

## EXPLANATORY MEMORANDUM TO

### THE FINANCIAL SERVICES AND MARKETS ACT 2000 (PROSPECTUS AND MARKETS IN FINANCIAL INSTRUMENTS) REGULATIONS 2018

2018 No. 786

#### 1. Introduction

- 1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.

#### 2. Purpose of the instrument

- 2.1 These Regulations make consequential amendments to the Financial Services and Markets Act 2000 (FSMA) in order to implement part of Regulation (EU) No 2017/1129 of the European Parliament and of the Council of 30 June 2017 (Prospectus Regulation) (“PR”) which apply from 21 July 2018.
- 2.2 These Regulations also make minor amendments to the UK transposition of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (recast) (OJ L173, 12/6/2014, p.349) (Markets in Financial Instruments Directive II) (“MiFID II”).

#### 3. Matters of special interest to Parliament

##### *Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 None.

##### *Other matters of interest to the House of Commons*

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

#### 4. Legislative Context

- 4.1 These Regulations implement Articles 1(3) and 3(2) of the PR which apply from 21 July 2018 by amending section 86 and Schedule 11A to FSMA.
- 4.2 These Regulations also make minor amendments to UK law following the UK transposition of MiFID II, which was implemented in the UK by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2017 (S.I. 2017/488), the Data Reporting Services Regulations 2017 (S.I. 2017/699), the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 (S.I. 2017/701) and the Financial Services and Markets Act 2000 (Markets in Financial Instruments) (No.2) Regulations 2017 (S.I. 2017/1255).

#### 5. Extent and Territorial Application

- 5.1 The extent of this instrument is the United Kingdom.
- 5.2 The territorial application of this instrument is the United Kingdom.

## **6. European Convention on Human Rights**

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

“In my view the provisions of the Financial Services and Markets Act 2000 (Prospectus and Markets in Financial Instruments) Regulations 2018 are compatible with the Convention rights.”

## **7. Policy background**

### *What is being done and why*

- 7.1 On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. This legislation has been prepared with these assumptions in mind.
- 7.2 In 2015 the European Commission conducted a consultation which identified shortcomings in the Prospectus Directive (PD) regime – the EU framework for the preparation of prospectuses, for both public offers of securities and where securities are admitted to trading on a regulated market. These shortcomings resulted in unnecessary costs and burdens to businesses, especially smaller businesses that rely more on raising smaller sums of capital but are currently disproportionately impacted by the high costs currently involved in doing so – particularly where a prospectus is required.
- 7.3 In June 2017 the European Parliament and Council adopted the Prospectus Regulation (PR) to replace the PD. The PR’s objective is to improve the prospectus regime, principally by making it cheaper and easier for smaller companies to access capital while maintaining investor protection. The majority of the PR will not apply in full until 21 July 2019. However, the part of the PR that concerns thresholds for an offer of securities to the public within the EU will apply from 21 July 2018.
- 7.4 Unlike the current PD, which is implemented into UK law through the FCA’s Prospectus Rules and FSMA, the PR will be directly applicable in the UK. However, consequential amendments need to be made to FSMA for its implementation.
- 7.5 Companies wanting to raise capital through issuing shares or bonds may be required to provide investors with a prospectus. This is a legal document which describes a company’s business, shareholding structure, and details of the securities. This legislation will increase the threshold, from €5 million to €8 million, for an offer of securities to the public within the UK for which a prospectus is required.

### *MiFID II amendments*

- 7.6 The Treasury has also previously transposed MiFID II, which came into application in January 2018. This statutory instrument makes minor technical amendments to fix minor omissions, correct minor technical errors, and updates outdated references in the original transposition of MiFID II into UK law. These amendments include: correcting the definition of a MiFID investment firm to ensure that these firms continue to be subject to the correct auditing requirements under the Companies Act 2006; updating obsolete MiFID I references in FSMA to the correct MiFID II

references; inserting an obligation for the FCA to notify the Agency for the Cooperation of Energy Regulators (ACER) when taking certain actions related to wholesale energy products; and inserting an obligation to share information on final judgements of criminal convictions related to MiFID II with the European Securities and Markets Authority (ESMA).

### *Consolidation*

- 7.7 The amendments made to FSMA, to the Companies Act 2006 and to S.I. 2017/701 do not require further consolidation.

## **8. Consultation outcome**

- 8.1 The Treasury has informally consulted with key stakeholders during the negotiation and implementation phases of the PR; the strong consensus is support for this increase in thresholds. A number of organisations that represent the views of small companies and the markets on which they are admitted indicate that implementing this amendment will allow companies more efficient access to capital on public markets.
- 8.2 The Treasury ran a public consultation on the transposition of MiFID II which opened on 27 March 2015 and closed on 18 June 2015. The Treasury received over 30 responses to the consultation document. The Treasury carefully considered these responses, and its response to the consultation<sup>1</sup>, when drafting the statutory instruments implementing MiFID II laid in 2017. As this statutory instrument makes minor technical amendments, the Treasury have not conducted a further formal consultation.

## **9. Guidance**

- 9.1 It is not considered necessary to issue specific guidance in connection with these Regulations.
- 9.2 These Regulations raise an existing threshold. The Treasury has had extensive informal engagement with business representatives during the negotiation and implementation phases of the PR. No concerns have been raised about businesses' ability to adapt to the raised threshold in the absence of further guidance.

## **10. Impact**

- 10.1 The Treasury expects there to be a positive impact on businesses stemming from this SI. The Treasury does not believe that there will be any impact on charities and voluntary bodies.
- 10.2 The Treasury does not believe that there will be any impact on the public sector stemming from this SI.
- 10.3 Two Impact Assessments, relating to the PR and MiFID II respectively, are submitted with this memorandum and are published alongside the Explanatory Memorandum on the legislation.gov.uk website.
- 10.4 The Impact Assessment for the PR states that making this change will reduce the administrative burden on issuers and facilitate capital raising for UK business, and estimates a net annual benefit to businesses of approximately £10 million per annum.

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<sup>1</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/590504/PU2037\\_MIFID\\_final\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/590504/PU2037_MIFID_final_web.pdf)

The Impact Assessment for MiFID II and MiFIR states that transposition will have an estimated annual net cost to business of £148.5 million.

- 10.5 The Impact Assessment for the PR analyses the impact of this change only. The Impact Assessment for MiFID II analyses the impact of all of the changes made by MiFID II, and as a result capture the changes made both by this final statutory instrument as well as the preceding ones laid earlier in 2016 and 2017. The Treasury does not consider that any of the provisions in this statutory instrument will have a material cost on business.

## **11. Regulating small business**

- 11.1 These Regulations apply to activities that are undertaken by small businesses, and will be beneficial to them. It will widen an existing exemption and its effect will be to reduce the burden on businesses, in particular smaller businesses; fewer public offers will need a prospectus and more capital can be raised at lower cost.
- 11.2 Additionally, due to the costs involved with producing a prospectus, smaller companies often choose to raise funds through institutional offers that are exempted from the prospectus requirement. However, institutional offers rather than public offers can result in dilution of the shares of existing shareholders. These changes should help to encourage smaller companies to conduct public rights issues, which will help to protect minority shareholders while enabling small businesses to raise more capital.

## **12. Monitoring & review**

- 12.1 These Regulations contain a requirement for the Treasury to review the regulations, every five years, and set out the conclusions of each review in a published report.

## **13. Contact**

- 13.1 Nye Williams-Renouf at HM Treasury Telephone: 0207 270 2453 or email [nye.williams@hmtreasury.gov.uk](mailto:nye.williams@hmtreasury.gov.uk) can answer any queries regarding the instrument.