States are unable to go beyond the requirements of the Directive and have very limited discretion. Not to implement the changes to the regime runs the risk of the UK being infracted. The deadline for implementation is 1 July 2012.

Furthermore, the changes to the prospectus regime are broadly welcome. The revisions provide a rare example of deregulation at an EU level, simplifying and reducing regulatory burden on issuers while maintaining sufficient and high levels of investor protection.

Changes to the Prospectus Directive require amendments to the relevant areas of statutory legislation (FSMA) and regulatory requirements (FSA Prospectus Rules). This Impact Assessment covers only the areas of implementation for which HM Treasury has responsibility.

D. Scope and impact

The Prospectus Directive affects the following parties:

- **Issuers** – companies and organisations looking to access capital markets and/or make offers of securities to the public
- **Third-party service providers** – e.g. lawyers and financial institutions such as investment banks. These groups must be familiar with the regime in order to provide their advisory services
- **Investors** – who benefit from the protection afforded to them of having a single EU regime setting out the information with which they must be provided when issuers raise capital

The review of the Prospectus Directive sought only to update, rather than reform, the regime. No fundamental changes were made as the Commission's analysis found that the Prospectus Directive was operating well.

The amendments that were made reflect small revisions to the thresholds that determine when the requirement to produce a prospectus applies, as well as the introduction of more proportionate disclosure for certain types of offers in order to reduce the cost-burden on issuers. Finally, the revised Prospectus regime provides greater legal certainty, codifying market behaviour and interpretation of the original Directive.

On this basis, the cost of changing the regime, and the impact on the market, is assumed to be small. This reflects the fact that only minor improvements are being made to the existing regime, essentially to put the framework on a better legal footing and to codify existing market behaviour.

The impact of the revised regime on affected parties may be summarised as follows:

- **Issuers** – will benefit from greater legal certainty, increasing market confidence in raising capital. They will benefit from small changes in the numerical limits at which point the Directive applies, meaning a small number of offers no longer require a prospectus to be produced. Issuers will benefit from reduced, proportionate disclosure for certain types of qualifying offers, notably involving rights issues. A small transition cost is expected in order for this group to familiarise itself with the updated regime.
- **Third-party service providers** – familiarisation will be needed with the updated regime by those providing advisory services. The changes to the regime are slight, however. Furthermore, this group will by its nature monitor regulatory developments as part of the day-to-day cost of providing advisory services.
- **Investors** – may benefit in particular from changes to rights issues, where proportionate disclosure may result in more relevant prospectuses being offered to them, and the risk of their dilution is reduced (as rights offers will be cheaper and thus more attractive to issuers). As the changes to the Prospectus regime are slight, and proportionate disclosure will apply only where investors are not affected, their protection should not change. *(See also 'risk assessment'.)*

E. Outcome of the review – further detail

(i) Proportionate disclosure regime

One of the changes to the Prospectus regime is the creation of a reduced or 'proportionate' disclosure regime for certain kinds of public offer, based on current disclosure requirements.

The Directive makes provision for a proportionate regime to apply in three cases: (i) SMEs and companies admitted to trading on regulated markets with reduced capitalisation; (ii) for certain lenders undertaking repeat issues of debt securities (totalling up to €75m EUR per year); and (iii) for companies raising secondary equity finance through rights issues of shares.

The proportionate regime will draw on existing disclosure requirements under the Prospectus Directive but specify that certain information need not be provided. The intention is to reduce the weight of the prospectus without affecting investor protection. Its creation will not impose any new cost on issuers either as it simply reduces what is already required under a 'full' prospectus today¹.

Notably, the development of the proportionate disclosure regime is being taken forward at Level 2 by the newly created European Securities & Markets Authority (ESMA). ESMA will make recommendations to the Commission, based on the current Prospectus regime, what reduced disclosure requirements will apply in each of the three scenarios. The extent of the final Prospectus regime therefore depends on ESMA's (and ultimately the Commission's) conclusions, and cannot be properly assessed ahead of Level 2 completion. This makes it difficult to evaluate the impact of the revised Directive.

Provisional work by ESMA, following its technical consultation of 15 June 2011, has shown that the scope to go furthest, in terms of a proportionate disclosure regime, will apply to rights issues. Certain reduced disclosure standards may apply in the other two scenarios, but must be balanced with the investor protection objective of the original Prospectus Directive. As rights issues necessarily apply only to *secondary* capital raising, ESMA takes the view that more substantial disclosure reduction is possible here without affecting investor protection – as much of this information will already be public.

For this reason, the cost-savings provided in this impact assessment focus only on a proportionate disclosure regime for rights issues. This is to reflect as accurately as possible the development of Level 2 work to date.

(ii) Thresholds and exemptions

The Commission's review also made revisions to the thresholds and exemptions which determine when the obligations of the Prospectus Directive apply.

The majority of this work was deregulatory in its focus, aiming to lift a number of small offers (typically made by small companies) outside of the Prospectus regime altogether. Notably, the UK has already brought two of these deregulatory changes into effect, on 31 July 2011, in order for small companies to benefit at the earliest possible opportunity. These relate to the number of investors to whom an offer can be addressed (increased from 100 to 150) and the overall size of the offer (which has risen from €2.5 million EUR to €5 million EUR), before triggering the requirement to produce a prospectus. **These measures, worth an annual £12m a year to the UK, have already been subject to consultation and cost-benefit analysis, and are not considered further here.**

Further deregulatory threshold revisions have been introduced: increasing the exemption threshold for debt securities issued over a 12 month period, from €50m EUR to €75m EUR, and a new provision made so that offers involving securities that are guaranteed by a Member State may omit information about the guarantor.

A *stricter* threshold was introduced during the review, relating to the minimum sum that an individual investor must make in order for the offer not to require the issuer to produce a prospectus. Currently, an investor may make a minimum contribution of €50,000 EUR per investor for the issuer to benefit from not needing to produce a prospectus. This is based on the assumption that this high level of capital means that the offer will be targeted at sophisticated, professional investors. The amending Directive will now require a minimum contribution of €100,000 EUR per investor for the issuer to continue to benefit from not needing to produce a prospectus. It was felt that at the lower threshold, some retail investors may inadvertently be treated as professionals, and thus the intentions of the Directive with respect to investor protection may not always be realised.

¹Article 7(2)(e) of the original Prospectus Directive 2003/71/EC provided for a proportionate disclosure regime for SMEs. However, when it was implemented in 2005, the Commission did not put in place a proportionate disclosure regime for SMEs. The Amending Directive changes Article 7(2)(e) so that it allows for proportionate disclosure regime not only for SMEs but also for the new category of "companies with reduced market capitalisation" (Small Caps). The Commission's mandate to ESMA of January 2011 instructed ESMA to provide the Commission with technical advice on proportionate disclosure regimes for SMEs and for Small Caps.

(iii) Simplification and legal certainty

Other changes to the Prospectus regime were designed to improve its application and provide greater legal certainty. These changes:

- make explicit that no new Prospectus is required when companies issue securities through intermediaries, so long as a valid Prospectus is available and the issuer consents to its use;
- improve the comparability of different prospectus via the prospectus summary. The liability attached to the summary has also been clarified;
- clarify investors' rights to withdraw from an offer and the time period in which a supplement should be produced;
- clarify the relationship between final terms and the base prospectus;
- align the Prospectus Directive with subsequent financial services legislation, in particular the definition of a 'qualified investor' in MiFID.

As the majority of these measures are technical and will be taken forward through Level 2 work by ESMA and the European Commission, they are not considered at this time.

F. Costs and benefits

Costs

(i) Compliance / transition

The first of these costs is the overarching cost of compliance with a change to the Prospectus regime. These costs relate to transitional business costs for market actors to understand and comply with the slight modifications to a Prospectus regime with which they are already familiar.

The transitional cost is assumed to be small – costing £0.4m. This reflects the fact that only small changes are being made to the Prospectus regime, mainly to codify existing market behaviour. Additionally, unlike the majority of financial services legislation, there is no day-to-day compliance cost made of businesses under the Prospectus Directive as it applies solely at the point of raising capital. The costs incurred therefore relate to basic familiarisation on the part of issuers raising capital under the regime.

Further familiarisation may be expected from third-parties offering related advisory and legal services – but familiarisation by this group is intrinsic to their monitoring of all kinds of relevant regulatory developments. It is impossible to disaggregate familiarisation with the PD from their day-to-day following of market developments and provision of expert advice.

The cost to investors is expected to be nil, as the Prospectus regime is simply being updated and experiencing minor, rather than substantial, change.

Calculating the transitional cost

In 2005, when the Prospectus Directive first came into effect, a fairly small transitional cost of £2.3 million was estimated by the FSA for issuers familiarising themselves with the new regime.

This figure was calculated on the basis of two days of compliance officer time, at a rate of £400/day, for the 2,910 companies then listed on the London Stock Exchange. We can assume that as the amended Prospectus Directive refines, rather than reforms, the existing regime means that this familiarisation process will now be considerably reduced.

Now, in 2011, market actors are familiar with the Prospectus regime. Considering that the introduction of the Prospectus Directive required only two days of time in 2005, our assumption is that it will take two hours of Compliance Officer (or equivalent) time for issuers to familiarise themselves with the amended regime. This provides a transition cost of £370,000, or approximately £0.4 million, based on the 2,620 companies currently

listed on the London Stock Exchange (as of 31 July 2011). The cost of the Compliance Officer has been increased by the FSA to £70/hour to reflect earnings inflation since 2005.

(ii) Specific costs

The second layer of costs relates to where the regime has been *tightened* with respect to the minimum amount of capital an individual must commit for the offer to be deemed to have been made to a professional investor (and not require a prospectus to be produced). Issuers will now need to make exempt offers to investors of at least €100,000 EUR per investor. Previously, this threshold was set at €50,000 EUR per investor – meaning that offers to investors between €50,000 EUR and €100,000 EUR will now require a prospectus, where previously they did not. In the same vein, a threshold increase was also made, from €50,000 to €100,000, for offers of non-equity securities. Only offers made at or above €100,000 will now continue to qualify for reduced disclosure under the prospectus regime.

The impact on the market is unclear. While offers between €50,000 EUR and €100,000 EUR will now require a prospectus, the reality of the way in which market participants use the thresholds in the Directive suggests that the same offers that would be made at €50,000 EUR will now simply be addressed to those, or most of those, same investors for a minimum sum of €100,000 EUR. Consequently, the impact may in fact be intangible, where market dynamics simply adjust to the requirements of the new regime. This is also hard to judge in view of the fact that the definition of a professional investor is being aligned with MiFID, which should allow businesses to access a wider pool of qualifying investors. Industry has welcomed alignment with MiFID.

Further clarity on transitional and specific costs, and market impact, will be sought from the consultation.

Benefits

(i) The benefit of legal certainty

Changes made to the Prospectus regime provide greater legal certainty to those involved in the raising of capital. It is difficult to assess whether these translate into direct cost-savings – for example, if the average amount of legal advice for producing a Prospectus was reduced by, say, two hours per offer – or whether the benefits are more intangible, generally helping the capital-raising process be more navigable.

Considering that the revisions to the Prospectus Directive essentially codify existing market behaviour, it is most likely that the impact will be more intangible, providing increased market confidence in capital raising on the part of issuers. Further understanding of the market impact will be sought through the consultation.

(ii) Specific cost-savings

Specific cost reduction will arise from having a proportionate disclosure regime for certain public offers.

Indicative cost-savings from developing a proportionate disclosure regime were provided in the Commission's Impact Assessment. However, the Prospectus Directive provides only the *framework* for a Prospectus regime and is reliant on the technical work undertaken by ESMA at Level 2. This is still being developed. Providing a meaningful estimate of the cost-saving for industry is therefore difficult.

Based on current Level 2 work, the proportionate disclosure regime for rights issues appears to offer the greatest saving for market participants. Here, broad estimates of the cost reduction possible were provided to the Commission as a result of the work of the UK's *Rights Issues Review Group*.

This work suggests that the administrative costs saved should be €233,000 EUR² for issuers in an average of 343 cases annually in the EU, (roughly €80 million across the EU). (This represents a significant cost reduction, considering industry and Treasury analysis suggests that the cost to UK issuers of producing a ‘full’ prospectus is typically between £350,000 and £600,000 per offer.)

A proportionate disclosure regime for rights issues may also benefit investors. Previous research by the UK’s *Rights Issues Review Group* and the European Securities Markets Expert Group, *ESME*, discovered that the length and complexity of the prospectus means that most investors do not use the prospectus to inform their investment decisions for rights issues. Unlike with a new company being admitted to trade, for rights issues substantial information is already available to investors in the marketplace. Proportionate disclosure may therefore be more relevant to them. Additionally, the reduced cost for issuers of going ahead with rights issues under the new proportionate regime may encourage them to undertake more rights issues, rather than private placements. This provides better value for existing investors currently at risk of dilution if secondary offers are not made to them by issuers.

Calculating the cost saving of a proportionate disclosure regime for rights issues in the UK

London Stock Exchange data shows that between July 2005 (when the Prospectus Regime was first introduced) and July 2011, 105 rights issues took place on the main market and AIM that fall within the scope of the updated Prospectus Directive – i.e. offers totalling €5 million EUR or more. This provides an average figure of 18 qualifying UK rights issues per year.

This figure could potentially be slightly conservative, as this is based on LSE data only. The benefit in the Prospectus Directive applies only to companies admitted to trading on regulated markets or Multilateral Trading Facilities (MTFs), and not to private companies undertaking secondary financing.

This means that the 150+ companies on the stock exchange of the Plus Markets Group could, however, also benefit, in addition to the 2500+ companies on the LSE. Yet it is likely that the majority of these constituents would undertake offers below the €5 million EUR threshold (and therefore would not need to produce a prospectus at all) as the market specialises in very small companies. LSE data is therefore a useful proxy for the benefit to UK companies of the proportionate disclosure regime for rights issues.

Therefore:

- [Conversion from €233,000 EUR = £205,000 [06 Sept. 2011, via currency conversion site www.xe.com]
- 18 x £205,000 = annual benefit of £3.7 million for the UK.
- Let us assume that the outcome of ESMA’s work results in a more conservative approach as to what information should be included for investors under a proportionate regime. Therefore, applying a discount of 10% to the saving of £205,000 = 18 x £184,500 = annual ‘best estimate’ saving of £3.3 million for the UK.

²To reach this figure, the Commission assumes that the costs related to external and internal auditor work is reduced by 100%, transaction counsel is reduced by 30%, publication is reduced by 20%, and the time of the issuer (the lead manager, and senior personnel) is reduced by 50%.

This figure is reached by the Commission drawing heavily on the work of the UK’s *The Rights Issue Review Group*, which indicated in its 2009 report to the Chancellor of the Exchequer where cost savings could be generated by a short-form prospectus for rights issues. This worked on the principle that information already in the public domain - and thus known to the investor already – ought not to be reproduced in the context of a rights issue prospectus.

- As financial information is already in the public domain from IPO and via ongoing disclosure obligations, information that requires the due diligence and oversight of external and internal auditing functions would therefore be nil, accounting for the Commission’s 100% reduction.
- The fact that financial information as well as significant corporate information (e.g. about the issuer’s resources, organisational structure and business overview) would be omitted would result in the amount of legal due diligence (“transaction counsel”) also being significantly reduced. Based on the areas excluded by *The Rights Issue Review Group*, a 30% reduction appears to be fair.
- Printing, distribution and publication costs would also be reduced by substantially reduced disclosure. While more than a fifth of information is excluded in the model of a short-form prospectus suggested by *The Rights Issue Review Group*, there will necessarily be certain fixed costs attached to production, irrespective of how much disclosure is reduced. A 20% saving therefore feels appropriate.
- The combination of substantially reduced third-party and legal work and the reduction in the volume of material included in the rights issue prospectus, results in the estimation that issuer-related costs are reduced by 50%.

However, the precise costs and benefits to industry will not be known until Level 2 work is completed.

It is difficult ahead of Level 2 work being completed to understand the extent of the cost-saving derived, and will be further explored through the consultation, but this figure represents our best estimate today. The introduction of a proportionate regime for rights issues provides a clear benefit for issuers – particularly combined with the new exemption for offers above €5m EUR (previously €2.5m EUR). This change to the PD, brought into effect early in the UK, is worth an annual £12m saving for UK issuers, lifting all offers between €2.5m EUR and €5m EUR out of the Prospectus regime and the need to produce a prospectus. **It is helpful to note that these two changes combined create an environment to boost secondary fundraising via rights issues, benefitting investors and issuers alike.**

No cost-saving has been possible to calculate for the marginal benefits provided by deregulatory changes to the thresholds and exemptions in the Prospectus regime. These are: raising the exemption threshold for debt securities issued over a 12 month period from €50m EUR to €75m EUR, and removing the need for prospectuses to disclose information about the guarantor where the guarantor is a Member State. More information will be sought from the consultation.

Further cost savings will be enjoyed by industry due to changes being made to the Prospectus Directive that are reflected in FSA Prospectus Rules. These, and measures which the Treasury has implemented early (worth £12 million per year), are subject to separate cost-benefit analysis. They are not included here.

G. Risk assessment

Due to the technical nature of the changes being made to the Prospectus regime, it is difficult to assess the monetised impact on firms. The extent of the costs and benefits will be further explored through the consultation. Furthermore, the impact of the changes to the Prospectus regime remain highly uncertain at this time as they will be largely determined by Level 2 work, rather than by the existence of the Directive itself.

Investor protection: As changes are being made to the thresholds at which the Prospectus Directive applies and 'proportionate' (reduced) disclosure is being introduced, the question arises of whether the same levels of investor protection apply. Further information will be sought from the consultation. However, previous Treasury analysis from implementing aspects of the Directive early and responses to the Commission's and the Treasury's consultations suggest that there is no increased risk to investor protection.

Principally, the changes to the Prospectus regime are slight and thus investor protection will not materially change. It is true that a few smaller and specialist offers will now be outside the scope of the Directive. However, these affect very small undertakings and thus the main benefit will be enjoyed by much smaller companies undertaking mainly secondary fundraisings (e.g. AIM listed companies). It is fair to assume that the nature of these offers – made to small numbers of investors, of small value – will be made to more sophisticated investors who typically do not rely on a prospectus to make their investment decisions. The thresholds in the Prospectus Directive therefore strike a fair balance regarding very small offers made to targeted investors (which would not require a prospectus), versus larger offers above the thresholds to a wider, retail investor balance (at which point the Prospectus Directive would apply). The new thresholds have not increased materially to suggest that this balance has been disrupted by the PD being reviewed, as has been reflected in the positive feedback provided by various market participants, including investor groups.

Investors also have the right not to invest in an offer without a prospectus, and issuers will themselves consider for a capital raising whether or not a prospectus should be produced, dependent on the needs of their investor base. It would not be in the interests of a successful capital raising not to do so. Investors also continue to be protected through the UK's financial promotion regime, which continues to apply where a prospectus is not required. Lastly, investor protection has been strengthened elsewhere in the review of the PD – regarding the threshold for offers made to professional investors. Currently, any offers made above €50,000 per investor do not require issuers to produce a prospectus. This will now only be available to issuers for offers they make above €100,000 per investor.

A question is posed over whether proportionate disclosure could affect investor protection. However, the Directive simply makes provision for this regime; it will be determined by expert work at Level 2. To date, Level 2 work has focused on developing a more substantial proportionate disclosure regime for secondary financing (rights issues) only. This is because ESMA takes the view that companies are already familiar to investors at the time of secondary fundraising. Investors may find more targeted information more relevant than a full prospectus in this scenario, and existing shareholders may benefit from a reduced threat of dilution (as issuers may become more attracted to rights issues being made less burdensome, in place of private placements). It is likely that any other form of proportionate disclosure regime will be less substantial, due to concerns expressed by ESMA around investor protection being weakened.

It is also for this reason that this impact assessment calculates the cost saving of having a proportionate disclosure regime for rights issues only.

H. Wider impacts

Competitiveness: Given that the Directive will introduce largely incremental change to the existing Prospectus regime, it should not have a significant effect on competition. The Prospectus Directive establishes tightly defined criteria as to its application for qualifying public offers of securities, and when companies are admitted to trading. As it applies across the EU and is a maximum harmonisation directive, the regime did not pose concerns relating to the competitiveness of UK markets on its introduction in July 2005, nor does it now.

Small firms: The Directive captures those companies which have securities admitted to trading on regulated markets and these tend to be substantial businesses. In addition, in relation to ‘public offers’ of securities, small companies are likely to be able to use the exemptions within the Directive that enable them to avoid production of a costly prospectus.

However, small companies do not enjoy exactly the same benefits under the Prospectus regime as large companies. This is because they are highly unlikely to engage in cross-border offers due to the small sums of capital they typically look to raise. Additionally, the relative cost of compliance with the regime, commensurate with the sums raised, will necessarily be higher than for large fundraisings undertaken by bigger companies.

For these reasons, having a series of thresholds to lift small offers and secondary fundraisings outside of the Prospectus regime is highly important. In this area, small companies will benefit in particular from the size of qualifying offers being doubled to €5 million EUR as a result of changes to the Prospectus Directive, and from a proportionate disclosure regime being created for rights issues which will reduce the cost of further secondary offers.

Microbusinesses: The Prospectus Directive applies only above a series of thresholds, and particularly only for offers above €5 million EUR. Consequently, it is highly unlikely that microbusinesses would in practice be caught by the Prospectus Directive, albeit that the wide application to ‘public offers’ means technically microbusinesses are in scope. Microbusinesses are a group less likely to raise finance from the public, typically relying on seed capital, that of family, friends, banks and experienced angel investors.

I. Summary

The UK supports the implementation of the revised Prospectus Directive and envisages an overall cost-saving to industry based on the introduction of a proportionate disclosure regime for rights issues, increased exemptions from the Prospectus regime, and greater legal certainty.

The thresholds in the Prospectus Directive strike a fair balance regarding very small offers made to targeted investors (which would not require a prospectus), versus larger offers made above the thresholds to a wider, retail investor balance (at which point the Prospectus Directive would apply). Investor protection is not affected by changes to the regime.

Annex 3

FSA cost benefit analysis and compatibility statement

Cost benefit analysis (CBA)

1. The Prospectus Directive has provided a sound framework in terms of investor protection and disclosure obligations for the financial instruments it covers. In addition, the framework has made it easier for issuers to offer securities in different Member States, and generated a wider variety of products that are now available to investors. The Commission's review aimed to reduce the administrative burdens of some of the obligations for issuers. In addition, Article 31 of the Prospectus Directive requires the Commission to assess the application of the Directive five years after its entry into force.
2. When proposing new rules, the FSA is obliged (under section 155 and 157 of the Financial Services and Markets Act 2000 (FSMA)) to publish a Cost-Benefit Analysis (CBA), unless we consider that the proposals will give rise to no costs or to an increase in costs of minimal significance. The CBA is an estimate of the costs and an analysis of the benefits that will arise from the proposals. It is a statement of the differences between the baseline (broadly speaking, the current position) and the position that will arise if we implement the proposals. Please note that the CBA covers the items from Chapter 3 only; that is the area for which the FSA is responsible.

Increasing legal certainty

3. In addition to the changes described in Chapter 2, there are several amendments in Chapter 3 which also tend to improve legal certainty. These include amendments to the exemptions from and thresholds for producing a prospectus (expanded to cover divisions); clarifying format and validity of a prospectus; and content requirement for securities notes. Increasing legal certainty is expected to be beneficial to the markets.

Exemptions and thresholds: Employee share schemes

4. The changes to the exemptions which remove the need to publish a prospectus when dealing with securities offered to employees is particularly relevant to the aim of reducing costs to companies on raising capital. Now that an EEA issuer is no longer required to have securities admitted to trading in order to benefit from an exemption, EU employees working for non-EU companies or companies traded on a non-regulated EU market or EU non-listed companies should not be penalised in comparison to EU employees of companies listed on an EU regulated market.
5. Based on the Commission's impact assessment analysis¹, 114 prospectuses could have benefited from this exemption EU-wide from 2006 to 2008. Based on the estimated cost of producing a prospectus ranging from €480,000 to €720,000, the total annual cost saving associated with producing a prospectus was estimated as being around €18m at a European level. The same analysis suggests a de minimis cost saving to the UK of between £2m to £3m.
6. We approved approximately four employee share scheme prospectuses during the same period. Whilst there may be a small number of scenarios where employees who previously would have received a prospectus no longer will, this impact is mitigated by employees' familiarity with the company and their role in its success. In addition, the extension of the exemption will encourage companies to run employee share schemes and encourage employee participation. The exemption will benefit us as we will spend less time vetting the documents which can be utilised elsewhere.

Q1: Do you agree with the analysis above on the impact analysis for employee share schemes in the UK?

Q2: Do you have any further comments on the costs to the UK market?

General overall compliance cost of proposals

7. HM Treasury's Impact Assessment in Annex 2 of this consultation paper covers the change in compliance costs as a result of the amendments to FSMA. The changes we propose in Chapter 3 of this consultation paper support this analysis.
8. As only small changes are being made to the regime, we agree that the overall transitional cost will be small and the costs incurred will relate to issuers and advisers familiarising themselves with the changes. This includes costs associated with legal advice.

¹ http://ec.europa.eu/internal_market/securities/docs/prospectus/proposal_240909/impact_assessment_en.pdf

Alignment with EU legislation – deletion of the annual information update

9. The deletion of Article 10 of the Prospectus Directive removes the requirement for issuers to publish an annual information update. As this requirement replicated disclosure requirements under the Transparency Directive, we expect a reduction in compliance costs to issuers, with no negative impacts on investor protection.
10. The Commission's Impact Assessment estimated that the costs to the issuer of fulfilling the obligation could amount from €2,500 to €5,000 per year. Relying on these figures and applying them to companies traded on the Main Market of the London Stock Exchange, this implies a saving of between £3m to £6m² for the UK.

Q3: Do you agree with our analysis on cost savings for UK issuers as a result of the removal of this requirement?

Alignment with EU Legislation – incorporation by reference

11. PR2.4.1R amends what may be incorporated by reference by replacing its reference to CARD with a reference to the Transparency Directive. As the requirements are similar under both, we believe that incremental costs and benefits as a direct result of this would be minimal.

Changes to the Qualified Investor Regime

12. In paragraph 3.27 we describe the changes to the Qualified Investor Regime and in particular the changes to the PR5.4R removing the Qualified Investor register. We believe this would have minimal to neutral cost implications to issuers and will benefit us as a result of no longer having to maintain the register.

Costs and benefits of remaining proposals

13. Apart from the issues drawn out above, we believe that the remaining proposals have limited cost and benefit implications:
 - a) **Exemptions and thresholds:** The majority of this work was deregulatory in focus (amendments to PR 1.2.2R(3) and PR 1.2.2R(4)). The increase in minimum denomination in PR 4.1.4R is discussed in paragraph 3.8 above. It relates to the higher €100,000 threshold for debt wholesale issues. The related threshold for an exemption from producing a prospectus is discussed in Chapter 2 and covered in the HM Treasury Impact Assessment in Annex 2. It appears that the market would adjust by continuing with similar practices at the higher thresholds. The benefit of these threshold changes is some limited enhancement in retail investor protection.

² Exchange rate of £1=€1.16

- b) **Prospectus summaries:** Our CBA does not cover the copy out changes to PR 2.1 as a result of changes to FSMA. The separate change to PR 2.1.3R increases the threshold to €100,000 for when a summary is not required for a non-equity prospectus. It is related to the other similar threshold changes which are discussed in Chapter 2. As in (a) above, incremental costs for firms as a result of this specific rule change are likely to be minimal.
- c) **Format and validity of a prospectus:** The clarifications covered in this section are believed to have minimal cost impact to the market.
- d) **Changes to the Disclosure and Transparency Rules:** Similar to (a) above, the changes to the DTRs are as a consequence of the increase in wholesale minimum denomination for non-equity securities from €50,000 to €100,000. The change is discussed in Chapter 3 under 'Changes to the Disclosure and Transparency Rules'. Whilst we would expect there to be costs to certain issuers who would potentially have to disclose under these amendments, we believe these to be minimal. The implications of the rule change are already well known in the market and issuers have been amending practices to issue debt at €100,000 as opposed to €50,000 to avoid any costly reporting requirements.
- e) **Changes to the Listing Rules:** The changes in the Listing Rules to reflect the increase in the various thresholds from €50,000 to €100,000 will have minimal cost implications for issuers, as set out in (a).
- f) **Further provisions:** Given the proliferation of website publication, we believe the changes to the requirements for the publication of prospectuses (PR 3.2.4R) will be of minimal costs in the case of PR 3.2.4AR (compulsory electronic publication). There may be some costs associated with legal advice which we believe would be covered under the general costs associated with compliance of the amendments discussed in the Impact Assessment. The change to PR3.2.4R(3) is deregulatory, giving issuers greater choice in where they publish electronic versions of prospectuses. Finally, the deletion of the 2,500 word limit for summaries (PR 2.1.5G) has no cost implications at this stage as a different restriction on summary length will be addressed in level 2 measures by the Commission as delegated acts in due course.

Q4: Do you agree with our analysis with regard to changes to the DTRs, LRs and PRs?

Compatibility statement

14. These proposals are compatible with all our regulatory functions in our capacity as the competent authority under Part 6 of FSMA, including the responsibility for implementing relevant EU Directives. In presenting the proposals set out in this consultation paper we are satisfied that they are compatible with the general duties conferred upon us under section 73(1) of Part 6 FSMA to have regard to the following factors:

The need to use resources in the most efficient and economic way

15. The proposals are consistent with an efficient and economical use of FSA resources.

The principle that a burden or restriction which is imposed on a person should be proportionate to the benefits, considered in general terms, which are expected to arise from the imposition of the burden or restriction

16. The proposals to implement the changes to the Prospectus Directive seek to minimise compliance and other costs and the CBA sets out the costs and benefits. The amendments aim to make the rules more proportionate. However, as these changes are as a result of a maximum harmonisation European directive, we have limited discretion as to the proposals themselves.
17. Stakeholders may have different views about the nature and extent of some of the impacts we have covered. So we would welcome feedback from respondents on any of these.

The desirability of facilitating innovation in respect of listed securities

18. An effect of the original Prospectus Directive was to generate a wider range of products available to issuers. The changes proposed generally do not alter this.

The international character of capital markets and the desirability of maintaining the competitive position of the UK

19. In the areas where we have had the option to make a discretionary decision we have taken account of the competitive implications between issuers subject to regulation in the UK and in other countries. We believe that the proposals are consistent with the aim of maintaining the UK's competitive position in international markets.

The need to minimise the adverse effects on competition of anything done in the discharge of those functions

20. The amendments aim to minimise adverse impacts on competition and we have had regard to this principle when implementing the Amending Directive.

The desirability of facilitating competition in relation to listed securities

21. Through the use of the passport, the Prospectus Directive is designed to allow listed and other securities to be offered and admitted to trading in Member States which has the effect of increasing competition between issuers for capital. The cost benefit analysis does not suggest there to be any adverse effects on this and on competition.

Equality and diversity issues

22. We have assessed that the amendments have little or no impact on the equality agenda and do not give rise to discrimination. We would nevertheless welcome any comments respondents may have on any equality issues they believe arise.

Appendix 1

Draft FSMA Regulations

2012 No.

FINANCIAL SERVICES AND MARKETS

The Prospectus Regulations 2012

Made - - - - - ***

Laid before Parliament ***

Coming into force - - - - - *1st July 2012*

The Treasury are a government department designated(a) for the purposes of section 2(2) of the European Communities Act 1972(b) in relation to—

- (a) matters relating to the listing of securities on a stock exchange and information concerning listed securities; and
- (b) measures relating to prospectuses on offers of transferable securities to the public.

The Treasury, in exercise of the powers conferred by section 2(2) of that Act, make the following Regulations:

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Prospectus Regulations 2012 and come into force on 1st July 2012.

(2) In these Regulations, “the 2000 Act” means the Financial Services and Markets Act 2000(c).

Review

2.—(1) The Treasury must from time to time—

- (a) carry out a review of the Prospectus Regulations 2011(d) and these Regulations,
- (b) set out the conclusions of the review in a report, and
- (c) publish the report.

(2) In carrying out the review the Treasury must, so far as is reasonable, have regard to how those parts of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading that are amended by Directive 2010/73/EU of the European Parliament and of

(a) S.I. 1992/1315.

(b) 1972 c.68; section 2(2) was amended by section 27(1) of the Legislative and Regulatory Reform Act 2006 (c.51) and by section 3 of, and Part 1 of the Schedule to, the European Union (Amendment) Act 2008 (c. 7). By virtue of the amendment of section 1(2) made by section 1 of the European Economic Area Act 1993 (c.51) regulations may be made under section 2(2) to implement obligations of the United Kingdom created by or arising under the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 (Cm 2073, OJ No L 1, 3.11.1994, p. 3) and the Protocol adjusting that Agreement signed at Brussels on 17th March 1993 (Cm 2183, OJ No L 1, 3.1.1994, p.572).

(c) 2000 c.8.

(d) S.I. 2011/1668.

the Council of 24 November 2010 (which is implemented by means of the instruments mentioned in paragraph (1)(a) and rules made by the Financial Services Authority under the 2000 Act) is implemented in other member States.

(3) The report must in particular—

- (a) set out the objectives intended to be achieved by the regulatory system established by the instruments mentioned in paragraph (1)(a),
- (b) assess the extent to which those objectives are achieved, and
- (c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

(4) The first report under this regulation must be published not later than 30th June 2017.

(5) Reports under this regulation are afterwards to be published at intervals not exceeding five years.

Amendments to exemptions

3.—(1) In paragraph 8(2) of Schedule 11A to the 2000 Act(a) (transferable securities), for paragraph (a) substitute—

“(a) that the total consideration for the transferable securities being offered in the EEA States is less than 75,000,000 euros (or an equivalent amount)”. [Art 1(2)(j)]

(2) In paragraph 9(1) of Schedule 11A to the 2000 Act (transferable securities), for “the total consideration of the offer in the European Union” substitute “the total consideration for the transferable securities being offered in the EEA States”. [Art 1(2)(h)]

(3) In section 86(1) of the 2000 Act(b) (exempt offers to the public)—

- (a) in paragraphs (c) and (d), for “50,000 euros” substitute “100,000 euros”; [Art 3(2)(c) & (d)]
- (b) omit the “or” following paragraph (d);
- (c) in paragraph (e), after “being offered” insert “in the EEA States”; and [Art 3(2)(e)]
- (d) insert after paragraph (e)—

“; or

(f) the offer falls within subsection (1A).

(1A) An offer (“the current offer”) falls within this subsection if the transferable securities are being sold or placed through a financial intermediary where—

- (a) the transferable securities have previously been the subject of one or more offers to the public;
- (b) in respect of one or more of those previous offers any of paragraphs (a) to (e) of subsection (1) applied;
- (c) a prospectus is available for the securities which has been approved by a competent authority no earlier than 12 months before the date the current offer is made; and
- (d) the person who drew up the prospectus gives written consent to the use of the prospectus for the purpose of the current offer.”. [Art 3(2) last subpara.]

(4) In section 87A of the 2000 Act(c) (criteria for approval of prospectus by competent authority), after subsection (2) insert—

(a) Schedule 11A was inserted by S.I. 2005/1433 and amended by S.I. 2006/3221, S.I. 2011/99 and S.I. 2011/1668. There are other amendments not relevant to these Regulations.

(b) Section 86 was substituted by S.I. 2005/1433 and amended by S.I. 2011/1668.

(c) Section 87A was substituted by S.I. 2005/1433.

“(2A) If, in the case of transferable securities to which section 87 applies, the prospectus states that the guarantor is a specified EEA State, the prospectus is not required to include other information about the guarantor.”. [Article 8(3a)]

New definition of qualified investors [Art 2(1)(e)]

4.—(1) In section 86 of the 2000 Act (exempt offers to the public)—

(a) in subsection (2)(a), for “Article 2.1(e)(i) of the prospectus directive” substitute “point (1) of Section I of Annex II to the markets in financial instruments directive”;

(b) for subsection (7) substitute—

“(7) “Qualified investor” means—

(a) a person or entity described in points (1) to (4) of Section I of Annex II to the markets in financial instruments directive, other than a person or entity that has requested to be treated as a non-professional client in accordance with that directive;

(b) a person or entity who is, at their request, treated as a professional client in accordance with Section II of Annex II to that directive;

(c) a person or entity who is recognised as an eligible counterparty in accordance with Article 24 of that directive;

(d) a person or entity whom an investment firm is authorised to continue to treat as a professional client in accordance with Article 71(6) of that directive.

(8) Investment firms and credit institutions which are authorised persons must communicate their classification of their clients as professional or non-professional (as the case may be) on request to an issuer subject to complying with the Data Protection Act 1998.

(9) In subsection (8), “credit institution” means—

(a) a credit institution authorised under the banking consolidation directive; or

(b) an institution which would satisfy the requirements for authorisation as a credit institution under that directive if it had its registered office (or if it does not have one, its head office) in an EEA State.”.

(2) Omit section 84(3) of the 2000 Act **(a)** (matters to be dealt with by prospectus rules).

(3) Omit section 87R of the 2000 Act **(b)** (register of investors).

Summaries and final terms

5. In section 87A of the 2000 Act (criteria for approval of prospectus by competent authority)—

(a) for subsection (6) substitute—

“(6) The summary must convey key information relevant to the securities which are the subject of the prospectus and, when read with the rest of the prospectus, must be an aid to investors considering whether to invest in the securities.”; and [Art 5(2)]

(b) in subsection (7) for the words from “the applicant must” to the end substitute—

“the applicant must, in writing, as soon as that element is finalised—

(a) inform the competent authority and any competent authority of any EEA State which the applicant has requested be supplied with a certificate of approval under section 87I; and

(b) make the information available to prospective investors.

(a) Section 84 was inserted by S.I. 2005/1433.

(b) Section 87R was inserted by S.I. 2005/1433.

(7A) The document containing the final offer price or the amount of transferable securities to be offered to the public may only contain information that relates to the securities note and must not be used to supplement the prospectus.” [Art 5(4) 3rd subpara]

(c) after subsection (8) insert—

“(9) In this section, “key information” means the information that enables investors to understand the transferable securities to which the prospectus relates and decide whether to consider the securities further.

(10) Key information includes—

- (a) the essential characteristics of, and risks associated with, the issuer and any guarantor, including their assets, liabilities and financial position;
- (b) the essential characteristics of, and risks associated with, investment in the transferable securities, including any rights attaching to the securities;
- (c) the general terms of the offer, including an estimate of the expenses charged to the investors by the issuer and the person offering the securities to the public, if not the issuer;
- (d) details of the admission to trading; and
- (e) the reasons for the offer and proposed use of the proceeds.”.

Supplementary prospectus

6.—(1) In section 87G of the 2000 Act(a) (supplementary prospectus) after subsection (3) insert— [Art.16(1)]

“(3A) But where the prospectus relates both to an offer of transferable securities to the public and the admission of those securities to trading on a regulated market, subsection (3) does not apply and the relevant period begins when the prospectus is approved and ends with the later of—

- (a) the closure of the offer to the public to which the prospectus relates, or
- (b) the time when trading in those securities on a regulated markets begins.”.

(2) In section 87Q of the 2000 Act(b) (right of investor to withdraw), for subsection (4) substitute—

“(4) A person (“P”) may withdraw P’s acceptance of an offer before the specified time where the conditions in subsection (5) are satisfied.

(5) The conditions are that—

- (a) a supplementary prospectus has been published;
- (b) prior to the publication, P agreed to buy or subscribe for transferable securities to which the offer relates; and
- (c) the significant new factor, material mistake or inaccuracy referred to in section 87G(1) which caused the supplementary prospectus to be published arose before delivery of the securities.

(6) The specified time is—

- (a) the end of the second working day after the day on which the supplementary prospectus was published; or
- (b) such later time as may be specified in the supplementary prospectus.”.

Provision of information

7. In section 87I of the 2000 Act(a) (provision of information to host Member State)—

(a) Section 87G was inserted by S.I. 2005/1433.
(b) Section 87Q was inserted by S.I. 2005/1433.

- (a) after subsection (2) insert—
 - “(2A) If the competent authority supplies a certificate of approval to the competent authority of the specified EEA State, it must also supply a copy of that certificate to the person who made the request under this section and to ESMA.”; and [Art 18(3)]
- (b) in subsection (5)(a), for “the date of the request” substitute “the date the request is received”. [Art 18(1)]

Civil liability attaching to the summary

8. In section 90 of the 2000 Act(b) (compensation for statements in listing particulars or prospectus) for subsection (12) substitute—

“(12) A person is not to be subject to civil liability solely on the basis of a summary in a prospectus unless the summary, when read with the rest of the prospectus—

- (a) is misleading, inaccurate or inconsistent; or
 - (b) does not provide key information (as defined in section 87A(9) and (10)),
- and in this subsection a summary includes any translation of it.”. [Art 6(2)]

Definitions

9. In section 103 of the 2000 Act(c) (interpretation of Part 6)—

- (a) in the definition of “the prospectus directive” after “admitted to trading” insert “as amended by Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 and by Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010”;
- (b) in the definition of “the transparency obligations directive” after “a regulated market” insert “as amended by Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 and by Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010”.

	<i>Name</i>
	<i>Name</i>
Date	Two of the Lords Commissioners of Her Majesty’s Treasury

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend provisions of the Financial Services and Markets Act 2000 (c. 8) (“the Act”) to implement in part Directive 2010/73/EU (OJ No L 327, 11.12.2010, p.1) of the European Parliament and of the Council. That Directive amends Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading (“the Prospectus Directive”) and Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market. Regulation 2 provides for a review of the United Kingdom’s implementation of the amendments made to the Prospectus Directive at five yearly intervals.

Regulation 3 makes amendments to exemptions to the obligation to produce a prospectus. Regulation 4 substitutes a definition of qualified investor based on concepts derived from Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets

(a) Section 871 was inserted by S.I. 2005/1433.
 (b) Section 90 was inserted by S.I. 2005/1433 and amended by the Companies Act 2006 (c.46), section 1272, Schedule 15, Part 1, paragraphs 1, 4, 5.
 (c) Section 103 was substituted by S.I. 2005/1433 and amended by the Companies Act 2006, sections 1265 and 1272, Schedule 15, Part 1, paragraphs 1 and 11.

in financial instruments (OJ No L 145, 30.4.2004, p.1). Regulation 5 amends the purpose of summaries and the obligation to notify competent authorities of final terms and make these available to investors.

Regulation 6 clarifies the last date before which a supplementary prospectus must be prepared if a significant new factor, material mistake or inaccuracy arises, and the last date on which an investor may exercise their right to withdraw their acceptance of an offer in this situation. Regulation 7 makes minor amendments to the obligation to provide information to the competent authority of a host EEA State. Regulation 8 extends to scope of section 90 to provide that the omission of key information from a summary may also attract civil liability and regulation 9 inserts up-to-date definitions into the Act.

An Impact Assessment of the effect of this instrument on the costs of business and the voluntary sector has been prepared and is available on HM Treasury's website (www.hm-treasury.gov.uk) or from the Securities and Markets Team, HM Treasury, 1 Horse Guards Road, London SW1A 2HQ and is annexed to the Explanatory Memorandum which is available alongside the instrument at legislation.gov.uk.

Appendix 2

Early Implementation SI 2011/1668

2011 No. 1668

FINANCIAL SERVICES AND MARKETS

The Prospectus Regulations 2011

Made - - - - *7th July 2011*

Laid before Parliament *8th July 2011*

Coming into force - - *31st July 2011*

The Treasury are a government department designated(a) for the purposes of section 2(2) of the European Communities Act 1972(b) in relation to—

- (a) matters relating to the listing of securities on a stock exchange and information concerning listed securities; and
- (b) measures relating to prospectuses on offers of transferable securities to the public.

The Treasury, in exercise of the powers conferred by section 2(2) of that Act, make the following Regulations:

Citation, commencement and amendments

2.—(1) These Regulations may be cited as the Prospectus Regulations 2011 and come into force on 31st July 2011.

(2) In section 86(1)(b) of the Financial Services and Markets Act 2000(c) (exempt offers to the public), for “100 persons” substitute “150 persons”.

(3) In paragraph 9(1) of Schedule 11A to that Act (transferable securities), for “the total consideration of the offer is less than 2,500,000 euros (or an equivalent amount)” substitute “the total consideration of the offer in the European Union is less than 5,000,000 euros (or an equivalent amount)”.

Michael Fabricant
Jeremy Wright

7th July 2011

Two of the Lords Commissioners of Her Majesty’s Treasury

(a) S.I. 1992/1315.

(b) 1972 c.68; section 2(2) was amended by section 27 of the Legislative and Regulatory Reform Act 2006 (c.51) and by section 3 of, and the Schedule to, the European Union (Amendment) Act 2008 (c. 7).

(c) 2000 c. 8; section 86 was substituted and Schedule 11A inserted by S.I. 2005/1433.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend two provisions of the Financial Services and Markets Act 2000 (c. 8) to implement in part Directive 2010/73/EU (OJ No L 327, 11.12.2010, p.1) of the European Parliament and of the Council. That Directive amends Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading (the Prospectus Directive) and Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (the Transparency Directive).

Regulation 1(2) increases the number of persons to whom an offer may be directed before it ceases to be an exempt offer from 100 to 150 persons. Regulation 1(3) increases from 2.5 to 5 million euros the limit for the total consideration of the offer in the European Union below which it is not unlawful to offer transferable securities to the public without an approved prospectus first having been made available to the public.

An impact assessment of the effect of this instrument on the costs of business and the voluntary sector is available from the Securities and Markets Team, HM Treasury, 1 Horse Guards Road, London SW1A 2HQ and is published with the Explanatory Memorandum alongside the instrument on legislation.gov.uk.

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2011 No. 1668

FINANCIAL SERVICES AND MARKETS

The Prospectus Regulations 2011

ISBN 978-0-11-151323-1

CORRECTION

Page 1: regulation 2 should be re-numbered as regulation 1.

October 2011

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and Queen's Printer of Acts of Parliament

Appendix 3

Draft Handbook changes

PROSPECTUS AMENDING DIRECTIVE (AMENDMENT) INSTRUMENT 2012**Powers exercised**

- A. The Financial Services Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000:
- (1) section 73A (Part 6 rules);
 - (2) section 79 (Listing particulars and other documents)
 - (3) section 84 (Matters which may be dealt with by prospectus rules)
 - (4) section 85 (Prohibition of dealing etc in transferable securities without approved prospectus)
 - (5) section 87 (Election to have prospectus)
 - (6) section 87A (Criteria for approval of prospectus by competent authority)
 - (7) section 87G (Supplementary prospectus)
 - (8) section 89A (Transparency rules)
 - (9) section 89B (Provision of voteholder information)
 - (10) section 89C (Provision of information by issuers of transferable securities)
 - (11) section 89D (Notification of voting rights held by issuer)
 - (12) section 89E (Notification of proposed amendment of issuer's constitution)
 - (13) section 89F (Transparency rules: interpretation etc)
 - (14) section 89G (Transparency rules: other supplementary provisions)
 - (15) section 89O (Corporate governance rules)
 - (16) section 96 (Obligations of issuers of listed securities)
 - (17) section 96A (Disclosure of information requirements)
 - (18) section 96C (Suspension of trading)
 - (19) section 99 (Fees)
 - (20) section 101 (Part 6 rules: general provisions);
 - (21) section 138 (General rule-making power);
 - (22) section 156 (General supplementary powers);
 - (23) section 157(1) (Guidance); and
 - (24) schedule 7 (The Authority as Competent Authority for Part 6)
- B. The rule-making powers listed above are specified for the purposes of section 153(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on [date].

Amendments to the Handbook

- D. The modules of the FSA's Handbook of rules and guidance listed in column (1) below are amended in accordance with the Annexes to this instrument listed in column (2).

(1)	(2)
Glossary of definitions	Annex A
Listing Rules sourcebook (LR)	Annex B

Prospectus Rules sourcebook (PR)	Annex C
Disclosure Rules and Transparency Rules sourcebook (DTR)	Annex D

Citation

- E. This instrument may be cited as the Prospectus Amending Directive (Amendment) Instrument 2012.

By order of the Board
[date]

Annex A

Amendments to the Glossary

In this Annex, underlining indicates new text and striking through indicates deleted text.

<i>annual information update</i>	the document referred to in PR 5.2.1R [deleted]
<i>Home State</i>	<p>...</p> <p>(9) (in <i>DTR</i>)</p> <p>(a) in the case of an <i>issuer</i> of debt securities the denomination per unit of which is less than EUR 1 000 or an issuer of <i>shares</i>:</p> <p>(i) where the <i>issuer</i> is incorporated in the <i>EEA</i>, the <i>EEA State</i> in which it has its registered office;</p> <p>(ii) where the <i>issuer</i> is incorporated in a third country, the <i>EEA State</i> in which it is required to file the annual information with the competent authority in accordance with Article 10 referred to in point (iii) of article 2(1)(m) of Directive 2003/71/EC.</p> <p>...</p>
<u><i>key information</i></u>	<p><u>(in <i>PR</i>) (as defined in section 87A(9) and (10) of the <i>Act</i>) means the information that enables investors to understand the <i>transferable securities</i> to which the <i>prospectus</i> relates and decide whether to consider the <i>securities</i> further. Key information includes:</u></p> <p>(a) <u>the essential characteristics of, and risks associated with, the <i>issuer</i> and any <i>guarantor</i>, including their assets, liabilities and financial position;</u></p> <p>(b) <u>the essential characteristics of, and risks associated with, investment in the <i>transferable securities</i>, including any rights attaching to the <i>securities</i>;</u></p> <p>(c) <u>the general terms of the <i>offer</i>, including an estimate of the expenses charged to the investors by the <i>issuer</i> and the <i>offeror</i>, if not the <i>issuer</i>;</u></p> <p>(d) <u>details of the <i>admission to trading</i>; and</u></p> <p>(e) <u>the reasons for the <i>offer</i> and proposed use of the proceeds.</u></p>

qualified investor

(in *PR*) (as defined in section 86(7) of the *Act*):

- (a) ~~any entity within the meaning of Article 2(1)(e)(i), (ii) or (iii) of the *prospectus directive*; or a person or entity described in points (1) to (4) of Section I of Annex II to *MiFID*, other than such a *person* or entity that has requested that they be treated as a *non-professional client* in accordance with *MiFID*; or~~
- (b) ~~an investor registered on the register maintained by the competent authority under section 87R of the *Act*; or a *person* or entity who is, at their request, treated as a *professional client* in accordance with Section II of Annex II to *MiFID*; or~~
- (c) ~~an investor authorised by an *EEA State* other than the *United Kingdom* to be considered as a qualified investor for the purposes of the *prospectus directive* a *person* or entity who is recognised as an *eligible counterparty* in accordance with article 24 of *MiFID*; or~~
- (d) a *person* or entity in respect of whom *investment firms* have been authorised to continue to treat as a *professional client* in accordance with article 71(6) of *MiFID*.

register

- (1) ~~(in *PR*) the register of qualified investors maintained by the *FSA* under section 87R of the *Act*. [deleted]~~

...

Annex B

Amendments to the Listing Rules sourcebook (LR)

In this Annex, underlining indicates new text and striking through indicates deleted text.

4.2 Contents and format of listing particulars

...

Minimum information to be included

- 4.2.4 R The following minimum information from the *PD Regulation* must be included in *listing particulars*:
- (1) for an issue of bonds including bonds convertible into the *issuer's shares* or exchangeable into a third party *issuer's shares* or derivative *securities*, irrespective of the denomination of the issue, the minimum information required by the *schedules* applicable to debt and derivative *securities* with a denomination per unit of at least ~~50,000~~100,000 euros;
 - ...
 - (3) for an issue of *asset-backed securities*, irrespective of the denomination per unit of the issue, the minimum information required by the *schedules* and *building blocks* applicable to *asset-backed securities* with a denomination per unit of at least ~~50,000~~100,000 euros;
 - (4) for an issue of *certificates representing shares*, irrespective of the denomination per unit of the issue, the *schedule* applicable to depositary receipts over shares with a denomination per unit of at least ~~50,000~~100,000 euros (except that item 13.2 (relating to profit forecasts) in Annex 10 is not to apply);

...

Annex C

Amendments to the Prospectus Rules sourcebook (PR)

In this Annex, underlining indicates new text and striking through indicates deleted text.

1.2 Requirement for a prospectus and exemptions

	[...]		
86	Exempt offers to the public		
	(1)	A person does not contravene section 85(1) if –	
		(a)	the offer is made to or directed at qualified investors only;
		(b)	the offer is made to or directed at fewer than 150 persons, other than qualified investors, per EEA State;
		(c)	the minimum consideration which may be paid by any person for transferable securities acquired by him pursuant to the offer is at least 50 <u>100</u> ,000 euros (or an equivalent amount);
		(d)	the transferable securities being offered are denominated in amounts of at least 50 <u>100</u> ,000 euros (or equivalent amounts); or
		(e)	the total consideration for the transferable securities being offered <u>in the EEA states</u> cannot exceed 100,000 euros (or an equivalent amount); ; <u>or</u>
		(f)	<u>the offer falls within subsection (1A).</u>
	<u>(1A)</u>	<u>An offer (“the current offer”) falls within this subsection where transferable securities are resold or placed through a financial intermediary where:</u>	
		(a)	<u>the transferable securities have previously been the subject of one or more offers to the public;</u>
		(b)	<u>in respect of one or more of those previous offers, any of paragraphs (a) to (e) of subsection (1) applied;</u>
		(c)	<u>a prospectus is available for the securities which has been approved by a competent authority no earlier than 12 months before the date the current offer is made; and</u>
		(d)	<u>the person who drew up the prospectus gives written consent to the use of the prospectus for the purpose of the current offer.</u>

	(2)	Where–	
		(a)	a person who is not a qualified investor (“the client”) has engaged a qualified investor falling within Article 2.1(e)(i) of the prospectus directive <u>point (1) of Section 1 of Annex II to the markets in financial instruments directive</u> to act as his agent; and
		(b)	the terms on which the qualified investor is engaged enable him to make decisions concerning the acceptance of offers of transferable securities on the client's behalf without reference to the client,
			an offer made to or directed at the qualified investor is not to be regarded for the purposes of subsection (1) as also having been made to or directed at the client.
	...		
	(7)	"Qualified investor" means -	
		(a)	an entity falling within Article 2.1(e)(i), (ii) or (iii) of the prospectus directive; <u>a person or entity described in points (1) to (4) of Section I of Annex II to the markets in financial instruments directive, other than a person or entity that has requested to be treated as a non-professional client in accordance with that directive;</u>
		(b)	an investor registered on the register maintained by the [FSA] under section 87R; <u>a person or entity who is, at their request, treated as a professional client in accordance with Section II of Annex II to that directive;</u>
		(c)	an investor authorised by an EEA State other than the United Kingdom to be considered as a qualified investor for the purposes of the prospectus directive <u>a person or entity who is recognised as an eligible counterparty in accordance with article 24 of that directive; or</u>
		(d)	<u>a person or entity whom an investments firm is authorised to continue to treat as a professional client in accordance with article 71(6) of that directive.</u>
	(8)	<u>Investment firms and credit institutions must communicate their classification of their clients as professional or non-professional clients (as the case may be) on request to an issuer, subject to complying with the Data Protection Act 1998.</u>	
	(9)	<u>In subsection (8) –</u>	

	<p><u>“credit institution” means</u></p> <p>(a) <u>a credit institution authorised under the banking consolidation directive; or</u></p> <p>(b) <u>an institution which would satisfy the requirements for authorisation as a credit institution under that directive if it had its registered office (or if it does not have one, its head office) in an EEA State.</u></p>
--	--

...

Exempt securities - offers of securities to the public

- 1.2.2 R In accordance with section 85(5)(b) of the *Act*, section 85(1) of the *Act* does not apply to *offers* of the following types of *transferable securities*:

...

- (3) *transferable securities* offered, allotted or to be allotted in connection with a merger or division, if a document is available containing information which is regarded by the *FSA* as being equivalent to that of the *prospectus*, taking into account the requirements of *EU* legislation;
- (4) ~~shares offered, allotted or to be allotted free of charge~~ dividends paid out to existing shareholders, and dividends paid out in the form of shares of the same class as the shares in respect of which the dividends are paid, if a document is made available containing information on the number and nature of the shares and the reasons for and details of the offer *offer*;
- (5) *transferable securities* offered, allotted or to be allotted to existing or former directors or employees by their employer ~~which has transferable securities already admitted to trading~~ or by an affiliated undertaking, ~~if a document is made available containing information on the number and nature of the transferable securities and the reasons for and details of the offer.~~ [**Note:** article 4(1) *PD*] if:
- (a) the company has its head office or registered office in the EU, provided a document is made available containing information on the number and nature of the transferable securities and the reasons for and details of the offer;
- (b) the company is established outside the EU and has transferable securities that are admitted to trading, provided a document is made available containing information on the number and nature of the transferable securities and the reasons for and details of the offer; or
- (c) the company is established outside the EU and has

transferable securities admitted to trading on a third country market provided that:

- (i) a document is made available containing adequate information, including the number and nature of the transferable securities; and
- (ii) the reasons for and details of the offer in a language customary in the sphere of international finance; and
- (iii) the European Commission has adopted an equivalence decision for the purpose of article 4(1) of the PD regarding the third country market concerned.

[Note: article 4(1) PD]

Exempt securities - admission to trading on a regulated market

1.2.3 R In accordance with section 85(6)(b) of the *Act*, section 85(2) of the *Act* does not apply to the *admission to trading* of the following types of *transferable securities*:

...

- (4) *transferable securities* offered, allotted or to be allotted in connection with a merger or a division, if a document is available containing information which is regarded by the *FSA* as being equivalent to that of the *prospectus*, taking into account the requirements of *EU* legislation;

...

...

2.1 General contents of prospectus

2.1.1 UK Sections 87A(2), (2A), (3) and (4) of the *Act* provide for the general contents of a *prospectus*:

(2)	The necessary information is the information necessary to enable investors to make an informed assessment of–	
	(a)	the assets and liabilities, financial position, profits and losses, and prospects of the issuer of the transferable securities and of any guarantor; and
	(b)	the rights attaching to the transferable securities.

(2A)	<u>If, in the case of transferable securities to which section 87 applies, the prospectus states that the guarantor is a specified EEA State, the prospectus is not required to include other information about the guarantor.</u>
(3)	The necessary information must be presented in a form which is comprehensible and easy to analyse.
(4)	The necessary information must be prepared having regard to the particular nature of the transferable securities and their issuer <u>and any delegated acts adopted by the Commission under article 7(1) of the prospectus directive.</u>

Summary

2.1.2 UK Sections 87A(5) and (6) of the *Act* set out the requirement for a *summary* to be included in a *prospectus*:

- (5) The prospectus must include a summary (unless the transferable securities in question are ones in relation to which prospectus rules provide that a summary is not required).
- (6) The summary must, briefly and in non-technical language, convey the essential characteristics of, and risks associated with, the issuer, any guarantor and the transferable securities to which the prospectus relates. The summary must also convey *key information* relevant to the securities which are the subject of the prospectus and, when read with the rest of the prospectus, must be an aid to investors considering whether to invest in the securities.

When a summary is not required

2.1.3 R In accordance with section 87A(5) of the *Act*, a *summary* is not required for a *prospectus* relating to *non-equity transferable securities* that have a denomination of at least ~~50~~100,000 ~~£~~€uros (or an equivalent amount) if the *prospectus* relates to an *admission to trading*. [Note: article 5.2 PD]

Contents of summary

...

2.1.5 G ~~The *summary* should generally not exceed 2 500 words. [Note: recital 21 PD] [deleted]~~

...

2.1.7 R The *summary* must also contain a warning to the effect that:

...

- (4) civil liability attaches to those *persons* who are responsible for the

summary including any translation of the *summary*, but only if the *summary* is misleading, inaccurate or inconsistent when read together with the other parts of the *prospectus* or it does not provide, when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in such *securities*, as set out in section 90(12) of the *Act*.

[**Note:** articles 5.2 and 6.2 *PD*]

...

2.2 Format of prospectus

...

- 2.2.5 R If *PR* 2.2.4R applies, the *securities note* must provide information that would normally be provided in the *registration document* ~~if where~~ there has been a material change or recent development which could affect an investor's assessments since the latest updated *registration document*, ~~or any supplementary prospectus~~, was approved, unless such information is provided in a supplementary prospectus. The *securities note* and *summary* shall be subject to a separate approval. [**Note:** article 12.2 *PD*]

...

2.4 Incorporation by reference

- 2.4.1 R (1) Information may be incorporated in the *prospectus* by reference to one or more previously or simultaneously published documents that have been approved by the competent authority of the *Home State* or filed with or notified to it in accordance with the *prospectus directive* or ~~titles IV and V of CARD~~ the TD.
- (2) ~~in particular under paragraph (1), information may be incorporated by reference to information contained or referred to in an annual information update. [**Note:** article 11.1 *PD*] [deleted]~~
- 2.4.2 G Information under ~~titles IV and V of CARD~~ the *TD* that may be incorporated by reference includes, for example, ~~instruments of incorporation or statutes of a company~~, annual accounts and annual reports, interim management statements, equivalent information made available to markets in the United Kingdom, and half yearly reports, ~~listing particulars and supplementary listing particulars~~. [**Note:** for full details refer to these titles of *CARD*]
- 2.4.3 R Information incorporated by reference must be the ~~latest~~ most recent available to the *issuer*, *offeror* or *person* requesting admission. [**Note:** article 11.1 *PD*]

...

2.5 Omission of information

...

2.5.2A UK Section 87A(2A) of the Act provides that information about certain guarantors may be omitted from a prospectus

<u>87A</u>	<u>(2A)</u>	<u>If, in the case of transferable securities to which section 87 applies, the prospectus states that the guarantor is a specified EEA State, the prospectus is not required to include other information about the guarantor.</u>
------------	-------------	--

...

3.2 Filing and publication of prospectus

...

3.2.4 R *A prospectus is deemed to be made available to the public for the purposes of PR 3.2.1R to PR 3.2.3R when published either:*

...

- (3) *in an electronic form on the issuer's website and or, if applicable, on the website of the financial intermediaries placing or selling the transferable securities, including paying agents; or*

...

3.2.4A R A person requesting admission and drawing up a prospectus in accordance with PR 3.2.4R(1) or (2) must also publish their prospectus electronically in accordance with PR 3.2.4R(3).

[Note: article 14.2 PD]

...

3.4 Supplementary prospectus

3.4.1 UK Section 87G of the Act provides that:

...	
(3)	...
(3A)	<u>But where the prospectus relates both to an offer of transferable</u>

	<u>securities to the public and the admission of those securities to trading on a regulated market, subsection (3) does not apply and the relevant period beings when the prospectus is approved and ends with the later of–</u>	
	(a)	<u>the closure of the offer to the public to which the prospectus relates; or</u>
	(b)	<u>the time when trading in those securities on a regulated market begins.</u>
(4)	...	

...

4.1 Use of languages

Language

...

- 4.1.4 R If *admission to trading* of *non-equity transferable securities* whose denomination per unit amounts to at least ~~50~~100,000 euros (or an equivalent amount) is sought in the *United Kingdom* or in one or more other *EEA States*, the *prospectus* must be drawn up in either a language accepted by the competent authorities of the *Home State* and *Host States* or in a language customary in the sphere of international finance, at the choice of the *issuer*, *offeror* or *person* requesting admission (as the case may be). [**Note:** article 19.4 PD]

...

5.1 Validity of prospectus

- 5.1.1 R A *prospectus* is valid for 12 months after its ~~publication~~ approval for an *offer* or an *admission to trading*, provided that the *prospectus* is updated by a *supplementary prospectus* (if required) under section 87G of the *Act*. [**Note:** article 9.1 PD]

...

- 5.1.4 R A registration document is valid for a period of up to 12 months after it is filed and approved, provided that it has been updated in accordance with PR 2.2.5R and PR 3.4.2R. [**Note:** article 9.4 PD]

Delete the whole of PR 5.2. The deleted text is not shown.

5.3 Certificate of approval

5.3.1 UK Sections 87H and 87I of the *Act* provide:

...

Provision of information to host Member State			
87I	...		
	(2)	...	
	(2A)	<u>If the competent authority supplies a certificate of approval to the competent authority of the specified EEA State, it must also supply a copy of that certificate to the person who made the request under this section and to ESMA.</u>	
	...		
	(5)	The [<i>FSA</i>] must comply with a request under this section—	
		(a)	if the prospectus has been approved before the request is made, within 3 working days beginning with the date of the request <u>the date the request is received</u> ; or
		...	

Delete the whole of *PR* 5.4. The deleted text is not shown.

App 1.1 Relevant definitions

...	
<i>annual information update</i>	the document referred to in PR 5.2.1R [deleted]
...	
<u><i>CARD</i></u>	<u><i>Consolidated Admission and Reporting Directive</i></u> [deleted]
...	
<i>issuer</i>	...

<u>key information</u>	(in <i>PR</i>) (as defined in section 87A(9) and (10) of the <i>Act</i>) means the information that enables investors to understand the <i>transferable securities</i> to which the <i>prospectus</i> relates and decide whether to consider the securities further. <u>Key information includes:</u>	
	(a)	<u>the essential characteristics of, and risks associated with, the <i>issuer</i> and any <i>guarantor</i>, including their assets, liabilities and financial position;</u>
	(b)	<u>the essential characteristics of, and risks associated with, investment in the <i>transferable securities</i>, including any rights attaching to the <i>securities</i>;</u>
	(c)	<u>the general terms of the offer, including an estimate of the expenses charged to the investors by the <i>issuer</i> and the offeror, if not the <i>issuer</i>;</u>
	(d)	<u>details of the <i>admission to trading</i>; and</u>
	(e)	<u>the reasons for the offer and proposed use of the <i>proceeds</i>.</u>
...		
<u>qualified investor</u>	(in <i>PR</i>) (as defined in section 86(7) of the <i>Act</i>):	
	(a)	<u>any entity within the meaning of Article 2(1)(e)(i), (ii) or (iii) of the <i>prospectus directive</i>; or a person or entity described in points (1) to (4) of Section I of Annex II to <i>MiFID</i>, other than such a <i>person</i> or <i>entity</i> that has requested that they be treated as a <i>non-professional client</i> in accordance with <i>MiFID</i>; or</u>
	(b)	<u>an investor registered on the register maintained by the competent authority under section 87R of the <i>Act</i>; or a <i>person</i> or <i>entity</i> who is, at their request, treated as a <i>professional client</i> in accordance with Section II of Annex II to <i>MiFID</i>; or</u>
	(c)	<u>an investor authorised by an <i>EEA State</i> other than the <i>United Kingdom</i> to be considered as a qualified investor for the purposes of the <i>prospectus directive</i> a <i>person</i> or <i>entity</i> who is recognised as an <i>eligible counterparty</i> in accordance with article 24 of <i>MiFID</i>; or</u>
	(d)	<u>a <i>person</i> or <i>entity</i> in respect of whom <i>investment firms</i> have been authorised to continue to treat as a</u>

	<i>professional client</i> in accordance with article 71(6) of <i>MiFID</i> .
<i>register</i>	register of <i>qualified investors</i> maintained by the <i>FSA</i> under section 87R of the <i>Act</i>. [deleted]

Sch 4 Powers exercised

Sch 4.1 G

The following powers and related provisions in or under the <i>Act</i> have been exercised by the <i>FSA</i> to make the <i>rules</i> in <i>PR</i> :	
	...
	Section 87R (Register of investors)
	...

Annex D

Amendments to the Disclosure Rules and Transparency Rules sourcebook (DTR)

In this Annex, underlining indicates new text and striking through indicates deleted text.

4.4 Exemptions

...

Debt issuers

- 4.4.2 R The *rules* on annual financial reports in *DTR* 4.1 (including *DTR* 4.1.7R(4)), half-yearly financial reports (*DTR* 4.2) and interim management statements (*DTR* 4.3) do not apply to an *issuer* that issues exclusively *debt securities admitted to trading* the denomination per unit of which is at least ~~50~~100,000 ~~€~~€uros (or an equivalent amount).

[**Note:** article 8(1)(b) of the *TD* and article 45(1) of the *Audit Directive*]

...

6.1 Information requirements for issuers of shares and debt securities

...

Information about meetings and payment of interest - debt security issuers

...

- 6.1.15 R If only holders of *debt securities* whose denomination per unit amounts to at least ~~50~~100,000 ~~€~~€uros (or an equivalent amount) are to be invited to a meeting, the *issuer* may choose as a venue any *EEA State*, provided that all the facilities and information necessary to enable such holders to exercise their rights are made available in that *EEA State*. [**Note:** article 18(3) of the *TD*]

...

6.2 Filing information and use of language

...

Language

...

- 6.2.8 R If *transferable securities* whose denomination per unit amounts to at least 50100,000 Euros (or an equivalent amount) are *admitted to trading* in the *United Kingdom* or in one or more *EEA States*, *regulated information* must be disclosed to the public in either a language accepted by the competent authorities of the *Home State* and *Host States* or in a language customary in the sphere of international finance, at the choice of the *issuer* or of the *person* who, without the *issuer's* consent, has requested such admission.

[**Note:** article 20(6) of the *TD*]

TP 1 Disclosure and transparency rules

DTR Sourcebook - Transitional Provisions

(1)	(2) Material to which the Transitional provisions applies	(3)	(4) Transitional provision	(5) Transitional Provision: dates in force	(6) Handbook Provision: coming into force
...					
(19)	<u>DTR 4.1, DTR 4.2 and DTR 4.3</u>	<u>R</u>	<u>The rules on annual financial reports (DTR 4.1), half-yearly financial reports (DTR 4.2) and interim management statements (DTR 4.3) shall not apply to issuers of exclusively debt securities the denomination per unit of which is at least 50,000 euros or in the case of debt securities denominated in a currency other than euro, the value of such denomination per unit is at the date of the issue equivalent to at least 50,000 euros which have already been</u>	<u>From [date instrument in force] to: as long as the debt securities to which (19) applies are outstanding</u>	

			<p><u>admitted to trading on a regulated market in the EU before 31 December 2010.</u></p> <p><u>[Note: article 8.1 TD]</u></p>		
(20)	<u>DTR 6.1.15</u>	R	<p>Where only holders of <u>debt securities</u> whose denomination per unit amount to at least 50,000 euros or for <u>debt securities</u> denominated in a currency other than euro, the value of such denomination per unit is equivalent to 50,000 euros at the date of issue, are to be invited to a meeting, the <u>issuer</u> may choose as a venue any <u>EEA State</u>, provided that all the facilities and information necessary to enable such holders to exercise their rights are made available in that <u>EEA State</u>, and only where those <u>debt securities</u> have already been admitted to trading on a regulated market in the EU before 31 December 2010.</p> <p><u>[Note: article 18 TD]</u></p>	From [date instrument in force] to: as long as the <u>debt securities</u> to which (20) applies are outstanding.	
(21)	<u>DTR 6.2.8</u>	R	<p>Where <u>debt securities</u> whose denomination per unit amount to at least 50,000 euro, or</p>	From [date instrument in force] to: as long as the <u>debt securities</u>	

		<p><u>for <i>debt securities</i> denominated in a currency other than euro, the value of such denomination per unit is equivalent to 50,000 euros at the date of issue, and such <i>debt securities</i> are <i>admitted to trading</i> in one or more <i>EEA States</i>, <i>regulated information</i> must be disclosed to the public in either a language accepted by the competent authorities of the <i>Home State</i> and <i>Host States</i> or in a language customary in the sphere of international finance, at the choice of the <i>issuer</i> or of the <i>person</i> who, without the <i>issuer's</i> consent, has requested such admission.</u></p> <p>[Note: article 20 <i>TD</i>]</p>	<p>to which (21) applies are outstanding.</p>	
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The Financial Services Authority
25 The North Colonnade Canary Wharf London E14 5HS
Telephone: +44 (0)20 7066 1000 Fax: +44 (0)20 7066 1099
Website: www.fsa.gov.uk

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