

EXPLANATORY MEMORANDUM TO THE PROSPECTUS REGULATIONS 2012

2012 No. 1538

1. Origin of this memorandum

This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These Regulations amend a number of provisions of the Financial Services and Markets Act 2000 (“FSMA”), in order to transpose into domestic law the provisions of Directive 2010/73/EU of the European Parliament and of the Council (“the PD Amending Directive”). The PD Amending Directive amends Directive 2003/71/EC (“The Prospectus Directive”), which stipulates when and how a prospectus must be published when securities are offered to the public or admitted to trading on a regulated market.

2.2 Two particularly pressing elements of the PD Amending Directive were transposed into domestic law last year, by measures contained in the Prospectus Regulations 2011 (SI 2011 No 1668). These measures were to help businesses, and small businesses in particular, raise equity finance more efficiently.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This Statutory instrument is being laid before Parliament on 15 June, 16 days before the Prospectus Directive, (as part of the Amending Directive 2010/73/EU) enters into force across the EU. The shortening of the recommended 21 days in Parliament is due to circumstances outside the control of HM Treasury. Specifically, the Delegated Regulation from the European Commission, which finalised certain aspects of the amendments to the Prospectus Directive, was significantly delayed. It was published on 30 March 2012, several months after the intended date.

3.2 This delay by the European Commission resulted in the remaining legislative process for HM Treasury being pushed back. HM Treasury’s Impact Assessment was submitted to the Regulatory Policy Committee as quickly as possible in the light of the delays at European level, on 4 April 2012. This impact assessment calculates the costs and benefits of the Prospectus Directive to the UK economy, and could not be finalised prior to the final publication of the Commission’s Delegated Regulation, as making accurate cost and benefit calculations required the final outcomes of policy decisions at the European level. This in turn pushed back the completion dates for the rest of the

domestic better regulation process, which was followed within its normal time frame.

4. Legislative Context

- 4.1 These Regulations amend Part VI of the FSMA 2000, which provides for the implementation of the Prospectus Directive in the United Kingdom. The Prospectus Directive seeks to enhance investor protection and improve the efficiency of the single market. Its key innovation is that a prospectus – which must be produced by companies when they make public offers of their securities, or when they are admitted to trade on a regulated market – approved in one Member State is valid across the EU. This gives issuers a ‘passport’ across the EU in order to help them raise equity finance. The Prospectus Directive came into force on 1 July 2005.
- 4.2 The PD Amending Directive followed a review by the European Commission, designed to simplify the procedure and reduce the administrative burden faced by issuers, without compromising investor protection or the functioning of the securities market in the EU.
- 4.3 The text of the final Amending Directive was agreed at the Permanent Representative Committee (COREPER) on 2 June 2010. The Government’s European Affairs Committee was notified of the Directive’s agreement on 16 June 2010. It was formally adopted by the Council and European Parliament on 24 November 2010.
- 4.4 The PD Amending Directive was published in the Official Journal on 11 December 2010. The deadline for member State transposition of these measures is 1 July 2012.
- 4.5 The Government submitted an explanatory memorandum dated October 2009 (doc 13688/09). The House of Commons Select Committee on European Scrutiny reported on the draft directive in 31 (2008-09) (28 October 2009), para. 3 and 1 (2009-10) (19 November 2009) para. 20, clearing it after Ministerial correspondence. The House of Lords European Union Committee considered the draft Directive in Sub-Committee A and cleared it from scrutiny on 3 November 2009.
- 4.6 Certain measures were introduced early by the Prospectus Regulations 2011 (SI 2011 No. 1668).
- 4.7 A Transposition Note is annexed to this Memorandum.

5. Territorial Extent and Application

These Regulations apply to all of the United Kingdom.

6. European Convention on Human Rights

The Financial Secretary to the Treasury, Mark Hoban MP, has made the following statement regarding Human Rights:

In my view, the provisions of The Prospectus Regulations 2012 are compatible with the Convention rights.

7. Policy background

- 7.1. The Prospectus Directive, adopted in 2003, introduced a harmonised EU framework for the production and initial disclosure requirements of a prospectus, which companies are required to produce when making a public offer of securities, or when first admitted to trading on a regulated market. The intention of the prospectus is to ensure investor protection and that adequate information is made available to them to ensure they understand the investment they are making. By creating an EU framework, companies are able to ‘passport’ their prospectuses, and thus their offerings, across the EU. The Directive establishes a series of thresholds which dictate when a prospectus must be produced. Below these thresholds, a prospectus is not required.
- 7.2. In 2010, the European Commission undertook a review of the Prospectus Directive. While it found that the framework was broadly operating well, it identified an opportunity to provide further simplification without compromising investor protection. The most significant of these changes is the introduction of a proportionate disclosure regime for rights issues, which reduces the amount of information which small businesses need to publish in certain types of prospectus, reducing cost without compromising investor protection.
- 7.3. Other key amendments have also been made. These include strengthening of the content, format and comparability of prospectus summaries. Clarification has been added to the final terms of a base prospectus, and 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.
- 7.4. Furthermore, the exemption from the obligation to publish a prospectus for subsequent resales of securities through intermediaries has been formalised. Clarification is provided as to the period for which a supplement to a base prospectus must be produced.
- 7.5. 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.
- 7.6. Two of its amendments increase the thresholds for which a prospectus must be required – the first, being the total size of the offer, and the second, the number of investors an issuer can approach before triggering the requirement

to produce a prospectus. Small companies undertaking secondary fundraising are the most likely group to benefit from these measures. Avoiding the costly production of a prospectus is estimated to save UK businesses around £12 million each year.

- 7.7. In November 2010, in its response to the Government green paper *Financing a Private Sector Recovery*, the Government indicated it would introduce these two measures in the summer of 2011, approximately one year early, in order to help small businesses access equity finance more easily and cost-effectively. Smaller companies will benefit in particular from these increases as they are the group most likely to make relatively small capital raisings of this size, and/or approach a relatively small number of investors. The measures will give them more efficient access to equity finance, as fewer offers will require a costly prospectus to be produced.
- 7.8. These implementation measures, and the related statutory instruments bringing them into effect, have undergone relevant Better Regulation and legal scrutiny. A near final draft of the statutory instruments was also included in the joint policy statement of the FSA and HM Treasury of the 25th May 2012.

8. Consultation outcome

These Regulations make the necessary amendments to the Financial Services and Markets Act 2000. HM Treasury and the FSA consulted on these changes to Directive 2010/73/EU of the European Parliament and of the Council. In December 2012. These consolidate the amendments needed to the Financial Services and Markets Act 2000, in order to bring the Amending Directive in its entirety into effect. The consultation responses we received were positive. Where respondents raised concerns, we considered them and amended our regulation appropriately.

9. Guidance

The Treasury is producing a joint policy statement in conjunction with the FSA, which sets out our joint consultation responses, and explains the changes we are making to FSMA and the FSA's prospectus rules (subject to better regulation clearance). This guidance will be published on the 25th May.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies is a cost saving for businesses, in particular small firms.
- 10.2 The impact on the public sector is negligible.
- 10.3 An Impact Assessment is attached to this memorandum.

11. Regulating small business

The legislation applies to small business, as this is the group which will benefit most from the changes. The impact is deregulatory and cost-saving, by helping small businesses raise equity finance more quickly and cost-effectively.

12. Monitoring & review

The UK's transposition of the Amending Directive will be subject to a Post Implementation Review five years after it comes into effect. Both the early implementation measures introduced by the Prospectus Regulations 2011, and measures introduced by these Regulations, will be reviewed simultaneously, with the report of the first review to be published on or by 30 June 2017.

13. Contact

Matthew Fisher at HM Treasury, telephone: 020 7270 4486 or email: matthew.fisher@hmtreasury.gsi.gov.uk, can answer any queries regarding the instrument.

Transposition Note

Amendments to the Prospectus Directive

A note of the transposition of Directive 2010/73/EU of 24 November 2010 amending Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading 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

Prospectus Directive (EU) 2003/71 - amendments

Article in Amending Directive (EU) No 2010/73)	Article in Prospectus Directive (EC) No 2003/71	Objectives	Provision in implementing legislation (proposed Prospectus Regulations 2012 unless otherwise stated)	Provision which has been amended in existing legislation or rules (PR = Prospectus Rules)	Responsibility for transposition
1(1)(a)(i)	1(2)(h)	Threshold increase for securities included in offer where total consideration is less than €2.5m is raised to €5m	SI (2011) No. 1668, s 1(3) (already in force); and s2(5) of the draft Prospectus Regulations 2012	FSMA Sch 11A, para 9(1)	HMT – already introduced by SI (2011) No. 1668.

1(1)(a)(ii)	1(2)(j)	Exemption threshold for non-equity securities issued in a continuous and repeated manner raised from €50m to €75m	2(4)	FSMA Sch 11A, para 8(2)(a)	HMT
1(1)(b)	1(4)(new)	European Commission powers to make delegated acts on Article 1 2(h) and (j) of PD	n/a	n/a	European Commission
1(2)(a)(i)	2(1)(e)	Amending definition of qualified investor to line with MiFID - persons/entities described in points (1) to (4) of Annex II of 2004/39/EC	3(2)(b) and (c) (and consequential amendment in 3(2)(a))	FSMA, s86(7) and (8); consequential amendment in s86(2)(a) FSA Glossary; PR App 1	HMT and FSA
1(2)(a)(ii)	2(1)(s)(new)	New prescriptive definition of key information	4(d)	FSMA, s87A(9) and (10) FSA Glossary; PR App 1	HMT and FSA
	2(1)(t)(new)	New definition of company with reduced market capitalisation		Prospectus Regulations (EC/809/2004)	European Commission
1(2)(b)	2(2) and (3)	Deleted - part of old definition of qualified investors	3(2)(b) and (c) (and consequential amendments in	FSMA, ss 86(7)(b) and 87R	HMT and FSA

1(2)(c)	2(4)	European Commission power to make delegated acts on the definitions in Article 2 Paragraph 1	3(1) and 3(3)	FSA Glossary; PR App 1	European Commission
1(3)(a)(i)	3(2)(b)	Threshold increased from 100 to 150 persons per Member State	SI (2011) No. 1668, s 1(2) – already in force	FSMA s86(1)(b) and FSA Rule PR1.2.1	HMT and FSA – already introduced by SI (2011) No. 1668.
	3(2)(c)	Exemption threshold raised for total consideration per investor raised from €50,000 to €100,000.	2(1)(a)	FSMA s86(1)(c) PR 1.2.1UK	HMT and FSA
	3(2)(d)	Exemption threshold raised from €50,000 to €100,000 for denomination of transferable securities	2(1)(a)	FSMA s86(1)(d) PR 1.2.1UK LR4.2.4R(1), (3) and (4)	HMT and FSA
	3(2)(e)	Exemption where total consideration less than €100,000 in the Union	2(1)(c)	FSMA s86(1)(e) PR 1.2.1UK	HMT and FSA
1(3)(a)(ii)	3(2)(new para)	Add an exemption to producing a prospectus for subsequent resales via financial intermediaries (“retail cascades”) if a valid prospectus is available in accordance with Article 9 (valid for 12	2(1)(d)	FSMA s86(1)(f) and s86(1A) (both new) PR 1.2.1UK	HMT and FSA

		months etc)					
1(3)(b)	3(4) (new)	European Commission power to make delegated acts concerning the exemption thresholds in A3(2)(c)-(e)	n/a	n/a		European Commission	
1(4)(a)(i)	4(1)(c)	Exemption from requirement to produce a prospectus for a merger if an FSA deemed equivalent document is available extended to cover Divisions and 'EU legislation' wording replaced with 'Union legislation'			PR 1.2.2.R(3)	FSA	
	4(1)(d)	Exemption amended to only cover dividends paid to existing shareholders in the form of shares (not all shares offered, allotted or to be allotted free of charge)			PR 1.2.2.R(4)	FSA	
	4(1)(e)	Exemption for securities offered to employees amended to remove requirement that the securities must already be admitted to trading on a regulated market and replaced with requirement that the Company has its head office or registered office in the Union			PR 1.2.2.R(5)	FSA	
1(4)(a)(ii)	4(1)(e) (new sub-para)	1(e) exemption (offers to employees) also applies to company outside the Union whose shares are admitted to trading on a regulated market or a 3rd country market. For latter, exemption applies if the document referred to is available in the language of international finance and that			PR 1.2.2.R(5)	FSA	

			the Commission has adopted an equivalence decision regarding the 3rd country market involved. The remainder of the rule outlines the commissions responsibility and framework for determining equivalence				
1(4)(b)	4(2)(d)		Exemption for securities admitted to trading on a regulated market offered in connection with a merger extended to cover “divisions” and to take into account “Union” (rather than “Community”) legislation			PR 1.2.3.R(4)	FSA
1(5)(a)(i)	5(2)	4(a)	Summary should provide key information and drawn up in a common format to facilitate comparison of summaries			FSMA s87A(6) PR 2.1.2 UK PR 2.1.3R	HMT & FSA
1(5)(a)(ii)	5(2)		Summary not required for a prospectus of non equity securities with denomination of at least €50,000 raised to €100,000 for admission to trading (save where requested by a Member State in accordance with Article 19 (languages))				FSA
1(5)(b)	5(3)	n/a	Cross reference to paragraph 4 removed	n/a		n/a	None
1(5)(c)	5(4)	4(b)	Final terms of offer must, if not in prospectus, be made available to investors, file with competent authority etc. Information in “final terms” shall only relate to the securities note and not be used to supplement the base prospectus			FSMA s87A(7) and (7A)	HMT

1(5)(d)	5(5)	Power to make delegated acts on format of prospectus, base prospectus, summary, final terms and supplements and the detailed content and specific form of the key information to be included.	n/a	n/a	European Commission
1(6)	6(2)	Civil liability extended to cover not providing key information and to contain a warning to that effect in the document	FSMA s90(12) PR 2,1,7R	7	HMT
1(7)(a)	7(1)	European Commission power to make delegated acts regarding specific information included in a prospectus	n/a	n/a	European Commission
1(7)(b)(i)	7(2)(b)	Amendment to the European Commission's regulation-making power: non equity securities denomination increased to €100,000 from €50,000	n/a	n/a	European Commission
1(7)(b)(ii)	7(2)(e)	Amendment to European Commission's regulation-making power: expanded to cover credit institutions issuing non equity securities and companies with reduced market capitalisation	n/a	n/a	European Commission
1(7)(b)(iii)	7(2)(g) (new)	Amendment to European Commission's regulation-making power: proportionate disclosure regime for companies whose shares are admitted to trading on a regulated market etc	n/a	n/a	European Commission

1(7)(c)	7(3)	Changed to refer to “ <i>delegated acts</i> ”	n/a	n/a	European Commission
1(8)(a)	8(2) and (3)	“ <i>Implementing measures</i> ” replaced with ‘ <i>delegated acts</i> ’	n/a	n/a	European Commission
1(8)(b)	8(3a)	Where securities guaranteed by a Member State, the information can be omitted about such a guarantor in the prospectus	2(3)	FSMA s87A(2A) PR 2.5.1A UK	HMT
1(8)(c)	8(4)	European Commission’s power to make delegated acts	n/a	n/a	European Commission
1(9)(a)	9(1)	Clarifying prospectus validity for 12 months after approval not publication.		PR 5.1.1R	FSA
1(9)(b)	9(4)	Amended to state valid up to 12 months after filed and approved provided it has been updated in accordance with Article 12(2) or Article 16		PR 5 1.4R	FSA
1(10)	10	Deleted	8	FSMA 96(2)(c)(ii) PR 2.4.3R	HMT and FSA
1(11)(a)	11(1)	Incorporation by reference - references to Article 10 deleted and ‘latest’ replaced with ‘most recent’		None	FSA
1(11)(b)	11(3)	Delegated acts on incorporation by	n/a	n/a	European

		reference			Commission
1(12)	12(2)	For issuers that already have a reg doc approved, only a sec note and summary need to be drawn up. (Article 12(1)). Article 12(2) is amended to clarify that the sec note shall provide the stated info unless such info is provided in a supplement in accordance with Article 16.		PR 2.2.5R	FSA
1(13)	13(7)	Delegated acts on time limits	n/a	n/a	European Commission
1(14)(a)(i)	14(2)(c)	prospectus can be published in electronic form on issuers website "or" on intermediaries website, not "and".		PR 3.2.4R(3)	FSA
1(14)(a)(i)	14(2) subpara at end	Extended to cover persons responsible for drawing up the prospectus and to require electronic publication where newspaper or printed doc are used		PR 3.2.4AR	FSA
1(14)(b)	14(8)	Delegated acts re publication of prospectus	n/a	n/a	European Commission
1(15)	15(7)	Delegated acts re advertisements	n/a	n/a	European Commission
1(16)	16(1)	Clarifies that supplement requirement triggered at the later of trading on regulated market beginning or final offer closing.	5(1)	FSMA s87G(3) PR 3.4.1.R UK	HMT & FSA
	16(2)	Clarifying withdrawal rights	5(2)	FSMA s87Q(4),	HMT

1(17)	18(1)	The FSA, at the request of the issuer, will provide the host member state with a certificate of approval. New: time scale for compliance runs from date of receipt of request; also new: added that the issuer/person responsible for drawing up the prospectus shall also be notified of the certificate of approval at the same time as the competent authority of the host member state.	6(a) and (b)	FSMA s87I(1A) and (5)(a)	HMT
1(18)	19(4)	Use of languages - denomination for non equity securities increased from €50,000 to €100,000		PR 4.1.4R	FSA
1(19)	20(3)	delegated acts re equivalence criteria	n/a	n/a	European Commission
1(20)	21(4)(d)	Delegated acts	n/a	n/a	European Commission
1(21)	24a, 24b and 24c (all new)	Delegated acts – 3 month silence procedure for Council and European Parliament	n/a	n/a	European Commission
1(22)	22(2)	Replace “key information” with “essential information” in Annexes I, II, III and IV	n/a	n/a	European Commission

FSMA: Financial Services and Market Act 2000

FSA Glossary: the Glossary in the FSA Handbook

PR: The FSA Prospectus Rules