



HM Treasury

# UK Prospectus Regime Review

## A consultation

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July 2021



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# Ministerial Foreword

Lord Hill's landmark Listings Review made a series of recommendations to the Government. Of these, reform of the prospectus regime stands out as being of particular importance. The government has accepted Lord Hill's recommendations, and is committed to improving the prospectus regime inherited from the EU. This consultation marks the start of that process.

The UK has a proud history as a location where many of the world's best companies have chosen to list and do business. Our markets remain among the most deep and liquid internationally. The Chancellor and I are determined to build on this excellent base, to enhance the functioning of the UK's capital markets, and ensure they are helping to create jobs, support businesses, and power growth across all of the UK.

With the overarching aim of enhancing the functioning of UK capital markets, this consultation outlines four specific objectives that the government proposes to achieve in the area of prospectuses in future.

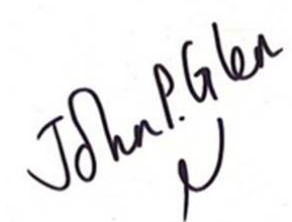
First, we want to facilitate wider participation in the ownership of public companies, and to remove the disincentives that currently exist for the issuance of securities to wide groups of investors – including retail investors. Doing so will allow a broader cross-section of society to benefit from their growth. It will also enable companies themselves to access a broader investor base, as well as improve market functioning overall by increasing the liquidity of markets.

Second, we intend to simplify the regulation of prospectuses and remove unnecessary duplications, without lowering regulatory standards. Notably, we propose separating out rules and processes related to traditional capital raising on stock exchanges, from those related to the raising of capital.

Third, we will improve the quality of information investors receive under the prospectus regime. As the fundamental purpose of a prospectus is to deliver key information to investors for them to make their investment decisions, ensuring that investors have high quality information is vital.

Finally, we will ensure that the regulation of prospectuses is more agile and dynamic. Leaving the EU means we can better tailor regulation to UK markets. Doing so will mean that, in future, the regulation of prospectuses will be better able to respond to innovation and change.

The government recognises the need to fundamentally reform this area and this consultation is a major step in that process.

A handwritten signature in black ink that reads "John P. Glen" with a stylized flourish underneath.

John Glen, Economic Secretary to the Treasury

# Chapter 1

## Introduction

### Background

1.1 In November 2020, the Chancellor announced in his 'Future of Financial Services' speech to the House of Commons that he had asked Lord Hill of Oareford CBE to lead an independent review of UK listings.

1.2 The objective the Chancellor set for Lord Hill's UK Listings review was to identify reforms to the UK listings regime that would attract the most innovative and successful companies to UK markets and help them access the finance they need to grow.

1.3 This objective is part of the Chancellor's overall vision to enhance the competitiveness of UK capital markets more broadly, and this consultation sits alongside, for instance, the Wholesale Markets Review consultation, which was also published today. The Wholesale Markets Review was established to determine how the UK's approach to regulating secondary markets needs to adapt following withdrawal from the EU, and to ensure that the framework continues to cater for future challenges and opportunities.

1.4 Similarly, Lord Hill's UK Listings Review was established to ensure the UK seizes these opportunities, having regained full control of its financial services regulation, and to tailor requirements more precisely to the needs of its companies, investors and markets.

1.5 The UK Listings Review was published on 3 March 2021 and made fourteen recommendations to the Government and the Financial Conduct Authority (FCA), the UK's independent securities regulator. On 19 April 2021, the Government confirmed it was taking forward all of Lord Hill's recommendations aimed at the Government.

1.6 One of Lord Hill's key recommendations was that the Government carries out a fundamental review of the UK's prospectus regime.

### The significance of the prospectus regime

1.7 Prospectuses are a key part of regulation in most developed capital markets. While the name for it might vary, a prospectus is the document in which a company seeking admission to a stock market or raising fresh capital through the issuance of new securities sets out, for the benefit of investors, the information they need to make informed investment decisions. The requirement for a prospectus ensures all investors receive adequate information and that it is accurate. Investors invest based on the information set out in this document, and where material facts are omitted or where information is misleading or inaccurate, those responsible for the

prospectus may be held liable for any losses suffered. This jeopardy has the disciplining effect of ensuring care is taken in preparing the document.

**1.8** The UK's prospectus regime derives from the EU Prospectus Regulation, now part of retained EU law following the UK's departure from the EU. It requires that, unless an exemption applies, a prospectus must be published in two instances:

- Where a person or company makes an offer to the public of transferable securities; or
- Where a company applies for its securities to be admitted to trading on a Regulated Market.

**1.9** Each of these two instances is explored in this document. Where either applies, and where no exemption applies, a prospectus has to be published by the applicant or offeror, after having been reviewed and approved by the FCA. The regulation and accompanying supplementary texts set out a comprehensive system of procedures, exemptions, content schedules and other regulation designed to make this system work.

**1.10** The Prospectus Regulation is therefore an important part of capital markets regulation and, for that reason, the UK Listings Review highlighted the need to consider carefully its impact on companies on or coming to stock markets.

**1.11** However, it has wider effect. It extends to all companies, public and private. It applies to any potential offerors of securities, including holders of securities and issuers. It is, for example, the exemptions within the public offer regime it contains that create the perimeter to the UK private placement regime. All companies which issue new securities therefore have an interest in it working well.

## **About this consultation**

**1.12** In this consultation the Government sets out how it proposes reviewing and potentially replacing the prospectus regime the UK has inherited from the EU. In doing so we are responding to Recommendation 7 of the UK Listings Review.

**1.13** The document also represents the Government's response to Recommendation 8 of the UK Listings Review: in Chapter 3 we set out how we propose to give the FCA the discretion to recognise overseas approved prospectuses should it choose to do so in order to facilitate more secondary listings.

**1.14** Chapter 5 proposes amendments to the liability regime that applies to prospectuses in order to encourage companies to include more forward-looking information in prospectuses. This in line with Recommendation 9 of the UK Listings Review.

**1.15** In this consultation:

- Our overall approach to this reform is explained in Chapter 2;
- The key issues in designing new rules on admissions to trading on Regulated Markets are discussed in Chapter 3;
- Prospectus content and ancillary powers for the FCA so the replacement regime will operate effectively are discussed in Chapter 4;



- How we can encourage the inclusion of more forward-looking information in prospectuses is addressed in Chapter 5;
- A discussion of how the revised regime would impact companies trading on junior stock markets is set out in Chapter 6;
- The revised scope of the UK public offer rules is in Chapter 7; and
- A discussion of how the revised regime would address public offerings of the securities of private companies, including those that raise capital through crowd funding, is set out in Chapter 8.
- A discussion of how the revised regime would address public offerings into the UK of overseas companies, is set out in Chapter 9.
- A list of potential ancillary powers, relevant to the discussion in Chapter 4, are set out in Annex A.

**1.16** A glossary of terms used throughout this consultation can be found in Annex C.

## **How to respond to this consultation**

**1.17** The Government welcomes views from all interested parties on this consultation, including from investors, financial services firms and accounting and law firms. When providing answers to the questions in this consultation we would welcome detail on the reasons for your answers and any additional information that may help us consider next steps. Where we set out potential options, please consider assessing the merits of an option relative to others presented.

**1.18** The consultation will run from Friday 2nd July to Friday 24th September. You can respond by emailing [UKProspectusRegime@hmtreasury.gov.uk](mailto:UKProspectusRegime@hmtreasury.gov.uk).

**1.19** Annex D (privacy statement) sets out how we will handle your consultation response should you decide to respond.

# Chapter 2

## Our overall approach

### Why reform the UK prospectus regime?

2.1 In his independent review of UK listings, Lord Hill argues that there is widespread support for a review of the UK prospectus regime.

2.2 He cites a range of issues raised by respondents: The ever-growing size of prospectuses without apparent utility for the reader of the document; Detailed disclosure requirements that are inappropriate for many of the companies subject to them. On similar related lines, the fact that these requirements are set out in statute and require an act of parliament to change them was another theme. He also cited other problems, including thresholds in the regulation which discourage listed companies from directing new share issuances at wider groups of investors.

2.3 Rather than recommending fixes to immediate problems cited by respondents (e.g. the often cited €8million threshold - see Box 2.A), Lord Hill advocates a fundamental overhaul of the regime. His ultimate conclusion is that the underlying design of the current prospectus regime is flawed. In particular, he suggests the current regime brings together two different regulatory concerns – the regulation of public offers of securities, and the regulation of admissions to stock markets – which should be dealt with separately so that they can be addressed on their individual merits.

2.4 The fundamental proposition of this consultation is, as Lord Hill suggests, that these two concerns should be dealt with separately. Reform along these lines could have considerable benefits, without compromising the high standards UK markets are known for. These include:

- Removing duplication and complexity for companies on stock markets raising further capital – if the public offering rules do not apply, these companies need only concern themselves with complying with the regulation that applies by virtue of their being admitted to trading on a stock market;
- Encouraging broader participation in companies by removing disincentives to offer securities to narrow groups of investors, rather than the wider public;
- Enabling the modernisation of the regulation the companies in scope are subject to, so we can ensure it remains relevant to today's economy; and
- Providing an opportunity to look again at the how this regulation has impacted private companies, including companies seeking alternative forms of finance outside of traditional stock exchanges.

## Box 2.A: Duplication and disincentives to wider participation: an example

A fast-growing UK-listed company wants to issue new shares to fund expansion, enlarging its capital by 9.9%. No prospectus is required under 'admission to trading rules' in the Prospectus Regulation as the increase is under 20% - the threshold for a further issue. The company plans to offer a slight discount to the prevailing price to get the deal away, but under the 10% maximum imposed by the UK listing rules.

The stock is well followed and there is demand from a wide range of investors. But the value of the offer is over the €8million threshold in Art 3(2)(b) of the Prospectus Regulation. If its book runners allocate shares to more than 150 natural or legal persons other than 'Qualified Investors', that would make the deal a 'public offer of securities' under the Regulation, requiring a prospectus.

So the company's advisors choose to place the shares exclusively with large institutional investors who are 'Qualified Investors'. Only they get the discount. This is despite the fact that the shares already trade freely in a highly regulated environment. The new retail investors that want to buy-in have to buy the new shares in the secondary market.

## The outcome we are seeking to deliver

2.5 The Government has considered Lord Hill's conclusions carefully and agrees there is a significant opportunity to replace the Prospectus Regulation with something better.

2.6 This is the beginning of a process of reform. However, we are embarking on this process with four key objectives:

- **Objective 1:** To **facilitate wider participation** in the ownership of public companies and remove the disincentives that currently exist for those companies to issue securities to wider groups of investors.
- **Objective 2:** To improve the efficiency of public capital raising by simplifying regulation and **removing the duplications** that currently exist in the UK prospectus regime.
- **Objective 3:** To **improve the quality of information** investors receive under the prospectus regime.
- **Objective 4:** To make the regulation in this area more **agile and dynamic**, capable of being quickly adapted and updated as times change.

## Our proposed approach

### Admissions to trading – our new approach

2.7 Prospectuses are and will remain an important component of the regulation of UK Regulated Markets. They will still be the document investors go to when there is an IPO on UK Regulated Markets. We are committed to ensuring those documents are clear, relevant and reliable.

2.8 However, the Government is concerned about embedding the level of detail that is embodied in the current Prospectus Regulation into legislation. Our goal is that regulation in this area more agile and dynamic. We want a system that is sufficiently flexible to allow regulation concerning Regulated Markets to be developed and altered as appropriate by the regulator of Regulated Markets.

2.9 Furthermore, the Government would like to explore whether it should remain a criminal offence to request admission to trading prior to a prospectus being published, as it is now. Currently, section 85(2) of FSMA prohibits requesting admission to trading on Regulated Markets without first having published an approved prospectus. Under section 85(3) of FSMA this offence is punishable by up to two years in prison, or a fine, or both. We are clear that appropriate standards of regulation should apply in relation to the admission of securities to stock markets. However, an application not supported by an approved prospectus where required could simply be refused by the relevant market. This may be more proportionate.

2.10 Therefore, in parallel with our proposal for reform of the law on public offers of securities (explained below in paragraphs 2.13-18), we are proposing to remove the section 85(2) prohibition on requesting admission to trading on Regulated Markets without first having published an approved prospectus. In connection with this, we also propose to give the FCA new rule making responsibilities on admissions to trading on Regulated Markets.

2.11 The new rule making responsibilities, coupled with the replacement of all or part of the existing Prospectus Regulation (as necessary), would enable the FCA to incorporate a replacement regime into its handbook, and tailor the regime appropriately after that when required.

2.12 Such rules could specify if and when a prospectus is required, what it should contain where one is required, and address other concerns currently addressed in the Prospectus Regulation. More detail is set out in Chapters 3 and 4.

### Public offers of securities – our new approach

2.13 Section 85(1) of the Financial Services and Markets Act 2000 (FSMA) makes it an offence to offer ‘transferable securities’ to the public unless an FCA-approved prospectus has been published. Under section 85(3) this offence, as with the section 85(2) offence outlined above, is punishable by up to two years in prison, or a fine, or both.

2.14 We propose retaining the section 85(1) prohibition on public offers of securities and the accompanying sanction applicable to non-compliant offers. We note it is the same penalty as that applicable for contravention of the ‘general prohibition’ in FSMA on the offering of financial services without authorisation. We note too they are similar offences: both are evasions of a system of fundamental

investor protection established to prevent harm to consumers and maintain the integrity of markets.

**2.15** However, we propose new exemptions for companies with (or applying to have) securities admitted to trading on stock markets of various types. Such exemptions would cover offers of securities admitted to trading on Regulated Markets or, as discussed in Chapter 6, junior markets like AIM or the Acquis Growth Market. We also discuss exemptions for companies admitted to trading on overseas equivalents of Regulated Markets in Chapter 9.

**2.16** This would mean that offerors of securities admitted to trading on stock markets or subject to an application for admission to a stock market would be exempted from rules governing public offers of securities. This is on the basis that the securities are already freely trading or, in the case of an Initial Public Offering (IPO), will be freely trading once the IPO completes. Such trading occurs in a highly regulated environment. New FCA rules applicable when securities are admitted to trading on Regulated Markets will, in the case of companies admitted to Regulated Markets, determine whether a prospectus is needed. In the case of junior markets, rules established by the exchange (and reviewed by the FCA) will ensure an admission document is provided. Further layers of regulation stemming from the fact a public offer is being made are duplicative and unnecessary.

**2.17** Separately, we are also proposing changes to what would constitute ‘the public’ in a public offering of securities. These are set out in greater detail in Chapter 7 of this consultation and, broadly speaking, aim to ensure that fundraising offers to close stakeholders of the company are not treated as public offers of securities subject to the penalties cited above. This aims to remove a disincentive against offering shares to a company's own shareholders introduced with the EU Prospectus Directive in 2005. This is consistent with our first objective in this review of facilitating wider participation.

**2.18** There will continue to be offers of securities to the public that are not exempted from section 85(1) notwithstanding the changes we describe above. Broadly speaking, these will be companies not admitted (or applying to be admitted) to a stock market of one type or other. These companies are called ‘private companies’ in this consultation. These companies are currently required to publish an approved prospectus when they make a public offer of securities over a threshold amount set out in the Prospectus Regulation. We discuss the appropriateness of this condition in Chapter 8 and consider whether to require a different condition.

## **Reform via a two-stage process**

**2.19** It follows from the proposals above that the replacement of the current prospectus regime will be achieved via a two-stage process:

- A government consultation followed, assuming the Government decides to proceed, by legislation; and
- An FCA review and consultation on the rules that will replace the Prospectus Regulation, where they are now empowered to make rules.

**2.20** The FCA has indicated its support for reforming the UK prospectus regime with a view to better aligning documentation requirements with the type of transaction being undertaken. It has confirmed that it stands ready to develop and

consult on further rules to underpin any changes to the existing admission and public offer regime subject to the outcome of this consultation and in line with the FCA's objectives.

## **Delegation and accountability: the Future Regulatory Framework approach**

**2.21** The proposed new rule making responsibilities for the FCA would replace the existing Prospectus Regulation, an area of retained EU law. The Government is considering its overall approach to retained EU law as part of the Future Regulatory Framework (FRF) Review will address.

**2.22** The key purpose of the FRF Review is to determine how the UK's financial services regulatory framework needs to adapt to reflect our position outside the EU and ensure it is fit for the future. It considers whether changes are required to regulators' objectives and principles; how we ensure regulators' accountability and scrutiny arrangements with the Treasury, Parliament, and stakeholders are appropriate given the regulators' new responsibilities; and how responsibility for designing and implementing rules in areas of retained EU law is transferred to the regulators. The Government published a consultation on the FRF in October 2020.<sup>1</sup> It will publish a second consultation on the FRF Review later in 2021.

**2.23** The Government is consulting on specific changes to the Prospectus Regulation now, alongside the FRF Review, in order to consider whether any proposed changes are needed and whether proposed changes are best delivered through changes to existing legislation or through regulator rules following the implementation of the FRF. Responses to this consultation will therefore be considered in parallel with the FRF Review.

**2.24** Any new rule making powers for the FCA would be subject to the conditions that apply in relation to FCA's general power to make rules and guidance. The FCA would remain subject to a duty to consult, requirements to conduct cost benefit analyses, and, as a public body, the FCA would remain subject to a range of other public law duties.

Q1 – Do you agree with our overall approach to reforming the UK prospectus regime?

Q2 – Do you agree with the key objectives that we are seeking to achieve?

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<sup>1</sup> See [Future Regulatory Framework \(FRF\) Review: Consultation - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/future-regulatory-framework-frf-review-consultation)

# Chapter 3

## The new FCA powers on admissions to Regulated Markets

**3.1** Throughout this consultation, we approach replacing the regulation of admissions to trading on Regulated Markets as separate from the regulation of public offers of securities.

**3.2** In this chapter, we address the rules on admissions to trading on a Regulated Market and seek consultees views on the key issues in designing replacement powers for the FCA. We also discuss the purpose of a prospectus, which we say should remain a feature of the regulation of UK Regulated Markets. In later chapters on revising the UK public offer rules we set out options which if pursued would mean prospectuses do not form part of the UK public offer rules. In Chapter 4, we address prospectus content and powers to ensure the system functions smoothly.

### The purpose of the new responsibilities

**3.3** The overall purpose of the new rule making responsibilities will be to enable the FCA to regulate admissions of securities to trading on Regulated Markets and to ensure, where necessary, that appropriate, relevant, reliable and timely disclosure to the market occurs. This is in service of its strategic objective established by Parliament to make the markets it regulates work well.

**3.4** This approach is in contrast to the current Prospectus Regulation, the purpose of which appears to be to determine when a prospectus is required and, if so, what it might contain. In our new approach, we are taking the view that a prospectus is merely a tool, albeit an important one, that securities regulators use to ensure Regulated Markets function as they should.

**3.5** The responsibilities will be framed in such a way as to give the FCA the broad discretion. For example, few would argue a prospectus is needed in all instances where admissions to trading of securities occurs. The FCA will be able to specify in its rules when a prospectus is needed. It will also have the discretion to determine content. And there will be other provisions, again ancillary to this overall purpose of appropriate regulation of admissions to trading on Regulated Markets. We discuss these further below.

### What is the purpose of a prospectus when seeking admission to a regulated market?

**3.6** The UK Listings Review calls for careful consideration of the overall purpose of a prospectus. In this consultation, we argue it is a tool of securities market regulation. We accept, however, this raises the question of what regulators should

use the tool for. We welcome views on this, and we appreciate consultees may look at it from differing perspectives (see Box 3.A).

### Box 3.A: The purpose of a prospectus - different perspectives

- **Economists** often say a prospectus remedies 'information asymmetries'. These occur where one party to a transaction has better information than its counter-party. In such markets, buyers cannot tell good product from bad and price-in the presence in the market of poor product to the detriment of other sellers who are not getting the value they otherwise might. Information asymmetries are a potential cause of market failure.
- **Investors** might see a prospectus in practical terms, as the resource that draws together the information they might need to assess and analyse a possible investment as they do their due diligence. They might also want to refer back to it afterwards in the light of subsequent developments as they monitor an investment decision, or where disputes on terms arise.
- **Issuers** can use them as an opportunity to explain their business to investors and attract the investment they need to succeed.
- **Lawyers** might point to the legal liability that attaches to a prospectus and see them as a means of ensuring investors can hold a company to hold to account for mis-stating or omitting key information.
- **Regulators** might view the jeopardy created by the legal liability as a positive force in markets, provided it is not disproportionate. Done well, legal liability ensures care is taken over what is said and what is included. This fosters trust. It means investors can rely on the information they receive.

3.7 Other perspectives will exist. To focus the debate, we would welcome comment on the following simple, practical statement of purpose:

A document of record, available to the public free of charge, that provides potential investors with the information they need and that they can rely on to make an investment decision in a security.

3.8 Consultees will note the statement of purpose does not address two other elements, deliberately omitted as they are discussed elsewhere in this document:

- When should a prospectus be published - we discuss this issue and seek the views of consultees' views in 3.11-3.16.
- Whether a prospectus requirement might be used in other regulatory settings - the Government is clear a prospectus should be feature of regulation of UK Regulated Markets. It is yet to be decided whether it should be a feature of regulation where securities are not admitted to a UK Regulated Market. Options are presented in Chapters 6, 8 and 9.

3.9 We will consider responses on these points as we consider further the fundamental purpose of a prospectus.



Q3 – Do you have any views on the underlying purpose of a prospectus when seeking admission to a regulated market?

## When should a prospectus be required for an admission to a regulated market?

**3.10** A prospectus is a key component in an initial public offering. However few would argue a prospectus is needed in *all* instances where securities are admitted to Regulated Markets. Article 1(5) of the current Prospectus Regulation sets out a range of exemptions from the requirement to publish a prospectus in relation to an admission of securities to trading on a Regulated Market.

**3.11** We are proposing granting the FCA discretion to determine whether or not a prospectus is required when securities are admitted to trading on UK Regulated Markets. We propose giving it the flexibility to establish rules or exemptions equivalent to Article 1(5), or to extend them should it deem it appropriate.

**3.12** We recognise that the Article 1(5)(a) exemption for further issues of securities below 20% of issued share capital commands significantly more attention from stakeholders than the other exemptions in Article 1(5), which are otherwise relatively technical in nature. This threshold determines whether a prospectus is required for a further issue or not, an important issue for companies already on markets considering raising new capital and investors alike.

**3.13** We recognise too that consideration of the purpose of a prospectus needs to encompass the issue of prospectuses for further issues.

**3.14** The purpose for prospectuses in relation to IPOs is straightforward. The company will be in private hands, will not be well known to the market, its valuation will be uncertain, and the information asymmetries will be significant. The case in other instances, when a company which is already listed issues new securities, divides opinion more. Investors can buy securities in the secondary market. Well-regulated markets require new material information to be disclosed in real-time in order that the secondary market remains fully informed. The new securities for sale to investors are the same as the securities already trading.

**3.15** However, the issuance of new capital can represent a material and strategic event for a company depending on the circumstances. Companies can and do materially alter as an overall investment proposition as a result of an injection of new capital. Problems such as information asymmetries arise and the need for disclosure and liability as a remedy should not be excluded. Company law may provide protections for the shareholders. However, this will depend on the domicile of the issuer.

**3.16** The Government believes that the FCA is the right body to make this determination of when a prospectus is required in Regulated Markets, and, if necessary, to update that view if things change in the future. This is a function of its role as securities regulator and a part of ensuring these markets work well, its objective. As we discuss below in 4.7-9, it does not mean 'one size fits all' in relation to the content of the document.

Q4 – Do you agree the FCA should have discretion to set rules on when a further issue prospectus is required?

## Recognition of prospectuses for secondary listings

3.17 The UK Listings Review recommends that the Government should consider the recognition of prospectuses drawn up under other jurisdictions rules as meeting UK requirements.

3.18 A secondary or dual listing is a listing on a stock market which is in addition to the company's main listing elsewhere. In recent decades regulatory reforms in numerous jurisdictions worldwide have removed or reduced many limits on institutional investors' abilities to invest capital in overseas markets. Large global companies have responded by dropping secondary listings, often to cut costs. Nonetheless, secondary listings remain a feature of international markets and the UK Listings Review says there remains more than 200 secondary or dual listings on the London Stock Exchange's Main Market. It also suggests there are a number of potential benefits to the UK as a financial centre in encouraging secondary listings.

3.19 The Government is interested in the creation of a framework which would permit overseas companies wanting a secondary listing to come to UK markets using an overseas prospectus prepared in accordance with the rules in the jurisdiction of their primary listing.

3.20 The general approach proposed in this chapter is to give the FCA broad discretion to determine whether a prospectus is required in relation to an admission to trading on a Regulated Market. The FCA could use that discretion not to require a UK prospectus where a prospectus is published in another country. Our preliminary view is that this should be sufficient to enable the FCA to accept an overseas prospectus in certain circumstances should it deem it appropriate.

Q5 – Do you agree the Government should grant the FCA sufficient discretion to be able to recognise prospectuses prepared in accordance with overseas regulation in connection with a secondary listing in the UK?
--

## Retention of provisions in statute

3.21 As we re-design the regime, we will need to consider what elements of the regime should remain in legislation or in the FCA handbook. Here, an important factor will be that a prospectus is a document with statutory liability attaching to it, which is ultimately to be determined by a court.

3.22 Therefore, our initial view is that provisions that contribute to the establishment of the liability attaching to prospectuses should be located in statute. For example, we propose retaining in statute an overall standard of preparation for a prospectus. This is a key determinant of liability for losses. Similarly, provisions providing for the supplementing of a prospectus when circumstances change again would be related to statutory liability. So again, provisions supporting the supplementary prospectus regime are likely to be positioned in legislation.

3.23 However, the overall rationale for giving the FCA rule making powers is to make the regime agile and flexible. Therefore, we suggest the main design principle should be that provisions are retained in statute only where strictly necessary. Our presumption will be that, absent a good reason for retaining a provision in statute, if an equivalent provision is required it will be located in the FCA rulebook.

# Chapter 4

## Prospectus content and ancillary provisions

4.1 In the previous chapter, we asked for consultees' views on how we might frame the new FCA rule making powers that will replace those parts of the Prospectus Regulation that address admissions to trading on Regulated Markets.

4.2 In this chapter, also about admissions to trading on Regulated Markets, we discuss the provisions which will govern prospectus content. We also discuss important ancillary provisions - supporting provisions aimed at ensuring the regime otherwise functions effectively.

### The 'necessary information' test

4.3 As noted above, we propose retaining in statute an overall standard of preparation for a prospectus.

4.4 We propose this standard should be based on the existing 'necessary information' test. The substantive provisions of the necessary information test are currently located in Article 6 of the Prospectus Regulation, following the 2017 reform (Box 4.A below).

#### Box 4.A: The necessary information test - substantive provisions

....a prospectus shall contain the necessary information which is material to an investor for making an informed assessment of: (a) the assets and liabilities, profits and losses, financial position, and prospects of the issuer and of any guarantor; (b) the rights attaching to the securities; and (c) the reasons for the issuance and its impact on the issuer.

That information may vary depending on any of the following: (a) the nature of the issuer; (b) the type of securities; (c) the circumstances of the issuer; (d) where relevant, whether or not the non-equity securities have a denomination per unit of at least EUR 100 000 or are to be traded only on a Regulated Market, or a specific segment thereof.

### Core test

4.5 We believe the core of the test, shown as the first paragraph in Box 4.A above, is well understood. It represents a robust, clear and comprehensible standard which we believe enjoys the support of market participants. We propose retaining the substance of the core test.

4.6 We also believe we should retain a clarification acknowledging that what is ‘necessary information’ may vary depending on certain factors. Participants in the 2015-17 consultations on the EU prospectus regime argued against a ‘one size fits all’ approach and the provision shown as the clarifying paragraph in Box 4.A were introduced in 2017 to address these concerns. However, we are considering amendments to better accommodate further issues and non-equity securities.

## Further issues

4.7 We are concerned that the current clarifying provisions do not address the key issue of whether a transaction is a further issue or an IPO. The UK Listings Review argues for a differentiation in disclosure for new applicants and further issuances. Many participants in the 2015-17 consultation argued for a differentiation between these types of transactions. The result, in the 2017 EU Prospectus Regulation, was what was called the simplified disclosure regime for certain secondary issuances, set out in Article 14.

4.8 Article 14(2) sets out a separate standard of preparation for these documents. It requires them to contain the relevant reduced information which is necessary to enable investors to understand:

- (a) the prospects of the issuer and the significant changes in the business and the financial position of the issuer and the guarantor that have occurred since the end of the last financial year, if any;
- (b) the rights attaching to the securities;
- (c) the reasons for the issuance and its impact on the issuer, including on its overall capital structure, and the use of the proceeds.

4.9 We would like to hear from consultees as to whether this revised separate standard, particularly with its reference to ‘relevant reduced information’, has clarified matters. We are minded not to include a separate test for further issues but instead make clear in the clarifying paragraph that a relevant factor is whether the issuer’s securities are to be admitted to the market for the first time or whether they have been admitted to the market before.

## Debt securities

4.10 Additionally, we are unlikely to include factor (d) on non-equity securities from the second clarifying paragraph.

4.11 Given that factor (b) refers to ‘type of securities’, factor (d) is potentially extraneous. It also refers to a disclosure threshold in the existing regulation applicable in debt capital markets and provides the basis for a distinction in the provisions on prospectus content between so-called ‘retail’ and ‘wholesale’ securities.

4.12 The FCA and others have previously argued the €100,000 denomination threshold referred to potentially distorts debt capital markets and should be reviewed. Deciding whether to have such a threshold is precisely the sort of matter we are proposing should be delegated to the FCA. Under our proposals, the FCA will be able to look at this point when it comes to consider how to exercise its new rule making responsibilities.

Q6 – Do you agree with our approach to the ‘necessary information test’?
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## Prospectus content

4.13 While retaining in statute the high-level standard of preparation applicable to a prospectus, the 'necessary information test', we propose to give the FCA the responsibility to make detailed rules on content.

4.14 In the current Prospectus Regulation, the rules on prospectus content are complex. They include rules specifying that there are different types of prospectuses (e.g. a base prospectus that is used in debt capital markets to establish an issuance programme or an 'ordinary' prospectus in relation to single issue). There are rules establishing the component parts of prospectuses (summary, risk factors, securities note, registration statement). There are detailed content schedules set out in annexes to secondary legislation accompanying the regulation.

4.15 The rules on prospectus content matter. However, because an issue is important, it does not follow that the issue must be resolved by legislation. The Government's preferred approach to prospectus content issues is that all content matters below the level required to establish a statutory standard of preparation should be delegated to the FCA.

4.16 Under our reforms, for example, it will be for the FCA to specify the component parts of the document should it wish to, as well as the detail of individual items of content. Similarly, the FCA would have discretion to determine how base prospectuses (which are used to launch issuance programmes for fixed income securities) should work or to establish the procedure for setting a final price in a price range prospectus.

4.17 Finally, as noted above, the UK Listings Review argued for a differentiation between prospectuses relating to IPOs or similar new applicant situations and further issuances. Lord Hill argued there is significant scope to reduce the content of prospectuses concerning further issuances. Article 14 of the Prospectus Regulation, introduced in 2017, introduced a simplified disclosure regime for secondary issuances but in relatively specific circumstances. Under our proposals, the FCA could choose how to modify the content requirements for secondary issuances and could depart from the narrow approach currently contained in Article 14. Our proposed refinement to the 'necessary information' test set out above together with our proposal to give to the FCA new rule making responsibilities to determine prospectus content is intended to give the FCA the scope to develop revised prospectus content in order to make markets work well.

## Provisions permitting omission of information

4.18 Article 18 of the Prospectus Regulation permits the FCA to authorise the omission of information from a prospectus that would otherwise be normally required in the document because it is 'necessary information' or because it is required by the detailed content requirement rules. Given this provision's close relationship to both the statutory liability and necessary information provisions discussed above, we are minded to retain equivalent provisions in statute. We do not propose substantive amendments.

## Ancillary arrangements

### Review and approval of prospectuses

4.19 Consistent with practice in most international primary capital markets, UK prospectuses are required to be approved by the relevant public authority (the FCA) prior to their publication. Generally speaking, where a public body does not approve the documentation it will be approved by the local stock exchange.

4.20 Currently, review and approval procedures are established in Article 20 of the Prospectus Regulation, with ancillary legislation and guidance establishing further detail. Further, section 87A of FSMA requires that the FCA 'must satisfy itself' that a prospectus submitted to it for approval meets the applicable content provisions and contains the 'necessary information' as discussed above.

4.21 That a document is approved by an authority prior to publication is important as it ensures that the market and the wider public have the definitive text of the prospectus. If alternative versions or drafts of documents the market relies on were to circulate the market could become disorderly. Ascertaining liability would be complex. Without the approval signifier, some other mechanism would be required to ensure the market knows it is dealing with the final and definitive text. The Government is therefore minded to include in the revised regime an ability on the part of the FCA to require that the prospectus is approved by the authority prior to publication.

4.22 A separate but related question is whether the FCA should review the prospectus prior to approval and publication. As noted, currently the FCA is required to scrutinise a prospectus before it approves it.

4.23 Consistent with the objective in this consultation of creating a flexible regime capable of being adapted and updated as times change, the Government is minded to remove the requirement to review prospectuses. Again, this would give the FCA the flexibility to establish its own policy in this area. The FCA currently already exercises similar discretion in UK primary capital in that its Listings Rules require issuers to submit certain types of shareholder circular for review and approval. This flexibility we are proposing could be employed to permit the FCA to decide not to review some or all types of prospectus or maintain the practice.

### Other areas

4.24 We expect to be able to provide new rule making responsibilities for the FCA, to replace a number of ancillary provisions should the FCA deem it necessary to do so in order to ensure the regime functions effectively.

4.25 A list and description of the provisions in the current regulation which might be replaced in this way is provided in Annex A and we invite views on the list. In each case it will be for the FCA to determine whether to exercise the power and provide a replacement provision or not. It may choose a different way of addressing the issue.

4.26 We are interested to hear from consultees as to whether they agree and whether are any other key areas we should consider when considering new rule making responsibilities for the FCA.

Q7 – Do you agree the FCA should have discretion to set out rules on the review and approval of prospectuses?

Q8 – Do you have any comments on what ancillary powers the FCA will need in order to ensure admissions of securities to Regulated Markets function smoothly? (See list of potential powers in Annex A.)

# Chapter 5

## Forward looking information

5.1 In his UK Listings Review Lord Hill identifies ‘forward-looking information’ – projections of future profitability of a company – as ‘a key, if not the key, category of information that investors ask for when a company is carrying out private funding rounds.’ He argues that the existing prospectus regime deters companies from including such information in the prospectuses they publish when they come to float in public markets, observing that ‘it is perverse that the flow of that information should be curtailed precisely when a company is taking what is usually the most significant corporate step in its history as well as often its largest fundraise and/or liquidity event.’

5.2 Lord Hill identifies the legal liability companies and their directors face as the main deterrent to the inclusion in prospectuses of this most useful category of information. Lord Hill relates how instead companies seeking to list are advised to rely on so-called ‘connected research’, equity research notes published by analysts from the investment banks in the underwriting syndicate, in order to signal to market participants the company management’s views of the potential profitability of the company. This process is opaque and adds to the time and cost of IPOs.

5.3 In this chapter we discuss reform of prospectus liability as it relates to forward looking information, and how reform could help to achieve our third objective for this review, that of improving the quality of information that investors receive.

### Background

#### The existing standard of liability in prospectuses

5.4 The liability which attaches to the information published in prospectuses is established by section 90 of FSMA. This states that any person responsible for the document is liable to pay compensation to a person who has suffered a loss in respect of any ‘untrue or misleading statement’ in the document or any omission from the document of any information that would be required under the ‘necessary information test’ or the rules. Those responsible are the issuer itself and, where the prospectus covers equity securities, the directors. Liability is determined by a court following a legal action by the investor or investors.

5.5 Schedule 10 of FSMA sets out exemptions to the liability for which section 90 provides. This includes the exemption at paragraph 1 of Schedule 10 that liability does not arise where a person reasonably believed that the statement was true and not misleading or that the omission was properly made. The standard of liability established by section 90 and Schedule 10 is sometimes characterised as a ‘negligence standard’.



## Other standards of liability in UK law

**5.6** The section 90 standard applicable to prospectuses is stricter than the standard which applies to other information required to be disclosed under various other securities laws and regulations applicable to the issuers of the securities which trade in UK markets. Examples of other such information might be information in annual reports or announced to stock markets via regulatory information services such as the London Stock Exchange's Regulatory News Service.

**5.7** Schedule 10A of FSMA is the schedule which addresses the liability of issuers in connection with other information published by issuers. FSMA Schedule 10A (3) states that an issuer is liable in respect of:

- an untrue or misleading statement only if a person discharging managerial responsibilities within the issuer knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading;
- the omission of any matter required to be included in published information only if a person discharging managerial responsibilities within the issuer knew the omission to be a dishonest concealment of a material fact.

**5.8** The standard of liability for this information is sometimes called a 'recklessness' or 'dishonesty' standard. The Companies Act establishes the identical standards of liability for directors of companies responsible for the various reports that appear alongside the financial statements in a company's annual report. In section 463 of The Companies Act 2006 the same standard of 'knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading' applies in relation to misleading statements. The same standard of 'knew the omission to be a dishonest concealment of a material fact' applies to omissions.

## Our proposed approach

**5.9** Clearly there is a need for requirements to be in place that ensure that appropriate and high quality information is available to market participants. However, the Government is minded to amend the statutory liability which attaches to prospectuses in certain respects.

**5.10** Our revised approach is based on feedback that disclosures to markets of forward-looking information via other disclosure mechanisms (i.e. annual reports and regulatory announcements) appears to occur with greater frequency than it does via prospectuses. We would invite comment from consultees on this observation.

**5.11** Given this assumption that disclosures to markets of forward-looking information released via other mechanisms work relatively well, we are minded to apply the same 'recklessness standard' applied in relation to misleading statements by section 463 of the Companies Act and Schedule 10A (3) of FSMA to forward looking information in prospectuses. That standard, as set out above, is that a person 'knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading'.

5.12 Along similar lines, to address omissions we again propose applying the standard applicable in section 463 and Schedule 10A(3) of FSMA. That standard is: ‘knew the omission to be a dishonest concealment of a material fact.’

5.13 This reduction in liability would apply only in relation to statements in a prospectus which project or predict a future state of affairs. It would not apply to statements of fact, which is to say any statement on the state of affairs at the date of the document or any statement of historic fact. Nor, for the avoidance of doubt, would it apply to the working capital statement in a prospectus. These would still be subject to the existing section 90 standard.

5.14 In Chapter 4 we suggest the FCA should continue to have powers to determine who is responsible for a prospectus. The revised standard of liability could therefore apply in relation to both natural persons (for example directors) or issuers, reducing the liability of both. For issuers, this raises the question of corporate knowledge. Again, we propose the test of corporate knowledge would be the same as for Schedule 10A: ‘if a person discharging managerial responsibilities within the issuer knew’. ‘Person discharging managerial responsibilities’ is an established concept in UK securities regulation.

5.15 We do not, however, propose including in the new standard the stipulation in Schedule 10A that a person is liable for losses arising from misleading statements where the claimant can demonstrate they acquired, held or disposed of shares ‘in reliance on the information in question’. This stipulation is reasonable in relation to claims arising outside of a situation where new investment is sought by an issuer and a document for that purpose is published. However, the purpose of a prospectus is to inform an investment decision. In a situation where the court is determining liability in relation for losses from mis-statement or omission, we think it is reasonable there should be, as now, a presumption of reliance on the prospectus.

## Additional warnings

5.16 In the reformed UK regime, the Government is minded to require, where a company includes forward looking statements and wishes it to be subject to the proposed new lower standard of liability for forward-looking information, that the information is explicitly identified as forward looking information. It would warn that as such there is inherent uncertainty as to whether the projection or prediction will prove to be accurate. It would also state explicitly that a lower standard of liability applies.

5.17 These disclosures would ensure that it is clear, one way or another, which standard of liability applies. It would also be open to the FCA, which under the proposals in this consultation will set the detailed rules for prospectus content, to make further provision to ensure this clarity is achieved if the FCA deems it necessary.

Q9 – Do you agree with our proposed change to the prospectus liability regime for forward looking information?

Q10 – Do you think that our proposed changes strike the right balance between ensuring that investors have the best possible information, and investor protection?

# Chapter 6

## Junior markets

**6.1** In much of this document so far we have discussed companies admitted to Regulated Markets. In the UK and EU, Regulated Markets are the main boards of stock markets, to which the full suite of EU and UK securities laws apply. An example is the London Stock Exchange's Main Market.

**6.2** In this chapter, we discuss other market types. A multilateral trading facility (or MTF) is a type of stock exchange or trading venue. Subject to MIFID II, certain facilities which bring together multiple third-party buying and selling interests in financial instruments can be authorised instead as an MTF, and fewer obligations apply than a Regulated Market. A further sub-category of MTF is an SME Growth Market. In the UK, there are two SME Growth Markets: the London Stock Exchange's AIM market and Aquis Exchange's Aquis Growth Market.

**6.3** In this chapter, we set out options for addressing companies whose securities are or will be admitted to trading on MTFs, including SME Growth Markets, and we consider how alterations could also help to achieve our objective of facilitating wider participation in the ownership of public companies and removing disincentives that currently exist for those companies to issue securities to wider groups of investors.

### **MTFs under the current Prospectus Regulation**

**6.4** Under the current Prospectus Regulation, securities on MTFs are not subject to requirements governing admissions to trading on Regulated Markets. 'Regulated Market' is a designation that excludes MTFs. However, issuers on MTFs (or applicants) are subject to the public offering rules.

**6.5** This means that a prospectus will not be required on initial admission to an MTF unless a public offering occurs. Instead a document will be required by the MTF operator's own rules. Under the London Stock Exchange's AIM rules, an 'Admission Document' meeting the requirements of the AIM rules, and only approved by AIM, must be published. By contrast, the Aquis Growth Market requires, via its rulebook, that an applicant submits a prospectus for review and approval by the FCA (notwithstanding that none is required by the Prospectus Regulation itself).

**6.6** However, the rules on public offerings of securities apply to the MTF companies in full, meaning that if a company on an MTF wants to make a public offering of securities a full prospectus is required.

**6.7** As a result, companies admitted to trading on MTFs considering a fund-raising face the same disincentives from offering the new securities to a wider investor base as other companies. If, for example, a company on a UK MTF is contemplating raising more than €8million, it does not have to publish a prospectus if it offers the shares to fewer than 150 natural or legal persons, excluding Qualified Investors. If it offers them more widely, it does. Very few companies on MTFs choose

the latter. As a result, the current prospectus regulation disincentivises wider participation in MTF companies just as much as Regulated Markets companies.

### **Box 6.A: How the Prospectus Regulation disincentivises wider participation in junior markets: an example**

A further issue of securities under the AIM rules only requires a new admission document to be published where the transaction enlarges share capital by 100% or more. But if the shares are offered to the company's own shareholders, assuming there are more than 150 (excluding qualified investors), then it that would constitute an offer to the public under the Prospectus Regulation and trigger the requirement for a prospectus.

There has not been a rights issue on the AIM market since 2015.

## **Options for junior markets**

**6.8** The change to the definition of the public we outline in 7.3-7.10 to exclude a company's own shareholders from being deemed the public would apply to all companies – Regulated Market companies, MTF companies and private companies – and would eliminate the disincentives to issue to a company's own shareholders.

**6.9** However, we propose to go further. The case for exempting companies with securities admitted to trading on junior markets (and applicants) is the same as for Regulated Market companies: they incentivise companies to issue securities to narrow groups rather than wide groups. The public offering rules are duplicative and unnecessary given the regulated nature of these markets. Exchanges operating junior markets are required by FCA rules to ensure their markets provide a wide range of investor protection measures and disclosures, including in relation to admissions to trading. The FCA has the right to review changes to market rules and object where it thinks it necessary. The Market Abuse Regulation provides investors with protection against insider dealing, market manipulation, misleading statements and other forms of market abuse.

**6.10** We have therefore developed two options for addressing companies admitted to MTFs including SME Growth Markets.

### **Option 1 – simple exemption from s85(1)**

**6.11** In addressing companies admitted to trading on MTFs, the simplest option is a straightforward exemption from the section 85(1) restriction on public offerings of securities. This exemption would be structured along the same lines as the one we are proposing to apply to companies admitted to trading on Regulated Markets. It would only apply where the issuer has itself requested admission of the securities to trading on the MTF. It would not apply where the trading on the MTF provides a secondary liquidity venue.

## Option 2 – exemption from s85(1) plus a new MTF admission prospectus

6.12 Chapter 5 sets out proposed changes to the statutory liability of those responsible for prospectuses. This aims to encourage companies to include more forward-looking information in prospectuses, thereby making them more useful to investors.

6.13 As it stands, this would have limited benefit for companies admitted to MTFs: the reform would apply to companies whose securities are admitted to trading on a Regulated Market, or applicants. The majority of companies admitted to MTFs in the UK are admitted to AIM via an AIM admission document. There is no recourse via section 90 of FSMA for investors in these companies; instead a claim in similar circumstances to that envisaged under section 90 would be under common law. It is not clear therefore whether the change proposed in Chapter 5 could have the same effect on MTF markets as intended for Regulated Markets: encourage issuers and directors to include forward looking information in Admission Documents by reducing their legal liability.

6.14 An alternative option (in addition to exempting companies admitted to trading on MTFs from the public offering rules as per Option 1 above) is to recognise admission documents published in relation to an admission to an MTF as a form of prospectus in the reformed regime. The intention would be to bring such documents within the scope of section 90 of FSMA, including the change to the standard of liability in respect of forward-looking statements proposed in Chapter 5. For the purpose of explaining this option, we will call this type of prospectus an ‘MTF admission prospectus’ in this consultation.

6.15 If we were to pursue the option of creating an ‘MTF admission prospectus’, we would wish to do so in a way that preserves the current system in which MTFs set their own admission criteria and rules, subject to FCA rules and oversight.

6.16 Therefore, we envisage that under this alternative option, the exchange operating the MTF would be able to specify through its own rulebook the content of the ‘MTF admission prospectus’, together with procedures for ensuring it meets the requirements of the MTF. This could include requiring the document is reviewed by a nominated advisor, as the London Stock Exchange’s AIM market requires currently.

6.17 We recognise that there are other MTFs models. The Aquis Growth Market requires, via its rulebook, that an applicant submits a prospectus for review and approval by the FCA. We would wish to retain the option of an MTF to specify that the FCA should review and approve the document, provided the FCA itself decides review and approval will continue for Regulated Market companies.

6.18 We also would wish the FCA to retain oversight over MTF rules as now. Currently FCA rules require exchanges to consult with the FCA on changes to their rules, and the FCA has the right to object. Any arrangement under which MTF rulemaking specifies the content an MTF admission prospectus would remain subject to the FCA right to object. We also envisage the FCA would have a power to require an MTF admission prospectus is filed in its National Storage Mechanism, its online archive of documents such as prospectuses and listed companies’ annual reports.

6.19 The Government is interested in consultee's views on this option. The Government recognises it is more complex than Option 1. It will only pursue this option further if it is persuaded there is likely to be sufficient benefit in the option. Such benefit could come from a reduced level of liability for those responsible for admission documents encouraging the inclusion of forward-looking information in MTF admission documents, and we invite comment on the option on that basis.

Q11 – Which option for addressing companies admitted to MTFs do you favour and why?
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## **Wholesale Markets Review – proposal for a new SME trading venue type**

6.20 At the same time as this review of the prospectus regime, the Government has launched its Wholesale Markets Review. This includes an ambitious and wide-ranging consultation on the structure of our markets which aims to improve liquidity and support investor confidence in capital markets.

6.21 The Wholesale Markets Review includes a proposal for a new type of trading venue aimed at smaller SME issuers. It may feature intermittent trading focused into so-called 'trading windows' to concentrate and maximise liquidity and regulation would be proportionate for a venue of this type.

6.22 If this proposal is implemented, an appropriate exemption from the section 85(1) restriction on public offers of securities would be introduced for securities that will be admitted to trading on this new venue type. The new venue type will be a regulated trading environment. As with Regulated Markets and MTFs, an exemption from section 85(1) would be appropriate as the public offering rules would be duplicative and unnecessary given the regulated nature of these markets.

# Chapter 7

## The scope of the UK's public offering rules

**7.1** In this consultation we are proposing to exempt companies that are admitted to trading on stock markets of various types from controls on the public offerings of securities. Most companies, however, are not admitted to stock markets. Controls over the public offerings of securities of these companies will remain as an important component of fundamental investor protection in the UK.

**7.2** In this chapter and the chapter that follows we therefore look at the key elements of the UK's public offering rules. In this chapter we look at the scope of those rules and how their alteration will be fundamental to achieving all of the objectives outlined in chapter 2. In Chapter 8 we discuss what private companies should do if they wish to offer securities to the public.

### The definition of 'the public'

**7.3** The current definition of 'public offer of securities' is deliberately drawn widely. An 'offer of securities to the public' is defined in Article 2(d) of the Prospectus Regulation as a 'communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered so as to enable an investor to decide to purchase or subscribe for those securities.' The definition goes on to add that it 'also applies to the placing of securities through financial intermediaries.'

**7.4** The 'public' is never fully defined beyond 'persons' and we can therefore assume it has its natural meaning. However, the rules go on to exempt offers directed at those persons who should not fall within an appropriate definition of the 'public' bearing in mind the purpose of the regime. These exemptions include:

- The Article 1(4)(a) exemption for offers solely directed at 'Qualified investors', as defined in Article 2(e) of the Prospectus Regulation;
- The Article 1(4)(b) exemption for offers addressed to fewer than 150 natural or legal persons other than 'qualified investors';
- The Article 1(4)(c) exemption for offers addressed to investors 'who acquire securities for a total consideration of at least €100,000';
- Offers directed at existing or former directors or employees by their employer or by an affiliated undertaking.

**7.5** We propose retaining this broad scope that results from the wide definition, together with the structure in which there is a presumption an offer of securities to a plurality of legal or natural persons is caught, unless a characteristic of the persons to which the securities are offered would exclude it.

7.6 However, we are proposing to add a further category of offer to the list of exemptions. The relationship between a holder of a company's securities and a company is not akin to the relationship that exists between a company and the wider general public. Holders of securities are stakeholders in the company with rights given to them by the terms of the instruments they hold. In the case of equity shareholders, holders are collectively the owners of the company.

7.7 We would therefore like to explore whether the holders of a company's securities are 'the public'. In some cases, other exemptions are available enabling companies to direct fundraising offers at existing holders of securities, for example the 150 persons or fewer exemption, the qualified investor exemption, or others. But in many situations, they are not. And in such situations, a company which wishes to raise new funds is incentivised by the existing rules to structure a fundraising offer of securities such that it is directed only at the exempted groups.

7.8 We therefore propose adding a new exemption from the public offer rules for existing holders of securities.

7.9 This new exemption would have the effect of taking all rights issues, by all types of companies, outside of the restrictions imposed by the public offering rules. This is one example of how, through reform of the prospectus regime, we aim to remove disincentives to issuing securities to wider groups of investors that exist in the current UK prospectus regime and thereby facilitate wider participation in companies.

7.10 For the avoidance of doubt, consultees should note that this new exemption would also have the effect of exempting all share-for-share offers (or security for security offers) because only the existing holders can receive such offers. This new exemption would also remove the need for the Article 1(4)(f) and 1(4)(g) exemptions for securities offered in connection with various forms of mergers and acquisition activity. Both of these exemptions have conditions attached and therefore bring complexity and additional cost to offerors. Share-for-share offers give shareholders the opportunity to roll-over their investment into the new company. Removing barriers to share-for-share offers is another example of our aim to incentivise wider participation in companies.

Q13 – Do you agree there should be a new exemption from the public offer rules for offers directed at existing holders of a company's securities?
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## The 150-person threshold

7.11 Some feedback to the UK Listings Review suggested that the Government should look again at the threshold in the Article 1(4)(b) exemption in the Prospectus Regulation, for offers to 150 people or fewer. This feedback argued that it was insufficiently flexible and a higher number should be selected.

7.12 Getting the threshold right is challenging. For the regime to operate in a clear and orderly fashion with the certainty all interested parties need, some form of numeric threshold is needed. Any numeric threshold chosen will have merits and demerits and will represent a compromise.



**7.13** We note however that other proposals in this consultation if enacted would provide companies currently subject to these rules with significantly more flexibility than they have now. These include the proposal to exempt offers of securities which are admitted to trading on a regulated market or an MTF, and also to exempt offers to a companies' own security holders. As a result, we believe that the overall package is sufficient such that there is no need to change the threshold number of natural or legal persons to which an offer has be directed to be deemed an offer to the public. However, we are interested to hear the views of consultees on this point.

## The Qualified Investor exemption

**7.14** In a similar vein, we are concerned to ensure the 'Qualified investor' exemption in Article 2(e) of the Prospectus Regulation operates appropriately. The term, defined in Prospectus Regulation, includes professional investors. We recognise its importance in ensuring UK institutional investors participate in UK private markets and in overseas stock markets without imposing undue additional legal obligations on the issuers. Such issuers could simply exclude them from participating if that were the case. We are minded to retain the exemption without substantive change but would be interested to hear from consultees as to whether they agree the qualified investor exemption is clear and works appropriately.

Q14 – Do you agree we should retain the 150 person threshold for public offers of securities and the 'qualified investors' exemption? Do you have any comments on whether they operate effectively?

## Offers to employees

**7.15** Given our objective of facilitating wider participation in the ownership of companies, we would be interested to hear views on the Article 1.4(i) exemption for public offers to employees, former employees, directors and ex-directors. As with offers to existing holders, directors and employees do not have the same relationship to a company as the general public. We are in particular concerned to ensure that this exemption secures the position of employees who work for a group company rather than the main member of a group that has issued the securities in question. In this respect, we note the exemption is reliant on the term 'affiliated undertaking'. We are keen to hear views as whether this wording is clear enough. We would appreciate views from consultees on whether the exemption functions appropriately.

Q15 – Does the exemption for employees, former employees, directors and ex-directors work effectively?

## Powers to vary the exemptions

**7.16** As we note above, we are interested to hear views on the operation of certain key exemptions within the public offering regime, although we are minded to not make changes at this juncture. This is because getting these exemptions right is important for the successful operation of the regime. We need to ensure it remains up to date and current.

7.17 For this reason, and in line with the fourth objective we have set out for this review (agility - see paragraph 2.6), we are minded to establish powers to vary the exemptions to the public offer rules by means of secondary legislation. This power would enable HM Treasury to delete, vary, or create new exemptions to the public offer rules by statutory instrument.

## **Thresholds to be restated into sterling**

7.18 Any monetary thresholds we retain in the revised legislation which are expressed in euros will be restated into appropriate sterling amounts.

# Chapter 8

## Public offerings by private companies

**8.1** The Prospectus Regulation provides a mechanism under which private companies can raise capital from the public through the offering of securities. In this chapter we discuss how this ability of private companies to raise capital from the public should be accommodated within the reformed regime.

### Background

**8.2** The Prospectus Regulation, its predecessor the Prospectus Directive, and the domestic public offering regime the Prospectus Directive replaced, the 1995 Public Offering of Securities Regulations (known as the POS Regs), all permitted companies to raise capital from the public by means of offering securities. In each case, this is or was permitted provided a prospectus was published. And in each case, there was (and still is) a size threshold for an offer under which an offeror was exempted from the requirement to publish a prospectus.

**8.3** Under the POS Regs that threshold was 40,000 ECUs, the EU's nominal currency unit before the euro was created. The threshold was raised to €5million when the Prospectus Directive replaced the POS Regs in 2005. When the Prospectus Regulation replaced the Prospectus Directive in 2017 and gave EU countries the flexibility to raise the threshold, the UK raised it again to €8million, the current threshold. This change took effect in July 2018.

**8.4** Prior to 2005, the POS Regs specified that the prospectus, where required, had to be filed with Companies House. There was no requirement for it to be reviewed and approved by Companies House (or any other body) prior to it being filed. Review and approval of public offer prospectuses was introduced in 2005 when the PD came in 2005 and brought the public offering rules together with stock exchange regulation. The Prospectus Directive required the relevant EU 'home competent authority' to review and approve the document. This was maintained when the Prospectus Regulation replaced the Prospectus Directive in 2017. Following the UK's withdrawal from the EU, only the UK authority, the FCA, can now approve a prospectus.

### The regime in practice

**8.5** While the facility is there for companies to raise capital, few use it except when raising smaller amounts of capital below the threshold at which a prospectus is required. Almost all usage of the facility is for amounts below the threshold at which a prospectus is required.

**8.6** The following table shows the number of 'public offer only' prospectuses (i.e. prospectuses issued in connection with a fundraising but with no admission to a stock market (of any type) the FCA has approved between 2017 and 2020.

**Chart 8.A: 'Public offer only' prospectuses approved in the UK, 2017-2020**

	2017		2018		2019		2020	
	No.	Offered (£m)	No	Offered (£m)	No	Offered (£m)	No	Offered (£m)
<u>Equity</u>								
Rights issues by large private companies	0	0	0	0	2	645	2	780
Offers to the wider public	1	10-40	2	163.9	1	7-50	1	7.5-50
<u>Debt</u>								
Debt offerings	0	0	0	0	1	162	0	0

Source: Financial Conduct Authority; HM Treasury analysis

**8.7** The period 2017-20 saw four large private companies carry out rights issues. In Chapter 7, we outline a proposal to revise the scope of the public offer regime to exclude offers to a company's own shareholders, including rights issues, from the scope of the rules. These are therefore shown separately from offers to the wider public in the table above.

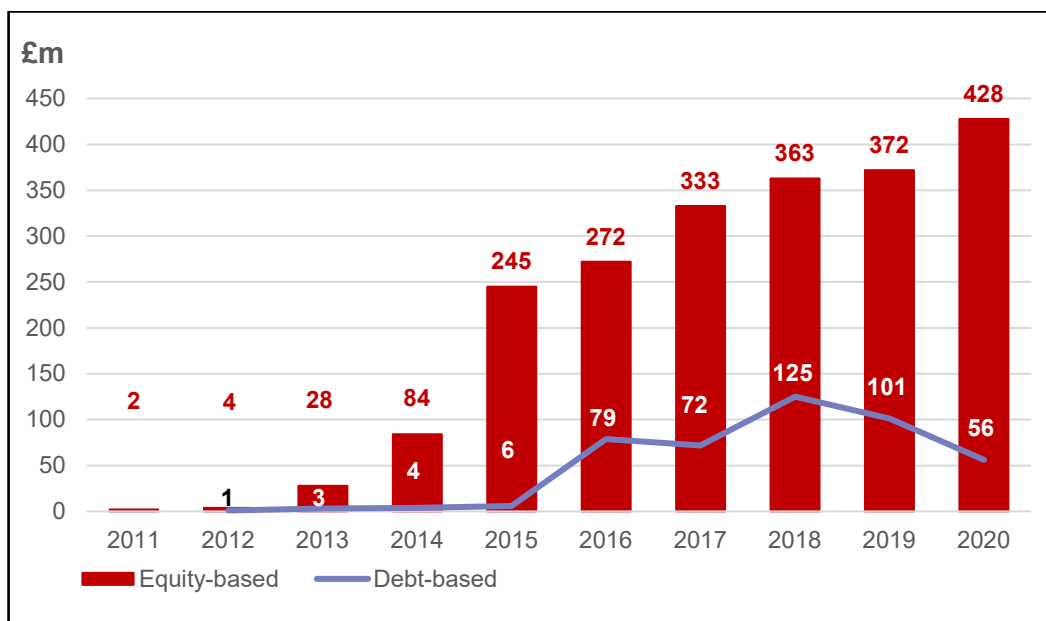
**8.8** The number of equity offerings to the wider public that required a prospectus was therefore small. Just five offers by only three companies occurred. One company was responsible for three of those offers, raising capital in each of the years in under review except 2018. It was also the only non-financial company. The other two companies raised capital in 2018, seeking £20m and £143.9m respectively.

**8.9** That so few transactions have occurred during the period is particularly notable as the period shown has followed significant technological change, including the rise of digital apps that have transformed finance. This has enabled the rise of crowdfunding during the past decade.

**8.10** Crowdfunding comes in various forms, including charity and social investment. Among those many types is crowd funding for commercial investment purposes via the offer of securities.

**8.11** Securities-based crowdfunding is a public offering of securities and is therefore within the scope of the Prospectus Regulation, provided the securities offered are transferable securities. The chart below shows the significant growth of the UK securities-based crowdfunding industry during the previous decade. It shows that securities-based crowdfunding has grown to be a credible source of corporate finance (given its focus on SMEs) during a period which has seen very little activity in the space above the prospectus threshold.

Chart 8.B: Growth of UK securities-based crowdfunding, 2011-18



Source: Judge Business School, University of Cambridge

8.12 Further analysis of crowd funding by transaction size shows more conclusively that deal size is clustered around the threshold limits in the Prospectus Regulation.

8.13 Chart 8C shows public offers carried out on crowd funding platforms between 2016 and 2020 segmented by transaction size, expressed in Euro. It is based on an HM Treasury survey of UK Crowdfunding Association members and respondents are estimated to have market share of over 95% of the UK securities-based crowdfunding industry. In each case the transaction size is the amount raised from 'the public', that is retail investors, via the platform, and excludes additional amounts that may have been co-invested by Qualified Investors. The chart is expressed in Euro because the threshold is expressed in that currency. All deals were in fact in sterling; currency amounts have been translated into Euro using the exchange rate at the date the deal closed.

8.14 The threshold is shown on the chart as a black line. The threshold was raised to €8million in July 2018. This data appears to show the effect of the prospectus threshold on this market. The small number of deals shown slightly above the threshold are in fact explained by exchange rate movement during the offer period. When these deals opened, they were all for an amount under the threshold.

8.15 The threshold is intended to provide a level at which additional obligations apply to public offers. However, this data and Chart 8A (above) appears to show that fundraisings over the threshold at which a prospectus is required are rare. The exemption is intended to operate as the threshold; it is in fact operating more like a cap.

Chart 8.C: Crowd funding deal activity segmented by size increments, 2016-20

Period → ↓ Size segment	H1 2016	H2 2016	H1 2017	H2 2017	H1 2018	H2 2018	H1 2019	H2 2019	H1 2020	H2 2020
€10m+	-	-	-	-	-	-	-	-	-	-
€9.5-10m	-	-	-	-	-	-	-	-	-	-
€9-9.5m	-	-	-	-	-	-	-	-	-	-
€8.5-9m	-	-	-	-	-	-	-	-	-	-
€8-8.5m	-	-	-	-	-	-	-	1/€8.2m	1/€8.3m	1/€8m
€7.5-8m	-	-	-	-	-	-	2/€15.7m	1/€8m	1/€7.8m	1/€7.8m
€7-7.5m	-	-	-	-	-	-	1/€7.3m	-	-	2/€14.2m
€6.5-7m	-	-	-	-	-	2/€13.5m	-	-	-	2/€13.4m
€6-6.5m	-	-	-	-	-	-	-	1/€6.1m	1/€6.4m	-
€5.5-6m	-	-	-	-	-	-	-	1/€5.6m	-	2/€11.4m
€5-5.5m	1/€5.2m	1/€5.2m	-	-	-	-	-	2/€10.4m	-	1/€5.2m
€4.5-5m	-	1/€4.6m	-	5/€24.1m	2/€9.5m	1/€4.7m	-	1/€4.6m	-	-
€4-4.5m	-	-	-	1/€4.2m	1/€4.1m	1/€4.3m	3/€12.8m	2/€8.5m	1/€4.4m	1/€4.1m
€3.5-4m	-	-	1/€3.7m	-	1/€3.9m	1/€3.8m	1/€4m	1/€3.5m	-	-
€3-3.5m	-	1/€3.1m	-	2/€6.3m	2/€6.7m	2/€6.4m	-	-	-	2/€6.9m
€2.5-3m	3/€8.2m	5/€13.9m	2/€5.5m	-	1/€2.8m	1/€2.7m	3/€8m	3/€8.1m	5/€13.4m	2/€5.3m
€2-2.5m	2/€4.8m	-	4/€8.7m	2/€4.3m	2/€4.8m	4/€8.6m	3/€6.7m	1/€2.4m	3/€7.2m	4/€9.3m
€1.5-2m	6/€10.5m	2/€3.3m	7/€11.5m	7/€12.2m	4/€6.7m	4/€6.7m	4/€6.8m	10/€17m	7/€11.9m	7/€12m
€1-1.5m	4/€5m	9/€10.7m	9/€11.4m	14/€17m	11/€13.6m	12/€14.2m	17/€20.9m	8/€10.3m	8/€9.9m	23/€27.5m
€0.5-1m	24/€17.2m	14/€10.5m	14/€10.1m	14/€11m	30/€21.2m	24/€17.1m	28/€18.8m	23/€15.7m	28/€18.8m	28/€19.9m
€0-0.5m	101/€12.1m	117/€15.7m	96/€12.3m	124/€22.1m	115/€19.8m	120/€21.6m	139/€25.2m	164/€27.4m	203/€29.7m	196/€34.7m

Source: HM Treasury survey of UK Crowdfunding Association member firms

**8.16** The likely cause of this pattern is the additional cost of preparing a prospectus relative to the deal size. Estimates for the cost of preparation of a prospectus vary significantly. However, with an €8million deal size, the cost only needs to exceed €80,000 to add 1% to transactions costs.

## Is a prospectus the right obligation?

**8.17** Raising capital inevitably has costs attached to it. However, in any case there are questions about the relevance and effectiveness of a prospectus as a means of assuring, protecting and informing investors in markets such as these. These raise the question of whether a better way of informing and protecting investors can be found.

**8.18** In capital markets, well evolved practices and systems exist. Information derived from the prospectus (and verified as part of the process of production of the prospectus) plays an important role in 'price discovery'.

**8.19** In private equity markets, which unlike public capital markets are unconstrained by the need to standardise information flows to ensure there is no selective disclosure, smaller numbers of well-resourced and informed institutions again subject potential investee companies to extensive iterative screening from which prices emerge.

**8.20** For public offers of securities with no stock market admission to dispersed small-scale investors, the Prospectus Regulation appears to envisage a direct issuer-to-investor model. In such a model, it is difficult to see comparable processes emerging. The Government would welcome evidence to the contrary, and views on how this can be studied. As the data above shows, the market above the threshold is largely non-functioning. Below the threshold, data is extremely limited as it is an unregulated area.

**8.21** However, although we do not know the total size of this 'below the threshold' retail securities investment market, there is clearly an increasingly vibrant intermediated market which has grown in this space in the form of the crowdfunding market, discussed above. Crowd funding platforms are authorised firms and the industry has grown to a size where data is collected, making this model visible to policy makers. The crowd funding model offers an answer to the question as to how can there be disclosure and due diligence in this market place: the technique enables the appetite for investors to be tested before due diligence is performed on the target company, meaning that there is no expenditure on due diligence for investment for which there is no demand. This means that due diligence obligations can be placed on the firms without making the model uneconomic.

**8.22** Comparisons of direct marketing and crowdfunding segments are difficult due to the lack of data. However, there is one part of this retail securities investment market where there is some limited evidence available: the so-called mini-bond (or 'non-transferable debt securities') market.

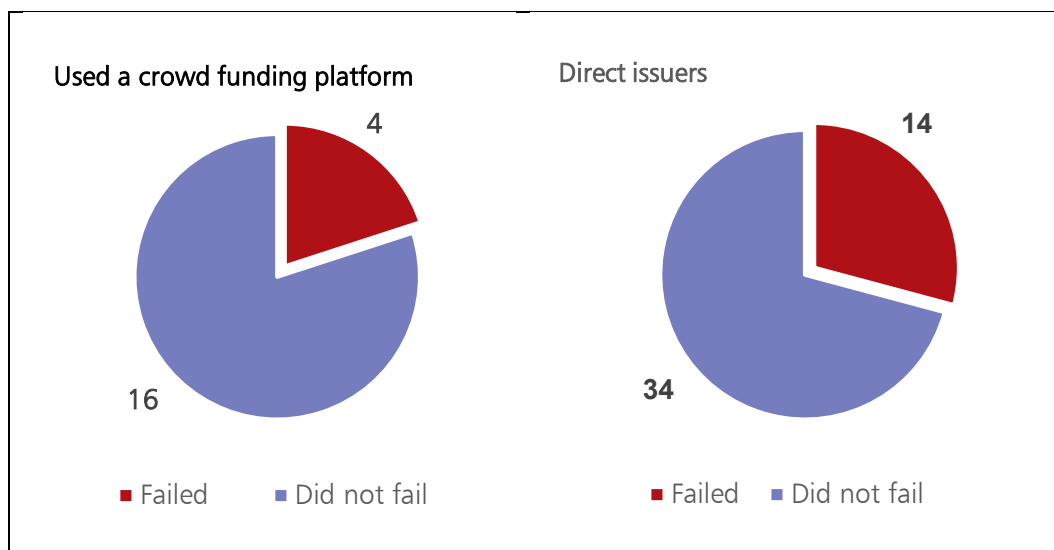
**8.23** Non-transferable securities are outside of the perimeter of the Prospectus Regulation. Investment services in relation to them are not subject to authorisation. The sector is largely unregulated. However, due to well-publicised failures in the sector, data exists. Research by London Economics commissioned by the Government and published in connection with the Government's recent consultation on potential regulation of non-transferable debt securities (NTDS)<sup>2</sup> shows this to have been a market which featured two different modes of intermediation: via crowd funding platforms or via direct offer.

**8.24** Further analysis of data collected by London Economics shows the failure rate of mini bonds sold via platforms to be lower than those sold via direct offer.

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<sup>2</sup> HM Treasury, [Regulation of non-transferable debt securities \(mini-bonds\) A consultation](#), May 2021.

**Chart 8.D: Mini-bond failure rate: comparison of modes of intermediation**



Source: London Economics; HM Treasury analysis

**8.25** London Economics identified 68 issuers of the 152 mini-bonds in its study and split them by mode of intermediation: those issuers that used a crowd funding platform and those that issued directly. It also identified 16 mini-bond issuers which failed. Further HM Treasury analysis identified two further mini-bond issuers which failed plus another which entered a company voluntary arrangement (CVA) with creditors.<sup>3</sup> Four of the 20 (20%) mini-bond which used a crowd funding platform failed, a high failure rate for a fixed income security. However, 14 of the 48 (29%) mini-bond issuers which issued directly failed. If the issuer which entered a CVA is included as a failure this rises to 15 out of 48 (31%).

**8.26** A potential conclusion we draw is the crowd funding model performed materially better in relation to mini-bonds than the direct issuance method. We note that the former provides for third-party checks on offerors; the latter does not.

**8.27** This evidence offers some insight given the real-world operation of the current public offer regime for securities in private companies. As we note above, the market below the prospectus threshold is active; but above the threshold it is virtually non-functioning. However, we accept this evidence provides limited insight into the question of whether the prospectus obligation would have been an effective safeguard as it is inapplicable to all non-transferable securities.

**8.28** We assume that if a prospectus had been required in these transactions this would have given investors more detailed information than the disclosures provided. There would have been the potential for a claim by investors under s90 of FSMA (explained in paragraph 5.4 above), which we contend elsewhere in this document has a disciplining effect in capital markets despite actual claims being very rare. And

<sup>3</sup> London Economics and YouGov, [Research into Non-transferable debt securities : A Report by London Economics and YouGov for HMT Treasury](#), May 2021. A list of 16 failed NTDS issuers is provided on p43. HM Treasury further analysis identified Blackmore Bond plc which entered administration on 22 April 2020 and Warren Evans plc which was placed into liquidation on 19 October 2018. The 18 failed issuers excludes Wind Prospect Group plc which entered into a CVA on 27 June 2017.



it would have been subject to review by the FCA prior to publication and the FCA may have refused to approve the prospectus in some of these instances.

**8.29** Regarding the disclosure that a prospectus would bring, YouGov survey evidence accompanying the London Economics research suggests that although investors were provided with information on the mini-bonds, they had limited understanding of the information they were provided with. This would apply equally if a prospectus document were provided. For this reason, in its consideration of extending the Prospectus Regulation to NTDS, in its consultation on the regulation of NTDS the Government suggests that the additional information provided via a prospectus to NTDS investors would be of limited benefit to the typical retail investor.

**8.30** Similarly, the Government's NTDS consultation suggests the liability imposed by a prospectus is less effective when companies are small with limited assets to satisfy a claimant who has recourse to the courts. To this we might add there is limited disciplining effect when the potential claimants are small scale investors rather than the well-resourced and sophisticated institutions dominant in capital markets.

**8.31** The requirement for an FCA review and approval of a prospectus may have proved to be a more effective investor protection measure. We note, however, that SME Growth Markets provide for an alternative model in which securities can be distributed to the public through regulated platforms without a prospectus obligation, discussed more below.

## **Alternative options**

**8.32** Given these concerns with the prospectus regime in retail markets for securities in private companies, the Government is interested in looking at alternative obligations to the requirement that an offeror publish a prospectus where a private company offers securities which are not to be admitted to a stock market of any type.

**8.33** Such obligations would aim to provide for disclosure to investors and appropriate standards of verification and due diligence in order to ensure appropriate levels of investor protection. Such an obligation could still be associated with a threshold transaction size provided the package of obligations is economic, and does not therefore operate effectively as a cap on offer size as the current threshold appears to.

**8.34** If the obligations are well calibrated, this could enable companies to raise larger amounts of capital via public offers of securities than is the case now and provide for better investor protection.

## **Option 1 – requirement for the offer to be made through an authorised firm**

**8.35** One option could be that instead of a company preparing a prospectus, an offer of securities over a threshold amount could instead be required to be registered with and to offer its securities via an authorised firm.

**8.36** Such a firm would then be subject to FCA conduct of business rules and would be therefore required to ensure appropriate disclosure and investor

protections, such as conducting an ‘appropriateness test’ to ensure investors have sufficient knowledge and experience of such investments. Indirectly, FCA financial promotions and product governance rules also imply that a platform should provide a certain level of due diligence on an issuer, although the FCA does not have specific provisions designed for firms facilitating ‘public’ offers of private securities.

**8.37** Currently crowd funding platforms are authorised as investment firms under MIFID. However, we note that there are over 3,300 firms authorised as an investment firm.<sup>4</sup> This group will encompass a wide range of firm types and business models. The Government would be interested in pursuing this option if it were satisfied the existing rules and standards applicable to a firm authorised as an investment firm were an appropriate substitute for the regulatory protections intended to be provided by the prospectus obligation. We invite comment on that basis.

## **Option 2 – requirement for the offer to be made through an authorised firm subject to a new bespoke permission**

**8.38** A variant of Option 1 would be to amend the Regulated Activities Order to define a bespoke new authorised activity. For the purpose of this consultation, the new regulated activity might be described as ‘operating a platform for the public offering of securities’. Option 2 would be that the offeror is required to register the offer with a firm authorised to operate a platform for the public offering of securities’.

**8.39** Creating a bespoke permission for such platforms would recognise the fact that such mechanisms are in fact a type of primary capital market, and would enable the FCA to frame specific rules and supervisory practices which would ensure appropriate standards of disclosure and due diligence and verification apply in relation to the companies offering securities on a ‘public offer platform’. This body of rules would be intended to provide a package of appropriate investor protection measures to replace the prospectus obligation.

**8.40** A new bespoke permission would also give the FCA a ‘gateway’ check as firms would have to seek authorisation or vary existing permissions to carry out this activity, with an expectation they would have commensurate management expertise and systems and controls appropriate to this activity. There would also be a further benefit of providing clearer data indicating which firms are carrying out this activity, as opposed to other regulated activities. This would enable the FCA to supervise the crowd funding industry in a consistent way, cognisant of industry trends and developments. The FCA could also consider tailored reporting requirements such that it has visibility on the number and values of offers being facilitated by such platforms to identify potential concerns.

**8.41** Given the costs of preparing a prospectus, the Government would expect that, if this option or option 1 were pursued, any regulatory burdens costs placed on the platforms would be proportionate such that the costs associated with making a public offer could decline under both options.

**8.42** We would be interested to hear the views of consultees on this idea. We would particularly welcome evidence on the costs of preparing a prospectus. We

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<sup>4</sup> Source: FCA [Investment Firms Register](#). Data is as of 3 June 2021.

would also be interested to hear views on whether, given proposals aimed at lowering the cost of compliance, the threshold amount of €8million equivalent could be reduced so that more offers go through firms authorised with the new permission.

### Option 3 – status quo option

**8.43** A third option is the status quo option. Under this option we would retain the obligation for a prospectus over the €8million threshold, which would be restated into sterling.

**8.44** This option would require the FCA to write specific prospectus rules for the offering of securities in private companies into its handbook.

Q16 – Which option for accommodating the right of private companies to offer securities to the public do you favour?
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# Chapter 9

## Public offers by overseas companies

9.1 In this final chapter we address companies making public offers into the UK from overseas. In line with our overall approach to the reform of the regime, we consider the cases of overseas private companies and companies admitted to overseas stock markets separately, looking at each on their merits.

### The current regime

9.2 Under the existing UK regime, if an overseas company wishes to make or extend an offer into the UK, it must publish a UK prospectus. It is the same obligation irrespective of whether the offering is in connection with a listing on a stock market or if it is of unlisted securities. This means presenting a draft prospectus to the FCA for review (in line with the requirements of the UK Prospectus Regulation) and approval. So far as we are aware, this facility has rarely if ever been used.

9.3 Articles 29 and 30 of the existing Prospectus Regulation provide for an equivalence regime. These provisions envisage the review and approval of prospectuses prepared in accordance with 'third country' prospectus rules, by the UK regulator. This approach is available where a third country jurisdiction has been determined to be equivalent to the UK and where other conditions are met, for example that co-operation arrangements between authorities exist.

9.4 The prospectus equivalence regime dates back to the original 2005 EU Prospectus Directive. It has never been used to access UK markets. Nor, so far as we are aware, has it been used in the EU.

9.5 It is notable that both models – the 'ordinary procedure' where UK prospectus rules are used or the existing equivalence approach – require a UK review and approval irrespective of any requirements put in place by the market authorities in the home jurisdiction. We believe this explains the lack of usage of the existing facility or interest in development of the equivalence-based route.

9.6 It is also notable that the basis of assessment of equivalence under Article 29 is relatively narrow: it is that 'information requirements imposed by those third country laws are equivalent to the requirements under *this Regulation*' (our emphasis). There is no ability to look at wider investor protection measures, for example corporate reporting measures like those provided for in the Transparency Directive or anti-market abuse rules like those provide for in the Market Abuse Regulation.

## Options for addressing overseas listed companies

9.7 We are interested to hear consultees' views on the overall value of a mechanism to permit public offerings into the UK by overseas companies.

9.8 We note UK institutional participation in overseas markets – both public and private – is catered for through the Qualified Investor exemption which is, we believe, working well. This ensures UK institutional investors can easily deploy capital overseas.

9.9 Retail participation through the mechanism of a public offer is possible in theory, but does not happen in practice. We are unaware of any instance in which an overseas listed company has extended an IPO or further issue to public in the UK using the UK prospectus mechanism provided for in the regime.

9.10 The creation of a more practical mechanism for public offers into the UK by overseas companies could mean such offers start to occur. However, this could also carry with it potentially significant new risks for retail investors. This is given the risk profile of deals such as these.

9.11 We would be interested to hear consultees' views on three options for overseas securities being admitted to UK stock markets.

### Option 1 – A status quo option

9.12 One option would be to maintain the status quo for overseas listed companies considering making offers into the UK. Under this option, overseas issuers would be able to extend an offer (in association with an admission of securities to an overseas stock market) into the UK provided an FCA-approved prospectus is reviewed and approved. This would mean, among other things, that if investors suffered losses because of mis-statement in the UK prospectus or through inappropriate omission of information, they could seek compensation for losses through the UK courts.

### Option 2 - A new deference mechanism

9.13 Another option would be to provide a new regime of regulatory deference to replace the equivalence regime set out in Articles 29 and 30 of the current regulation. This would allow companies with securities listed on a non-UK stock market to extend an offer of those securities to the public in the UK, on the basis of offering documents prepared in accordance with the rules of that market's jurisdiction. However, there would be no FCA review of the documents, and such a mechanism would consider investor protection on a wider and more holistic basis than is currently the case.

9.14 This mechanism would need to balance UK competitiveness and consumer protection as well as the integrity of UK markets. In order to balance these priorities a new deference mechanism could exclude the extension of overseas IPOs to the public in the UK .

9.15 We are interested to hear the views of consultees on the component elements of the new mechanism. In determining deference, the key outcome to be considered by the Government as part of an assessment will be whether another jurisdiction provides equivalent investor protection to that provided in the UK if an offer of securities on an overseas market is extended to the UK public. As such, a

mechanism should look at investor protection on a wider and more holistic basis than the current mechanism in Article 29 which only looks at equivalence with the requirement in the Prospectus Regulation. For example, it should consider wider disclosure regimes such as corporate reporting rules or anti-market abuse rules.

**9.16** Our initial view is the mechanism should consist of a jurisdictional assessment by HM Treasury, that in accordance with existing equivalence mechanisms between HM Treasury and the Financial Regulators would be supported by advice from the FCA. This assessment will consider:

- the adequacy of the regulation in place to protect investors, as well as whether the market has effective rules, processes and systems in place to give protect investors.
- whether there are effective arrangements for cooperation between regulators.

**9.17** We also propose that where a public offer is made into the UK under this mechanism, the FCA is notified. In connection with this, we would consider providing the FCA with a reserve power to order an offer into the UK to be closed to the UK public where it is satisfied its completion would be detrimental to the interests of investors in the UK. The FCA has a similar reserve power, rarely used, to refuse listing in the UK where it is satisfied its completion would be detrimental to the interests of investors.

**9.18** Finally, where an offer is made to the UK public under this mechanism, we would require that UK investors have access to the same information as those in the home jurisdiction, free of charge

### **Option 3 - No right to make a public offer into the UK**

**9.19** As noted above, we are interested to hear views on the overall value of a mechanism to permit public offerings into the UK by overseas companies. If a more practical mechanism was found, this might increase cross-border public offers but could also create a risk of harm to UK consumers. Given that the current system does not provide a practical mechanism by which overseas offerors can offer securities to the UK public, one available option is to not provide an equivalent right to make a public offer in the revised regime.

**9.20** This would not constrain the Government from including such a mechanism on a reciprocal basis in any Mutual Recognition Arrangement the Government may conclude with overseas partners in future.

Q17 – Which of the options above do you prefer? (Please state reasons)

Q18 – Do you have any further thoughts or considerations over how a new deference mechanism (Option 2) should operate?

## **Overseas private companies**

**9.21** The Government considers the risks of cross-border public offerings in the securities of overseas private companies to be in a different category to those presented by listed companies. The Government is minded not to provide a facility enabling these companies to make public offerings into the UK. As noted, the

Qualified Investor exemption will continue to facilitate the access of UK institutional investors to overseas private equity markets.

Q19 – Do you agree there should be no mechanism to allow public offerings of securities by overseas unlisted companies? (Please state reasons)

# Annex A

## Ancillary provisions

In Chapter 4, we discuss various ancillary provisions provided for in the current Prospectus Regulation and say we are minded to give the FCA new rule making responsibilities in these areas.

The following table is a list of existing provisions we are likely to consider. We seek consultees views on ancillary provision in Question 8.

Existing area	Description
Article 11 Responsibility Rules	<p>Powers to enable the FCA to specify via its rulebook who is responsible for a prospectus, for example the issuer or directors.</p> <p>The FCA can use this power to distinguish between different transaction types, for example having differing rules for equity and debt securities.</p>
Article 21 Publication Arrangements	<p>Powers to enable the FCA to require issuers to publish prospectuses free of charge and to establish other ground rules related to the publication of the document, for example how long the document must remain in the public domain at the issuer's expense, that it be in a digital format, that it shall not be subject to restrictions on access, and so forth.</p> <p>The FCA may choose to require issuers to file the final document in the 'National Storage Mechanism', its online archive of company filings.</p>
Article 22 Advertisements	<p>The Advertisements Regime is aimed at ensuring the presentation of the transaction in all marketing exercises (including presentation in oral form) is not inaccurate or misleading and is consistent with the presentation of the transaction in the prospectus. It requires materials supporting marketing activities to be clearly recognisable as advertisements. It requires such communications to say that a prospectus is or will be available and where. Where a prospectus is required, the regime requires all material information disclosed in when marketing the transaction to be in the prospectus; where a prospectus is not required it prohibits the selective disclosure of material information to some parties but not others.</p> <p>These provisions are important to the orderly functioning of primary capital markets. As noted, a prospectus is not just an information source; it is something that investors rely on. The liability that attaches to a prospectus ensures due diligence occurs. Prospectuses are therefore subject to extensive verification.</p>



	<p>The Advertisements Regime means that even if investors do not read the whole prospectus, they can rely on information in any roadshow presentation, or in any form of marketing of the deal. This contributes to the investor confidence that is crucial in successful capital markets.</p>
<p>Article 23 Withdrawal rights</p>	<p>Article 23 of the existing Prospectus Regulation gives investors who have accepted an offer the right to withdraw that acceptance where a supplementary prospectus is published. The investor has two days following publication. Supplementary prospectuses are required where a significant new factor, material mistake or material inaccuracy relating to the information included in a prospectus comes to light before the transaction closes.</p> <p>The principle behind withdrawal rights is that the investors' acceptances will have been based on information which has changed. Although the existing right is derived from the regulation of public offerings in the current regulation, the right could be relevant to orderly admissions to trading on Regulated Markets. We are minded to grant the FCA a power to give investors a right of withdrawal where a supplementary prospectus is published.</p> <p>However, the FCA will have full discretion to review the operation of withdrawal rights under the current regime and to determine whether or not to include withdrawal rights in its new rules. It will be able to develop these rules further if it judges it necessary, subject to its rule making procedures.</p>

# Annex B

## List of questions

- 1 Do you agree with our overall approach to reforming the UK prospectus regime?
- 2 Do you agree with the key objectives that we are seeking to achieve?
- 3 Do you have any views on the underlying purpose of a prospectus when seeking admission to a regulated market?
- 4 Do you agree the FCA should have discretion to set rules on when a further issue prospectus is required?
- 5 Do you agree the Government should grant the FCA sufficient discretion to be able to recognise prospectuses prepared in accordance with overseas regulation in connection with a secondary listing in the UK?
- 6 Do you agree with our approach to the 'necessary information test'?
- 7 Do you agree the FCA should have discretion to set out rules on the review and approval of prospectuses?
- 8 Do you have any comments on what ancillary powers the FCA will need in order to ensure admissions of securities to Regulated Markets function smoothly? (See list of potential powers in Annex A.)
- 9 Do you agree with our proposed change to the prospectus liability regime for forward looking information?
- 10 Do you think that our proposed changes strike the right balance between ensuring that investors have the best possible information, and investor protection?
- 11 Which option for addressing companies admitted to MTFs do you favour and why?
- 12 Do you agree there should be a new exemption from the public offer rules for offers directed at existing holders of a company's securities?
- 13 Do you agree we should retain the 150 person threshold for public offers of securities and the 'qualified investors' exemption? Do you have any comments on whether they operate effectively?
- 14 Does the exemption for employees, former employees, directors and ex-directors work effectively?
- 15 Which option for accommodating the right of private companies to offer securities to the public do you favour?

- 16 Which of the options above do you prefer? (Please state reasons)
- 17 Do you have any further thoughts or considerations over how a new deference mechanism (Option 2) should operate?

# Annex C

## Glossary of terms

FSMA	Financial Services and Markets Act 2000.
Further issue	An issue of securities of a class already admitted to trading on a market of any type.
IPO	Initial Public Offering, where shares in a company are first admitted to trading on a public market. The term is used irrespective of the technique used to bring the company to market and irrespective of whether the transaction constitutes a public offer of securities.
Junior market	An MTF including an SME Growth Market
Multilateral Trading Facility (MTF)	<p>A multilateral trading facility operated by an investment firm, a qualifying credit institution or a market operator that brings together multiple third party buying and selling interests in financial instruments in a non-discretionary way.</p> <p>In this consultation, the MTFs referred to are so-called 'primary MTFs' which provide a trading facility for the securities of issuers who have themselves consented to the market operator providing a trading facility in their securities.</p>
Non-transferable debt securities (NTDS)	Commonly referred to as 'minibonds', NTDS are unlisted bonds typically issued by companies to retail investors in order to raise finance. As non-transferable securities, investors cannot sell their investment, which normally must be held until maturity
Primary market	A market in securities in which the buyers subscribe for or otherwise acquire newly issued shares. The proceeds in a primary market accrue to the issuer rather than a selling shareholder. A market is described as a primary market as opposed to being a secondary market.
Private company	In this consultation, a company with securities that are not admitted to any type of stock market.
Prospectus Directive (PD)	Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading. This is the EU directive that preceded the 2017 EU Prospectus Regulation. EU Member States were required to transpose the requirements into their national frameworks by July 2005.
Prospectus Regulation	Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, as it forms part of retained EU law in the UK following the UK's departure from the EU. The Prospectus

	Regulation sets legal requirements on prospectuses, including when they should be published and what they should contain.
POS Regs	The Public Offers of Securities Regulations 1995 (SI 1995/1537). These contained the public offer rules prior to the transposition of the Prospectus Directive in 2005.
Public offer of securities	An offer to the public to buy or subscribe for transferable securities as defined in Article 2(d) of the Prospectus Regulation or, as the context dictates, previous equivalent regulation or a future equivalent regime.
Public offer rules	Those provisions of FSMA and the Prospectus Regulation that relate to public offers of securities or, as the context dictates, previous equivalent regulation or a future equivalent regime.
Qualified Investor	As defined in Article 2(e) the Prospectus Regulation. Institutional investors and other professional investors who, for the purpose of the Prospectus Regulation, do not need to be issued a prospectus when offers are directed at these persons.
Regulated Market	As defined in Article 2(j) of the Prospectus Regulation, a multilateral system operated or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments (in the system and in accordance with its non-discretionary rules) in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules or systems.
Secondary / dual listing	A listing on a stock market which is in addition to the company's main listing elsewhere.
Secondary market	A market in securities between investors. The proceeds of a sale in a secondary market accrue to the selling holder of the security not its issuer. A market is described as a secondary market as opposed to being a primary market.
Securities-based crowd funding	The offering of securities on an online platform to raise capital from retail investors.
SME Growth Market	A sub-category of MTF designed to facilitate access to capital for small and medium sized enterprises. In the UK, there are currently two SME Growth Markets: the London Stock Exchange's AIM market and Aquis Exchange's Aquis Growth Market.
Stock market regulation	Any regulation that applies to an issuer or other person in relation to securities being or having been admitted to trading on a stock market of any type, as opposed to other bodies of regulation applicable for other reasons.



# Annex D

## Privacy statement

This notice sets out how HM Treasury will use your personal data for the purposes of the UK Prospectus Regime Review and explains your rights under the General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (DPA).

### *Your data (Data Subject Categories)*

The personal information relates to you as either a member of the public, parliamentarians, and representatives of organisations or companies.

### *The data we collect (Data Categories)*

Information may include your name, address, email address, job title, organisation and employer of the correspondent, as well as your opinions. It is possible that you will volunteer additional identifying information about yourself or third parties.

### *Legal basis of processing*

The processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in HM Treasury. For the purpose of this consultation the task is consulting on departmental policies or proposals or obtaining opinion data in order to develop good effective government policies.

### *Special categories data*

Any of the categories of special category data may be processed if such data is volunteered by the respondent.

### *Legal basis for processing special category data*

Where special category data is volunteered by you (the data subject), the legal basis relied upon for processing it is: the processing is necessary for reasons of substantial public interest for the exercise of a function of the Crown, a Minister of the Crown, or a government department.

This function is consulting on departmental policies or proposals, or obtaining opinion data, to develop good effective policies.

### *Purpose*

The personal information is processed for the purpose of obtaining the opinions of members of the public and representatives of organisations and companies, about departmental policies, proposals, or generally to obtain public opinion data on an issue of public interest.

### *Who we share your responses with*

Information provided in response to a consultation may 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 2018 (DPA) and the Environmental Information Regulations 2004 (EIR).

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 and which deals with, amongst other things, 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 can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Treasury.

Where someone submits special category personal data or personal data about third parties, we will endeavour to delete that data before publication takes place.

Where information about respondents is not published, it may be shared with officials within other public bodies involved in this consultation process to assist us in developing the policies to which it relates. Examples of these public bodies appear at: <https://www.gov.uk/government/organisations>

As the personal information is stored on our IT infrastructure, it will be accessible to our IT contractor, NTT. NTT will only process this data for our purposes and in fulfilment with the contractual obligations they have with us.

### *How long we will hold your data (Retention)*

Personal information in responses to consultations will generally be published and therefore retained indefinitely as a historic record under the Public Records Act 1958.

Personal information in responses that is not published will be retained for three calendar years after the consultation has concluded.

### *Your Rights*

- You have the right to request information about how your personal data are processed and to request a copy of that personal data.
- You have the right to request that any inaccuracies in your personal data are rectified without delay.
- You have the right to request that your personal data are erased if there is no longer a justification for them to be processed.
- You have the right, in certain circumstances (for example, where accuracy is contested), to request that the processing of your personal data is restricted.
- You have the right to object to the processing of your personal data where it is processed for direct marketing purposes.
- You have the right to data portability, which allows your data to be copied or transferred from one IT environment to another.



## How to submit a Data Subject Access Request (DSAR)

To request access to personal data that HM Treasury holds about you, contact:

HM Treasury Data Protection Unit  
G11 Orange  
1 Horse Guards Road  
London  
SW1A 2HQ

[dsar@hmtreasury.gov.uk](mailto:dsar@hmtreasury.gov.uk)

## COMPLAINTS

If you have any concerns about the use of your personal data, please contact us via this mailbox: [privacy@hmtreasury.gov.uk](mailto:privacy@hmtreasury.gov.uk).

If we are unable to address your concerns to your satisfaction, you can make a complaint to the Information Commissioner, the UK's independent regulator for data protection. The Information Commissioner can be contacted at:

Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

0303 123 1113

[casework@ico.org.uk](mailto:casework@ico.org.uk)

Any complaint to the Information Commissioner is without prejudice to your right to seek redress through the courts.



## HM Treasury contacts

This document can be downloaded from [www.gov.uk](http://www.gov.uk)

If you require this information in an alternative format or have general enquiries about HM Treasury and its work, contact:

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