

28 January 2005

RH/VS

Simon Cubley  
Capital Markets & Governance Team, 4/22  
HM Treasury  
1 Horse Guards Road  
London SW1A 2HQ

Dear Mr Cubley

**Re: Consultation on ‘UK Implementation of the Prospectus Directive (2003/71/EC)’**

I have pleasure in submitting the response of the Institute of Chartered Accountants in England & Wales (“ICAEW”) to the joint HM Treasury/FSA consultation “UK Implementation of the Prospectus Directive 2003/71/EC.”

The ICAEW is the largest professional accountancy body in Europe, with over 126,000 members. Our members have wide-ranging experience of listed companies and, in preparing our response, we have focused on matters relevant to our members working at listed companies, in practising firms of accountants and in corporate finance advisory roles.

We set out our detailed responses to the questions raised in the consultation as an Appendix 1 to this letter.

The ICAEW is willing to provide assistance through practical guidance to supplement the UK Listing Rules as it has done in the past with our publications: “Going concern and financial reporting: Guidance for directors of listed companies registered in the UK”; “Pro forma financial information: Guidance for preparers under the Listing Rules”; and “Prospective financial information: Guidance for UK directors”. These publications may require revision following the FSA’s proposed changes to the Listing Rules.

Please contact me should you wish to discuss any of the points raised in this response or if you would like further information on this submission.

Yours sincerely

A handwritten signature in black ink that reads "Robert Hodgkinson". The signature is written in a cursive style with a small dot above the 'i' in "Hodgkinson".

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## APPENDIX 1

*Q 1. Do you agree that the Directive definition of a public offer benefits from this clarification?*

Yes, we agree with the clarification to exclude a communication in connection with screen trading as set out in the consultation paper.

*Q 2. Do you anticipate particular issues regarding the application of the definition of a public offer in other circumstances?*

We are not aware of any particular issues with the application of the definition in the Directive other than as identified in the consultation paper.

*Q 3. Do you consider the 2.5 million euros threshold to be an appropriate level at which the production and approval of a prospectus is required under UK law?*

*And if not:*

*Q 4. What form of additional UK prospectus regime should apply below the 2.5 million euros threshold?*

We consider that the 2.5 million euro threshold established by the Prospectus Directive should be accepted as appropriate for UK purposes.

We note the concern outlined in paragraph 4.16 of the consultation paper that with the increase in the threshold “reckless or unscrupulous promoters will be encouraged to undertake capital raising in the knowledge that a prospectus will not be required, to the detriment of investor protection”. This concern appears to overlook a number of legal sanctions already available under the Financial Services and Markets Act 2000, and in particular the functioning of the financial promotion regime. Any prospectus relating to an offer falling below the 2.5 million euro level would constitute a financial promotion and, unless exempt, would require approval by an authorised person. Concerns over investor protection are only tenable if it is argued that the financial promotion regime is defective. If this is the case, there are wider consequences than those outlined in paragraph 4.16. On the assumption that this is not in fact the case, we would see little merit in the creation of an additional UK prospectus regime for offers below the 2.5 million euros threshold.

Given the importance of sub 2.5 million euro fund raising for smaller entrepreneurial companies we would, however, welcome consideration being given to whether the exemptions from the financial promotions regime might be extended, subject to investor protection considerations, so as to reduce the burden on smaller companies seeking to raise funds.

### *Other aspects of the 2.5 million euro threshold*

The wording of the Prospectus Regulations 2005 for the proposed amendment of section 85 of FSMA establishing the 2.5 million euro threshold tracks the wording of Article 1.2(h) of the Prospectus Directive (although the words ‘which limit shall be calculated over a period of 12 months’ appear to have been omitted).

Employee share plans often involve the grant of awards of free shares. From a literal reading of the above exemption it would appear that, since no consideration is payable by the employees for the shares, no prospectus is required for an offer of free shares. We would welcome confirmation that this is the case.

Such an approach would be consistent with the policy behind the Prospectus Directive, namely the enhancement of investor protection. It is self-evident that someone who receives something for free does not need the same level of protection as someone who has to pay the market price. It is also consistent with the “no sale doctrine” in US securities law, which states that shares issued free to investors do not require registration.

We would also welcome a statement that, where shares are offered to employees at a discount to market value, the actual consideration payable by the employees (i.e. the discounted value) will be relevant to €2.5 million limit (and not the full market value of the shares).

*Q 5. Do you agree with our approach to implementing the exemption where the offer of securities is addressed to fewer than 100 persons?*

We recognise that the approach is consistent, in principle, with the existing approach.

It is also appreciated that HM Treasury must work within the constraints of the Prospectus Directive and that Draft Regulation 85 (3) (b) mirrors the Prospectus Directive. However, that guidance as to the interpretation of this Draft Regulation would be helpful. In particular:

- does each copy of the offer document have to be personally addressed to an individual recipient before the exemption applies?
- will publication on a website, whether or not addressed to an individual, automatically rule the exemption unavailable?
- if, on publication of the offer document, it is apparent that a reader cannot acquire securities pursuant to the offer will that reader be excluded from the 100?
- it is apparent that a qualified investor is excluded from the 100 headcount. If that qualified investor acquires securities pursuant to the offer on behalf of a third party who is not a qualified investor, e.g. as a result of a discretionary management agreement, will that third party need to be counted within the 100?

*Q 6. Do you agree with our proposed implementation approach for attaching responsibility to the prospectus?*

Yes, we agree that the structure and the identification of responsibility should remain unchanged compared to the existing regime.

*Q 7. Do you agree that the UK should have a Qualified Investor regime?*

We agree that the UK should make provision for a Qualified Investor regime. It will be important, however, if the regime is to encourage smaller issuers in approaching private investors and others when seeking to raise capital, as stated in paragraph 4.24, that smaller issuers are able to do this without the need to seek approval of the relevant marketing document from an authorised person under the financial promotion regime.

Accordingly we would hope that proposals are in hand to amend the financial promotions regime to provide for an exemption for communications with Qualified Investors.

*Q 8. Do you agree that a prospectus should be made available on an issuer's website in addition to in printed form?*

In principle, we agree with this proposal as, practically, many companies already publish their prospectuses on their websites.

However, on occasion, prospectuses are issued by private companies whose securities are neither to be admitted to trading on either a regulated market or an exchange regulated market nor are they to be marketed in more than one EEA State. Usually in such circumstances the relevant company can take advantage of an appropriate exemption. If an exemption is not available, however, the prospectus would fall within the scope of the Prospectus Directive. Such companies may not have developed a website at the relevant time, and we consider therefore that there should be flexibility as to whether the prospectus should be published on the issuer's website.

*Q 9. Do you agree that a notice should be published stating how the prospectus has been made available and where it can be obtained by the public?*

We recognise that publication in a newspaper is a long established means of making information "public" and that the approach remains the basis for the optional disclosure of the notice as contained in Article 31 of the Prospectus Directive. We are not however sure how effective such a method is in conveying information to the public (given there are a considerable number of national newspapers which could be selected, and that the readership of any particular one is likely to be only a small subsection of the public). We believe that consideration might be given to an alternative approach – for example a single publicly accessible website where the information in the notice might be posted, maintained perhaps by the competent authority.