



HM Treasury

Public Offers and Admissions to Trading Regime – Illustrative Statutory Instrument

Policy Note

December 2022

Public Offers and Admissions
to Trading Regime –
Illustrative Statutory
Instrument

Public Offers and
Admissions to Trading
Regime – Illustrative
Statutory Instrument

Policy Note



© Crown copyright 2022

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at: www.gov.uk/official-documents.

Any enquiries regarding this publication should be sent to us at public.enquiries@hmtreasury.gov.uk

ISBN: 978-1-915596-23-9 PU: 3244

Contents

Chapter 1	Overview	8
	Policy background	8
	Summary of the illustrative statutory instrument	9
Chapter 2	How are the Financial Services and Markets Bill powers being used?	13
Chapter 3	Role of the regulator	16
Annex	Detailed explanation of the illustrative statutory instrument	18

Chapter 1

Overview

1.1 The [Financial Services and Markets \(FSM\) Bill](#) was introduced to Parliament on 20 July 2022. The FSM Bill will repeal retained EU law on financial services so that it can be replaced with an approach to regulation that is designed for the UK, building on the existing UK model principally set out in the Financial Services and Markets Act 2000 (FSMA). Under this model of regulation, the financial services regulators generally make the detailed regulatory requirements that apply to firms, operating within a framework established by government and Parliament. Adopting this model implements the outcomes of the [Future Regulatory Framework](#) (FRF) Review.

1.2 The purpose of this note is to explain how His Majesty's (HM) Treasury may use powers introduced in the FSM Bill to move to a comprehensive FSMA model for the regulation of the Prospectus Regime. The government will use new powers being taken forward in the FSM Bill to commence the repeal of the existing Prospectus Regulation and replace it with a regulatory framework using the new Designated Activities Regime (DAR). Further detail of how the DAR will be used is set out below.

Policy background

1.3 In November 2020, the government asked Lord Hill of Oareford CBE to lead an independent review of the UK listing regime. Lord Hill reported in March 2021, recommending, among other things, that HM Treasury should conduct a fundamental review of the UK's Prospectus Regime. He concluded that the current regime, which is largely contained in the retained EU Prospectus Regulation, is duplicative, making the public capital raising process inefficient and disincentivising the use of public markets. He also observed that it sets out detailed and prescriptive rules in primary legislation, making it inflexible and unresponsive to changing market conditions.

1.4 On 1 July 2021, the government published a consultation on the UK's Prospectus Regime, which addressed Lord Hill's recommendations and proposed repealing and replacing the EU Prospectus Regulation. The proposals in that consultation were widely welcomed by industry and in March 2022 HM Treasury confirmed its intention to move forward with these proposals largely as consulted.

1.5 In July, the government announced at Mansion House that these reforms would be implemented using powers being taken forward in the FSM Bill.

Summary of the illustrative statutory instrument

1.6 The Prospectus Regime Review signalled the government's intent to establish a reformed Prospectus Regime and Public Offer Regime. In the [outcome](#) of the review the government committed to replacing the regime currently contained in the UK Prospectus Regulation, with the aim of making regulation in this area more agile and effective; facilitating wider participation in the ownership of public companies; and delegating a greater degree of responsibility for the regime to the Financial Conduct Authority (FCA).

1.7 As set out above, the government will use new powers being taken forward in the FSM Bill to commence the repeal of the existing Prospectus Regulation and replace it with a new regulatory framework using the DAR. The DAR will be a new part of FSMA designed to provide a framework for regulating certain financial activities following the repeal of retained EU law. The Bill gives the government a power to designate activities, bringing them into the DAR, which can be used as an alternative to the Regulated Activities Order (RAO) in order to continue to regulate that activity when retained EU law is repealed.

1.8 This is a key element of the new framework being delivered through the FSM Bill, which will provide the basis for proportionate regulation of certain activities, products, or conduct which relate to financial markets, products or services. By designating an activity under the DAR, HM Treasury will be able to make regulations relating to the performance of that activity including, where necessary, stipulating where the FCA make rules that apply to the activity without persons carrying on the activity needing to be authorised under FSMA. The DAR will often be the appropriate basis for regulation where a financial activity is carried on by persons whose main business is not financial services. Regulating their important financial activities without requiring them to be authorised as a financial services firm under FSMA ensures that such regulation is proportionate. For example, the Prospectus Regulation deals with companies offering securities to the public. Ensuring that a wide variety of firms can undertake this type of activity without becoming authorised is key to the operation of the UK's financial markets.

1.9 This SI illustrates how the DAR will be used to create a new Public Offers Regime, for which the regulatory framework is set out in secondary legislation, with the setting of detailed requirements being delegated to the FCA, including any requirement for a prospectus. Through the use of the DAR, the government will give the FCA the powers it needs to replace the detailed requirements currently contained in the Prospectus Regulation in a proportionate way that is consistent with the FSMA model.

1.10 Following the repeal of retained EU law in this area, the Bill powers will be used to introduce new provisions and restate (with amendments) existing provisions from retained EU law. This SI illustrates how the government will deliver the following reforms to the

existing Prospectus and Public Offers Regime using the Bill's powers. The government intends to make the changes outlined here when the repeal of the existing Prospectus Regulation is commenced:

- **A new public offer architecture:** Under the new regime, there will be a general prohibition on public offers of securities. This will be achieved by amending the criminal offence contained in s. 85(1) FSMA. There will then be exemptions from this prohibition. The principal exemptions will apply to offers where the securities are admitted to trading on UK markets or offered by means of regulated platforms.
- **Admissions to trading on Regulated Markets:** The concept of a prospectus will be retained as an important part of the regulation of public offers of securities admitted to trading on Regulated Markets. The FCA will be given enhanced rulemaking responsibilities regarding admissions of securities to trading on UK Regulated Markets. This will allow the FCA to specify when a prospectus is required, what a prospectus should contain and address the manner and timing of validation and publication. FCA rulemaking responsibilities will also cover other matters that currently sit in the Prospectus Regulation.
- **Admissions to trading on Multilateral Trading Facilities (MTFs) operating primary markets:** The FCA will be given rulemaking powers to ensure that, in appropriate circumstances, the rulebooks of MTFs operating as primary markets require an admission document to be published and treated as a prospectus. These admission documents will therefore also be subject to the statutory compensation remedy for prospectuses. This will implement the conclusion of the Prospectus Regime Review that admission documents should be treated as prospectuses.
- **Forward-looking information:** Lord Hill identified 'forward-looking information' – statements that predict the future financial performance of a company, such as projections of future profitability – as particularly useful information for investors to have at their disposal when making investment decisions. He argued that the liability provisions in the existing Prospectus Regime deter companies from including such information in the prospectuses they publish. The reformed regime will remove this deterrent by establishing a different liability threshold (based on fraud and recklessness) for certain categories of forward-looking information in prospectuses, to be specified by the FCA. Aside from this change, the regime will generally retain the existing negligence-based threshold for liability for false, misleading or omitted information.
- **Offers of securities not admitted to trading:** The new regime will continue to allow companies to offer securities to the public without having them admitted to a securities market. The government is reforming the requirements for such offers, making it easier for

companies to raise large amounts of capital whilst maintaining investor protection:

- The government will not retain the requirement in the Prospectus Regulation which requires that companies offering securities to the public of a value over €8 million must publish a prospectus. This has, in practice, acted as a cap on the size of deals, resulting in many companies issuing securities almost exclusively below the threshold or raising capital solely from institutional investors.
 - As an alternative, the government will create a route through which offers of any size can be made to the public – a ‘public offer platform’. Companies will be required to use a public offer platform where the offer is not otherwise exempted from the prohibition on public offers, and where the total value of the offer is above a certain threshold. This threshold is yet to be determined.
- **An enhanced scope of the Public Offer Regime:** In April 2021, following Dame Elizabeth Gloster’s Review of the collapse of London Capital and Finance (LCF), the government consulted on the future regulation of non-transferable debt securities (NTDS), such as ‘minibonds’. In [response to this consultation](#), the government decided to bring certain non-transferable securities (NTS, including but not limited to minibonds) within the scope of the new Public Offers Regime where those NTS may cause harm to investors if their offer is not subject to greater regulation. In practice, this approach will mean that offers of such securities will need to be made through a public offer platform, unless another exemption applies.

1.11 Alongside these reforms to the Prospectus Regime and to allow for the intended changes outlined above, the government will legislate to create a new regulated activity covering the operation of a public offer platform, such as a securities-based crowdfunding platform, by amending the RAO. It will then be for the FCA to determine the detailed requirements to which such platforms will be subject (including the levels of due diligence and disclosure required on offers made through them). The government continues to consider its approach to creating this new regulated activity, which is not included in the accompanying illustrative SI, and will lay an SI when parliamentary time allows following Royal Assent of the FSM Bill.

1.12 Overall, the effect of this illustrative SI will be to delegate a greater degree of responsibility to the FCA to put in place a regime that is designed and calibrated for UK markets and reflects the difference between public offers and admissions to trading. As such, the full suite of reforms will take effect after the FCA has consulted on and implemented rules under its expanded responsibilities. This is consistent with the comprehensive FSMA model of regulation, under which the financial services regulators generally make detailed

regulatory requirements under a framework set by government and Parliament.

1.13 As stated, this SI is being published for illustrative purposes and should not be treated as final. Square brackets are used in the SI to identify areas where the wording and effect of certain items is particularly likely to change. Important points of detail, such as additional detail of the enforcement provisions, general transitional provisions, deference mechanisms, and the full scope of the consequential amendments across other legislation have intentionally not been included in this SI. HM Treasury continues to consider the details of its regime of regulatory deference for offers into the UK of securities listed on overseas stock markets.

1.14 **The exact drafting, design and format of this SI is therefore not final and will continue to develop before the final legislation is laid before Parliament following Royal Assent of the FSM Bill.** For enquiries, please contact UKProspectusRegime@HMTreasury.gov.uk.

Chapter 2

How are the Financial Services and Markets Bill powers being used?

2.1 Chapter 2 of the FSM Bill will amend FSMA to enable HM Treasury to implement changes in line with the outcome of the Prospectus Regime Review through secondary legislation. The section below highlights the new powers most relevant to this SI; further detail can be found in the annex.

2.2 S. 71K FSMA states that HM Treasury may provide for activities of a specified description to be a designated activity for the purposes of FSMA, provided the activity relates or is connected to UK financial markets or exchanges, financial instruments, financial products, or financial investments that are, or are proposed to be, issued or sold to, or by, persons in the UK. This SI will use this power to designate activities for the new regime, including activities relating to public offers of securities, admissions of transferable securities to trading on Regulated Markets, admissions of transferable securities to trading on primary MTFs, and advertisements of such securities.

2.3 S. 71L FSMA states that a person must not conduct a designated activity that is prohibited in regulations, and that where a designated activity is permitted, a person must comply with rules and requirements relating to that activity (made under s. 71N). This SI will use this power to create a prohibition on public offers of securities, except where an exemption to the prohibition applies. This will set the framework of the new regime, as well as the perimeter of the criminal offence, set out in s. 85 FSMA associated with breaching the prohibition on offering securities to the public.

2.4 S. 71M FSMA states that designated activity regulations may make general provisions in relation to designated activities, including provision supplementing any requirements relating to a designated activity. This SI will use this power to impose statutory procedural safeguards that will apply when the FCA proposes to refuse approval of a prospectus and the ability to require supplementary information to be disclosed in the interests of investors.

2.5 S. 71M(3) FSMA states that designated activity regulations may provide for exemptions and/or confer powers on HM Treasury or the FCA. This SI will use this power to specify offer types exempted from the prohibition on public offers of securities, such as offers to fewer than 150

investors in the UK other than Qualified Investors. Where an offer is exempted, it can be made without breaching the prohibition, and so without committing an offence under this SI.

2.6 S. 71N FSMA states that, where HM Treasury regulations provide, the FCA may make rules relating to designated activities. This SI will use this power to give the FCA the following rulemaking powers in relation to the designated activities:

- Broad rulemaking powers over Regulated Markets which will enable the FCA to determine when a prospectus is needed, what it should contain, the process for validating a prospectus, the approval of a prospectus where applicable, and the procedure for any such approval;
- Powers over primary MTFs which will enable the FCA to determine when MTF rules must require an admission document be treated as a prospectus. MTF operators will remain responsible for the setting of detailed prospectus rules including content requirements and the process for validating and publishing a prospectus in their rules, subject to FCA oversight; and
- Powers enabling the FCA to make rules around the conduct of public offers of securities.

2.7 S. 71N(4) FSMA states that, where HM Treasury regulations provide, the FCA may make rules enabling requirements imposed by the rules to be dispensed with or modified. This SI will use this power to enable the FCA to modify or waive its rules, such as by agreeing to a request from an issuer to omit information from a prospectus which would otherwise be required in circumstances specified in FCA rules.

2.8 S. 71O FSMA states that, where HM Treasury regulations provide, the FCA may, by directions, impose requirements relating to the carrying on of designated activities as it considers appropriate. This will enable the inclusion of rules requiring the suspension, withdrawal, or prohibition of an offer on the condition that the FCA considers it to be desirable for (i) protecting the interests of investors or (ii) advancing any of its operational objectives.

2.9 S. 71P FSMA states that designated activity regulations may make provisions regarding liability and compensation, and that such provision may provide for the FCA to make rules determining liability. This SI will use this power to recreate a statutory compensation remedy for anyone who has suffered a loss as a result of any untrue or misleading statement in a prospectus or any omission of information required to be included by the necessary information test. This power also enables this SI to make changes to raise the liability threshold regarding forward-looking information and to provide withdrawal rights in circumstances specified by FCA rules.

2.10 S. 71Q FSMA states that designated activity regulations may make provisions regarding enforcement, including requiring the supply of information and providing powers of censure. This SI will use this

power (particularly 71Q(2)(a), which states that designated activity regulations may make provision about enforcement, including provision requiring the supply of information) to ensure that the FCA has sufficient information-gathering powers and enforcement powers in relation to the carrying on of the designated activities to uphold this regime.

2.11 S. 71R FSMA states that HM Treasury may make modifications to legislation as it considers appropriate for the designated activity regulations or rules. This SI will use this power to give the FCA rulemaking powers and make connected amendments to existing legislation that simplify some aspects of the regime and make reforms in line with consultation feedback. For example, amending the criminal offence contained in s. 85 FSMA so that it is consistent with the prohibition on public offers contained in the SI.

2.12 S. 138EA FSMA also states that, where a regulator proposes to make rules, it must have regard to any matters specified in regulations made by HM Treasury that are relevant to the making of the rules in question. This SI will use this power to require the FCA to have regard to the desirability of facilitating offers being made to a wide range of investors when making rules on admissions to trading on Regulated Markets or primary MTFs. As set out in its policy statement on the repeal of retained EU law and its replacement with a regulatory framework tailored to the UK, the government intends to use the 'have regards' power only where necessary. The government proposes to introduce this 'have regard' given the vital importance of the new regime making it simpler for a wide range of investors to participate in offerings.

2.13 Overall, the powers contained in the Bill will allow HM Treasury to reform the Public Offer Regime, making it simpler, more agile, and more effective. Designating the activity of offering securities to the public and putting in place a general prohibition on that activity, with specific exemptions, will create a much simpler Public Offers Regime. Providing the FCA with powers to set the detailed requirements on prospectuses will allow it to put in place a more effective regime, which can more readily adapted as needed.

Chapter 3

Role of the regulator

3.1 The FCA is working closely with the government to support the development of the new legislative framework. The FCA recognises that there will be a significant role for its rules to support and further define the regulatory framework for public offers and admissions to trading.

3.2 This will include:

- creating rules that implement a comprehensive Prospectus Regime for admissions to trading on Regulated Markets, and public offers of securities that are proposed to be admitted, or are admitted, to trading on such markets, in place of the corresponding Prospectus Regulation requirements;
- the necessary changes to facilitate the approach to admissions, or offers connected with admissions, on primary MTFs;
- a framework of rules for firms carrying on the new regulated activity intended to capture operating a public offer platform;
- rules to define or set criteria for other aspects of the new regime, such as what can be considered ‘forward-looking information’ within a prospectus, which will be subject to a different liability treatment;
- rules on the distribution and advertising of securities subject to public offers and admissions, to replace the corresponding provisions under the Prospectus Regulation (such as article 22 which deals with communicating advertisements and disclosing other information concerning an offer).

3.3 The FCA intends to engage closely with market participants in developing its approach to rules across these and other topics to ensure they are proportionate and effective, and in line with the FCA’s operational objectives to support market integrity, protect consumers and promote effective competition, and its strategic objective of ensuring markets work well. This will include publishing formal policy documents for discussion and/or consultation. Any FCA consultation on rule proposals will be accompanied by a cost-benefit analysis in line with the FCA’s statutory duties. The FCA intends to start engaging with the market during 2023, in parallel to the parliamentary process to enact the FSM Bill and the supporting SI, in order to start developing its policy and proposed rule changes at the earliest opportunity.

3.4 The FCA is also committed to ensuring reasonable transition periods once relevant rules are finalised, to avoid disruption to companies’ capital raising activities and ensure markets have certainty.

This will also enable exchanges, MTF operators, authorised firms and wider market participants to adapt their policies and procedures as necessary to support the provision of services to issuers.

Annex: Detailed explanation of the illustrative statutory instrument

A.1 Note that where provisions in sections of FSMA are referenced, these refer to FSMA as amended by the FSM Bill (as introduced to Parliament).

Part 1 – Introductory

A.2 Part 1 of the illustrative SI defines a number of key terms, including ‘relevant securities’ and ‘transferable securities’. Many of these will restate and replace terms already in use in the existing Prospectus Regulation, which the government intends to repeal.

A.3 A new concept of ‘primary MTF’ is in regulation 7 to reflect that the relevant public offer exemption and the regime around MTF prospectuses will only apply to offers made via an MTF when carrying on primary market activities.

Part 2 – Designated activities

A.4 Regulations 8, 9 and 10 designate activities using s. 71K FSMA, to be introduced by clause 8 (designated activities) of the FSM Bill.

A.5 Regulation 8 will designate activities relating to public offers of securities, including offering securities to the public (8(a)) and advertising a public offer of securities (8(b)). Alongside this, the SI will amend s. 85 FSMA and introduce a new civil prohibition (regulation 11, using s. 71L). This will mean that, when an issuer wishes to make an offer of securities to the public that are in scope of these regulations, they must meet the terms for an exempt offer. In addition, such an issuer will be required to comply with the relevant requirements applicable to these activities under the SI or FCA rules.

A.6 Regulation 9 designates activities relating to the admission of transferable securities to trading on a Regulated Market. This will primarily be for the purposes of enabling the FCA to make rules about admissions-based activities in place of the requirements that currently apply under the Prospectus Regulation in relation to an admission to trading, or an offer involving an admission to trading, on a Regulated Market. It will mean, for instance, that an issuer that wishes to have its

transferable securities traded on a Regulated Market will have to comply with rules made by the FCA, including, where the FCA so determines, the requirement to publish a prospectus.

A.7 Regulation 10 designates activities relating to the admission of transferable securities to trading on a primary MTF. Among other things, this illustrates how a framework will be put in place for treating MTF admission documents as prospectuses as per the Prospectus Regime Review. The SI will, for instance, give the FCA the ability to make rules specifying when MTF operator rules should state that an admission document must be treated as a prospectus.

Part 3 – Regulation of public offers and admissions to trading

A.8 Part 3 relates to the regulation of the designated activity of offering securities to the public and of admissions to trading. It sets out what the FCA's rulemaking and enforcement powers will be in this area, as well as certain key provisions and direction powers.

A.9 Regulation 11 will prohibit non-exempt offers of securities to the public, in line with s. 71L, Schedule 1 contains a series of offer types that are exempted from the prohibition and are therefore permitted as per s. 71M(3). This also sets the scope for the amendments to the criminal offence in s. 85 FSMA under s. 71R(3) FSMA.

A.10 Regulation 12 will restate the equality of information requirement currently set out in article 22(5) of the Prospectus Regulation (which will be repealed). This provision requires that, for any of the permitted offers, an issuer must disclose information to all investors where they have disclosed that information to one investor. This has been included in the SI to show that the new regime will replicate the equality of information requirement in the current regime, which the government does not intend to change. Regardless of where the threshold (above which the prohibition on public offers of securities applies) is set, the government is considering including a requirement that all offers of a size above a lower threshold (currently proposed to be £1 million) will be subject to this requirement.

A.11 Regulations 13-15 set out the rulemaking powers the FCA must have in relation to the designated activities described above. Regulation 16 gives examples of the sorts of rules that the FCA may make in relation to the activities about admissions to trading on a Regulated Market, including rules about the core features of a Prospectus Regime. They include when a prospectus is needed, what it should contain, the process for validating a prospectus, the approval of a prospectus where applicable, and the procedure for any such approval. This indicates how the FCA will, in connection with Regulated

Markets, be able to make rules covering the detailed requirements, functions and processes currently contained in the Prospectus Regulation.

A.12 Regulation 14 sets out rules the FCA may make in relation to primary MTFs, given the different regulatory model that applies to MTFs compared to Regulated Markets. The SI will give the FCA the ability to set out when MTF rules should state that an admission document treated as a prospectus is needed when seeking admission to trading on an MTF and to address key ancillary matters relating to those prospectuses, such as supplements and responsibility. The MTF operator however will set out detailed prospectus rules, including content requirements (while adhering to the necessary information test) and the process for validating and publishing the document, subject to FCA oversight.

A.13 Regulation 15 states that the FCA may also make designated activity rules related to the public offers of securities when not related to admissions to trading, using powers which are conferred by s. 71N FSMA. This will allow the FCA to make rules on certain procedural and conduct issues around public offers of securities, such as withdrawal rights.

A.14 S. 138EA FSMA will state that, where a regulator proposes to make rules, it must have regard to any matters specified in regulations made by HM Treasury that are relevant to the making of the rules in question. Regulation 17 uses this section to require the FCA to have regard to the desirability of facilitating offers being made to a wide range of investors when making such admission rules or rules relating to admissions to trading on primary MTFs (the latter being the 'specified matter' in this case). This aims to ensure that the FCA takes account of HM Treasury's policy objective, as set out in its consultation on the Prospectus Regime, of widening participation in capital markets. The FCA will be expected to consider the 'have regard' in future rulemaking under this SI along with other relevant matters such as the FSMA regulatory principles and its strategic and operational objectives.

A.15 Regulation 18 (using the power conferred by s. 71N(4)) will allow for the FCA to modify or waive its rules, replicating the effect of existing powers that apply in the current Prospectus Regime and Part 6 of FSMA. This will allow the FCA to agree to a request from an issuer to omit information from a prospectus which would otherwise be required in circumstances specified in FCA rules.

A.16 Regulation 21 will replicate and adapt the 'necessary information test' contained in article 6 of the Prospectus Regulation. This will remain in statute as it sets the key standard of preparation for the content of a prospectus, and is the standard to which the statutory compensation regime set out in regulations 27 and 28 (and which restate and adapt s. 90 FSMA insofar as it applies to prospectuses) applies.

A.17 As outlined in the outcome of the Prospectus Regime Review, HM Treasury is making three clarifications to the test. First, as the SI illustrates, to clarify that the 'necessary information' may vary if the issuer already has relevant securities admitted to trading on a market and therefore is already subject to ongoing information disclosure requirements (performing a similar role to article 14 of the Prospectus Regulation). Second, to ensure that prospectuses contain information to help investors to make an informed assessment, the SI clarifies that an issuer's or guarantor's 'prospectus' includes their creditworthiness – this means that, in certain circumstances, the investor can receive more relevant information about the issuer. Third, the SI will remove the factor that necessary information may vary depending on, where relevant, whether non-equity securities have a denomination per unit of at least €100 000 or are to be traded only on a Regulated Market (or segment) to which only qualified investors have access.

A.18 The SI will also clarify that in the case of asset-backed securities or debt securities where the issuer's payment or delivery obligations are linked to an underlying asset or an index, the necessary information includes information about the asset backing the security or the relevant underlying asset.

A.19 Regulations 23-26, through s. 71M, will enact adapted versions of the Part 6 FSMA provisions (which will be repealed) that relate to approving and scrutinising a prospectus, such as the statutory procedural safeguards that will apply when the FCA proposes to refuse approval of a prospectus and the ability of the FCA to require supplementary information to be disclosed in the interests of investors.

A.20 Regulations 27 and 28 describe provisions regarding liability and compensation for anyone who has suffered a loss as a result of any untrue or misleading statement in a prospectus or any omission of information required to be included by the necessary information test. This uses the power conferred by s. 71P, which states that designated activity regulations may make provisions regarding liability and compensation. These will broadly enable the existing regime under s. 90 to be retained, but in a form adapted to the new, more flexible regime.

A.21 Regulation 29 shows that HM Treasury intends to ensure that investors continue to have withdrawal rights in circumstances specified in FCA rules that have the same or similar legal effect, and therefore offer the same protection to investors, as those currently provided for by articles 17 and 23 of the Prospectus Regulation.

A.22 Any power to make rules, as well as any power of intervention or enforcement, must be accompanied by adequate information-gathering powers to work effectively. Accordingly, regulation 30 gives the FCA a general power to require information in relation to the carrying on of its functions under the SI. This makes use of the powers

conferred by s. 71O, which states that the FCA may make directions to impose such requirements. The other enabling power for this provision is 71Q, which provides powers to require information, particularly 71Q(2)(a), which states that designated activity regulations may make provision about enforcement, including provision requiring the supply of information.

A.23 S. 71O states that, where HM Treasury regulations provide, the FCA may, by directions, impose requirements relating to the carrying on of designated activities as it considers appropriate. Regulation 31 will enable the FCA to give directions to impose requirements (including requiring the suspension, withdrawal, or prohibition of an offer) under this power in relation to the carrying on of the activities specified in the SI on the condition that it considers it to be desirable for (i) protecting the interests of investors or (ii) advancing any of its operational objectives.

A.24 FSMA contains other direction powers that are derived from the Prospectus Regulation. Those powers can be used where there has been a breach of an applicable provision, and sit in s. 87K, 87L and 87LA. The illustrative SI shows HM Treasury's intention to retain those powers alongside the new 71O power, but adapts them so that they apply to the requirements under the DAR-based framework. HM Treasury may consider consolidating these powers.

A.25 Regulations 32-34 outline the disciplinary powers that the FCA will need under this regime. These essentially restate and adapt to this SI the powers set out in s. 87M (for public censure) and s. 91 (for financial penalties) FSMA, to sanction persons who have contravened a provision of the regime and impose a monetary penalty if appropriate.

A.26 As this is only an illustrative SI, the detail of the provisions relating to the exercise of enforcement powers has not been included. This includes powers needed to carry out an investigation, other matters dealt with by Part 11 of FSMA, and related matters such as publication of notices.

Part 4 – Amendments of primary and secondary legislation

A.27 S. 71R states that HM Treasury may make modifications to existing provisions in legislation as it considers appropriate for the designated activity regulations or rules. This enables this SI to make connected amendments to existing legislation, which enables the simplification of some aspects of the regime and make reforms in line with consultation feedback. For instance, the SI amends the criminal offence contained s. 85 FSMA to include the general prohibition on

public offers of securities. The full scope of consequential amendments that may be necessary has not been set out in this illustrative SI.

Schedule 1

A.28 This schedule sets out the offer types that are exempted from the public offer prohibition. These exemptions generally draw on those in article 1(4) of the Prospectus Regulation that apply to the need to publish a prospectus but are expanded or amended to cover the areas detailed below. This is being done so that the exemptions in the new regime are clear and do not cause disruption. Where there are changes the government will consider appropriate transitional provisions to support the repeal of the existing Prospectus Regulation.

A.29 Paragraph 1 sets out that offers below a threshold amount are exempt from the prohibition on public offers. This exemption interacts with paragraph 7, which will create a new exemption for offers made by means of a public offer platform specifically authorised for the purpose. This exemption will allow public offers over the threshold amount (to be set out in paragraph 1) to be made on these platforms outside of a Regulated Market or primary MTF.

A.30 As noted in Chapter 1, the government continues to consider the appropriate level for the threshold above which offers are required to be made via a public offer platform, where no other exemption exists. When making this decision, the government will take into account the needs of real economy firms to access finance, how best to ensure effective disclosure and investor protection, and the impact on crowdfunding platforms.

A.31 Depending on where this threshold is placed, the government will consider including a lower threshold (the level of which is yet to be determined), above which offers are in scope of the Public Offer Regime (and are subject to the 'equality of information' requirement set out in Regulation 12) but are not required to be made through a securities market or public offer platform.

A.32 Some existing exemptions that apply to the requirement to publish a prospectus, such as the exemption for divisions, have intentionally been omitted from this illustrative SI because the government believes they are no longer appropriate under the revised public offer prohibition.

A.33 The current Prospectus Regulation allows offers to be made without a prospectus for securities denominated in amounts over €100 000. Paragraph 4 will create a corresponding exemption from the prohibition on public offers, but set at a lower amount of £50 000. As outlined in the outcome of the Prospectus Regime Review, this is to

minimise disruption to UK institutional investor access to international wholesale bond markets.

A.34 Paragraphs 8 and 10 are derived from articles 1(4)(e) and (h) of the Prospectus Regulation respectively. They will adapt these exemptions to the new public offer regime. These exemptions relate to offers of shares to existing shareholders to be substituted for shares in the same class, where there is no increase in share capital, and offers of dividends paid out in the form of shares.

A.35 Paragraph 9 describes a new form of own-shareholder exemption that applies where the offer is not made in conjunction with an admission of securities to trading on a Regulated Market or primary MTF. It will allow, for example, rights issues to be made by companies without securities that are traded. Where an offer is made in connection with an admission to trading on a Regulated Market or primary MTF, this exemption will not be necessary as the exemptions relating to Regulated Markets or primary MTFs will apply.

A.36 Paragraph 11 is aimed at offers made in connection with takeovers involving the offer of securities that are not admitted to trading on a Regulated Market or primary MTF.

A.37 Paragraph 12 concerns offers of securities to directors or employees, including offers made by a person holding the securities as a trustee in pursuance of an employee share scheme, and is derived from the current exemptions in the Prospectus Regulation.

A.38 Paragraph 13 is a new exemption which will apply to offers of loan notes in the context of takeover transactions. These securities are typically expressed to be non-transferable and will therefore fall within the scope of the new prohibition.

A.39 Paragraph 14 is a new exemption that concerns securities offered from the conversion or exchange of other securities under the banking special resolution regime. This is to ensure that there are no unnecessary or unintended regulatory hurdles in a situation where a bank is in a resolution scenario.

Schedule 2

A.40 This schedule contains provisions which supplement the compensation remedy provisions imported from FSMA. Part 1 of Schedule 2 will largely relocate the existing Schedule 10 of FSMA, which includes, for example, the defences to compensation claims under the statutory liability scheme for prospectuses, into this legislation, insofar as it applies to prospectuses.

A.41 Part 2 of Schedule 2 will reform the regime for forward-looking information. Under the new regime, a person responsible for a

prospectus will be liable to pay compensation only if that person knew or was reckless as to whether the forward-looking statement was untrue or misleading, or omitted information in the dishonest concealment of a material fact, at any time from when the prospectus is published to the later of either the offer's closure or when trading in the securities begins. S. 71P enables this SI to make changes to liability in this area.

Schedule 3

A.42 This schedule indicates the kind of consequential amendments to primary and secondary legislation that will be provided for under the DAR powers. Most notably, paragraph 6 will amend s. 85 FSMA so that s. 85 becomes a general prohibition on public offers of securities, and s. 85(2) is omitted – see in particular s. 71R(3) FSMA, which permits the modification of existing criminal offences. This is a step towards simplifying the Prospectus Regime, removing duplication and unnecessary complexity where it exists, and refocusing the regime on the public offer of securities.

Aspects of the drafting still in development

A.43 As stated above, this SI is being published for illustrative purposes and should not be treated as final. Square brackets are used in the SI to identify provisional drafting. HM Treasury wishes to flag the following areas as particularly likely to be further refined:

- **Regulation 4: the definition of 'relevant securities'**. This SI sets out a definition of 'relevant securities' in order to deliver on a recommendation of the Gloster Review, as outlined above. This definition intends to capture 'minibonds' and other non-transferable securities that may cause harm to investors if their offer is not subject to greater regulation. The government is keen to ensure that business that does not affect retail investors or is already regulated elsewhere is not unintentionally brought within scope of the reformed regime. In particular, HM Treasury expects to modify the current draft of this SI, in particular to allow existing business or market activity in such areas as the wholesale loan markets, building societies, credit unions and cooperative and mutual benefits societies, to continue.
- **Regulation 7: the definition of 'primary MTF', and regulation 14: FCA rules relating to admission to trading on a primary MTF.** The government intends that the FCA should have rulemaking powers to ensure that, in appropriate circumstances, the rulebooks of MTFs operating as primary markets require an admission document to be treated as a prospectus in order to allow their issuers to benefit from the different liability threshold offered to forward-looking

information in prospectuses in the new regime. However, the government wishes to do this in a way that maintains, as far as possible, the existing regulatory model in which MTF operators set their own rules on the content requirements and the process for validating and publishing a prospectus, subject to FCA oversight.

- **Regulation 21: changes to the ‘necessary information test’.** As outlined above, this SI will make minor changes to this aspect of existing legislation to improve the quality of information received by investors via prospectuses. In particular, the SI specifies that an issuer’s or guarantor’s ‘prospectus’ should be understood to include ‘creditworthiness’ where appropriate.
- **Enforcement powers:** As outlined above, full provisions relating to the exercise of enforcement powers have not been included. This includes powers needed to carry out an investigation, other matters dealt with by Part 11 of FSMA, and related matters such as publication of notices – in particular, adding the full ancillary and procedural provisions.
- **Schedule 1 exemptions:** A number of exemptions in schedule 1, in particular paragraph 11: takeovers, may be amended to ensure their scope is appropriate and they do not cause unintended disruption. As noted above, the government also continues to consider the appropriate level of the threshold amount in paragraph 1.

HM Treasury contacts

This document can be downloaded from www.gov.uk

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

Correspondence Team
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

Tel: 020 7270 5000

Email: public.enquiries@hmtreasury.gov.uk