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Dear HM Treasury colleagues,

UK Prospectus Regime Review

We welcome the opportunity to respond to HM Treasury's Consultation Paper on the UK Prospectus Regime.

The Quoted Companies Alliance *Legal Expert Group* has examined the proposals and responded from the viewpoint of small and mid-sized quoted companies. A list of Expert Group members can be found in Appendix 2.

Small and mid-sized quoted companies have for decades struggled with the disproportionately complex and costly "one-size-fits-all" approach taken by EU legislation in relation to prospectuses. There has been a single-minded focus on the Official List (the UK's regulated market for EU purposes) with its constituency of mature and higher value companies and scant regard for the needs and aspirations of smaller growth companies, for whom the time and expense of coming to market is a paramount consideration. It is therefore not a surprise that many of these companies have exited the public markets and that new entrants to the public markets in the UK have declined over recent years. As Lord Hill observed in his UK Listing Review, "The number of listed companies in the UK has fallen by about 40 per cent. from a recent peak in 2008"[1].

We are therefore heartened by HM Treasury's prompt actions in adopting and taking forward the recommendations made in the Listing Review, including those addressed specifically in this Consultation Paper.

We endorse Lord Hill's view that "it is better to go back to first principles as to the core purpose of the prospectus and the kind of transaction for which it should be required"[2] and we wholeheartedly agree that in moving forward we should adopt an approach to the prospectus that would take us closer to the kind of system we had before the Prospectus Directive and Regulation were introduced in the EU[3]. We believe that

[1] UK Listing Review of 3 March 2021: Letter to the Chancellor
[2] *ibid*
[3] *ibid*

reform which merely focuses on modifying and deleting what we have at present would be another missed opportunity.

Finally, we would emphasise that our response to the consultation which follows is informed by the needs and aspirations of the small and mid-sized quoted company community which we represent and which makes up a very significant proportion of the companies traded on the UK's securities markets. Most of all, these companies wish to see the adoption within the UK of a regime which is balanced and proportionate and which recognises the importance of growth companies to the market and to the health of the domestic economy as a whole.

If you would like to discuss our response in more detail, please do not hesitate to contact us.

Yours sincerely,

Tim Ward
Chief Executive

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

General

Overall, we are encouraged by the direction of travel taken by HM Treasury in relation to prospectus reform. We support the principle of decoupling the concept of "public offers" from that of "admission to trading on a regulated market" as the criteria for the requirement to issue a prospectus and we strongly support that principle being extended to cover MTFs. We also support the approach being taken to secondary issues and to pre-emptive offers to existing shareholders (see paragraphs below headed "*The New Document Regime"*).

We endorse Lord Hill's view that the approach to be taken to reform of the prospectus regime and, in particular, to simplifying documents for secondary offers should be one of returning to first principles – looking at the core purpose of the document - as opposed to one which takes the full prospectus as its starting point and operates from the perspective of "what can we take out". The objectives of the Consultation Paper will only be achieved by a more radical approach which looks at the array of information which is already in the public domain and seeks to supplement this solely with information which is required to meet the "necessary information" test (as to which, please see our response to Question 6).

Flexibility

We agree that there are significant long-term advantages in enshrining flexibility into the rules governing prospectuses through the use of delegated legislation which empowers the FCA and/or the operators of MTFs to determine matters such as when a prospectus should be required and the contents of the prospectus. This approach will enable UK capital markets to react swiftly and adapt to market practice and to evolve over time in line with the objectives set out in the Consultation Paper. However, as will be apparent from our detailed responses to the Questions below, we have reservations about unchecked delegation of such powers. We believe that (a) the parameters within which this flexibility operates should be clearly delineated and (b) proposed changes by way of delegated legislation should be subject to consultation, to reporting requirements and to periodic review.

The New Document Regime

We strongly agree with the overall approach to documentation which is proposed in the Consultation Paper (the ***New Documentation Regime***). Given that this underpins our response, we have summarised our understanding of it (and made a number of initial observations) below.

In summary this approach envisages the use of four different types of document across the Main Market and MTFs.

1. Admission Document/IPO Prospectus

This is the document which is required to be prepared by any company which is seeking admission of its shares to a public market for the first time in the UK whether it be the Main Market or an MTF. If admission is coupled with a public offer the document could legitimately be termed an "*IPO Prospectus*" (we note that for the purposes of Question 11, which discusses MTF admission documents, it is referred to by HM Treasury as an "*MTF Admission Prospectus*"[4]). However, if the admission is by way of an introduction or placing under

[4] But we have tried to focus here on the category of document rather than the nomenclature. As a general observation, we believe that terminology needs to be addressed and we have remarked on this elsewhere in this response.

an applicable exemption, or if it is issued under the requirements of the Listing Rules and the AIM Rules for Companies (as applicable) for reverse takeovers, then it will be an "admission document"[5]. Where the document is an IPO prospectus (on Main Market or MTF) it will need to include additional information such as the terms of the offer and basis of allocation, the acceptance process, the reasons for the issue and the use of proceeds.

Note that we believe that the AIM Admission Document is representative of the system we had before the Prospectus Directive and Regulation (Lord Hill makes favourable reference to that system in the Listing Review) and that it contains all, or substantially all, of the information required to meet the "necessary information test" (see also our response to Question 7). For this reason, it is readily capable of forming the basis of an IPO prospectus for an MTF and we endorse HM Treasury's proposal that MTF admission documents will be able to form the basis of offers to the public.

2. Secondary Issue Offer Document

Secondary Offers of securities by companies whose shares are already admitted to trading and who are therefore subject to the rigorous disclosure requirements of the Market Abuse Regulation would generally be exempted from rules governing public offers of securities save where FCA rules prescribe the use a prospectus (Main Market only). Note that we do not support the continuation of the requirement for a prospectus to be prepared for new issues of 20 per cent. or more of a company's issued share capital. This is discussed in detail in our answer to Question 4.

Subject to the above exception for Main Market companies, all secondary offers (as distinct from institutional placings to qualified investors and/or other persons who fall within an exemption to the prospectus regime which, as at present, will continue to be exempt from the public offer regime[6]) will be capable of being made using a simplified offering document (***Secondary Issue Offer Document***) or even an RNS announcement containing prescribed information. It will be for the FCA or, in the case of MTFs, the relevant market operator to determine the contents of that document or announcement. However, our expectation is that the document or announcement would (i) disclose any changes to published information, (ii) incorporate, by reference, key announcements and financial and other information (which would be made available on a designated part of the company's website see "*Incorporation of information from company website*" below) and (iii) include key information relevant to the securities offer (including the terms of the offer, the acceptance process, the reasons for the issue and the use of proceeds).

Secondary Issue Offer Documents would be outside the Financial Promotion Regime created by section 21 of the Financial Services and Markets Act 2000 (***Financial Promotion Regime***) and would therefore not require issue or approval by an authorised person.

3. Pre-Emptive Offer Document

We support the proposition that offers to existing shareholders should be outside the public offer regime. In such cases (subject to any rules made by the FCA for Main Market companies (which we address in our response to Question 4 below)), no prospectus would be required. Such offers could be made on the basis of an RNS announcement or simple circular (being a further abbreviated form of the Secondary Issue Offer

[5] In the case of an MTF, this would be an MTF Admission Document. We also advocate that, as in times gone by, such documents on the Main Market should be termed "Listing Particulars" or another title which does not denote a public offer and reinforces that document's function as a market admission document as opposed to a document offering shares to the public.

[6] Such issues are typically conducted on the back of a trading update endorsed with the terms of the placing

Document) (***Pre-emptive Offer Document***) which would include reference (and/or a link) to relevant RNS announcements on the company's website as well as information relating to matters such as the terms of the offer, the offer application process and use of the proceeds.

As with the Secondary Issue Offer Document, the Pre-Emptive Offer Document would also be outside the Financial Promotion Regime[7] and would therefore not require issue or approval by an authorised person

4. Exempt Offer Document

We will argue later in this response that there are compelling reasons to raise the existing financial threshold for exemptions from the requirement for a prospectus from €8 million to £20 million. In many cases the overlap in exemptions between the Financial Promotion Regime and the Prospectus Regime will enable offers which fall within this exemption to be made without any specific documentary requirements. However, where an exemption under the Financial Promotion Regime is not met a document will be required to be issued or approved by an authorised person. We refer to such a document as an ***Exempt Offer Document***.

Increase in financial threshold for exempt offers

We discuss the 150 person threshold and the qualified investors exemption under Question 13 below. However, we would urge HM Treasury to revisit the existing €8 million public offer value threshold as a priority.

We believe that that threshold should be increased to £20 million. Any concerns that this may lead to a significant undermining of the UK's investor protection regime would, in our view, be misplaced as offers below the increased financial threshold would remain subject to the rigour of the Financial Promotion Regime. In broad terms, the Financial Promotion Regime requires the intervention of an FCA authorised entity if an offer of securities is to be communicated to persons who are deemed by the legislature to need additional protection before receiving that document. The FCA authorised entity must conduct due diligence and satisfy itself that the document offering the securities is accurate and "*fair, clear and not misleading*"[8] and, in relation to communications likely to be received by retail clients, the communication must, among other things, be "*sufficient for, and presented in a way that it is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received*"[9].

As an aside, we believe that the figure of £20 million is one which has previously had support from HM Treasury.

We acknowledge that some companies may prefer to issue a Secondary Issue Offer Document or a Pre-Emptive Offer Document complying with the relevant rules of the FCA or the operator of the MTF in preference to an authorised financial promotion even where the offer would otherwise be exempt from the public offer regime. This would seem to be a perfectly legitimate alternative and we would therefore suggest that this option is kept open for companies.

Finally, to avoid any doubt, our proposals relating to exemptions from the public offer regime are made on the assumption that exemptions would continue to be cumulative and not mutually exclusive (so, for

[7] A new exemption from the public offer regime would be created to address pre-emptive offers to existing shareholders. This is the subject of Question 12.
[8] See FCA Rules: COBS 4.2.1(1)
[9] See FCA Rules: COBS 4.5

example, the qualified investor exemption used for institutional placings would continue to be capable of being combined with the financial threshold exemption and/or the not more than 150 persons exemption).

Incorporation of information from company website

As a source of key information, the company's website will be central to the proposals relating to Secondary Issue Offer Documents and Pre-Emptive Offer Documents or any RNS announcement which fulfils the same function as those documents.

At present, the requirements for AIM companies are clearly prescribed by Rule 26 of the AIM Rules for Companies whereas those for Main Market companies exist piece-meal across a number of different pieces of legislation (for example section 430 of the Companies Act 2006, Article 17.1 of MAR and DTR 7.2.9).

We believe that securing a consistent approach to the content and presentation of company websites across all market segments will greatly facilitate the use of Secondary Issue Offer Documents and Pre-Emptive Offer Documents. Where a secondary offering (whether or not pre-emptive) is being made, we envisage that a link would be included in the relevant document or announcement which would take readers through to a dedicated part of the website which has been established by the company for the purpose of the offering. The requirements of Rule 26 of the Takeover Code in relation to takeover offers provides a useful precedent for this approach.

We also recognise that posting information on a website will not necessarily be effective to communicate that information to all potential offerees on a public offer. Where appropriate this should be addressed by the inclusion of a right for persons to call for the delivery to them of hard copies of documents where those documents contain or convey key information.

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

Meaning of "Efficiency"

We support the broad objectives set out in the Consultation Paper. However, we would emphasise that the litmus test for efficiency of a public capital raising (one of the stated objectives) is that it should demonstrably lower the time and cost of production of a prospectus. This is fundamental since, as our membership will readily attest, the time and cost of producing a prospectus is the single most significant (and, in many cases, an insurmountable) obstacle to small and mid-size companies making offers to the general public.

Objectives to continue without time limit

The objectives should apply not only to the current consultation exercise, but ongoingly, as yardsticks by which the overall effectiveness of the new prospectus regime should be judged. Indeed, we would recommend that they are used to shape periodic reports on the overall effectiveness of the new regime (see below).

Periodic reporting and review

In our response to Question 1 we stated that the new legislation should not only be subject to consultation but should also be the subject of reporting requirements and periodic reviews.

In terms of reporting requirements, we suggest that a segment of the Chancellor's annual report to Parliament on the State of the City (this being a core recommendation of Lord Hill[10]), should be dedicated to a discussion of key changes in legislation and an assessment of how they have balanced the need for appropriate market regulation with the need for the UK to remain competitive on the international stage for listings and public offers of securities.

Moreover, we would advocate a formal review of the new prospectus regime against the stated objectives on a periodic basis (say, every 5 years) so that Parliament and/or the individual market operators responsible for overseeing the UK's capital markets are compelled to address whether further reform(s) are necessary and/or desirable. The EU approach of periodically reviewing directives such as the Market Abuse Directive and the Prospectus Directive would be a useful model to adopt in this instance.

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

In general, we believe that the function of the prospectus is well understood and have little to add.

The prospectus plays a critical role both as a regulatory document and as a marketing document for the company. In the case of initial admissions where the company will not have been subject to a disclosure regime beyond the minimum requirements[11], the primary function of the prospectus is to provide sufficient additional information to enable a fair evaluation to be made of the company as an investment proposition (with the formal test being set out in Article 6(1) of the UK Prospectus Regulation (please see our response to Question 6)).

Once issued, the prospectus sets a base level of market disclosure for investors. From thereon, disclosures are largely mandated by the continuing obligations of the relevant market and by the comprehensive disclosure obligations imposed by the Market Abuse Regulation. This base level of market disclosure is substantially refreshed annually with the publication of the company's annual report and accounts.

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

Flexibility

In general, we recognise that delegation of legislation to the FCA has significant advantages in terms of flexibility.

Parameters of operation

Significant concern has been expressed by those members of our organisation who are market practitioners and who experience the day-to-day operation of regulators, that the delegated powers should be subject to checks and balance so as to avoid undermining the laudable objectives of the current reform. Regulators need to respect clear operational parameters covering issues such as (i) maximum levels of disclosure which can be imposed for Main Market and MTF companies (to prevent so-called "gold plating") and (ii) the extent of the authority and law-making jurisdiction of each regulator within each tier of the market so as to prevent

[10] UK Listing Review: Recommendations overview: Monitoring and delivering results

[11] For unlisted companies, the primary requirements are to make periodic filings of financial and other key information with the Registrar of Companies, to maintain the statutory registers and to present its annual accounts to its shareholders for approval at annual general meeting

overlap and ensure that regulation is appropriate to each market (we alluded to the damage done to the markets by the "one-size fits all philosophy" which largely informed the EU legislation currently on the statute book.

The primary objective should be that the FCA has regulatory power over Main Market companies (this being the area which it is best acquainted with[12]) while individual market operators have regulatory power over their respective MTFs.

Balancing the interests of stakeholders

The challenge which the new regime will present to the FCA, and to the market operators will arise largely from the need to balance the interests and aspirations of a number of stakeholders who, individually and collectively, are vital contributors to the vibrancy and dynamism of UK capital markets. Those interest are legion, but our assessment is that the following should be at the forefront of the minds of regulators and market operators:

i. the interests of companies, who will be concerned to be able to raise capital swiftly and without undue expense;

ii. the interests of institutional investors who have access to information and analysis which retail investors do not (such as research notes and pathfinder prospectuses and admission documents);

iii. the interests of retail investors (including, in some cases, friends and family who have loyally backed the company in its early stages), who have limited access to information and analysis relative to institutions but who, studies have suggested, are critical for liquidity and price formation[13]; and

iv. the interests of market practitioners, who wish to have deal certainty and swift execution.

FCA's powers to be concentrated on the Main Market

If the circumstances when a prospectus is required is devolved to the FCA (and under the current UK financial services structure, the FCA is the only appropriate regulator), it is important, in our view, that the FCA does not use that discretion to directly overreach into the field of MTFs and is not given delegated powers to regulate offerings on MTFs as well as regulated markets. For example, we believe that any suggestion that MTF admission documents/IPO prospectuses for MTFs should be subject to vetting would be fatal to our junior markets. We comment in detail on the concept of vetting in the context of the new regime in our response to Question 7.

In short, we would advocate FCA regulation for regulated markets and MTF operator regulation for MTFs (who could, like AQSE, use FCA rules if they so wish). As an aside, we think there is benefit to be gained from revisiting the term "regulated market", which is essentially an EU construct. Such term carries the unfortunate connotation that MTFs are not themselves "regulated". The term "primary market" might be a

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[12] The UK has led the world in having successful MTFs for small and mid-sized quoted companies. UK MTFs have, to date, largely operated outside the EU prospectus framework primarily due to concerns over speed of execution and cost. It follows that the FCA has had very limited involvement in fund raising on UK MTFs, where the cost of raising capital is a much more critical factor for the size of company on those markets

[13] Fundraising without a prospectus has, arguably, come at the cost of lower retail investor participation and dilution. We and others have previously published studies that have illustrated that retail investors underpin liquidity in, and price formation for, small and medium-sized quoted companies. Allowing companies on, or wishing to be admitted to, MTFs to access capital from retail investors using a less costly and easily produced document offers a potential solution to this issue.

more appropriate term. In the same vein, we believe that, for the small to mid-sized company community, the term "prospectus" is something of a "busted brand", denoting a document which should be avoided at all costs (hence the seismic movement of the market towards the institutional placing model over recent years).

Abolition of the 20 per cent. rule

The existing requirement for Main Market companies to issue a prospectus where their share capital is increased by 20 per cent. or more (the ***20 per cent. rule***) is, in our view, an anomaly which needs to be corrected. The percentage is an arbitrary one and is largely, if not wholly, irrelevant in any assessment of whether there has been a material change in the investment proposition presented by a company. The existing disclosure regime is more than sufficient to inform existing shareholders of the extent of the issue, the capital raised and the purposes to which that capital is intended to be put.

In 2020, at the height of the COVID-19 crisis, many companies took advantage of relaxations introduced by the Pre-Emption Group to raise capital and respond to unprecedented market appetite for new issues. Amidst this extreme market buoyancy, many did not notice that many companies were limiting their offers to less than 20 per cent. of their existing share capital to avoid being saddled with the time and cost of producing a prospectus. The 20 per cent. rule was instrumental in depriving companies and investors of market opportunities and limiting the amount of new capital being injected into the economy.

The current review provides the perfect opportunity to abolish the 20 per cent. rule or at least replace it with a rule which is more directly aligned with the concept of a material change of investment proposition. Failure to address this issue will risk losing a significant part of the benefit of the other reforms being proposed.

As a model for what might be considered to be appropriate, we would refer HM Treasury to the approach taken on AIM – namely that the requirement to issue a further admission document arises when there is an issue of shares which amounts to a reverse takeover such that the investment proposition presented by the company is a radically different one to that which previously applied. This is both balanced and fair. Specifically, it recognises that in those circumstances the ongoing disclosure obligations are themselves insufficient to inform the market and it is therefore right and proper for the "base level" of market information to be revisited and refreshed.

Freedom of movement between markets

We would like to make an additional observation relating to freedom of movement of companies between MTF's and the Main Market, both upwards and downwards. We perceive that many in the City view the UK capital markets as a continuum, with companies joining at the level which is appropriate for them and then having the potential to graduate to other markets in line with the development of their businesses. The requirement to produce a prospectus/admission document at each point of movement is a fetter on this free movement and we recommend that it is abolished or made subject to significant derogations. Companies are subject to rigorous disclosure requirements across all market strands and in many cases a change in market is unrelated to a change in the core business proposition which, as we have emphasised above, should be the single most important factor in determining whether a further prospectus/admission document should be presented to the market.

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?

Overriding Principle

As a general observation, we believe that it is important for the City to continue to attract overseas companies and we encourage a policy of openness to foreign applicants seeking a secondary listing facility on the London market.

Main Market

We agree that the FCA, as the principal regulator for financial services in this area, should be the appropriate entity to recognise overseas prospectuses for the purposes of secondary listings on the Official List in the UK. We recommend that an assessment of equivalence of overseas prospectuses should be a priority with a view to keeping the City open to the Worldwide community of companies. Additionally, where there is not equivalence we would like to see consideration given to how best to address differences with a view to simplifying the existing position to the greatest extent possible without compromising market integrity.

MTFs

As regards MTFs, we assume that the proposed new legislation would delegate to MTF operators the discretion to admit overseas companies to their markets using a document approved for this purpose by the relevant MTF operator, as at present. We would support such an approach providing that the overseas jurisdiction has appropriate equivalence to the UK regulatory regime. Our comments above apply equally here.

Recommendation

To encourage greater emphasis on mutual recognition, we would like to see new legislation which provides the right for applicants from overseas jurisdictions which are not currently on a “designated market” to be able to apply to the FCA or to the relevant MTF for a ruling as to whether documents produced in that overseas market are capable of being treated as equivalent for the purposes of seeking a secondary listing on a UK market. The legislation should prescribe a response time and process for consultation and final ruling on such matters.

Q6 Do you agree with our approach to the ‘necessary information test’?

We agree that the “necessary information” test should remain as the cornerstone for disclosure in any admission document (including any MTF admission document) or prospectus regardless of the market on which the securities are traded or are to be admitted to trading.

We consider that it is appropriate for this test to be enshrined in primary legislation. The alternative of allowing MTFs discretion, in their own admission rules to apply, amend or rephrase, the “necessary information” test (as contemplated by the proposals in the Consultation Paper), would lead to inconsistency

across UK capital markets[14]. We therefore consider that delegated powers to market operators in this area are inappropriate.

The adoption of an overriding and market agnostic "necessary information" test is also consistent with the adoption of a statutory compensation scheme for MTF admission documents (considered further in our response to Question 11) which, if adopted, would align the liability attached to an MTF Admission Document with that which currently attaches to prospectuses on the Main Market.

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

Distinction between Main Market and MTFs

In the context of the proposals, we envisage that the prospectus will be largely a Main Market concept. It will be required at the time of admission to the market (although we maintain that where there is no public offer, such documents would better be termed "listing particulars" or "Main Market admission documents") and at the time of any subsequent public offer, where the FCA determines that a Secondary Issue Offer Document or Pre-Emptive Offer Document is not appropriate[15] (these two terms are defined and discussed in our response to Question 1). Since the Main Market is the domain of the FCA, it is appropriate that rules on the review and approval of prospectuses issued by companies within that segment should be set by it.

In the case of MTFs, the proposals envisage that an admission document prepared under the rules of the market operator may be used as the basis for an offer to the public (as to which, see our response to Question 11). It will also be for the MTF operator to determine the form and content of the MTF admission document as well as any Secondary Issue Offer Document or Pre-Emptive Issue Offer Document issued by an MTF traded company.

Vetting

For the avoidance of doubt, we envisage that, as at present, MTF Admission Documents will continue to be produced under the stewardship of the nominated adviser (AIM) or other adviser designated by the rules of the MTF and will not be subject to FCA scrutiny (or vetting) or approval. We believe that further offer documents issued by these companies should also be exempt from vetting or approval. As we understand the proposals, such documents will invariably (if not in every case) fall into the Secondary Issue Offer Document and/or Pre-Emptive Issue Offer Document category in any event – and if they do not they will follow the format and content requirements of the MTF admission document. We recommend that all such documents are, however, filed with the national storage mechanism so that they can be accessed as a matter of record.

For Main Market companies – and particularly small and mid-sized Main Market companies (which represent the majority of constituents of that segment) – we are of the view that the additional burden (in terms of time and cost) that the vetting process adds to the production of prospectuses, outweighs the benefits of what is fundamentally an independent check on internal consistency and compliance with content

[14] Arguably some inconsistency exists at the moment since the AIM market, currently adopts a "full understanding" test. However, in practice, this is broadly the same as the "necessary information" test applying to a prospectus -see paragraph (K) of Schedule 2 to the AIM Rules for Companies.

15 However, see our commentary above on the abolition of the 20 per cent. rule. Our hope is that a prospectus will only be required where there is a change in the investment proposition which justifies it,

requirements of the document. This additional cost (which is driven in part by the "stop and restart" pattern as drafts are reviewed and comments are received and addressed by the company and its advisers) is one of the primary reasons that companies in this segment are reluctant to issue prospectuses under the current regime.

Allowing the FCA to determine when "vetting" is required is highly likely, in our view, to lead to the FCA maintaining the existing position and it may even lead to the FCA extending the circumstances in which it should vet prospectuses. This would not be welcomed by our members. We would therefore support legislation which prescribes the circumstances when, or if, the FCA should vet prospectuses and we would encourage the legislature to reduce those circumstances (for example, in the case of prospectuses issued by Main Market companies below a certain level of market capitalisation).

Approval and review

The Consultation Paper suggests that FCA "approval" is essential in order to inform the market that there is an approved prospectus. Yet, the paper also suggests that not all prospectuses would be "reviewed" by the FCA. This is inconsistent. First, we do not see that FCA approval is essential to identify the final, definitive, version of a prospectus. We believe that could equally and easily be achieved through a filing mechanism. The Consultation Paper itself advocates that all prospectuses should be filed with the national storage mechanism (a recommendation which we would extend to MTF admission documents). This was the approach under previous UK legislation relating to prospectuses both under prior Companies Acts and the Public Offers of Securities Regulations 1995 (SI 1995/1537) where prospectuses were required to be filed with the Registrar of Companies. Second, if all prospectuses are to be "approved" by the FCA, we struggle to see how the FCA can "approve" a prospectus without "reviewing" it in some way. This leads to an apparent conflict with the earlier statement in the Consultation Paper that not all prospectuses would be required to be reviewed by the FCA. This inconsistency would not follow if all prospectuses are required to be filed with the national storage mechanism, rather than be approved by the FCA.

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.)

We are in agreement with the ancillary powers identified in Annex A. However, withdrawal rights for a public offer on an MTF should replicate the same position as a prospectus. It is unclear why there would be any reason for a distinction.

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

General

We strongly support the introduction of measures to facilitate increased disclosure of forward-looking information, such as profit forecasts and estimates, in IPO and secondary issue documentation. Again, we would wish to see these measures apply equally to regulated markets and MTFs. We agree with Lord Hill's observations that the inclusion of such information can be an important, but not necessarily conclusive, factor in the investment decision.

Proposed new liability threshold for forward-looking statements

The proposals to apply a knowledge/recklessness test as a defence with a "lighter" threshold to the statutory compensation scheme in Section 90 of the Financial Services and Markets Act 2000 for false and misleading statements, in relation to forward looking information are, in general, a welcome step. We agree that the proposals should not apply to working capital statements.

We have analysed the existing law and practice around liability for forward-looking statements and our analysis is included in Appendix 1 to this response. It is apparent that measures to achieve greater uniformity across markets and circumstances would also be a welcome development.

Presumption of reliance

We question whether there should be a presumption of reliance in favour of the investor/claimant.

It is conceivable that an investor's decision to invest on an IPO could be determined by many factors - for example, the strength of the company's management, the company's sector of operation, the investor's own view of the company's position in its market and prospects. A profit forecast may be one of those factors, but may not even be a factor at all (many investors have been able to invest in UK quoted companies without forward looking information up until now). It seems disproportionate to us that an investor/claimant who has, perhaps, made their own informed, or possibly misguided investment decision should be allowed serendipitously to use a profit forecast in the document to claim compensation from the company and/or its directors where no reliance was placed on that profit forecast. We have seen instances in the US markets where an industry has developed around identifying inaccuracies in documents which are of no relevance to investors and using them to extract compensation from companies. We believe that the presumption of reliance will merely encourage such claims to be pursued in the UK.

For this reason, we are not convinced by the argument that dispensing with the reliance requirement should be the "price" for the easier defence. We therefore urge HM Treasury to retain reliance as a precondition to any claim in this new defence. We also believe that this better reflects the objectives of the Consultation Paper.

Practical effect

We would add that it may well take more than this nuanced change in the law to cure the innate reluctance by companies and their directors to include forward-looking information in prospectuses. Directors of companies have an understandable fear of being "hostages to fortune" if a genuine profit forecast made honestly and in good faith turns out to be incorrect. There are issues of reputation and market sentiment to consider which can be seen by companies and their directors as being far more problematic than any legal liability. Additionally, the level of warranty cover requested by underwriters/placing agents can at least make directors uncomfortable (although such warranties may be capable of being "right-sized" by negotiations between the board and the underwriters/placing agents).

Reporting and review of forward-looking information

Moreover, statements which constitute profit forecasts or estimates are commonly subject to some form of independent, objective, scrutiny. This is either required by legislation or regulatory rule or is carried out voluntarily by the company and its directors (see Appendix 1). Commercial and/or reputational factors may also effectively require such statements to be subject to this additional level of verification. This process inevitably adds a further, and often unwanted, layer of professional costs.

"Good Faith Forecast"

One solution may be to retain the existing framework whilst also introducing the concept of a "good-faith forecast". This would be a forecast offered by the company's board in good faith and after due consideration and which takes advantage of the proposed "lighter touch" liability regime and is recognised as such by the market. Best estimate forecasts would be clearly signposted as such so as to enable investors to afford them an appropriate amount of weight in making their decisions. It would remain to be seen whether investors would put any value on forecasts of this nature or whether they would discount them on the grounds that the directors have an easy "out" if they prove to be incorrect (notwithstanding that this would not actually by the case).

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

We believe that the new framework for the prospectus regime which is proposed has the potential to strike a fair balance. However, the ultimate outcome will largely depend upon whether it is possible to maintain the spirit of the proposals through the implementation process. The setting of clear parameters to the authorities delegated to the FCA and/or MTF market operators will be an important element in discouraging "gold plating" which would otherwise have the potential to defeat the objectives set out in the Consultation Paper.

Q11 Which option for addressing companies admitted to MTFs do you favour and why?

General

Our understanding is that, under both options proposed in the Consultation Paper, the document used to admit a company's securities to a MTF could be made available to the public and form part of a public offer. We believe this is a welcome development and provides a useful framework which could potentially be used for more public offers and greater retail participation of retail investors in MTF securities.

MTF Admission Documents and other MTF offering documents to be exempt from the Financial Promotion Regime

It is important that the Financial Promotion Regime (also discussed in our response to Question 1) is disapplied in relation to documents used to admit securities to MTFs, particularly if they are to be permitted to be used for public offers. This is currently the case for prospectuses and was previously the case for public offer prospectuses under the Public Offers of Securities Regulation 1995 (SI 1995/ 1537). What this means, in practice, is that the Financial Promotion legislation (principally, The Financial Services and Markets Act 2000 (Financial Promotion) Order (SI 2005/1529), as amended) should have clear exemptions from the Financial Promotion Regime for documents used to admit securities to MTFs and to make secondary offerings of securities traded on MTFs where the form and content of the communication complies with the requirements prescribed by the relevant market operator.

Statutory Compensation

We understand that under Option 2, the so called MTF Admission Prospectus, would: (a) have attached to it a statutory compensation mechanism for inaccurate and misleading statements (as for a prospectus); and

(b) have, associated with that compensation regime, the less stringent knowledge/reckless defence for forward-looking information such as profit forecasts (see our response to Question 9 above).

Our views on Option 1 and Option 2 are as follows:

First, we would have no objection to imposing a statutory compensation mechanism for documents used to admit securities to MTFs. This would provide investors with an easier form of redress than that currently provided under contract or the common law. As documents used to admit securities to MTFs are already compiled in accordance with exacting standards and with professional advice, we do not envisage that this will lead to any adverse timing or cost implications. We also see the adoption of a statutory compensation mechanism as being the flipside to our firmly held view that secondary offering documents/announcements issued by MTFs (in circumstances where a prospectus would currently be required) should not be subject to the additional time and cost burden of "vetting".

Second, we welcome any mechanism which would encourage the greater use of forward-looking information such as profit forecasts and we see that the statutory compensation mechanism and the lighter defence of forward-looking information go hand in hand. The former seems a small price to pay for the latter.

Finally, we would caution against the use of the word "prospectus" in Option 2. As we have stated elsewhere, a "prospectus" is viewed by many as a "busted brand", and practitioners have forcefully argued that market practice is to "*avoid using a prospectus at all costs*". We do not think therefore that retaining the word "prospectus" for these documents would be helpful. We would suggest calling documents under Option 2. "MTF Admission Documents" or something similar. The word "prospectus" should be avoided except, perhaps, where a public offer is involved (see our response to Question 1).

Mechanics of retail offerings on MTFs

We have given some thought as to what, if any, additional legislative measures may be required so as to accommodate or facilitate public offers being made using the MTF Admission Document. We would emphasise that this is not an issue which currently typically arises. The vast majority of offers made on MTFs have been conducted as placings (sometimes with a small exempt retail element) and non-exempt offers to the general public necessitating the publication of a prospectus have been extremely rare.

The current practice for an IPO on AIM typically involves a marketing exercise solely to institutional investors using a "pathfinder" AIM Admission Document (which is not permitted to be distributed to the wider public under the Financial Promotion Regime). The level of demand and the number of shares admitted as well as the price is determined following this exercise, a placing agreement is signed and the final AIM Admission Document is published (which is largely a historical document describing these fundraising arrangements). Under the AIM Rules for Companies there is then a period of at least 3 working days before the admission to trading becomes effective.

If the objectives of the proposals set out in the Consultation Paper are achieved, we expect to see public offers being made using the MTF Admission Document, which would contain all the terms and conditions of the offer. This means that the MTF Admission Document would remain "live" during the period of the public offer rather than being a historical document recording the terms of an institutional placing.

The demand from the public will be uncertain (the price would, we expect, primarily be driven by the demand from institutional investors who are likely to form the largest element of the fundraise) and a longer

timetable will be needed to accommodate a minimum period for the public to review the document and make applications for shares. The exact number of shares to be admitted to trading will not be known until the public offer is closed and the shares allocated.

IPOs on AIM are very rarely underwritten because very few of the market participants have the regulatory permissions, balance sheet strength or risk appetite to offer such a facility. AIM companies do not, therefore, have the certainty of funds that an underwriting commitment would give them.

Assuming that MTFs will not willingly, as a matter of routine, permit dual admission dates for IPOs (an initial admission date for the institutional element and a second, subsequent, admission date for the public or retail element), public offers have the potential therefore to lengthen the current IPO timetable for a MTF admission and, critically, the length of time institutional investors would need to remain committed**.**

Measures need to be created to allow the marketing arrangements for the public offer and the institutional element to run, as far as possible, contemporaneously. This could, for example, involve allowing the "pathfinder" MTF Admission Document (essentially the final document without numbers) to be issued to the public at the same time as it is issued to institutional investors (and, potentially, to attach liability to the pathfinder in line with that attached to the final document). As we have mentioned above, this is not currently permitted under Financial Promotion legislation.

An alternative and immediate approach (we recognise that, in time, market practice might develop other options), would be for the relevant legislation to allow MTF operators to use the current facility available under the Prospectus Regulation for prospectuses to be drawn up either as a single document or as a tri-partite document (consisting of a summary, a registration statement and a securities note). If this facility was permitted for MTF Admission Documents, this would allow the "registration statement" of the MTF Admission Document to be issued contemporaneously to institutional investors and the public. Once the overall level of demand and the number of securities to be issued is determined after the marketing exercise, the "securities note" element of the MTF Admission Document (essentially, the number of shares and the price and information consequential on those numbers) would be issued and admission to trading would become effective.

Although we consider that there might be merit in allowing the tri-partite facility to be extended to MTF documents to facilitate public offers on those markets, we would clarify that we do not support any legislative requirement for a prospectus to have a "summary" and certainly not in a prescribed form. We are merely suggesting that MTF documents should be able, like prospectuses, to be drawn up in more than one document.

Q12 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?

We strongly support the proposal for offers to existing holders of a company's securities to be exempt from the requirement to issue a prospectus under the public offer rules. We believe that this exemption should apply both to companies on regulated markets and on MTFs. We also see considerable overlap of this exemption with the proposals for a shorter form offering document to replace the full prospectus for all offers made by companies who are already admitted to UK securities markets and have been subject to the rigorous market disclosure requirements of the UK Market Abuse Regulation and the rules imposed by their own market operators.

Q13 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?

The 150-person threshold exemption for public offers has little or no practical value for quoted companies and is rarely used. Quoted companies have wide shareholder bases and the number of shareholders within them cannot easily be identified due to the common use of nominee accounts. Quoted companies cannot therefore safely rely on this exemption as they are unable to quantify the exact number of their shareholders at the time of making an offer. Moreover, during an offer period, the number of their shareholders will fluctuate due to market trading. Nonetheless, we acknowledge that there may be instances where such exemption has value and we would therefore not advocate its elimination[16].

We would hope that, if the right regime is introduced for offers to existing shareholders (as discussed elsewhere in our response to the Consultation Paper), such as rights issues and open offers, and for certain non-pre-emptive offers our membership would have limited concerns with this exemption.

However, for unquoted companies, we are sure that this exemption continues to have practical use, particularly where offers are structured to apply to a limited number of people.

We are not aware of any particular issues regarding the "qualified investor" exemption although the proposed reforms may provide an opportunity for the terminology and the definition to be revised and widened in a manner which more closely aligns the term with the corresponding exemption under the UK's Financial Promotion Regime (discussed in more detail in the response to Question 1, above).

However, we think there might be merit in including the directors of a company and its subsidiaries within this definition of "qualified investors".

Even if the measures set out in the Consultation Paper were enacted, we would strongly object to the modification or, worse, the withdrawal of this exemption. The "qualified investor" exemptions has formed the backbone of raising capital by way of a placing on AIM for some time and we understand it works well in its current form. Whereas we are strongly supportive of measures to improve the participation of retail investors, the facility easily to conduct a placing should be retained as an option for companies.

Q14 Does the exemption for employees, former employees, directors and ex-directors work effectively?

We are not aware of any of our membership having any issues with the director/employee exemption for prospectuses.

Q15 Which option for accommodating the right of private companies to offer securities to the public do you favour?

As an organisation primarily representing the interests of small and mid-sized quoted companies, we have chosen not to offer any observations on the options for non-quoted companies to make public offers presented in the Consultation Paper.

[16] For example, a company with a number of non-qualified investors making an offer for subscription of securities priced in excess of 8 million euros.

However, we believe that the definition between public and private companies needs to be clarified so that there is a clear distinction between the two.

The introduction of the Public Offers of Securities Regulations (SI 1995/1537) in 1995 and the subsequent EU legislation on prospectuses set out the circumstances in which UK companies were to issue prospectuses in connection with "public offers" with certain offers being exempt. Previously, this legislation was contained in UK companies' legislation which also contained the current prohibition on UK private companies making "offers to the public". Under the historic companies' legislation, the same definition of what constituted an "offer to the public" was used for the purposes of the public offer prohibition on private companies and the requirement to issue a prospectus. Since 1995, that has no longer been the case. It is generally considered by practitioners that the test of a public offer under the old (and existing – see section 755 of the Companies Act 2006) companies legislation is much narrower than the test (with exemptions) applicable to the requirement to publish a prospectus. For example, an offer to an unlimited number of "qualified investors" and to 149 non "qualified investors" does not require a prospectus, but such an offer would amount to a public offer for the purposes of the public offer prohibition on private companies.

We believe that HM Treasury should take this opportunity to clarify and give greater certainty in this area as we suspect that the "prospectus rules" are creating confusion and leading private companies inadvertently to breach the Companies Act 2006. We would point out that the definition of a "public offer" in historic companies legislation never was very clear (see section 756(2) of the Companies Act 2006) and there has been little by way of case law as guidance. Now would be a welcome time to give greater clarity and certainty in this area. In fact, we wonder whether, with the increasing alignment of public and private companies under the 2006 Act, consideration should be given by HM Treasury to abolishing the public offer prohibition on private companies currently in section 755 of the Companies Act 2006.

Q16 Which of the options above do you prefer? (Please state reasons)

Please see response to Q15.

Q17 Do you have any further thoughts or considerations over how a new deference mechanism (Option 2) should operate?

Please see response to Q15.

Appendix 1

Current rules and practice in relation to profit forecasts

Statements which constitute profit forecasts or estimates are commonly subject to some form of independent, objective, scrutiny. This is either required by legislation or regulatory rule or is carried out voluntarily by the company and its directors as comfort.

We have summarised below the relevant provisions applicable to profit forecasts for companies on the Main Market and to companies traded on AIM and those which are applicable to companies making profit forecasts in the context of a public offer to which the Takeover Code applies.

The Prospectus Regulation Rules

The Prospectus Regulation rules for companies issuing prospectuses require a profit forecast/estimate to be clear and unambiguous and the principal assumptions upon which it is made must be disclosed. These assumptions must be specific, precise and "*reasonable*" - an element of objectivity - and readily understandable. Uncertain factors which could materially change the outcome of the profit forecast must be drawn to the attention of investors. The profit forecast must include a statement that the basis of its preparation is comparable with a company's historical financial information and is consistent with its accounting policies.

Although there is no formal legal requirement in the prospectus regulation rules for a profit forecast to be independently scrutinised, they often are reviewed by independent accountants (to which formal accounting standards typically apply), either for comfort or, more formally, to meet the commercial or reputational requirements of a sponsor and/or underwriting syndicate. Profit forecasts are often reinforced by "comfort letters", to which legal liability may attach in some circumstances.

AIM Rules

The AIM Rules for Companies, which apply to AIM Admission Documents, go further and require statements constituting profit forecasts and estimates to be accompanied by a statement that the profit forecast/estimate) has been made by the directors "*after due and careful enquiry*" (which is close to a negligence standard) and a further statement by a nominated adviser that the nominated adviser has satisfied itself that the director's statement has been made after "due and careful enquiry". The principal material assumptions underlying the profit forecast need to be disclosed and they are required to be specific and precise and be readily understandable to investors. Again, "comfort letters" are likely to be given "behind the scenes".

Listing Rules

If a listed company includes a profit forecast/estimate in a class 1 circular it must:

(a) comply with the requirements for a profit forecast or profit estimate set out in the Prospectus Regulation Rules (see above); and

(b) include a statement confirming that the profit forecast/estimate) has been properly compiled on the basis of assumptions stated and that the basis of accounting is consistent with the accounting policies of the listed company. It is common for "comfort letters" to be given behind the scenes.

Takeover Code

It is also worth noting that, in the context of takeovers, the Takeover Panel requires profit forecasts/estimates to be accompanied by reports from an independent accountant (to which accounting standards will apply -see above) that the profit forecast/estimate has been prepared on the basis stated and is consistent with a company's accounting policies and from a company's independent financial adviser that the forecast/estimate has been prepared with "*due care and consideration*".

Appendix 2

The Quoted Companies Alliance *Legal Expert Group*

Mark Taylor (Chair)	Dorsey and Whitney
Maegen Morrison (Deputy Chair)	Hogan Lovells International LLP
Stephen Hamilton (Deputy Chair)	Mills & Reeve LLP
Danette Antao	Hogan Lovells International LLP
Paul Arathoon	Charles Russell Speechlys LLP
Naomi Bellingham	Practical Law Company Limited
Ross Bryson	Mishcon De Reya
Andrew Chadwick	Clyde & Co LLP
Philippa Chatterton	CMS
Paul Cliff	Gateley
Sarah Dick	Stifel
Tunji Emanuel	LexisNexis
Kate Francis	Dorsey and Whitney
Claudia Gizejewski	LexisNexis
Francine Godrich	Focusrite Plc
Sarah Hassan	Practical Law Company Limited
David Hicks	Charles Russell Speechlys LLP
Kate Higgins	Mishcon De Reya
Alex Iapichino	Majestic Wine Plc
Nichols Jennings	Locke Lord LLP
Martin Kay	Blake Morgan
Jonathan King	Osborne Clarke
Nicola Mallet	Lewis Silkin
Nicholas McVeigh	Mishcon De Reya
Catherine Moss	Shakespeare Martineau LLP
Hilary Owens Gray	Practical Law Company Limited
Kieran Rayani	Stifel
Jaspal Sekhon	Hill Dickinson LLP
Donald Stewart	Kepstorn
Gary Thorpe	QCA Director
Robert Wieder	Faegre Drinker LLP