

**EXPLANATORY MEMORANDUM TO**  
**THE PROSPECTUS REGULATIONS 2013**  
**2013 NO. 1125**

**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 draft Regulations make one amendment to the Financial Services and Markets Act 2000 (“FSMA”), in order to ensure complete transposition into domestic law of certain 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 The PD Amending Directive was transposed into domestic law in 2011 and 2012, by measures contained in the Prospectus Regulations 2011 (SI 2011 No 1668) and the Prospectus Regulations 2012 (SI 2012 No 1538).

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

None.

**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.
- 4.2 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.
- 4.3 The Prospectus Directive was amended in 2010 by the PD Amending Directive following a review by the European Commission. The PD

Amending Directive was adopted by the Council and European Parliament on 24 November 2010 and published in the Official Journal on 11 December 2010. The deadline for member State transposition of these amendments was 1 July 2012.

- 4.4 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.
- 4.5 Certain measures were introduced early by the Prospectus Regulations 2011 (SI 2011 No. 1668); the remaining measures were introduced by the Prospectus Regulations 2012 (SI 2012 No. 1538). A Transposition Note is annexed to this Memorandum (Annex I).
- 4.6 It has subsequently become apparent that the amendments made by the Prospectus Regulations 2012 did not give full effect to one element of the PD Amending Directive; consequently a further amendment is necessary. The further amendment is needed to ensure that full breadth is given to the meaning of the term “valid prospectus” in the final paragraph of Article 3(2) of the Prospectus Directive, which relates to the question of whether a further prospectus is needed in the context of a retail cascade.

## **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, Greg Clark MP, has made the following statement regarding Human Rights:

*“In my view, the provisions of The Prospectus Regulations 2013 are compatible with the Convention rights.”*

## **7. Policy background**

- 7.1. The Prospectus Directive, as amended by the PD Amending Directive, provides at Article 3(2) that *“Member States shall not require another prospectus in any such subsequent resale of securities or final placement of securities through financial intermediaries as long as a valid prospectus is available in accordance with Article 9 and ...”*

- 7.2. Article 9 of the Prospectus Directive states that a prospectus shall be valid for 12 months once approved by the competent authority (ie the FSA). However it also provides that, in cases of certain non-equity securities issued in a continuous or repeated manner by credit institutions, the prospectus shall be valid until no more of the securities concerned are issued in a continuous or repeated manner.
- 7.3. The Prospectus Regulations 2012 introduced a new section 86(1A) to FSMA which sets out the circumstances in a further prospectus would not be required in the context of a retail cascade. This section provides that one of the conditions is that a prospectus approved within the past 12 months is available. The amendment now proposed would clarify that, in the case of non-equity securities issued in a continuous or repeated manner by credit institutions, the condition is satisfied until no more of the securities concerned are issued in a continuous or repeated manner.

## **8. Consultation outcome**

The Treasury and Financial Services Authority issued a joint consultation on the UK's transposition of the PD Amending Directive, including a draft of the Prospectus Regulations 2012 (Consultation CP 11/28). A number of responses were received, but none of them related to the point which is the subject of this amendment.

## **9. Guidance**

The Treasury does not propose to produce any guidance in relation to the Regulations.

## **10. Impact**

- 10.1 The impact on business, charities or voluntary bodies is negligible.
- 10.2 The impact on the public sector is negligible.
- 10.3 An impact assessment of the effect of the Prospectus Regulations 2012 on the costs of business and the voluntary sector has been prepared and is available on HM Treasury's website ([www.hmtreasury.gov.uk](http://www.hmtreasury.gov.uk)). This amendment does not alter the impact assessment.

## **11. Regulating small business**

The PD Amending Directive and the UK Regulations giving effect to it effectively apply to small business, as this is the group which benefits 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 the Prospectus Regulations 2012 came into effect. The Prospectus Regulations 2011, the Prospectus Regulations 2012 and these Regulations will be reviewed simultaneously, with the report of the first review to be published on or by 30 June 2017.

## **13. Contact**

Victoria Gibbs at HM Treasury, telephone: 020 7270 5630 or email: [victoria.gibbs@hmtreasury.gsi.gov.uk](mailto:victoria.gibbs@hmtreasury.gsi.gov.uk), can answer any queries regarding the instrument.



## ANNEX I

### TRANSPOSITION TABLE

#### United Kingdom Transposition Note – Directive 2010/73/EU

#### Amendments to Prospectus Directive and Transparency Directive

A table 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

#### Abbreviations:

**DTR:** Disclosure and Transparency Sourcebook (Part of the FSA Handbook)

**DTR TP:** Disclosure and Transparency Sourcebook Transitional Provisions (Part of the FSA Handbook)

**FSA:** Financial Services Authority

**FSA Glossary:** the Glossary in the FSA Handbook

**FSMA:** Financial Services and Market Act 2000

**PR:** The FSA Prospectus Rules (Part of the FSA Handbook)

### 1. Amendments to the Prospectus Directive (EU) 2003/71

<u>Article in Amending Directive (EU) No 2010/73)</u>	<u>Article in Prospectus Directive (EC) No 2003/71</u>	Objectives	Provision in implementing legislation (proposed Prospectus Regulations 2012 unless otherwise stated)	Provision which has been amended in existing legislation or 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	FSMA Sch 11A, para 9(1)	HMT – already introduced by SI (2011) No. 1668.

			s2(5) of the draft Prospectus Regulations 2012		
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 3(1) and 3(3))	FSMA, ss 86(7)(b) and 87R  FSA Glossary; PR	HMT and FSA

				App 1	
1(2)(c)	2(4)	European Commission power to make delegated acts on the definitions in Article 2 Paragraph 1	n/a	n/a	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 months etc)	2(1)(d)	FSMA s86(1)(f) and s86(1A) (both new)  PR 1.2.1UK	HMT and FSA
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 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		PR 1.2.2.R(5)	FSA
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”)		PR 1.2.3.R(4)	FSA

		legislation			
1(5)(a)(i)	5(2)	Summary should provide key information and drawn up in a common format to facilitate comparison of summaries	4(a)	FSMA s87A(6)  PR 2.1.2 UK	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))		PR 2.1.3R	FSA
1(5)(b)	5(3)	Cross reference to paragraph 4 removed	n/a	n/a	None
1(5)(c)	5(4)	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	4(b)	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	7	FSMA s90(12)  PR 2,1,7R	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	n/a	n/a	European Commission

		regulation-making power: non equity securities denomination increased to €100,000 from €50,000			
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)	HMT and FSA

				PR 2.4.3R	
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 reference	n/a	n/a	European 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)(ii)	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), (5) and (6)	HMT

1(17)	18(1)	The FSA, at the request of the issuer, will provide the host member state with a certificate of approval. <b>New:</b> time scale for compliance runs from date of receipt of request; <b>also new:</b> 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

## **2 Amendments to the Transparency Directive (EU) 2004/109**

<b>Article in Amending Directive (EU) No 2010/73)</b>	<b>Article in Transparency Directive (EC) No 2003/71</b>	<b>Objectives</b>	<b>Provision in implementing legislation</b>	<b>Provision which has been amended in existing legislation or rules</b>	<b>Responsibility for transposition</b>
2(1)	2(1)(i)	Change to the definition of “home state” with regard to issuers incorporated in third countries		FSA Glossary	FSA

2(2)(a)	8(a)	Provision to apply in relation to holders of debt securities whose denomination per unit is at least €100,000 (or equivalent) – previously €50,000.		DTR 4.4.2	FSA
2(2)(b)	8(b)	Retention of €50,000 limit in relation to debt securities issued prior to 31 Dec 2010		DTR TP1, rule 19	FSA
2(3)	18(3)	Provision to apply in relation to holders of debt securities whose denomination per unit is at least €100,000 (or equivalent) – previously €50,000.		DTR 6.1.15	FSA
2(4)	20(6)	Provision to apply in relation to holders of debt securities whose denomination per unit is at least €100,000 (or equivalent) – previously €50,000.		DTR 6.2.8	FSA