



HM TREASURY

# Consultation on early implementation of amendments to the Prospectus Directive

March 2011





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# Contents

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|           |   | Page |
|-----------|---|------|
| Chapter 1 | Introduction  | 3    |
| Chapter 2 | Measures for early implementation                     | 5    |
| Chapter 3 | How to respond  | 9    |
| Annex A   | Draft implementing instrument (SI) for early measures | 11   |
| Annex B   | Impact Assessment                                     | 13   |



# 1

## Introduction

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**1.1** On 24 November 2010 the European Parliament and Council adopted Directive 2010/73/EU (the “Amending Directive”), which amends the Prospectus Directive 2003/71/EC (the “PD”) on the prospectus to be published when securities are offered to the public or admitted to trading and the Transparency Directive 2004/109/EC (the “TD”) on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

**1.2** This consultation document seeks views on early implementation in the UK of two elements of the Amending Directive. The Government will consult separately on proposals for implementation in the UK of the remaining elements of the Amending Directive. These are not considered here.

### UK implementation

**1.3** Member States have until **1 July 2012** to adopt and publish their implementing measures.

**1.4** In order to transpose the two measures of the Amending Directive into UK law, we intend to amend the previous UK legislation which implements the PD.

**1.5** A draft of the proposed Statutory Instrument implementing two measures of the Amending Directive (hereafter “the amending SI”) is set out at Annex A. A draft impact assessment is set out at Annex B.

**1.6** We do not propose to use the implementation process to make any changes beyond those required by the Directive. The Directive is a ‘maximum harmonisation’ Directive, in relation to the format and contents of a prospectus. Consequently, there is limited scope for EU Member States to apply discretion in the way in which it is implemented.

**1.7** We are consulting on introducing two measures of the Amending Directive early (before the implementation deadline), as these will be beneficial to companies. The threshold for an offer of securities for which a Prospectus is required will be raised from €2.5 million to €5 million. Furthermore, the minimum number of investors for which a Prospectus is required will increase from 100 to 150 investors per Member State. These measures will particularly benefit smaller companies.

### Background and key points

**1.8** The PD is the EU framework for the preparation of prospectuses for public offers of securities and where securities are to be admitted to trading on a regulated market. Its objectives are to enhance investor protection and to improve the efficiency of the single market. Its key innovation is that a prospectus approved in one Member State is valid across the EU, giving issuers a ‘passport’ across EU capital markets. The PD was implemented in the UK via the Prospectus Regulation 2005 (hereafter “the 2005 regulation”), which came into force on 1 July 2005.

**1.9** Article 31 of the PD required the European Commission to review the application of the Directive five years after its entry into force and to present, where appropriate, proposals for its review. The Amending Directive is the outcome of consultations carried out on the operation of the PD. The Commission consulted on the operation of the PD in 2009 and concluded that the

overall effect of the Directive has been positive. However, the need for some improvements was identified. This focused on the need to improve and simplify the application of the PD, to reduce administrative burdens on issuers whilst maintaining investor protection, and improve legal certainty.

**1.10** This consultation considers the early implementation of two specific measures of the Amending Directive. Chapter 2 outlines the proposals for their early implementation in the UK. Chapter 3 explains how to respond to this consultation document and includes a summary of the consultation questions.

**Box 1.A: The changes to the original Directive we propose to implement early:**

- **Increasing the total consideration of the offer for which the Directive does not apply from €2.5 million to €5 million.** The Amending Directive increases from €2.5 million to €5 million the limit for the total consideration of the offer in the EU, 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.
- **Increasing the minimum number of investors for which a prospectus is required from 100 to 150 investors.** The Amending Directive increases the number of persons to whom an offer may be directed before it ceases to be an exempt offer (an offer of transferable securities to the public without an approved prospectus first having been made available to the public) from 100 to 150 persons per Member State.

# 2

## Measures for early implementation

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**2.1** This section looks at the measures in the Amending Directive that we propose to implement early in the UK and explains how we intend to implement this into UK law.

**2.2** We welcome comments on any aspect of the proposed implementation and, in particular, we would welcome information from consultees on the likely costs and benefits of the implementation measures, where applicable. Where we are seeking views on a specific point, we have inserted a consultation question.

**2.3** The Government is demonstrating its support for smaller companies in the context of the regulatory framework by proposing to introduce two measures of the Amending Directive early. These measures will be beneficial to companies, particularly smaller companies.

### Amendments for early implementation

#### Increasing the total consideration of the offer for which the Directive does not apply

**2.4** The Amending Directive increases from €2.5 million to €5 million the limit for the total consideration of the offer in the EU<sup>1</sup> 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.

**2.5** The intention of this measure is to reduce the administrative burden on issuers. This will be particularly beneficial for smaller companies as it will widen the existing consideration for which the Directive does not apply, enabling companies to raise capital more cost-efficiently as they will be able to raise larger amounts of capital.

**2.6** The SI implements this measure by:

- in the appropriate place in Financial Services and Markets Act 2000, paragraph 9(1) of Schedule 11A to that Act (transferable securities), replacing “the total consideration of the offer is less than 2,500,000 euros (or an equivalent amount)” with “the total consideration of the offer in the European Union is less than 5,000,000 euros (or an equivalent amount)”.

#### Increasing the minimum number of investors for which a prospectus is required from 100 to 150 investors.

**2.7** The Amending Directive increases the number of persons to whom an offer may be directed before it ceases to be an exempt offer (an offer of transferable securities to the public without an approved prospectus first having been made available to the public) from 100 to 150 persons per Member State.

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<sup>1</sup> If European Free Trade Association countries decide to adopt the Amending Directive this will apply within the European Economic Area.

**2.8** The intention of this measure is to reduce the administrative burden on issuers. This will be particularly beneficial for smaller companies as it will widen an existing exemption, enabling companies to raise capital more cost-efficiently as they will be able to offer securities to a wider set of investors.

**2.9** The SI implements this measure by:

- in the appropriate place in section 86(1)(b) of the Financial Services and Markets Act 2000 (exempt offers to the public), replacing “100 persons” with “150 persons”.

## Early implementation

**2.10** We are proposing to introduce these two measures of the Amending Directive early because they will be beneficial to companies. These changes widen existing exemptions and will mean that fewer offers require a prospectus. Implementing these amendments early will allow companies more efficient access to capital on public markets.

**2.11** The benefits are likely to be most significant in the case of further fundraisings by smaller public companies. The measures will enable unquoted companies and companies on exchange-regulated markets, such as AIM and PLUS Quoted, and the main markets, to offer securities to a wider set of investors more cost-effectively. They will also help companies already on market to raise capital through further issues more cost-efficiently, as they will be able to raise larger amounts of capital at a time.

**2.12** Responses to the Government’s Green Paper consultation *Financing a Private Sector Recovery*<sup>2</sup> outlined the costs involved in producing a prospectus. Respondents estimated that the cost of producing a prospectus can range from 7 to 12 percent of the funds raised for consideration levels below £10 million, where a prospectus is required. For example, for an offer of £5 million preparing a prospectus could cost in the range of £350,000 to £600,000.

**2.13** Using evidence<sup>3</sup> from the last 10 years (2000-2010) on the number of public offers<sup>4</sup> requiring a prospectus on both the London Stock Exchange’s Main Market and AIM, the number of issues that would have benefitted from a higher fundraising threshold of €5 million (i.e. those with total public issues between €2.5 million and €5 million between 2000 and 2010) is 256.

**2.14** Using these statistics we can estimate the benefits of increasing the fundraising threshold from €2.5 million to €5 million. The total benefits are estimated to be in the range of £9 million to £15 million, representing a benefit of £350,000 to £600,000 for 26 public offers per year.

**2.15** We anticipate the benefits to be towards the higher range, as it is likely that the cost incurred in producing a prospectus has impacted upon those fundraisings (those below €5 million but above €2.5 million). This is because once an issuer is required to produce a prospectus it is often more cost-effective to undertake a higher fundraising. In addition, we have not been able to estimate the quantitative benefits associated with increasing the number of persons to whom an offer may be directed before it ceases to be an exempt offer from 100 to 150 persons, which will also contribute to the benefits. This is because it is difficult to ascertain how many companies have used this exemption when undertaking offers. We would welcome any information that respondents to the consultation are able to provide on this.

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<sup>2</sup> <http://www.bis.gov.uk/businessfinance>

<sup>3</sup> <http://www.londonstockexchange.com/statistics/new-issues-further-issues/new-issues-further-issues.htm>

<sup>4</sup> ‘Total Further Public Offers’ includes the following offer types: further rights shares, offer for subscription, open offer, placing & open offer, placing and offer for subscription, public offering, rights issue.

### **Box 2.A: Question 1**

Do you have any information on the quantitative benefits associated with increasing the number of persons to whom an offer may be directed before it ceases to be an exempt offer from 100 to 150 persons?

**2.16** Due to the costs involved with producing a prospectus, smaller companies often choose to raise funds through private placements. Since the implementation of the PD in July 2005, the London Stock Exchange has estimated that AIM companies have raised approximately £28 billion through further fundraisings, the majority of which (approximately 98%) was through private placements. However, private placements rather than public offers can result in dilution of the shares of existing shareholders. These changes should help to encourage smaller companies to conduct rights issues, which will help to protect minority shareholders.

### **Box 2.B: Question 2**

Do you have any views on the Government's decision to introduce these specific elements of the Amending Directive earlier than required, because this will be beneficial to smaller companies?

## **Cross-border offers**

**2.17** Member States have until 1 July 2012 to adopt and publish their implementing measures. It is left to the discretion of Member States whether they transpose the Amending Directive into their domestic law in advance of the implementation date. As we intend to introduce two measures into UK legislation early, issuers will need to take care when undertaking cross-border offers when using these measures. This is because Member States may have yet to implement the same measure. Particular care will need to be taken when using the fundraising threshold, as the limit applies to the total consideration of the offer in the EU<sup>5</sup>. For example, where an offer of say €3 million is made in the UK and in another Member State that has not yet implemented the measure, in this case the offer may not be exempt under the domestic law of the other Member State. This will not be applicable where offers are made entirely in the UK. Where a prospectus is required in another Member State, issuers should consider electing to have a prospectus in the UK which could then be passported into that other Member State so as to avoid the issuer infringing the laws of the other Member State. This should be borne in mind in relation to both the increase in the funding threshold to €5 million and the increase to 150 of the minimum number of investors for which a prospectus is required. It is important that issuers have a clear understanding of these points and we shall be working with the FSA to ensure this explanation is brought to the attention of industry.

**2.18** A draft of the proposed Statutory Instrument implementing these two measures of the Amending Directive is set out at Annex A. It is proposed that these measures come into force in the summer of 2011, approximately 12 months before the required implementation date.

### **Box 2.C: Question 3**

Do you have any comments on the draft regulations of the amending SI?

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<sup>5</sup> If European Free Trade Association countries decide to adopt the Amending Directive this will apply within the European Economic Area.



# 3

## How to respond

### Box 3.A: Summary of Consultation Questions:

- 1 Do you have any information on the quantitative benefits associated with increasing the number of persons to whom an offer may be directed before it ceases to be an exempt offer from 100 to 150 persons?
- 2 Do you have any views on the Government's decision to introduce these specific elements of the Amending Directive earlier than required, because this will be beneficial to smaller companies?
- 3 Do you have any comments on the draft regulations of the amending SI?

**3.2** We invite comments on the issues and questions set out in this consultation paper, which includes a draft Statutory Instrument and Impact Assessment, by 9 June 2011. Please send responses to:

Securities and Markets Team  
HM Treasury  
1 Horse Guards Road  
London  
SW1A 2HQ

Email: SAMteam@hmtreasury.gsi.gov.uk

**3.3** When responding, please state if you are responding as an individual or representing the views of an organisation. In accordance with the code of practice on open government, comments will be made publicly available unless respondents specifically request otherwise.

### Confidentiality disclosures

**3.4** Information provided in response to this consultation, including personal information, might be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act (DPA) and the Environmental Information Regulations 2004. If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply with and which deals, amongst other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation but we cannot give an assurance that confidentiality will be maintained in all circumstances.

**3.5** An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department. Your personal data will be processed in accordance with the DPA, and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Any Freedom of Information Act queries should be directed to:

Correspondence and Enquiry Unit  
Freedom of Information Section  
HM Treasury  
1 Horse Guards Road  
London  
SW1A 2HQ

Tel: (+44) (0) 20 7270 4558

Fax: (+44) (0) 20 7270 4681

Email: [public.enquiries@hm-treasury.gov.uk](mailto:public.enquiries@hm-treasury.gov.uk)

## **Code of practice on consultation**

**3.6** This consultation is being conducted in line with the criteria in the Government's Code of Practice on Consultation. The seven consultation criteria are:

- When to consult – formal consultation should take place at a stage when there is scope to influence the policy outcome.
- Duration of consultation exercises – consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
- Clarity of scope and impact – consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
- Accessibility of consultation exercises – consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
- The burden of consultation – keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
- Responsiveness of consultation exercises – consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
- Capacity to consult – officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

If you feel this consultation does not fulfil these criteria, please contact:

Angela Carden  
HM Treasury  
1 Horse Guards Road  
London  
SW1A 2HQ

Email: [angela.carden@hmtreasury.gsi.gov.uk](mailto:angela.carden@hmtreasury.gsi.gov.uk)



# Draft implementing instrument (SI) for early measures

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## STATUTORY INSTRUMENTS

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2011 No.

### FINANCIAL SERVICES AND MARKETS

#### The Prospectus (Amendment) Regulations 2011

*Made* - - - - - \*\*\*

*Laid before Parliament* \*\*\*

*Coming into force* - - - [31st July 2011]

The Treasury are the government department designated<sup>(1)</sup> for the purposes of section 2(2) of the European Communities Act 1972<sup>(2)</sup> in relation to—

- (a) 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

1.—(1) These Regulations may be cited as the Prospectus (Amendment) Regulations 2011 and come into force on [31<sup>st</sup> July 2011].

(2) In section 86(1)(b) of the Financial Services and Markets Act 2000<sup>(3)</sup> (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)”.

*Name*  
*Name*

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<sup>(1)</sup> S.I. 1992/1315, article 9.

<sup>(2)</sup> 1972 c.62; section 2(2) was amended by section 27 of the Legislative and Regulatory Reform Act 2006 (c.51). 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 2<sup>nd</sup> May 1992 (Cm 2073, OJ No L 1, 3.11.1994, p. 3) and the Protocol adjusting that Agreement signed at Brussels on 17<sup>th</sup> March 1993 (Cm 2183, OJ No L 1, 3.1.1994, p.572).

<sup>(3)</sup>2000 c. 8.Section 86 was substituted and Schedule 11A inserted by S.I. 2005/1433, reg. 2.

**EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations amend two provisions of the Financial Services and Markets Act 2000 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 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 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 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 has been prepared and is available on the HM Treasury website ([www.hm-treasury.gov.uk](http://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 on the OPSI website ([www.opsi.gov.uk](http://www.opsi.gov.uk)).

# B

## Impact Assessment

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Impact Assessment below.

|   |   |
|---|---|
| <b>Title:</b><br><b>Impact assessment of UK implementation regulations making amendments to the EU Prospectus Directive.</b><br><br><b>Lead department or agency:</b><br>HM Treasury<br><b>Other departments or agencies:</b> | <b>Impact Assessment (IA)</b>                 |
|   | <b>IA No:</b> HMT1137                         |
|   | <b>Date:</b> 09/03/2011                       |
|   | <b>Stage:</b> Consultation                    |
|   | <b>Source of intervention:</b> EU             |
|   | <b>Type of measure:</b> Secondary legislation |
| <b>Contact for enquiries:</b><br>Victoria Gibbs<br>0207 270 4427  |   |

## Summary: Intervention and Options

### What is the problem under consideration? Why is government intervention necessary?

In September 2009, the European Commission published a proposal to amend the Prospectus Directive (PD) which is the EU framework for the preparation of prospectuses in public offers of securities and where securities are admitted to trading on a regulated market. In November 2010 the European Parliament and Council adopted the "Amending Directive". The Government now has to implement the directive to meet the European deadline of 1 July 2012 and is proposing to do this by amending existing domestic legislation. The Government is proposing to introduce two measures early (before the implementation deadline), as these will be beneficial to companies. Both the threshold for an offer of securities, and the minimum number of investors for which a Prospectus is required, will be raised.

### What are the policy objectives and the intended effects?

The Commission consulted on the operation of the PD in 2009 and concluded that the overall effect of the Directive has been positive. However, some improvements were identified. The objectives of the Amending Directive are to improve and simplify the application of the PD, principally by reducing the administrative burdens on issuers whilst maintaining investor protection and improving legal certainty. The Government is proposing to introduce two measures of the Amending Directive early as these will be beneficial to companies, particularly smaller companies, by reducing the administrative burden on issuers and facilitating capital raising. The proposed UK implementation regulations bring this into effect so UK industry can benefit from these changes as soon as reasonably possible.

### What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

- 1) To amend the prospectus provisions of the Financial Services and Markets Act 2000 and the transparency provisions of the Companies Act 2006, and the FSA to amend its Prospectus and Disclosure and Transparency Rules in order to comply with the European Directive 2010/73/EU to meet the European deadline of 1 July 2012 and bring two measures of the Amending Directive into force early.
- 2) To amend the regulations as set out in option (1) but not to bring two measures of the Amending Directive into force early.

Option 1 is preferred in view of the benefits associated with introducing two measures of the Amending Directive early. These will reduce the administrative burden on companies, particularly smaller companies, and facilitate capital raising.

**Will the policy be reviewed?** It will be reviewed. **If applicable, set review date:** 01/2016

**What is the basis for this review?** PIR. **If applicable, set sunset clause date:** Month/Year

**Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?**

Yes

**SELECT SIGNATORY Sign-off** For consultation stage Impact Assessments:

*I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.*

Signed by the responsible SELECT SIGNATORY: \_\_\_\_\_

*MIL*

Date: \_\_\_\_\_

*9/3/11*

# Summary: Analysis and Evidence

## Policy Option 1

Description:

| Price Base<br>Year 2010   | PV Base<br>Year 2010                               | Time Period<br>Years 10 | Net Benefit (Present Value (PV)) (£m)                         |  |                    |
|---|--|-------------------------|---|--|--------------------|
|   |  |                         | Low: 84   | High: 141                                | Best Estimate: 112 |
| <b>COSTS (£m)</b>   | <b>Total Transition<br/>(Constant Price) Years</b> |                         | <b>Average Annual<br/>(excl. Transition) (Constant Price)</b> | <b>Total Cost<br/>(Present Value)</b>    |                    |
| Low   | 0  |                         | 0   | 0  |                    |
| High  | 0  |                         | 0   | 0  |                    |
| Best Estimate   | 0  |                         |   | 0  |                    |
| <p><b>Description and scale of key monetised costs by 'main affected groups'</b></p> <p>These changes widen existing exemptions that have already been implemented into UK legislation. They will reduce burdens on companies, so that fewer offers will need a prospectus. No monetised costs are envisaged. We are seeking more information on these via the consultation process.</p>  |  |                         |   |  |                    |
| <p><b>Other key non-monetised costs by 'main affected groups'</b></p> <p>There could be indirect costs relating to the adjustment of industry and the FSA to these changes as well as the updating of related guidance. These are expected to be negligible.</p>  |  |                         |   |  |                    |
| <b>BENEFITS (£m)</b>  | <b>Total Transition<br/>(Constant Price) Years</b> |                         | <b>Average Annual<br/>(excl. Transition) (Constant Price)</b> | <b>Total Benefit<br/>(Present Value)</b> |                    |
| Low   | 0  |                         | £9 million  | £84 million                              |                    |
| High  | 0  |                         | £15 million   | £141 million                             |                    |
| Best Estimate   | 0  |                         | £12 million   | £112 million                             |                    |
| <p><b>Description and scale of key monetised benefits by 'main affected groups'</b></p> <p>We have estimated that the potential benefits for companies of increasing the current exemptions under which there is no requirement to produce a prospectus may amount to approximately £9 million to £15 million, representing a benefit of £350,000 to £600,000 for 26 public offers per year. The total benefits of early implementation are therefore estimated to be £12 million, as companies will benefit from a year of early implementation.</p> |  |                         |   |  |                    |
| <p><b>Other key non-monetised benefits by 'main affected groups'</b></p> <p>Implementing these amendments early will allow companies more efficient access to capital. They are likely to be most significant in the case of further fundraisings by smaller companies. The measures will enable companies to offer securities to a wider set of investors more cost effectively and to raise capital more cost efficiently, as they will be able to raise larger amounts of capital at a time.</p>   |  |                         |   |  |                    |
| <b>Key assumptions/sensitivities/risks</b>  |  |                         |   | <b>Discount rate (%)</b>                 | 3.5                |
| <p>This is a consultation Impact Assessment. We have used the consultation to seek views from industry and investors who can express a more detailed opinion on the costs and benefits of the UK implementation regulation.</p>   |  |                         |   |  |                    |
| <b>Direct impact on business (Equivalent Annual) (£m):</b>  |  |                         | <b>In scope of OIOO?</b>                                      | <b>Measure qualifies as</b>              |                    |
| Costs: 0  | Benefits: 12                                       | Net: 12                 | Yes   | OUT                                      |                    |

## Enforcement, Implementation and Wider Impacts

|   |                |      |                    |        |       |
|---|----------------|------|--------------------|--------|-------|
| What is the geographic coverage of the policy/option?   | United Kingdom |      |                    |        |       |
| From what date will the policy be implemented?  | 31/07/2011     |      |                    |        |       |
| Which organisation(s) will enforce the policy?  | UK courts/FSA  |      |                    |        |       |
| What is the annual change in enforcement cost (£m)?   | 0              |      |                    |        |       |
| Does enforcement comply with Hampton principles?  | Yes            |      |                    |        |       |
| Does implementation go beyond minimum EU requirements?  | No             |      |                    |        |       |
| What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions?<br>(Million tonnes CO <sub>2</sub> equivalent) | Traded:<br>N/A |      | Non-traded:<br>N/A |        |       |
| Does the proposal have an impact on competition?  | Yes            |      |                    |        |       |
| What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?            | Costs:<br>N/A  |      | Benefits:<br>N/A   |        |       |
| Distribution of annual cost (%) by organisation size<br>(excl. Transition) (Constant Price)                               | Micro          | < 20 | Small              | Medium | Large |
| Are any of these organisations exempt?  | No             | No   | No                 | No     | No    |

## Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

| Does your policy option/proposal have an impact on...?   | Impact | Page ref within IA |
|--|--------|--------------------|
| <b>Statutory equality duties<sup>1</sup></b><br><a href="#">Statutory Equality Duties Impact Test guidance</a> | No     |                    |
| <b>Economic impacts</b>  |        |                    |
| Competition <a href="#">Competition Assessment Impact Test guidance</a>  | Yes    | p6                 |
| Small firms <a href="#">Small Firms Impact Test guidance</a>   | Yes    | p5                 |
| <b>Environmental impacts</b>   |        |                    |
| Greenhouse gas assessment <a href="#">Greenhouse Gas Assessment Impact Test guidance</a>                       | No     |                    |
| Wider environmental issues <a href="#">Wider Environmental Issues Impact Test guidance</a>                     | No     |                    |
| <b>Social impacts</b>  |        |                    |
| Health and well-being <a href="#">Health and Well-being Impact Test guidance</a>                               | No     |                    |
| Human rights <a href="#">Human Rights Impact Test guidance</a>   | No     |                    |
| Justice system <a href="#">Justice Impact Test guidance</a>  | No     |                    |
| Rural proofing <a href="#">Rural Proofing Impact Test guidance</a>   | No     |                    |
| <b>Sustainable development</b><br><a href="#">Sustainable Development Impact Test guidance</a>                 | No     |                    |

<sup>1</sup> Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. It is intended to extend this consideration requirement under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

## Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

### References

Include the links to relevant legislation and publications, such as public impact assessments of earlier stages (e.g. Consultation, Final, Enactment) and those of the matching IN or OUTs measures.

| No. | Legislation or publication  |
|-----|---|
| 1   | EU Impact Assessment<br><a href="http://ec.europa.eu/internal_market/securities/docs/prospectus/proposal_240909/impact_assessment_en.pdf">http://ec.europa.eu/internal_market/securities/docs/prospectus/proposal_240909/impact_assessment_en.pdf</a> |
| 2   | EU Amending Directive <a href="http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:327:0001:0012:EN:PDF">http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:327:0001:0012:EN:PDF</a>   |
| 3   | Prospectus Directive 2003/71/EC <a href="http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:345:0064:0089:EN:PDF">http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:345:0064:0089:EN:PDF</a>                               |
| 4   | Transparency Directive 2004/109/EC <a href="http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:390:0038:0057:EN:PDF">http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:390:0038:0057:EN:PDF</a>                            |
| 5   | The Prospectus Regulation 2005 Impact Assessment <a href="http://www.hm-treasury.gov.uk/d/20050519_Final_RIA.pdf">http://www.hm-treasury.gov.uk/d/20050519_Final_RIA.pdf</a>  |
| 6   | Matching IN: Financial Services Authority regulation of the second charge mortgage market (attached)  |

+ Add another row

### Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

#### Annual profile of monetised costs and benefits\* - (£m) constant prices

|                                  | Y <sub>0</sub> | Y <sub>1</sub> | Y <sub>2</sub> | Y <sub>3</sub> | Y <sub>4</sub> | Y <sub>5</sub> | Y <sub>6</sub> | Y <sub>7</sub> | Y <sub>8</sub> | Y <sub>9</sub> |
|----------------------------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|
| <b>Transition costs</b>          | 0              |                |                |                |                |                |                |                |                |                |
| <b>Annual recurring cost</b>     | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              |
| <b>Total annual costs</b>        | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              |
| <b>Transition benefits</b>       | 0              |                |                |                |                |                |                |                |                |                |
| <b>Annual recurring benefits</b> | 12             | 12             | 12             | 12             | 12             | 12             | 12             | 12             | 12             | 12             |
| <b>Total annual benefits</b>     | 12             | 12             | 12             | 12             | 12             | 12             | 12             | 12             | 12             | 12             |

\* For non-monetised benefits please see summary pages and main evidence base section



Microsoft Office  
Excel Worksheet

## **Evidence Base (for summary sheets)**

### Background to the Amending Directive (2010/73/EU)

On 24 November 2010 the European Parliament and Council adopted Directive 2010/73/EU (the "Amending Directive"), which amends the Prospectus Directive (PD) (2003/71/EC) on the prospectus to be published when securities are offered to the public or admitted to trading and the Transparency Directive (TD) (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. Member States have until 1 July 2012 to adopt and publish the laws, regulations and administrative provisions, necessary to comply with this Directive, which will apply from 31 December 2010.

The PD was adopted in 2003 and is the EU framework for the preparation of prospectuses for public offers of securities and where securities are to be admitted to trading on a regulated market. Its objectives are to enhance investor protection and to improve the efficiency of the single market. Its key innovation is that a prospectus approved in one Member State is valid across the EU, giving issuers a 'passport' across the EU capital markets. The PD was implemented in the UK via the Prospectus Regulation 2005, which came into force on 1 July 2005.

Article 31 of the PD required the European Commission to review the application of the Directive five years after its entry into force and to present, where appropriate, proposals for its review. The Amending Directive is the outcome of consultations carried out on the operation of the PD. The Commission consulted on the operation of the PD in 2009 and concluded that the overall effect of the Directive has been positive. However, the need for some improvements was identified. This focused on the need to improve and simplify the application of the PD, to reduce administrative burdens on issuers whilst maintaining investor protection and to improve legal certainty.

The Government is proposing to introduce two measures of the Amending Directive early (before the implementation deadline) so that UK industry can benefit from these changes. These measures will be beneficial to companies, particularly smaller companies, by reducing the administrative burden on issuers and facilitating capital raising.

These implementation regulations seek to amend the prospectus provisions of the Financial Services and Markets Act (2000) in order to comply with the European Amending Directive (2010/73/EU) and so that UK industry can benefit from the early implementation of these changes as soon as reasonably possible.

### **Small Firms Impact Assessment Test**

The Directive captures those companies which have securities admitted to trading on regulated markets and these tend to be substantial businesses which are generally required to have more than 25% of the business owned by third parties. 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 prospectus. This includes making an offer to fewer than 100 persons or an offer of less than €2.5 million.

The Amending Directive made amendments to these specific exemptions by i) increasing the number of persons to whom an offer may be directed before it ceases to be an exempt offer from 100 to 150 persons per Member State; and ii) increasing the limit for the total consideration of the offer in the EU below which a prospectus is not required from €2.5 million to €5 million.

We are proposing to introduce these two measures of the Amending Directive early, as they will be beneficial to companies, particularly smaller companies. These changes widen existing exemptions and their effect is to lift burdens, as fewer offers will need a prospectus. Discussions held between HM Treasury and a number of organisations that represent the views of small companies and the markets on which they are admitted suggest that implementing these amendments early will allow companies more efficient access to capital on public markets.

### **Competition Assessment**

Given that the Regulations will introduce largely incremental changes to the existing regime, they should not have a significant effect on competition. We anticipate that the early implementation of these measures of the Amending Directive will not significantly alter the competitive positions of the regulated and exchange-regulated markets. Introducing these measures early is likely to be beneficial for UK companies in terms of competitiveness compared to other Member States which have not implemented these measures early.

**Option 1 - To amend the prospectus provisions of the Financial Services and Markets Act 2000 and the transparency provisions of the Companies Act 2006, and the FSA to amend its Prospectus and Disclosure and Transparency Rules in order to comply with the European Directive 2010/73/EU to meet the European deadline of 1 July 2012 and bring two measures of the Amending Directive into force early.**

*Benefits:*

Option 1 would provide additional benefits associated with introducing two measures of the Amending Directive early. The threshold for an offer of securities in the EU for which a Prospectus is required will be raised from €2.5 million to €5 million. Furthermore the minimum number of investors for which a Prospectus is required will increase from 100 to 150 investors per Member State.

Implementing these amendments early will allow companies more efficient access to capital on public markets. These changes widen existing exemptions and their effect is to lift burdens, as fewer offers will need the production of a prospectus. Responses to the Government's Green Paper consultation *Financing a Private Sector Recovery* outlined the costs involved with producing a prospectus. Respondents estimated that the cost of producing a prospectus can range from 7 to 12 percent of the funds raised for consideration levels below £10 million, where a prospectus is required. For example, for an offer of £5 million preparing a prospectus could cost in the range of £350,000 to £600,000.

Using evidence<sup>1</sup> from the last ten years (2000-2010) on the number of public offers<sup>2</sup> requiring a prospectus on both the London Stock Exchange's Main Market and AIM, 1,783 public offers benefitted from the €2.5 million limit for the total consideration of the offer below which no prospectus is required. The number of issues that would have benefitted from a higher fundraising threshold of €5 million (i.e. those with total public issues between €2.5 million and €5 million between 2000 and 2010) is an additional 256.

Using these statistics we can estimate the benefits of increasing the fundraising threshold from €2.5 million to €5 million. The benefits are estimated to be in the range of £9 million to £15 million, representing a benefit of £350,000 to £600,000 for 26 public offers per year. The total benefits of early implementation are therefore estimated to be in the range of £9 million to £15 million, as companies will benefit from a year of early implementation.

We anticipate the benefits to be towards the higher range, as it is likely that the cost of producing a prospectus has impacted upon those fundraisings below €5 million but above €2.5 million. This is because once an issuer is required to produce a prospectus it is often more cost effective to undertake a higher fundraising. In addition, we have not been able to estimate the quantitative benefits associated with increasing the number of persons to whom an offer may be directed before it ceases to be an exempt offer from 100 to 150 persons, which will also contribute to the benefits. This is because it is difficult to ascertain how many companies have used this exemption when undertaking offers. We would welcome any information that respondents to the consultation are able provide on this.

The benefits are likely to be most significant in the case of further fundraisings by smaller public companies. The European Commission's impact assessment for the proposals found that the evidence gathered indicated that the preparation costs of prospectuses particularly impact upon small and medium-sized issuers, which raise capital less frequently and for smaller amounts. Small companies are likely to be able to use the exemptions within the Directive that enable them to avoid production of a prospectus. The measures will enable unquoted companies and companies on both exchange-regulated markets, such as AIM and PLUS Quoted, and the main markets to offer securities to a wider set of investors (from 100 to 150 investors)

<sup>1</sup> <http://www.londonstockexchange.com/statistics/new-issues-further-issues/new-issues-further-issues.htm>

<sup>2</sup> 'Total Further Public Offers' includes the following offer types: further rights shares, offer for subscription, open offer, placing & open offer, placing and offer for subscription, public offering, rights issue.

more cost effectively. They will also help companies to raise capital through further issues more cost efficiently, as they will be able to raise larger amounts of capital (from €2.5 million to €5 million) at a time.

Due to the costs involved with producing a prospectus, smaller companies often choose to raise funds through private placements. Since the implementation of the PD in July 2005, the London Stock Exchange has estimated that AIM companies have raised approximately £28 billion through further fundraisings, the majority of which (approximately 98%) was through private placements. However, private placements rather than public offers can result in dilution of the shares of existing shareholders. These changes should help to encourage smaller companies to conduct rights issues, which will help to protect minority shareholders.

## **Risks**

In the case of cross border offers issuers may not be able to take advantage of the early implementation of these measures. This is because it is left to the discretion of Member States whether they transpose the Amending Directive into their domestic law in advance of the implementation date. As we intend to introduce early two measures into UK legislation issuers will need to take care when undertaking cross border offers when using these measures. This is because Member States may have yet to implement the same measure. Particular care will need to be taken when using the fundraising threshold, as the limit applies to the total consideration of the offer in the EU<sup>3</sup>. For example, where an offer, of say €3 million, is made in the UK and in another Member State that has not yet implemented the measure, in this case the offer may not be exempt under the domestic law of the other Member State. This will not be applicable where offers are made entirely in the UK. Where a prospectus is required in another Member State issuers should consider electing to have a prospectus in the UK which could then be passported into that other Member State so as to avoid the issuer infringing the laws of the other Member State. This should be borne in mind in relation to both the increase in the funding threshold to €5 million and the increase to 150 of the minimum number of investors for which a prospectus is required. It is important that issuers have a clear understanding of these points and we shall be working with the FSA to ensure this explanation is brought to the attention of industry.

As is the case at present, investors may choose not to take up an offer where a prospectus is not produced. On the assumption of implementing these measures approximately 12 months early we have estimated that there will be the option of not producing a prospectus for 26 more offers. Investors may choose not to invest in these offers. However, this is not expected to be significant, especially as issuers still have the option of producing a prospectus if they consider it necessary. We welcome views from investors on this point.

### **Costs:**

These two changes widen existing exemptions and their effect is to lift burdens, so that fewer offers will need a prospectus. No monetised costs are envisaged. There could be indirect costs relating to the adjustment of industry and the FSA to these changes as well as the updating of related guidance. The associated costs are expected to be negligible.

The impact assessment prepared by the European Commission to accompany its proposed amendments to the PD indicated that widening these existing exemptions could have indirect costs through a possible increased risk to investor protection. This was on the basis that widening the exemption would mean a prospectus would not be required for a greater number of offers, thereby potentially reducing the information available to investors. As set out above, our analysis suggests that early implementation of these measures in the UK will mean issuers have the option of not producing a prospectus for 26 more offers. However, we consider the risk to investor protection to be minimal. Investors do not have to take up an offer where a prospectus is not produced. And for example in the case of companies quoted on AIM, they are also subject to AIM's rules on disclosure of periodic financial information.

## **Option 2 - To amend the regulations as set out in option (1) but not to bring two measures of the Amending Directive into force early.**

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<sup>3</sup> If European Free Trade Association countries decide to adopt the Amending Directive this will apply within the European Economic Area.

*Benefits:*

The proposed UK implementation regulations seek to amend the prospectus provisions of the Financial Services and Markets Act 2000 in order to comply with the European Amending Directive 2010/73/EU. However, they only bring into effect two specific measures so UK industry can benefit from the early implementation of these changes. The Government will consult industry separately on proposals for implementation in the UK of the remaining elements of the Amending Directive, which will set out the costs and benefits of implementing these changes. These are not considered here.

The benefits associated with introducing these two measures will be smaller under option 2 as their implementation will have been delayed. On the basis that the delay in implementation is 12 months, the total present value of the benefits associated with introducing these measures will be £100 million, £12 million less than under option 1.

*Costs:*

As set out above, the Government will consult separately on proposals for implementation in the UK of the remaining elements of the Amending Directive, which will set out the costs and benefits of implementing these changes. These are not considered here.

## Annexes

Annex 1 should be used to set out the Post Implementation Review Plan as detailed below. Further annexes may be added where the Specific Impact Tests yield information relevant to an overall understanding of policy options.

### Annex 1: Post Implementation Review (PIR) Plan

A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. If the policy is subject to a sunset clause, the review should be carried out sufficiently early that any renewal or amendment to legislation can be enacted before the expiry date. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences. Please set out the PIR Plan as detailed below. If there is no plan to do a PIR please provide reasons below.

**Basis of the review:** [The basis of the review could be statutory (forming part of the legislation), i.e. a sunset clause or a duty to review, or there could be a political commitment to review (PIR)];

Within 5 years of the implementation of the statutory instrument the Treasury will review the implementing regulations.

**Review objective:** [Is it intended as a proportionate check that regulation is operating as expected to tackle the problem of concern?; or as a wider exploration of the policy approach taken?; or as a link from policy objective to outcome?]

To ensure that the regulations remain an appropriate method of implementing the Amending Directive.

**Review approach and rationale:** [e.g. describe here the review approach (in-depth evaluation, scope review of monitoring data, scan of stakeholder views, etc.) and the rationale that made choosing such an approach]

Treasury officials will seek views of relevant stakeholders, such as issuers, intermediaries, investors and the FSA.

**Baseline:** [The current (baseline) position against which the change introduced by the legislation can be measured]

**Success criteria:** [Criteria showing achievement of the policy objectives as set out in the final impact assessment; criteria for modifying or replacing the policy if it does not achieve its objectives]

The Treasury and stakeholders consider that the implementing regulations continue to satisfactorily implement the provisions of the Amending Directive.

**Monitoring information arrangements:** [Provide further details of the planned/existing arrangements in place that will allow a systematic collection of monitoring information for future policy review]

Treasury officials are in regular contact with affected stakeholders.

**Reasons for not planning a review:** [If there is no plan to do a PIR please provide reasons here]

Add annexes here.

## HM Treasury contacts

This document can be found in full on our website at:  
[hm-treasury.gov.uk](http://hm-treasury.gov.uk)

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