

# **EXPLANATORY MEMORANDUM TO THE PROSPECTUS REGULATIONS 2005**

## **2005 [Statutory Instrument No. 1143]**

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)<sup>1</sup>. 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<sup>2</sup>. 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).

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<sup>1</sup> '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>)

<sup>2</sup> '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](http://europa.eu.int/comm/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf))

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.

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<sup>3</sup>. 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.

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

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 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.