EXPLANATORY MEMORANDUM TO THE

PROSPECTUS REGULATIONS 2005

2005 No. 1433

1. This explanatory memorandum has been prepared by Her Majesty's Treasury and is laid before Parliament by command of Her Majesty.

2. Description

2.1 The Prospectus Directive aims to improve market efficiency by enabling companies to gain access to financial markets across the EU through the production of a single approved prospectus. The Directive also seeks to protect investors by requiring high standards of disclosure within these prospectuses. This is a maximum harmonisation Directive, which must be transposed into UK domestic law by 1 July 2005.

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

None.

4. Legislative Background

4.1 On 4 November 2003, the European Parliament and the Council of the European Union adopted the Prospectus Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market.

4.2 This Directive is one of the key measures adopted in the EU as part of the Financial Services Action Plan (FSAP)[1]. The FSAP forms the legislative framework for developing the Single Market in financial services.

4.3 The Prospectus Directive has been subject to the "Lamfalussy" process for financial services' legislation in the EU[2]. This introduced a new four level legislative approach, namely, framework principles, implementing measures, regulatory cooperation and enforcement. The Directive is a framework directive ("Level 1" text), with further details provided in implementing measures ("Level 2" or comitology measures).

4.4 HM Treasury are using their powers under section 2(2) of the European Communities' Act 1972 to implement the Prospectus Directive into domestic legislation in the United Kingdom.

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[1] 'The EU Financial Services Action Plan: Delivering the FSAP in the UK' (http://www.hm-treasury.gov.uk./media/1B4/C6/1B4C6967-BCDC-D4B3-124E99B62E501FCD.pdf)

[2] 'The Final Report of the Committee of Wise Men on the Regulation of Europeans Securities Markets' (http://europa.eu.int/comm/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf)

4.5 The Transposition Note is attached.

5. Extent

5.1 This instrument applies to the whole of the United Kingdom.

6. European Convention on Human Rights

The Economic Secretary to the Treasury has made the following statement regarding Human Rights:

In my view, the provisions of the Prospectus Regulations 2005 are compatible with the Convention rights.

7. Policy Background

7.1 The Prospectus Directive aims to enhance investor protection through the production of high quality prospectuses and to improve the efficiency of the internal market through the issue of a single approved prospectus, which will be valid for use across the EU.

7.2 The Directive identifies two circumstances where a prospectus is required: first, when an offer of securities is made to the public and, secondly, when securities are admitted to trading on a regulated market. The Directive introduces the concept of a single "passport" for issuers, where a prospectus approved by one competent authority (the Financial Services Authority in the UK) is available for use throughout the EU, without additional approval or significant administrative requirements from competent authorities of other Member States.

7.3 A public joint consultation exercise with the FSA on the Prospectus Directive Regulations 2005 was undertaken in October 2004 with the publication of the *'UK Implementation of the Prospectus Directive 2003/71/EC'* consultation document[3]. Given the maximum harmonisation nature of the Directive, there was little scope for the UK to apply discretion in the way in which it was transposed. The consultation document therefore considered the relatively few areas in which the UK has implementation options under the Directive. The formal consultation period closed on 28 January 2005 and 17 responses were received from industry, including law, accountancy and investment management firms, and professional bodies. Respondents were broadly supportive of HM Treasury's proposed implementation approach, which aimed to avoid imposing super-equivalent requirements on the UK. A Feedback Statement to consultation will shortly be available on the Treasury's website.

7.4 However, three significant policy amendments to the draft Regulations were made in the light of the consultation responses. These were as follows: one, to remove the proposed obligation that an issuer make available an electronic copy of their prospectus on their website; two, not to require the formal aggregation of the number of offerees during a 12 month period, when applying the exemption from producing a

[3] http://www.hm-treasury.gov.uk./media/DFE/27/DFE27339-BCDC-D4B3-16FD311B308ABF54.pdf

prospectus in cases where an offer is made to fewer than 100 persons; and three, in the case of an offer being made to a discretionary private client broker, to ensure that such an offer would continue to be regarded as being made to the *broker* (rather than to the broker's *client*), thus exempting the offeror from the requirement to produce a prospectus.

8. Impact

8.1 A Regulatory Impact Assessment is attached and it contains further details of the responses to the consultation document.

8.2 The impact of this instrument is primarily on the private sector. Any impact on the public sector will rest principally with the FSA, which will be responsible for any relevant amendments to its rules and enforcement functions.

9. Contact

James Templeton at HM Treasury (Tel: 0207 270 4637) should be contacted with any queries regarding the instrument.

Final Regulatory Impact Assessment

Title of Proposal

1. The Prospectus Regulations 2005, ("the Prospectus Regulations 2005").

Purpose and Intended Effect of Proposal

2. The purpose of the measure is to implement the EU Prospectus Directive,[4] which came into force on 31 December 2003, in the most cost effective and proportionate way. The aims of the Directive are to enhance investor protection through the production of high quality prospectuses, and to improve the efficiency of the internal market through the issue of a single approved prospectus, which will be valid for use across the EU.

3. The Directive describes two broad areas where a prospectus is required; first, when an offer of securities is made to the public and, secondly, when securities are admitted to trading on a regulated market. In seeking to increase investor protection, the Directive requires that any prospectus shall meet specified disclosure standards and that all prospectuses be approved by a competent authority (the Financial Services Authority in the UK) when produced.

4. The Directive introduces the concept of a single "passport" for issuers where a prospectus approved by one competent authority is available for use throughout the EU, without additional approval or significant administrative arrangements from other Member States. This means that once the competent authority in the relevant Member State has approved the prospectus, it will then be accepted elsewhere in the EU. An issuer's home or host Member State will determine the competent authority that is responsible for approving the prospectus and for ensuring that the obligations of issuers and others under the Directive are met.

5. In order to aid efficiency, the Directive seeks to improve the efficiency of capital raising by, for example, introducing a new procedure for a more flexible, tri-partite format of a prospectus and by applying differing disclosure requirements for equity and non-equity securities. The disclosure requirements are not specified in the Directive, which is a piece of EU framework legislation, but are prescribed in a detailed implementing Regulation[5]. The disclosures required are consistent with the existing requirements of the UK listing regime.

[4] Directive 2003/71/EC (OJ L 345, 31.12.2003, P. 0064 - 0089)
[5] Commission Regulation (CE) 809/2004 of 29 April 2004

Background

6. The Directive builds on existing legislation regarding admission of securities to listing and publication of prospectuses in relation to public offers; in particular, the Public Offers Directive (89/298/EC) and the Consolidated Admissions and Reporting Directive (2001/34/EEC). It is required because the existing mutual recognition mechanism in relation to prospectuses across the EU remains fragmented and complex and is considered to be an obstacle to the achievement of an efficient internal market.

7. The Directive is one of the key measures adopted in the EU as part of the Financial Services Action Plan (FSAP)[6]. The FSAP is the legislative framework for developing the Single Market in financial services. Its programme of measures intends to fill gaps and remove the remaining barriers to provide a legal and regulatory environment that supports the integration of financial markets across the EU.

8. In May 2004, the Treasury, the FSA and the Bank of England published a paper regarding the implementation of FSAP directives in the UK[7]. This set out the UK's approach to implementing the FSAP in three key areas: internal arrangements within the public authorities, working with business and cooperation with authorities in other Member States. Our consultation has been carried out in a manner consistent with that approach by working with other public authorities (principally, the FSA) and the financial services' sector.

9. The UK's existing regime dealing with the issue and content of prospectuses is contained mainly in Part VI of the Financial Services and Markets Act, 2000 (FSMA) together with Schedules 7, 8, 9, 10 and 11 to FSMA, which contain provisions relating to official listing, the competent authority and public offers. The Treasury is legislating through regulations made under section 2(2) of the European Communities Act 1972, making relevant amendments to primary and secondary legislation. The FSA is making amendments to its handbook as detailed in their consultation paper, which includes a cost/benefit analysis.

New Regime for Prospectuses

10. The Directive introduces a new regulatory regime that requires, amongst other things, the production of prospectuses in relation to securities "admitted to trading on a regulated market". This change largely replaces the existing regime for listed securities in the UK. However, the overall effect is likely to be relatively small. This is due to the fact that companies that previously had to produce Listing Particulars, by virtue of being listed, will generally now be required to produce a prospectus in relation to admission of their securities to

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[6] Published by the Commission in May 1999. Since the FSAP's endorsement by the European Council in Lisbon in March 2000, 39 out of 42 measures in the FSAP have been adopted by the EU.
[7] 'The EU Financial Services Action Plan: Delivering the FSAP in the UK' (http://www.hm-treasury.gov.uk./media/1B4/C6/1B4C6967-BCDC-D4B3-124E99B62E501FCD.pdf)

trading. The exemptions contained within the Directive are similar to those previously applying to listed companies and, as noted previously, the prescribed content of the prospectus is very closely aligned with that of a set of Listing Particulars. Consequently listed companies will not generally be required to produce prospectuses more or less regularly or in a different form under the new regime.

11. The Directive also introduces important changes in relation to when "an offer of securities to the public" is made. Under the existing UK Public Offer of Securities regime, any such offer to the public of non-listed securities would require the production of an (unapproved) prospectus. Under the new regime any offer to the public will require a prospectus, to be approved by the relevant competent authority (the FSA in the UK). Most of the exemptions contained within the Directive are similar to those that exist under the current Public Offer of Securities regime. One important difference is that any offer of securities to the public, where the consideration is less than 2.5 million Euros, calculated over a 12-month period, is outside the scope of the Directive. This compares to the equivalent threshold of £100,000 for any single offer of securities under the current UK regime.

12. The entities most directly affected by the Directive are largely the same ones affected by the existing laws and regulations, namely, those companies offering securities to the public or seeking admission of securities to trading on a regulated market. There may be circumstances in which other parties (such as financial intermediaries and investors) are affected by the Directive but these will be limited and may often be positive; for example, investors will be able to take advantage of the qualified investor provisions described below.

Member State Options

13. The Directive is maximum harmonisation in terms of the required format and content of prospectuses; this means that Member States are not allowed to impose additional requirements regarding prospectuses beyond those specified in the Directive. The intention of the Directive is that harmonisation of the information contained in the prospectus should provide a high standard of investor protection consistently across the EU.

14. In relation to areas other than the content of prospectuses, there are three main areas where Member States retain a discretion:

- **Qualified investors**. The Directive states that a Member State may choose to authorise natural persons and SMEs as "qualified investors". The definition of such investors within the Directive enables a potentially broader range of individuals to qualify compared to the equivalent existing requirements.

- **Electronic publication of the prospectus and related notice**. The Directive introduces a new option that a home Member State may require an issuer to publish its prospectus in electronic form on its website in addition to publication in printed form. The Directive also states that a home Member State may require an issuer to publish a notice stating how the prospectus has been made available and where it can be obtained by the public.

- **Summary of debt document in English**. The Directive introduces a new option that a Member State may require an issuer of a prospectus relating to admission to trading on a regulated market of high-denomination non-equity securities to produce a summary in their home language. The UK is not requiring issuers in these circumstances to produce a summary in English.

New Ongoing Requirements

15. The Directive imposes few new obligations on companies with securities admitted to trading on a regulated market compared to the existing Listing regime. The main ones are as follows:

- **Annual information**. Article 10 of the Directive requires issuers whose securities are traded on a regulated market to provide to the competent authority at least annually a document that contains or refers to all information that they have published or made publicly available within and outside the EU over the preceding 12 months.

- **Summary of Prospectus**. The Directive requires that all prospectuses include a summary with the exception of prospectuses relating to non-equity securities having a denomination of €50,000 or more if the securities have been admitted to trading on a regulated market.

16. As noted previously, those companies most directly affected by the Prospectus Directive regime (with securities admitted to trading on a regulated market) will not generally notice significant changes compared to the existing regime. In relation to those companies (and others) making offers of securities to the public, the changes brought about by the Prospectus Directive will have implications, not least in that any prospectus will need to be approved by the competent authority.

Risk Assessment

17. The Prospectus Directive seeks to improve and harmonise the required content of prospectuses. However, the existing EU legislation already provides protection to investors by specifying when, and in what form, prospectuses should be produced. The predecessor Directives to the Prospectus Directive govern the requirements for the preparation, scrutiny and distribution of prospectuses (or their equivalents) both in relation to offers of securities to the public and to admission of securities to listing on an official stock exchange. As noted elsewhere, the disclosure requirements that will

apply under the Prospectus Directive are not markedly different to those that currently apply when securities are admitted to trading on a listed stock exchange.

18. A more important focus of the Directive is on achieving improvements to the efficiency of the capital-raising process across the EU. The existing prospectus regime provides a number of obstacles to companies seeking to raise capital cross-border. Notably, there is no single definition of an “offer to the public”; this means that, for the same transaction, a company might need to produce a prospectus in one Member State (where it is deemed to be a public offer) but not in another Member State (where it is deemed to be a private placement). In addition, the different procedures and interpretations in Member States when prescribing and checking the information given in a prospectus increase the difficulties faced by companies in raising capital across the EU. The requirement, for example, for companies to provide a full translation of a prospectus into the local language of a Member State is a powerful disincentive, even for relatively large companies.

19. One of the main ways in which the Directive addresses these difficulties is the introduction of a single definition of public offer. In addition, the “passport” regime set out in the Directive is one in which responsibility for approval of a prospectus clearly rests with one Member State and other Member States will not be able to impose additional content requirements once that approval has been obtained.

20. A single market in financial services throughout Europe will benefit businesses by providing access to deeper and more liquid capital markets and benefit investors by providing them with more and wider investment opportunities. A broad indication of the potential benefits of improved cross-border activity is given by the fact that it has been estimated that the macro-economic benefit of a single EU financial market could be as much as 1.5% of GDP. A report for the European Commission by London Economics estimated that single market integration could reduce the cost of capital for companies by 0.5%.

21. The specific benefits to companies carrying out multi-jurisdictional transactions are difficult to estimate. Companies should be able to avoid many of the additional prospectus costs currently associated with such transactions but other related costs (for example, in relation to taxation and deal structuring) will remain. In addition, powerful obstacles to cross-border capital raising will remain, reflecting the different stages of development across EU Member States, for example, in relation to the strength of the equity culture and the depth of investment capital available. It will also remain the case that cross-border transactions will tend to appeal to larger companies as the capital needs of smaller businesses can often be satisfied by their domestic markets. Commentators do not expect the number of 1,230 overseas companies listed on EU stock exchanges at 31 December 2003 (only 12% of the total number) to increase significantly.

22. To the extent that there are significant improvements in cross-border capital raising in the EU, the UK is likely to benefit, particularly given its strong position in the international securities' markets. There were 2,692 listed companies on the London Stock Exchange at 31 December 2003 compared to the next most significant European stock exchange, Euronext (comprising France, Belgium and Netherlands) which had 1,392 listed companies. Within these totals, London had been successful in attracting 381 overseas companies compared to 346 such companies on Euronext.

Policy Options

23. As with all proposals for regulation, the Treasury has considered the option of making no changes. We have concluded that this option is not appropriate in this case. Failure to implement the Directive requirements would put the UK in breach of our community obligations and thereby open the UK to infraction proceedings and claims for damages. It would also impact adversely on businesses seeking to make use of the passporting arrangements contained in the Directive. Our proposed policy options therefore are as follows:

Option 1

24. Implement the Regulations and use the Member State option not to apply the provisions relating to qualified investors, electronic publication and summary of debt document in English (see para. 14). The Regulations would seek to meet the UK's objectives by incorporating the Directive's provisions through changes to the Financial Services and Market Act 2000 and related Regulations.

Option 2

25. Implement the Regulations and use the Member State option to apply the provisions in relation to qualified investors only. Option 2 would provide the same certainty as Option 1 that the UK had complied with its implementation obligations. The application of these additional provisions would result in costs and benefits as described below.

Benefits and costs

26. The sections below on benefits and cost do not take into account any environmental or social impacts arising out of the options considered. The operation of financial markets may have significant implications for sustainable development, but the Directive itself does not directly impact on the environment or our natural resources. Likewise the operation of financial markets may have significant implications for the distribution of wealth and income, but the Directive does not itself directly impact on the distribution of

wealth and income. The focus of the analysis set out below is therefore on the economic costs and benefits associated with the options.

27. There are good grounds for believing that having an effective prospectus regime brings significant benefits to companies, investors and others (such as market operators). The aim of the Directive is to improve investor protection by harmonising high-quality disclosure requirements across the EU to the benefit of investors. The Directive is designed to allow issuers to have a passport to raise capital across the EU which should encourage issuers to raise capital cross-border who were previously discouraged by different information and disclosure regimes. However, it is not straightforward to compare the (often unquantifiable) benefits of an improved regime with the more tangible costs to companies and others of complying with that regime.

Benefits

Option 1

28. Replacing the UK's existing regime with that in the Directive would eliminate any risk of proceedings by the Commission for failure to implement properly. It would also leave the UK with a similar prospectus regime to other Member States, which should remove certain obstacles to cross-border capital raising. Implementing the Directive in the UK and elsewhere would narrow the differences between the prospectus regimes in EU Member States. This would reduce compliance costs for those offering securities, issuing securities or admitting them to trading in more than one Member State.

Option 2

29. Option 2 would also eliminate the risk of proceedings by the Commission for failure to implement properly and would provide the same benefits. The qualified investor regime is designed to provide greater opportunities, particularly for smaller companies, to access capital from private investors and SMEs without necessarily triggering the need for a prospectus.

Costs

Option 1

30. Adapting to a new regime would involve a certain level of costs. However, the compliance costs for those companies admitted to trading on a regulated market should be relatively small. The UK has an existing regime for listed companies that is largely consistent with the regime proposed by the Directive for companies whose securities are admitted to trading on a regulated market. The FSA has estimated that familiarisation with the new prospectus rules would require two days of compliance officer (or equivalent) time, costed at approximately £400 per day. This results in a total one-off cost of some £2.3m for the 2,910 companies currently listed.

31. There is a new ongoing obligation for these companies relating to the provision of annual information. These companies will need to provide to the FSA at least annually a filing that would refer to where information published or made publicly available in the last year may be obtained, the date of publication and a short description of the information. The compliance costs arising out of this requirement have been estimated by the FSA as £1.85m. It is estimated that preparing the update will take, on average, 1.5 days of compliance officer time, which results in total recurring costs of some £1.7m. The FSA also estimate that companies will each incur £50 of costs for filing the update with the Regulatory News Service, resulting in total costs of £150,000.

32. The main area of incremental costs associated with implementing the Directive relates to the production of prospectuses and is, therefore, of a "one-off" nature rather than ongoing. However, as noted in para. 10, most listed issuers will not be required to produce prospectuses more or less regularly or in a different form from previously. The Directive does require that all prospectuses (except those for high-denomination debt) include a summary but there is anecdotal evidence that this will not require significant additional work beyond existing market practice and should not result in significant incremental costs. This point was not challenged during the formal consultation process.

33. Companies whose securities are not admitted to trading on a regulated market will feel more noticeable effects of the proposed changes to the prospectus regime. These companies will include those with securities traded on the Alternative Investment Market (AIM) and OFEX, the two most successful junior equity markets in Europe (in terms of the number of companies traded on the markets). More than 700 UK companies have securities trading on AIM whilst more than 150 UK companies have securities trading on OFEX. These companies, together with any company not publicly traded, may bear incremental costs as a result of making "offers to the public" as captured by the Directive and hence requiring a prospectus approved by the FSA.

34. The incremental costs could potentially fall into two categories:

- **An approved prospectus compared to no prospectus**. There may be circumstances in which an offer is not an "offer to the public" under the existing UK regime but is one under the Directive. This is not likely to be typical as the exemptions available under the Directive are more generous than those available under the existing regime. It is most likely that companies and their advisers when structuring their offers will ensure that the offer falls clearly within an existing exemption. Anecdotal evidence suggests that most offers currently made are so structured and this expectation was borne out by many of the consultation responses. The likely rarity of these circumstances means the associated costs are not expected to be significant.

- **An approved prospectus compared to an unapproved prospectus**. This is the circumstance where an offer (made outside a regulated market) currently requires an unapproved prospectus under the Public Offers of Securities (POS) Regulations but would require a prospectus approved by the FSA under the Directive. The incremental cost of preparing an approved prospectus compared to an unapproved prospectus has been estimated by the FSA as £50,000, largely comprising legal and professional costs. During 2003, some 688 POS prospectuses were produced. However, it would be likely that far fewer prospectuses under the Directive would be required, as many would be exempt under the more generous exemptions that will now apply. The FSA estimates that some 75% of these documents will be exempt and that, of the remaining 175 non-exempt public offers, approximately two thirds (115) would now need to be approved. The total costs are therefore estimated as £5.7 million, representing an incremental cost of £50,000 for 115 public offers.

35. There may be circumstances in which issuers decide not to make a public offer or seek admission to trading on a regulated market in the EU in order to avoid the resultant costs associated with production of a prospectus. Such companies may go to more lightly regulated markets in order to raise capital and/or obtain greater liquidity in their securities. However, companies currently have the choice as to whether to seek admission to either a regulated or a non-regulated market and will weigh up the costs and benefits as appropriate. Equally, companies and their advisers typically structure offers under the current POS Regulations regime in order to avoid production of a prospectus.

Option 2

36. Option 2 will involve the same incremental costs described above in relation to Option 1.

37. The introduction of the proposed qualified investor regime will not result in any obligatory incremental costs given that the regime is available to issuers and those seeking qualification as qualified investors, but it is not compulsory. If issuers do choose to access the list of qualified investors then we expect the FSA to levy a modest charge. Equally, those seeking qualification as qualified investors will incur professional costs to provide evidence that they meet the requisite criteria.

The Small Firms' Impact Test

38. As well as the Treasury's official joint consultation exercise with the FSA, informal consultations have also been held, via a series of round table meetings, with a number of industry associations, including some representing smaller companies. The view has consistently been expressed that small companies (as defined by Cabinet Office guidelines) are highly

unlikely to be caught by the provisions of the Directive for reasons noted below.

39. 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. Companies with a balance sheet total of less than £3.18 million for example would generally fall within one of the Directive's exemptions, such as making an offer to fewer than 100 persons or an offer of less than 2.5 million Euro). This view was confirmed by one-to-one discussions held between HM Treasury and a small number of individual companies. The Partial Regulatory Impact Assessment was also discussed with the Small Business Service at DTI.

Competition Assessment

40. Given that the Regulations will introduce largely incremental change to the existing regime, they should not have a significant effect on competition. Those markets defined as "regulated markets" in the Directive, such as the Main Market of the London Stock Exchange (LSE), will be directly affected, as companies with securities admitted to trading on those markets will be required to comply with the relevant provisions of the Directive. The main competitors to the Main Market will tend to be other EU regulated markets, which will be similarly affected by the Directive, and therefore the effects on the LSE's competitive position should be limited.

41. Those markets that are not "regulated markets", such as the Alternative Investment Market and OFEX, will be indirectly affected. Although companies traded on these markets will not be subject to the rules regarding admission to trading, they will still be affected by the need to produce a prospectus when an offer to the public is made (subject to any applicable exemptions contained within the Directive).

42. We do not anticipate that the implementation of the Directive will significantly alter the competitive positions of the regulated and non-regulated markets. There are important distinguishing features between the main market of the London Stock Exchange and other non-regulated markets, such as the differing regulatory emphases, which will continue to exist. This is particularly the case since the London Stock Exchange announced in 12 October 2004 that AIM would no longer be a regulated market.

Guidance and Enforcement

43. A copy of the Explanatory Memorandum that will accompany the legislation through Parliament is attached. Its purpose is to give an overview

of the motivation behind and objectives of this Directive. Comprehensive detailed rules regarding the implementation of the Directive and compliance guidance will be provided by the FSA.

44. The Government has delegated the power of enforcement of the prospectus regime to the FSA via the Financial Services and Markets Act 2000 (FSMA). The FSA already has enforcement responsibilities under the post-FSMA regime; there is no reason to believe that amendments to the regime under either of the options would not be enforced.

Sanctions

45. Article 25 of the Directive requires that administrative sanctions can be imposed against persons responsible but does not prevent Member States from imposing criminal sanctions. The FSA will be able to prosecute in respect of the criminal offences provided for by the Regulations.

Monitoring and Review

46. Article 31 of the Directive states that the Commission shall make an assessment of the application of the Directive five years after the date of the Directive coming into force. The Commission will present a report to the European Parliament and the Council accompanied where appropriate by proposals for its review. In addition, under the Lamfalussy process for financial services legislation in the EU, the Commission has a role in ensuring that legislation is enforced properly in Member States, relying, in part, on market evidence that problems exist.

47. The UK Government has itself recently undertaken to monitor and review all new legislation after a period of two years. The Treasury will conduct such a review of the Prospectus Regulations in two years' time.

48. The sorts of criteria that the effectiveness of the proposed prospectus regime needs to be judged against might include its impact on the following:

- the incidence of cross-border capital raising by issuers;
- the confidence of investors in the quality of information provided in prospectuses;
- the costs of capital for issuers; and
- the access to capital for issuers including SMEs in the UK and across the EU.

Consultation

49. The *'UK Implementation of the Prospectus Directive 2003/71/EC'* consultation document, published in October 2004, was the first formal public

consultation on the Prospectus Directive Regulations 2005, although informal consultations had already been held with industry associations, exchanges and advisers. This was a joint consultation exercise with the FSA. The consultation period ended on 28 January 2005 and we have now received 17 responses from industry.

50. Respondents broadly supported two of the Treasury's key proposals, namely, the clarification of the definition of a public offer and the adoption of a Qualified Investor regime, designed also to include SMEs and natural persons. All but two respondents were also of the view that 2.5 million Euros was an entirely appropriate level at which a prospectus should be deemed a legal requirement. The majority of respondents did not consider a sub 2.5 million Euros regime necessary, given the associated cost and time burdens, particularly for smaller firms.

51. However, there were two areas on which respondents disagreed with the Treasury's proposed approach. With regard to the exemption from supplying a prospectus in cases where an offer is made to fewer than 100 people, the Treasury had proposed aggregating the number of offerees over a given 12 month period. Whilst most respondents recognised the motivation prompting this approach – namely, to prevent any possibility of successive offers of the same securities being made to groups of 99 people at a time - approximately half voiced concerns about its practicality, questioning the extent to which a prospectus's circulation could be accurately calculated over a given period of time. The second proposal that prompted opposition from a number of respondents was the obligation that issuers should publish an electronic copy of their prospectus on their website. This prompted concerns for issuers who might not have their own website, as well as fears of the potential for breaching foreign security laws, given the international accessibility of any document published on the internet.

52. In light of these views, the Treasury has therefore decided not to require the formal aggregation of the number of offerees over a 12-month period for the purposes of the 100 persons' exemption. It will instead be a matter for the regulator to monitor whether a number of successive offers constitutes one single offer or a series of different offers (and thus whether or not the exemption may apply). The requirement for an electronic copy of a prospectus on individual issuers' websites has also been removed.

53. The proposal that issuers be required to publish a notice stating how and where a copy of the prospectus can be obtained has also been removed in the light of some of the consultation responses, which questioned its purpose.

54. One other issue raised was the need to clarify the treatment of offers made to discretionary private client brokers for the purposes of the Qualified Investor exemption. In the light of some of the consultation feedback received, the Treasury has clarified the Regulations to ensure the continuation of the current position, whereby offers to discretionary brokers are understood to be addressed to the brokers themselves, as Qualified Investors, rather than

to the clients on behalf of whom they are working. This will ensure capital-raising costs for SMEs are not unnecessarily increased.

55. There were also a number of legal and drafting comments made by respondents, many of which have been accepted. One matter of particular note was that of defining the person who has responsibility for a prospectus and the way in which one should interpret the Directive on this subject and, in turn, transpose it into UK legislation. We propose to resolve this matter by conferring power on the FSA to make rules determining who should be responsible for prospectuses.

56. There will be no extra cost implications arising from any of these modifications.

Summary and Recommendation

57. Option 2 is recommended. This will enable the UK to comply with its obligations to implement the Directive. In addition, the benefits associated with the provision of an optional Qualified Investor regime are expected to exceed the insignificant incremental costs.

Ministerial Sign-Off

58. I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

ECONOMIC SECRETARY TO THE TREASURY

May 2005

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Option	Total cost per annum	Total benefit per annum
1. Implement the Directive and apply none of the optional provisions.	Incremental one-off costs of £2.3m in relation to familiarisation with new prospectus rules. Incremental ongoing costs of £5.7m for companies required to issue approved prospectuses under the Directive, which had previously produced unapproved prospectuses. Incremental ongoing costs of £1.85m in relation to filing annual update information. Insignificant incremental costs for companies required to issue approved prospectuses where no prospectus was previously required.	Unquantifiable incremental benefits of a new regime which encourages UK companies to raise capital across the EU. Reduction in costs for those companies offering securities or admitting them to trading in more than one Member State. Overall benefit of Single Market in Financial Services estimated as reduction in cost of capital by 0.5%. Unquantifiable incremental benefits from providing UK investors with more and wider investment opportunities across the EU.
2. Implement the Directive and apply the provision for a Qualified Investor regime.	Same incremental costs as Option 1.	Same incremental benefits as Option 1.