

Regulatory Reform Order:

A second consultation on proposed changes to the Financial Services and Markets Act 2000

May 2006



HM TREASURY



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INTRODUCTION

SUMMARY OF PROPOSALS

1.1 This consultation paper sets out the Government's proposals to amend various provisions in the Financial Services and Markets Act 2000 (FSMA). The proposals will be implemented by a Regulatory Reform Order (RRO) made under the Regulatory Reform Act 2000 (RRA).

1.2 A formal consultation was launched on 5 December 2005 and closed on 5 March 2006. Thirty four responses were received, including proposals for new deregulatory measures. In light of these responses we now propose to modify some of our proposals, and to make some new proposals. As a result of the consultation and further analysis, we have decided not to pursue some of the proposals further – our reasoning for this is set out in text. This consultation paper has been sent to all thirty four respondents. It covers the new proposals received, and suggested changes to our initial proposals.

1.3 This consultation paper has also been posted on the Treasury's public website www.hm-treasury.gov.uk/consultations_and_legislation/consult_liveindex.cfm

1.4 The proposals set out in this paper would:

- enable the FSA not to consult on temporary or unwritten guidance, and when consulting on all guidance, relieve the FSA of the requirement to produce a cost-benefit analysis and accompanying statements and accounts (Chapter 3). These proposals remain the same as before;
- remove unnecessary consultation between the FSA and regulators in other countries in the European Economic Area (Chapter 5). We plan to go further here than initially proposed;
- permit the FSA board to delegate the issuing of guidance (Chapter 6). We plan to allow delegation only to a committee or sub-committee of the FSA board, and not to an individual. We plan to go less far here than initially proposed;
- extend the FSA's powers to waive or modify all of its rules in respect of authorised and unauthorised persons (Chapter 7). These proposals remain as before.
- allow the FSA to discontinue or suspend the listing of securities or to cancel the approval of sponsors with fewer procedural requirements where the request for discontinuation, suspension or cancellation comes from the issuer or sponsor himself (Chapters 8 and 9). These proposals remain as before;

lighten authorisation requirements in relation to partnerships whose members change (Chapter 11). This is a completely new proposal.

REGULATORY REFORM ORDERS

1.5 Each of the proposals for inclusion in a proposed Regulatory Reform Order (RRO) has to satisfy the following legal tests:

- **necessary protection** – the Minister making a RRO must be of the opinion that it does not remove any necessary protection. This means that no RRO can be made unless the Minister is of the opinion that it would maintain any protections that the Minister considers to be necessary. Such protection relates to the checks and balances associated with a particular regulatory regime. The protection does not have to be statutory in nature and does not have to be for the purposes originally intended by Parliament. If the Minister considers a particular protection to be no longer necessary, he or she must provide the Parliamentary Committees with evidence to support this view.
- **rights and freedoms** – an RRO cannot be made unless the Minister is satisfied that it does not prevent any person from continuing to exercise any right or freedom which they might reasonably expect to enjoy. This test recognises that there are certain rights that it would not be fair to take away from people via the RRA procedures.

1.6 In order to provide for the effective reform of regulatory regimes, RROs can retain existing burdens and create new burdens. But where that is the case stringent additional safeguards apply:

- **proportionality** – if a new legal burden is being imposed, or an existing burden retained or increased, then the Minister must ensure that it is proportionate to the benefit it brings. This means, for example, that imposing a burden of several thousand pounds for a negligible benefit would not pass the test.
- **fair balance** – before proposing any RRO that has the effect of imposing legal burdens, the Minister must be of the opinion that a fair balance is being struck between the interests of the person affected by the Order and the interests of the wider public. In this context, fairness does not mean that everyone must benefit. It means that the benefit to society as a whole must be such as to justify the additional burden on a small group or the individual.

desirability – the Minister making the RRO must be of the opinion that the extent to which it removes burdens or brings other benefits makes the Order as a whole desirable.

CONSULTATION

How to respond

1.7 The Government welcomes the views of all stakeholders on the issues raised in this document. The consultation period begins with the publication of this document, and will run for 4 weeks. Please ensure that your responses reaches us by 21 June 2006.

1.8 Responses to the consultation should be sent to the following address. Inquiries or comments about the consultation process should be sent to the same address:

Barbara Smith
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Room 4/18
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1 Horse Guards Road
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Email: barbara.smith@hm-treasury.x.gsi.gov.uk

1.9 This document can also be found on the HM Treasury website: <http://www.hm-treasury.x.gsi.gov.uk>.

1.10 When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of a larger organisation, please make it clear who the organisation represents and, where applicable, how the view of members were assembled.

CONFIDENTIALITY DISCLOSURES

1.11 Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily) the Freedom of Information Act 2000 (FOIA), the Data Protection Act (DPA) and the Environmental Information Regulations 2004). If you want the information that you provide to be treated as confidential, please be aware that, under the FOIS, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality will be maintained in all circumstances.

1.12 An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department. The Department will process your personal data in accordance with the DPA, and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

FREEDOM OF INFORMATION CONTACT

I.13 Any Freedom of Information Act queries should be directed to:

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Email: public.enquiries@hm-treasury.x.gsi.gov.uk

REVISED PARTIAL REGULATORY IMPACT ASSESSMENT

I.14 A revised Partial Regulatory Impact Assessment (Partial RIA) is published with this document and should be read in conjunction with it. The revised Partial RIA lays out implementation options and considers qualitative, and where possible, quantitative costs and benefits for each option.

2

LIGHTER CONSULTATION ON RULES

BACKGROUND

2.1 Section 155 of FSMA requires the FSA to consult publicly before issuing virtually all new rules. The proposed rules must normally be accompanied by a cost-benefit analysis, an explanation of the purpose of the rules, and a statement of their compatibility with the FSA's statutory duties under s.2 of FSMA.

2.2 While s.155(7) enables the FSA to dispense with consultation if it considers that the ensuing delay would prejudice the interests of consumers, there are no further exemptions from consultation. This causes two problems, namely:

1. prejudicial delay to others: the FSA must consult even when it considers that the delay caused by consultation would prejudice the interests of firms and others subject to the rules; and
2. consultation for no useful purpose: the FSA must consult where this might serve limited useful purpose, e.g. to correct a clerical or drafting error.

2.3 To mitigate the first problem the FSA has adopted a policy of offering waivers of FSA rules in circumstances where it would be burdensome for firms to have to wait for the outcome of consultation before rules are changed. Under this policy of granting waivers firms must notify the FSA to confirm that they wish to take advantage of a waiver. This procedure can be awkward and costly for both the FSA and for the firms concerned.

2.4 To mitigate the second problem of consulting for limited useful purpose the FSA publishes regular quarterly consultation papers (known as "Miscellaneous CPs") which gather together minor proposals for changes to the FSA's Handbook of rules and guidance.

THE ORIGINAL PROPOSAL

2.5 Our original consultation document proposed to extend the circumstances at s.155(7) in which the FSA is not required to consult on rules (or to comply with the obligations in s.155(1) to (6)) to include the following;

- where the FSA considers delay in making the rules is prejudicial to the interests of anyone affected by the rule (rather than just prejudicial to consumers); and
- where the FSA considers the changes have a minor effect. One option floated was to provide the FSA with discretion to decide what constitutes a 'minor effect', and to support this with an FSA statement of policy. Another option floated was to state in the Order what such changes having a 'minor effect' might be, in particular a minor clarification of existing rules, minor changes consequential upon provisions in domestic or EU legislation, or the correction of a clerical or drafting error.

2.6 As a new safeguard, we proposed that the FSA would only be able to use one of the new exemptions if it considered that the proposal did not significantly prejudice the interests of consumers, and in the case of the minor effect exemption, other persons subject to or affected by the proposal.

CONSULTATION RESPONSES

2.7 The majority of consultation respondents held reservations about the FSA being able to exercise discretion when determining what constitutes a ‘minor effect’ or what constitutes ‘significant prejudice’. Changes which the FSA believes are minor might not be viewed as such by the industry, even if the Order clarifies what ‘minor effect’ might be. Past examples of this difference of views were provided. Many respondents believed that the FSA might not foresee all consequences and implications of any changes, and some believed that changes which are made to avoid prejudicing one part of the industry might prejudice another part in an unforeseen way.

2.8 Many respondents believed that prior notice of new measures should be given in order to allow systems to be adapted in time, and to allow trade bodies and professional advisers to alert their members and clients.

2.9 There was general consensus that ‘minor effect’ should be defined in the Order. Some respondents suggested a narrower definition than that proposed, in particular that ‘minor effect’ should extend only to the correction of clerical, typographical or drafting errors, changes to references in statutory provisions, clarificatory amendments, and changes to form or arrangement - i.e. to changes which have no impact on meaning or emphasis. Some respondents suggested that ‘prejudicial delay’ should somehow be defined more precisely in the Order.

2.10 There was general consensus that proposed changes should be published by the FSA prior to their adoption, perhaps on a set number of fixed dates per year, and that 28 days should be provided to comment about the measure itself, or to propose that a full scale public consultation should be launched. One respondent suggested that any such objections should satisfy narrow formal criteria, in particular that it could be demonstrated clearly that the FSA’s proposals would be disproportionate. There was general consensus that the FSA should be obliged to consider any representations made.

2.11 Other proposals included that all representations and the FSA’s views towards them should be published, that final FSA decisions should be approved by the FSA board, that final FSA decisions should be subject to an appeals process, for example to the Financial Services Practitioner Panel, that the FSA’s annual report should provide an account of how the new powers have been applied, and that the Financial Services Consumer Panel should be given an opportunity to comment on all FSA proposals, even if not subject to full public consultation.

2.12 Many respondents believed that under the new arrangements the FSA should continue to produce a cost-benefit analysis, statement of compatibility with the FSA’s general duties, and account of representations. One respondent felt that a cost-benefit analysis might be replaced with a new requirement to produce a lighter impact statement. One respondent felt that the FSA need not produce a cost-benefit analysis.

2.13 There was general consensus that the FSA should issue a policy statement setting out how the new arrangements would operate in practice, and that the FSA should pre-consult informally with industry prior to suggesting that a particular change might be adopted under the new powers.

2.14 One respondent proposed that arrangements which apply to the FSA should apply equally to the Financial Ombudsman Service, as some rules might be made

jointly by both bodies, and some reform packages might involve both bodies introducing rule changes at the same time.

THE REVISED PROPOSAL

2.15 We have decided to accept the general consensus of industry views. In our view s.155 of FSMA as drafted already allows the FSA and the Financial Ombudsman Service to adopt a lighter touch consultation procedure, including for minor changes. We therefore no longer propose to amend FSMA. We also consider that the requirements of s.155(1) would be satisfied by publication of an appropriate notice on the FSA's website. It is for the FSA to decide whether, and if so what sort of lighter touch consultation procedures to adopt within FSMA, and to discuss this with industry, consumers and others.

ANALYSIS

Necessary Protections

2.16 FSMA will not be amended hence no necessary protections will be removed by the Order.

Rights and Freedoms

2.17 FSMA will not be amended hence the Order will not prevent any person continuing to exercise any rights or freedoms that he might reasonably expect to be able to continue to exercise.

Costs and Savings

2.18 FSMA will not be amended hence the Order will not generate any costs or savings.

New Burdens

2.19 FSMA will not be amended hence the Order will not generate any new burdens or re-enact any existing burdens.

3

LIGHTER CONSULTATION ON GUIDANCE

BACKGROUND

3.1 Section 157(3) of FSMA requires the FSA to consult publicly before issuing any guidance on its rules. The requirement applies also to temporary or unwritten guidance and, in accordance with s.155, must normally be accompanied by a cost-benefit analysis, an explanation of the guidance and a statement of its compatibility with the FSA's statutory duties.

3.2 While the FSA is excused under s.155(7), as with rules, from consulting on proposed guidance where the ensuing delay in issuing guidance would prejudice the interests of consumers, there are no further exemptions from consultation. This causes two problems, namely:

1. prejudicial delay to others: as with rules, the FSA must consult even when the ensuing delay in issuing guidance would prejudice the interests of firms and others subject to the guidance; and
2. consultation for no useful purpose: as with rules, the FSA must consult where this might serve limited useful purpose, e.g. to correct a clerical or drafting error.

3.3 These requirements regarding consultation on guidance place burdens not just on the FSA but also on the public, firms and other stakeholders, since all may allocate resources to considering proposals which are unlikely to be improved or changed by consultation. The scope of the requirement, applying as it does to unwritten and temporary guidance, as well as the obligation to produce a cost-benefit analysis, an explanation of the guidance and a compatibility statement further burdens the FSA with administrative tasks which are not proportionate to the nature of the revisions to the guidance. This burden is likely to increase as the FSA seeks to simplify its Handbook in a number of places and make it more accessible.

THE ORIGINAL PROPOSAL

Narrow Option

3.4 Our original consultation document proposed to widen the range of scenarios in which the FSA has the discretion not to consult (or comply with the requirements of section 155(1) to (6)), namely;

- where the FSA considers delay in making the guidance is prejudicial to the interests of anyone affected by it (rather than just prejudicial to consumers); and
- where the FSA considers the changes have a minor effect. One option floated was to provide the FSA with discretion to decide what constitutes a 'minor effect', and to support this with an FSA statement of policy. Another option floated was to state in the Order what such changes having a 'minor effect' might be, in particular a minor clarification of existing guidance, minor changes consequential upon provisions in domestic or EU legislation, or the correction of a clerical or drafting error.

3.5 As with our proposals on rules, we proposed that the FSA would only be able to use each new exemption if it considered that the proposal did not significantly prejudice the interest of consumers and, in the case of the minor effect exemption, other persons subject to or affected by the guidance. Where the FSA does not consult then the additional requirements in FSMA relating to consultation on guidance would not apply, i.e. the requirements set out in paragraph 3.9 of this document.

3.6 We also proposed to remove the requirement to consult on guidance which is not intended to have continuing effect and unwritten guidance. The FSA would then still have to consult on all guidance given to regulated persons generally or to a class of regulated person, in writing and intended to have more than a temporary effect.

Broad Option

3.7 In addition we consulted upon a proposal to remove the requirement on the FSA, when consulting on any guidance, to produce a cost benefit analysis (s.155(2)(a)), a statement of compatibility with the FSA's statutory duties (s.155(2)(c)), an account of representations made to it in the course of the consultation (s.155(5)) and a note detailing how the final guidance differs from the draft circulated for consultation (s.155(6)).

3.8 We proposed that if this 'broad option' was adopted the FSA would issue a policy statement so that firms and consumers would be able to see how they intended to handle the revised consultation procedures.

CONSULTATION RESPONSES

Narrow option

3.9 Many consultation respondents expressed similar views about these proposals as they did about the proposals to relax the FSA's need to consult on rule changes. Respondents noted that compliance with guidance is treated by firms almost as seriously as compliance with rules and that guidance is becoming more important as rules become more principle-based.

3.10 Some respondents noted that FSA 'guidance' currently takes many forms, ranging from formal guidance found in the FSA handbook of rules, to the less formal discussion papers, market watch publications, and List! publications, to FSA speeches and 'Dear Chief Executive Officer' letters. Much of this material is not formally classified as guidance and hence not subject to consultation. It was suggested that a clearer distinction needs to be made between this range of communications, including to help clarify what force applies to each type of communication, and that all these communications should be published by the FSA in a more coherent way.

3.11 In relation to formal FSA guidance, many consultation respondents held reservations about the FSA being able to exercise discretion when determining what constitutes a 'minor effect' or what constitutes 'significant prejudice'. Changes which the FSA believes are minor might not be viewed as such by the industry, even if the Order clarifies what 'minor effect' might be. Past examples of this difference of views were provided. Many respondents believed that the FSA might not foresee all consequences and implications of any changes, and some believed that changes which are made to avoid prejudicing one part of the industry might prejudice another part in an unforeseen way. Many respondents believed that prior notice of new measures

should be given in order to allow systems to be adapted in time, and to allow trade bodies and professional advisers to alert their members and clients.

3.12 There was general consensus that ‘minor effect’ should be defined in the Order. Some respondents suggested a narrower definition than that proposed, in particular that ‘minor effect’ should extend only to the correction of clerical, typographical or drafting errors, changes to references in statutory provisions, clarificatory amendments, and changes to form or arrangement - i.e. to changes which have no impact on meaning or emphasis. Some respondents suggested that ‘prejudicial delay’ should somehow be defined more precisely in the Order.

3.13 There was general consensus that proposed changes should be published by the FSA prior to their adoption, perhaps on a set number of fixed dates per year, and that 28 days should be provided to comment about the measure itself, or to propose that a full and formal public consultation should be launched. One respondent suggested that any such objections should satisfy narrow formal criteria, in particular that it could be demonstrated clearly that the FSA’s proposals would be disproportionate. There was general consensus that the FSA should be obliged to consider any representations made.

3.14 Other proposals included that all representations and the FSA’s views towards them should be published, that final FSA decisions should be approved by the FSA board, that final FSA decisions should be subject to an appeals process, for example to the Financial Services Practitioner Panel, that the FSA’s annual report should provide an account of how the new powers have been applied, and that the Financial Services Consumer Panel should be given an opportunity to comment on all FSA proposals, even if not subject to full and formal public consultation.

3.15 Few consultation responses related specifically to the proposal that the FSA should no longer consult on guidance which is not intended to have a continuing effect and on unwritten guidance, some sought more clarification on this proposal.

3.16 There was general consensus that the FSA should issue a policy statement setting out how the new arrangements would operate in practice, and that the FSA should pre-consult informally with industry prior to suggesting that a particular change might be adopted under the new powers.

3.17 One respondent proposed that arrangements which apply to the FSA should apply equally to the Financial Ombudsman Service, as some rules might be made jointly by both bodies, and some reform packages might involve both bodies introducing rule changes at the same time.

Broad option

3.18 A number of respondents supported the ‘broad option’, i.e. that in relation to all guidance the FSA should not have to produce a cost-benefit analysis, statement of compatibility with the FSA’s general duties, account of representations, and note detailing how the final guidance differs from the initial draft. Some other respondents opposed the ‘broad option’ and others felt that a full cost-benefit analysis for guidance having a minor effect might be replaced with a new requirement to produce a lighter impact statement.

THE REVISED PROPOSAL

Narrow option

3.19 We have decided to accept the consensus of industry views. As with consultation on rules, we consider that FSMA currently allows the FSA to adopt a lighter-touch consultation process, including in relation to minor changes. We therefore no longer propose to amend FSMA for this purpose. As with consultation on rules, it is for the FSA to determine its consultation procedures, in light of discussions the FSA may have with industry, consumers and others.

3.20 We intend to proceed with the proposal that FSMA should no longer consult on unwritten guidance and on guidance which is not intended to have a continuing effect. This is a proportionate measure which is consistent with the principles underlying the existing arrangements in s.158 of FSMA.

Broad option

3.21 We consider that in relation to all forms of guidance, the FSA should not be required by FSMA to produce a cost-benefit analysis (s.155(2)(a)), explanation of the purpose of the proposed rules (s.155(2)(b)), explanation of the FSA's reasons for believing that making the proposed rules is compatible with the FSA's general duties (s.155(2)(c)), account of representations made (s.155(5)) and note detailing how the final guidance differs from the initial draft (s.155(6)). The FSA could still choose to produce such analyses, explanations, accounts and notes where it considers this would be appropriate, and the FSA could still choose to produce a policy statement on this. These would be matters for the FSA. This new approach should give the FSA more flexibility and more of an incentive to issue communications in the form of guidance.

3.22 We propose that these reforms should apply in the same way to the Financial Ombudsman Service.

ANALYSIS

Necessary Protections

3.23 We do not consider that any necessary protections will be lost by removing the legal obligation on the FSA to meet the requirements in s.155(2)(a), s.155(2)(b), s.155(2)(c), s.155(5) and s.155(6). We consider that the continued requirement to consult, to bring proposed guidance to the attention of the public and to take account of any representations received will continue to provide the appropriate level of safeguard.

3.24 We do not consider that any necessary protections will be lost by removing the legal obligation on the FSA to consult on unwritten guidance and on guidance not intended to have continuing effect. The requirements of s.2 of FSMA should continue to provide the necessary protections appropriate for these kinds of communication.

Rights and Freedoms

3.25 Those subject to or affected by the guidance and consumers will still be able to exercise the rights and freedoms they might reasonably expect to be able to exercise. These reforms simply provide the FSA with greater flexibility to provide guidance, and

encourage the FSA to issue more communications in the form of guidance, hence both reducing burdens and providing industry with more clarity.

Costs and Savings

3.26 The new flexibilities applying to the FSA should benefit industry by leading to a more coherent body of communications which formally constitute guidance, and by enabling the FSA to produce guidance more swiftly.

New Burdens

3.27 The Order will not generate any new burdens or re-enact existing burdens.

4

LIGHTER CONSULTATION ON OTHER MATTERS

BACKGROUND

4.1 FSMA requires the FSA to consult on a variety of matters other than rules and guidance, including codes of practice, policy statements on the imposition of penalties, statements of the FSA's decision-making procedure and arrangements for investigating complaints.

4.2 On some of these matters, as with rules and guidance, the FSA is exempted from the need to consult if it considers that the delay would be prejudicial to consumers. But, as with rules and guidance, there are no further exemptions from consultation and the FSA encounters the same two problems seen in the last two chapters:

3. prejudicial delay to others: the FSA must consult even when it considers that the delay caused by consultation would prejudice the interests of firms and others subject to the rules; and
4. consultation for no useful purpose: the FSA must consult where this might serve limited useful purpose, e.g. to change a clerical or drafting error.

4.3 Unnecessary consultation places burdens on not just the FSA but also on the public, firms and other stakeholders, since all may allocate resources to considering and reviewing proposals which are unlikely to be improved by consultation.

THE ORIGINAL PROPOSAL

4.4 Our original consultation document proposed, as with rules and guidance, to loosen the consultation requirements which apply to these policy statements, codes, and directions.

4.5 On the matters listed at paragraph 4.6 of this document, FSMA already grants the FSA the option not to consult if delay would be prejudicial to the interests of consumers. We proposed to widen that discretion to allow the FSA - subject to the safeguard described in paragraph 4.11 of this document - not to consult where;

- the FSA considers that delay in making the changes is prejudicial to the interests of those subject to or affected by the proposal; or
- the FSA considers the changes have a minor effect. One option floated was to provide the FSA with discretion to decide what constitutes a 'minor effect', and to support this with an FSA statement of policy. Another option floated was to state in the Order what such changes having a 'minor effect' might be, in particular a minor clarification of the existing document, minor changes consequential upon provisions in domestic or EU legislation, or the correction of a clerical or drafting error.

4.6 The matters are:

- Statements of principle in relation to the conduct expected of approved persons (Section 65)

Section 64 of FSMA enables the FSA to issue statements of principle with respect to the conduct expected of approved persons. A failure to comply

with a statement of principle amounts to misconduct under section 66 and if the FSA takes action against the person, it may impose a penalty or publish a statement of the person's misconduct. Codes of practice may specify descriptions of the type of conduct, which, in the opinion of the FSA, comply with the statement of principle. At present, before issuing statements or codes of practice the FSA must allow representations to be made and must have regard to the representations (Section 65).

- Procedure for giving a direction as to whether the general prohibition does not apply to the carrying on of an insurance market activity by members of Lloyds (Section 319)

Sections 316 and 318 broadly provide that the general prohibition (i.e. no person may carry on a regulated activity without authorisation) shall not apply, or that core provisions shall apply, to Lloyd's underwriters unless a direction has been made by the FSA. Section 319 sets out the procedures to be followed.

- Directions in relation to the general prohibition under Part XX of FMSA – provision of financial services by members of the professions (Section 330)

The general prohibition does not apply to members of a profession provided certain requirements are complied with and that a direction under section 328 has not been made (section 327). Section 328 provides that the FSA may direct that the general prohibition shall apply to specified classes of person or specified classes of activity. Section 330 sets out the procedure which must be followed before a direction is made.

4.7 On the matters listed at paragraph 4.9 of this document the FSA must consult in all cases and we did not propose to introduce the exemption regarding prejudicial delay to consumers or others affected by the changes.

4.8 However we did propose to grant the FSA the discretion not to consult where the FSA considers the changes comprise a minor clarification of the existing document, minor changes consequential upon provisions in legislative instruments (this includes domestic and EU legislation), or the correction of a clerical or drafting error.

4.9 The matters are:

- Statements of policy on the imposition on approved persons of warnings and decision notices, penalties and their amount (Section 70)

Section 69 FSMA requires that the FSA must issue a statement of its policy with respect to the imposition of penalties for the misconduct of approved persons and the amount of penalty under that section. Section 70 sets out the procedure that must be applied before the statement is issued.

- Statements of policy on the imposition of penalties on issuers of listed securities or applicants for listing and issuers of financial instruments and certain persons connected to them (Section 94)

If the FSA considers that an issuer of securities, an applicant for listing, an issuer who has requested or approved the admission of the instrument to trading on a regulated market, a person discharging managerial responsibilities within such an issuer, or a person connected to such a person discharging managerial responsibilities, has contravened any provision of the Part VI rules, it may impose on him a penalty of such amount as it considers appropriate. The FSA must also issue a statement of

its policy with respect to the imposition and amount of such penalties and sets out the procedure that must be applied before the policy is issued (section 94).

- The scheme for distributing income from fines levied under Part VI of FSMA (Section 100)

The FSA may impose penalties relating to the listing of securities under Part VI of FSMA. Section 100 provides that the FSA must operate a scheme to ensure that the amounts paid to the FSA are applied for the benefit of issuers of securities admitted to the official list, and issuers who have requested or approved the admission of financial instruments to trading on a regulated market. It also sets out the procedure that must be applied before the scheme is made.

- The Code giving guidance as to what behaviour constitutes market abuse (Section 121)

Section 118 sets out the definition of market abuse. Under section 119 the FSA must issue a code, which gives guidance to those determining whether or not behaviour amounts to market abuse and whether or not behaviour is or is not accepted market practice. Section 121 requires that the FSA must consult upon the code before it is issued.

- Statements of policy on the imposition of penalties in relation to market abuse (Section 125)

The FSA must issue a statement of its policy with respect to the imposition of penalties for market abuse and the amount of such penalties under that section. Section 125 sets out the procedure that must be applied before the policy is issued.

- Statements of policy on the imposition of disciplinary measures on an authorised firm (Section 211)

The FSA must issue a statement of its policy with respect to the imposition of penalties and the amount imposed under Part XIV FSMA. Section 211 sets out the procedure that must be applied before the policy is issued.

- Statements of procedure regarding supervisory, warning or decision notices (Section 396)

Section 395 requires that the FSA must determine the procedure that it shall follow in relation to the giving of warning notices and decision notices (e.g. for penalties) and supervisory notices. Section 396 sets out the procedure, which must be followed before such statement of procedure are issued.

- Schemes for investigating complaints against the FSA (Schedule 1 para 7)

The above paragraph provides that the FSA must establish a complaints scheme for the investigation of complaints arising in connection with the exercise or failure to exercise its functions. It contains procedures to be followed before the scheme is issued and these include consultation.

- Details of a scheme in relation to the amount of penalties imposed under the Act (Schedule 1 para 16)

Various provisions within FSMA provide that the FSA may impose penalties. The above paragraph provides that the FSA must operate a scheme to ensure that the amounts paid to the FSA are applied for the benefit of

authorised persons. It also sets out the procedure that must be applied before the scheme is made. (Chapter 10 of this document proposes that others may also benefit from this scheme).

CONSULTATION RESPONSES

4.10 As with the consultation proposals relating to relaxing the FSA's need to consult on rules and guidance, many consultation respondents held reservations about the FSA being able to exercise discretion when determining what constitutes a 'minor effect' or what constitutes 'significant prejudice'. Changes which the FSA believes are minor might not be viewed as such by the industry, even if the Order clarifies what 'minor effect' might be. Past examples of this difference of views were provided. Many respondents believed that the FSA might not foresee all consequences and implications of any changes, and some believed that changes which are made to avoid prejudicing one part of the industry might prejudice another part in an unforeseen way.

4.11 Many respondents believed that prior notice of new measures should be given in order to allow systems to be adapted in time, and to allow trade bodies and professional advisers to alert their members and clients.

4.12 There was general consensus that 'minor effect' should be defined in the Order. Some respondents suggested a narrower definition than that proposed, in particular that 'minor effect' should extend only to the correction of clerical, typographical or drafting errors, changes to references in statutory provisions, clarificatory amendments, and changes to form or arrangement - i.e. to changes which have no impact on meaning or emphasis. Some respondents suggested that 'prejudicial delay' should somehow be defined more precisely in the Order.

4.13 There was general consensus that proposed changes should be published by the FSA prior to their adoption, perhaps on a set number of fixed dates per year, and that 28 days should be provided to comment about the measure itself, or to propose that a full and formal public consultation should be launched. There was general consensus that the FSA should be obliged to consider any representations made.

4.14 Other proposals included that all representations and the FSA's views towards them should be published, that final FSA decisions should be approved by the FSA board, that final FSA decisions should be subject to an appeals process, for example to the Financial Services Practitioner Panel, that the FSA's annual report should provide an account of how the new powers have been applied, and that the Financial Services Consumer Panel should be given an opportunity to comment on all FSA proposals, even if not subject to full scale public consultation.

4.15 One respondent was concerned in particular about the FSA being able to make minor changes to statements of principle relating to the conduct expected of approved persons (s.65). One respondent was content in particular for the proposed more flexible consultation arrangements to apply to the code giving guidance as to what behaviour constitutes market abuse (s.121), another respondent opposed this particular proposal.

THE REVISED PROPOSAL

4.16 We agree with this consensus of industry views. In our view FSMA as drafted already allows the FSA to adopt a lighter touch consultation procedure, including for minor changes. We therefore no longer propose to amend FSMA. It is for the FSA to

decide exactly what sort of lighter touch consultation procedures to adopt within FSMA, and to discuss this with industry, consumers and others.

ANALYSIS

Necessary Protections

4.17 FSMA will not be amended hence no necessary protections will be removed by the Order.

Rights and Freedoms

4.18 FSMA will not be amended hence the Order will not prevent any person continuing to exercise any rights or freedoms that he could reasonably expect to be able to continue to exercise.

Costs and Savings

4.19 FSMA will not be amended hence the Order will not generate any costs or savings.

New Burdens

4.20 FSMA will not be amended hence the Order will not generate any new burdens or re-enact any existing burdens.

5

FSA CONSULTATION WITH EEA REGULATORS

BACKGROUND

5.1 Sub-section 49(2) of FSMA requires the FSA to consult a European Economic Area (EEA) firm's home state regulator before granting permission¹ to carry out a regulated activity to a person who is connected with that firm; or cancelling or varying such a permission.

5.2 The sub-section implements parts of various EC Directives.² However, while the EC Directive provisions were designed to ensure that other European regulators were consulted before authorisation was granted or expanded, s.49(2) over-implements the requirements by compelling the FSA to consult other regulators when cancelling or narrowing a permission.

5.3 The s.49(2) provisions are burdensome in cases where major financial groups such as insurers and banks apply to cancel or vary permissions since such groups will have authorised entities in many of the other 24 EU Member States.

5.4 Exceeding the minimum requirements of EC Directives in this way has resulted in a certain degree of reputational damage to the FSA as EEA regulators have complained about such consultation not covered by EC Directives. Various regulatory authorities across the EEA have confirmed that they are not required to consult home state regulators when varying or cancelling the authorisation of a connected person.

THE ORIGINAL PROPOSAL

5.5 We proposed to amend s.49(2) to require the FSA to consult with EEA regulators only as required by the relevant EC Directives. In particular, we proposed to;

- remove the requirement to consult European regulators prior to cancelling a permission;
- remove the requirement to consult where a variation narrows the scope of a permission.

5.6 We proposed that the FSA should still be required to consult prior to the grant of a permission and prior to a variation which extends the scope of a firm's permission.

CONSULTATION RESPONSES

5.7 All 17 consultation respondents who expressed a view on these proposals agreed with them. One respondent proposed that although requirements on the FSA to consult with overseas regulators could be dropped, the FSA should still be required to notify overseas authorities of the changes in question. Four respondents proposed that we could go further. In particular that the FSA need not consult other EEA regulators when extending a permission, as EC Directives only require the FSA to consult in relation to authorisation applications. These respondents did not support existing UK

¹ Permission to carry on a regulated activity is obtained under Part IV FSMA.

² Article 12 of the Banking Consolidation Directive (2000/12/EC); Article 6 of the Investment Services Directive (93/22/EC); Article 5b(3) UCITS Directive (85/611/EC) (which were all amended by the Conglomerates Directive (2002/87); and Article 39 of the Consolidated Life Assurance Directive (85/611/EC).

super-equivalence. Some of these respondents suggested that the Treasury should be able to make regulations which specify when the FSA should consult with other EEA regulators. Some of these respondents also suggested that EC Directives might not require the FSA to consult with other EEA regulators when an existing FSA permission is extended and where this happens to involve business being conducted under a different EC Directive (for example if a bank decides to act as a general insurance intermediary).

THE REVISED PROPOSAL

5.8 We agree with consultation respondents that the UK should not introduce obligations which exceed the minimum required by EC Directives, especially as this does not appear to be supported by cost-benefit analysis nor favoured by industry. Unjustified consultation, albeit between regulators, is still costly to industry as financial regulators are funded via industry fees.

5.9 We intend to amend s.49(2) to remove the requirement on the FSA to consult EEA regulators prior to cancelling or varying a permission (including variations which extend a permission). We do not propose to place a legal obligation on the FSA to notify other EEA regulators in these circumstances. Instead we propose to leave this to the FSA's discretion.

5.10 Upon reflection we consider that the relevant EC Directives require the FSA to consult other EEA regulators when a person authorised by the FSA expands their business activities and as a result starts to conduct business which is covered by a different EC Directive. For example, if a banking group wished to begin acting as a general insurance intermediary the FSA would need to consult other EEA regulators, even though domestically this would simply involve the extension of an existing FSA permission.

ANALYSIS

Necessary Protections

5.11 The requirements of s.49(2) act as protections. However, insofar as those requirements are super-equivalent to the Directive requirements, we do not regard them as 'necessary protections'. Therefore no necessary protections will be removed. Those consulted did not indicate that these proposals would remove any necessary protections.

Rights and Freedoms

5.12 Our proposed Order will not prevent anybody from exercising any rights or freedoms that he could reasonably expect to be able to continue to exercise. They simply involve removing a requirement to consult with EEA regulators, a requirement which EEA regulators find burdensome and do not value.

Costs and Savings

5.13 The FSA will only be required to consult to the extent required by the Directives. This will save the FSA and EEA regulators time and resources. Firms to whom s.49(2) applies will be saved from having to provide more information than is required by the EC Directives which should make the variation of permission process less time

consuming. The FSA issues around 15 variations of permission per year which involve cancellations or narrowing of the permission and many more that involve an increase in scope of permission that would not involve a firm obtaining authorisation under a new EC Directive. Many involve notifying more than one other EC regulator, some involve notifying all. Without these notification requirements each permission could be processed between 10-20 days quicker.

New Burdens

5.14 No new burdens will be imposed and no existing burdens will be re-enacted.

Additional note on RRA compliance

5.15 Section 1(4) of the RRA provides that an RRO cannot apply to provisions which have been amended (other than for consequential or incidental purposes) within the preceding two years. This sub-section of FSMA was amended by SI 1610/2004 in order to implement the EC Insurance Mediation Directive (2002/92/EC). However, the amendments can be described as consequential or incidental, because the effect was to disapply the sub-section for the purposes of (or in connection with) the newly specified activities of insurance mediation rather than to amend the application of s.49(2) to existing activities covered by the legislation. Therefore the test at section 1(4) of the RRA is met.

6

DELEGATING THE ISSUANCE OF GUIDANCE

BACKGROUND

6.1 FSMA requires the FSA board formally to approve all general guidance³ issued by the FSA, regardless of its importance. The requirement stems from Schedule 1, paragraph 1(2), which stipulates that issuing general guidance is one of the FSA's legislative functions; and from Schedule 1, paragraph 5(2) which provides that, in exercising its legislative functions, the FSA must act through its governing body.

6.2 However, much FSA guidance is routine or technical in nature. Guidance issued by comparable regulatory organisations, such as the Office of Fair Trading is not required to be considered by the board and nor is guidance issued by the Financial Ombudsman Service.

THE ORIGINAL PROPOSAL

6.3 We proposed to include an exception in Schedule 1, paragraph 5(2) allowing the board of the FSA to delegate the task of issuing general guidance to a committee, sub-committee, officer or member of staff.

CONSULTATION RESPONSES

6.4 Consultation respondents generally agreed with these proposals, subject to some qualifications. A number of respondents did not agree that the making of guidance should be delegated to one individual. Some proposed instead that the board could delegate this responsibility to a committee of the board comprising senior executives, which would report periodically to the board.

6.5 Others agreed with the original proposal on condition that new checks, balances and processes are introduced to ensure that guidance produced in this way continues to meet the FSA's statutory objectives, is consistent, high quality, published centrally and widely, and identified as having been produced this way. These respondents did not suggest what such mechanisms might be.

6.6 Two respondents disagreed with the original proposal, citing the importance of board approval.

THE REVISED PROPOSAL

6.7 We agree with the thrust of responses that the board of the FSA should be able to delegate the task of issuing general guidance to a committee or sub-committee of the board, but not to an individual. It will be for the FSA to issue a policy statement which explains how the new arrangements would operate. This should provide the necessary reassurances about consistency, quality, and publication. This should also explain who will sit on the committee or sub-committee, and how it will be held to account to the board.

6.8 The FSA Handbook of Rules is structured with rules and guidance alongside each other. Most significant changes involve amending both rules and guidance and

³ General guidance is defined in section 158(5) of FSMA as guidance which is given to persons generally, to regulated persons generally or to a class of regulated person; intended to have continuing effect; and given in writing or other legible form.

would continue to be considered by the FSA board in the same way as now. The most significant exception to this is the guidance relating to rules on collective investment schemes.

ANALYSIS

Necessary Protections

6.9 Given the status and nature of FSA guidance - which unlike FSA rules does not have the force of legislation, but which provides assistance with how rules should be implemented - we do not consider that board approval of guidance constitutes a necessary protection. The delegation of approval to a committee or sub-committee would ensure that guidance was still subject to internal checks and balances, but it would not be subject to the more lengthy procedures attendant upon obtaining approval from the board. Therefore, the balance of advantage, for both the FSA and those to whom the guidance applies, lies in giving the board greater flexibility to delegate the issuing of guidance.

Rights and Freedoms

6.10 Our proposed Order will not prevent anybody from exercising any rights or freedoms that he could reasonably expect to be able to continue to exercise.

Costs and Savings

6.11 The board of the FSA would be free to delegate the issuing of guidance to a committee or sub-committee. This will allow the board to focus on more important issues and increase the efficiency of the FSA in approving and issuing guidance, to the benefit of firms and consumers, who rely on such guidance to interpret the FSA's rules. In addition, the FSA will no longer have to analyse whether the guidance is "general guidance" under s. 158(5), and in need of full board consideration. Additionally, less time and resources will be consumed preparing the "board pack". This involves preparing detailed paperwork which is scrutinised by FSA legal advisers.

6.12 These proposed changes will enable the FSA to issue material with the status of guidance in a more timely and responsive manner than at present, which should lead to reduced compliance costs.

New Burdens

6.13 No new burdens will be imposed and no existing burdens will be re-enacted.

7

REMOVING RESTRICTIONS ON WAIVERS AND MODIFICATIONS

BACKGROUND

7.1 Section 148 of FSMA confers on the FSA a power to waive or modify its rules if it believes the rule concerned is unduly burdensome or does not achieve its purpose. However this Section, as currently drafted, does not allow the FSA to waive or modify rules which relate to unauthorised persons. Additionally, the FSA may only waive or modify rules falling within the list of categories contained at s.148(1).

7.2 It seems anomalous that the FSA is unable to grant waivers to all those subject to its rules. For example, exempt professional firms and applicants subject to application fees are not authorised persons but they are subject to FSA rules. Furthermore, some of the rules which are currently specified in s.148 cannot be waived as they apply to unauthorised persons, for example appointed auditors and actuaries – on whom duties may be imposed in rules under s.340 and unauthorised persons who have applied for authorisation, or granted permission from a future date.

7.3 Meanwhile the list at section 148 is restrictively small: it does not specify, for example, the funding rules applicable to the Financial Services Compensation Scheme and to the Financial Ombudsman Service, nor the FSA's procedural rules for complaints handling by firms - thus preventing the FSA from waiving or modifying such rules where appropriate. Similarly, approved persons rules are not specified with the result that, for example, the FSA would be unable to consider waiving its controlled function rules which require a firm to apply for approved person status for each of its directors even though the regulated business formed only a small proportion of its total activities.

THE ORIGINAL PROPOSAL

7.4 We proposed to amend s.148(1) to allow the FSA to waive or modify all of its rules and in respect of both authorised and unauthorised persons.

CONSULTATION RESPONSES

7.5 All those who responded to these consultation proposals agreed with them. One respondent proposed that the FSA should set out which rules could not be waived or modified due to EC law prohibitions. Two respondents were concerned about how FSA processes would cope with an increased volume of requests such as to ensure fair and equal treatment. One respondent proposed that FSA processes should be clearly defined and published, including how persons may apply, how their application will be assessed, and how outcomes will be published.

7.6 One respondent proposed that the Financial Ombudsman Service should benefit from equivalent additional flexibilities, in particular in relation to voluntary jurisdiction rules made under section 227 of FSMA and in relation to the standard terms in the voluntary jurisdiction made under schedule 17, paragraph 18 of FSMA. This would enable the Financial Ombudsman Service to ensure that there was symmetry between the compulsory and consumer credit jurisdictions.

THE REVISED PROPOSAL

7.7 We intend to retain the original proposal with no revisions. We do not consider that the Financial Ombudsman Service should waive or modify the voluntary jurisdiction rules (which deal with the scope of the voluntary jurisdiction) for a single person and in relation to the standard terms, as the Financial Ombudsman Service already has a power to make different terms for different matters or different cases we do not consider that a waiver or modification power would provide any additional flexibility. It is for the FSA to decide how to explain to industry how its waiver and modification processes work.

ANALYSIS

Necessary Protections

7.8 Section 148 contains various requirements which must be fulfilled before the FSA waives or modifies a rule. There is no suggestion that these requirements will be revoked or reduced as they apply to the existing provisions and they will be applied to any new provision. Accordingly, no necessary protection will be removed.

Rights and Freedoms

7.9 Our proposed Order will not prevent anybody from exercising any rights or freedoms that he could reasonably expect to be able to continue to exercise.

Costs and Savings

7.10 The FSA will be able to waive or modify all of their rules as long as they are satisfied that;

- compliance by the person with the rules, or with the rules as unmodified, would be unduly burdensome or would not achieve the purpose for which the rules were made; and
- the waiver or modification would not result in undue risk to persons whose interests the rules are intended to protect.

7.11 Firms and persons not currently subject to FSMA's waiver and modification provisions would benefit from the greater flexibility that the amendment will bring. Currently around 1150 waivers are granted per year by the FSA, spread evenly in all areas where waivers can be granted.

New Burdens

7.12 No new burdens will be imposed.

BACKGROUND

8.1 FSMA requires the FSA to follow certain procedures prior to discontinuing or suspending the listing of a security. In particular, the FSA must notify the issuer of the details of the discontinuance or suspension (s.78(3)(a)), the reasons for the FSA's decision (s.78(3)(b)), the right to make representations (s.78(3)(c)), the date on which the discontinuance or suspension took, or will take, effect (s.78(3)(d) and the right to refer the matter to the Tribunal (s.78(3)(e)) as provided for by s.77(5). These provisions implement, in part, Articles 18 and 19 of the EC Admissions Directive (2001/34/EC).

8.2 Clearly, these procedures are appropriate where the discontinuation or suspension has been initiated by the FSA and such action is being resisted by the issuer. However, where the cancellation or suspension is initiated at the request of the issuer, the procedural requirements appear to serve no useful purpose. The company necessarily knows and has no need to make representations or refer the matter to the Financial Services and Markets Tribunal. The market is informed by market announcements published in accordance with the Listing Rules.

THE ORIGINAL PROPOSAL

8.3 Where the issuer seeks to discontinue or suspend the listing of a security, we proposed to remove the obligation on the FSA to fulfil the following procedural requirements; the reasons for the FSA's decision (s.78(3)(b)); the right to make representations (s.78(3)(c)); and the right to refer the matter to the Tribunal (s.78(3)(e)). We proposed in addition as a consequential amendment to remove the anomaly in section 77(5) of FSMA which allows an issuer to petition the Tribunal about a discontinuation or suspension when that discontinuation or suspension was requested by that issuer. However, in order to protect the rights of the issuer we proposed inserting a provision allowing him to make representations and refer the matter to the Tribunal if the FSA refuses his request to discontinue or suspend the listing of the securities.

CONSULTATION RESPONSES

8.4 All those who responded to these proposals supported them.

THE REVISED PROPOSAL

8.5 We propose to retain the original proposal with no revisions.

ANALYSIS

Necessary Protections

8.6 We propose to retain the requirements on the FSA to give details of the discontinuance or suspension and to inform the issuer of the date on which the discontinuance or suspension took place or will take place. In addition, we will allow an issuer to refer the matter to the Tribunal if the FSA refuses their request. Given that the

issuer will himself be applying for the discontinuance or suspension, we do not regard the remaining requirements in section 78 as necessary protections.

Rights and Freedoms

8.7 Our proposed Order will deny access to the Tribunal (for the purpose of making representations on the discontinuance or suspension) only to those whose securities were discontinued or suspended from listing on the application of their issuer. However, given that the discontinuance or suspension will occur by consent we do not consider that this proposal will prevent anybody from exercising any rights or freedoms that he could reasonably expect to be able to continue to exercise.

Costs and Savings

8.8 In a typical two-week period in July 2005, the FSA had to deal with 18 cancellation requests and 7 suspension requests under the s.78 procedure. Under our proposal the quantity of unnecessary paperwork would be reduced, benefiting both the FSA and the issuer. Around 1 FSA person day was involved in total processing all of these requests.

New Burdens

8.9 We will insert provisions regarding the giving of notice and warning notice if the FSA decide not to grant the request to de-list or suspend listing. The FSA will have to consider any representations received and the issuer may apply to the Tribunal if the FSA reject their application. This is a proportionate and fairly balanced response because it protects the interests of the issuer in an area which directly affects the way in which they can carry on business, whilst also leaving the FSA room to make the right supervisory decisions. Accordingly, the desirability test is also met.

EC Compliance

8.10 Articles 18 and 19 of the EC Admissions Directive (2001/34/EC) provide as follows:

- 18(1): The competent authorities may decide to suspend the listing of a security where the smooth operation of the market is, or may be, temporarily jeopardised or where protection of investors so requires.
- 18(2): The competent authorities may decide that the listing of the security be discontinued where they are satisfied that, owing to special circumstances, normal regular dealings in a security are no longer possible.
- 19: Member States shall ensure decisions of the competent authorities refusing the admission of a security to official listing or discontinuing such a listing shall be subject to the right to apply to the courts.

8.11 Article 19 is parasitic upon Article 18. Article 18 sets out the circumstances in which the competent authority can unilaterally decide to suspend or discontinue listing, but it does not limit the authority's right to suspend or discontinue with the consent of the issuer. This can be dealt with in national provisions, provided that the objectives of the Directive are not compromised. Our proposal removes the issuers right to apply to the Tribunal to challenge such a decision, where the suspension or discontinuance is carried out at the request of the issuer. That said, we have retained

the right to refer the matter to the Tribunal where the FSA refuse to grant the issuer's request to discontinue or suspend the listing of the security. The proposal is a modest one and will not jeopardise the purpose of the Directive since it does not reduce protection for investors. The right removed from issuers in the UK would be irrational for them to use, since it would involve challenging a decision which they had themselves requested.

CANCELLING SPONSOR APPROVAL

BACKGROUND

9.1 FSMA requires the FSA to issue a warning notice before cancelling a sponsor's⁴ permission – even when cancellation is at the request of the sponsor. Persons in receipt of such a warning notice may appeal to the Financial Services and Markets Tribunal.

9.2 The requirement to issue a warning notice is contained at sub-section 88(4). Sub-sections 88(5) and 88(6) proscribe the way the FSA must treat representations made in response to the warning notice; while sub-section 88(7) provides for the right of appeal to the Tribunal.

9.3 The notice arrangements presume a contentious background to cancellation. Clearly the arrangements are appropriate where the cancellation has been initiated by the FSA and such action is being resisted by the sponsor. However, where the cancellation is initiated at the request of the sponsor, the requirement serves no useful purpose. The market is informed by announcements published on the FSA website. The sponsor necessarily knows and has no need to be given a warning notice or make representations to the Tribunal.

9.4 Requiring the FSA and the sponsor in question to follow the s.88 procedure appears to have resulted from an oversight when FSMA was being drafted. There are procedures similar to s.88 for the cancellation of a firm's Part IV permission (see s.54) or the de-recognition of a Recognised Investment Exchange or Recognised Clearing House (see s.298). However, these other procedures (in s.54 and s.298) are not required if the cancellation of permission or de-recognition is at the request of the person concerned. The procedure in s.88, on the other hand, must be followed even if cancellation is requested by the sponsor. This appears to be disproportionate.

THE ORIGINAL PROPOSAL

9.5 We proposed to amend s.88(4) so that the FSA is exempt from issuing a warning notice in cases where the cancellation is at the request of the sponsor. Sub-sections 88(5) to (7) reference the issue of a warning notice and so by removing the need to issue a notice, we would remove the requirement upon the FSA to follow the procedure set out therein. This would mean that the sponsor would not have access to the Tribunal.

CONSULTATION RESPONSES

9.6 All those who responded to these proposals supported them. One respondent proposed that the market should be informed by a clear statement on the FSA website and the sponsor should be informed that their approval has been cancelled.

THE REVISED PROPOSAL

9.7 We propose to retain the original proposal, and to allow the FSA to decide how best to ensure that the cancellation of a sponsor's approval is communicated and publicised.

⁴ A sponsor is a person approved by the FSA to perform services on behalf of others, as required by the listing rules.

ANALYSIS

Necessary Protections

9.8 Given that the person will himself be applying for the cancellation, we do not consider that our proposal will remove any necessary protections.

Rights and Freedoms

9.9 Our proposed Order will deny access to the Tribunal to those who themselves make an application to cancel their permission to act as a sponsor. However, given that the cancellation will be by consent we do not consider that the proposal will prevent anybody from exercising any rights or freedoms that he could reasonably expect to be able to continue to exercise.

Costs and Savings

9.10 In the nine months to July 2005, for example, the FSA dealt with nine voluntary applications for cancellation of sponsor status, necessitating the issuance of a warning notice, final notice, and decision notice in each instance – a process that often spans several weeks. Under our proposal this superfluous paperwork, which burdens both the FSA and firms, would be eliminated. Around 1 FSA person day in total was involved in processing all of these requests.

New Burdens

9.11 No new burdens will be imposed and no existing burdens will be re-enacted.

BACKGROUND

10.1 Under Schedule 1, paragraph 16(2) FSMA, the FSA must apply market abuse penalty income for the benefit of authorised persons. This means that recognised exchanges and listed and non-listed issuers cannot benefit from the application of these types of penalty income. The principal purpose of financial penalties is to promote high standards of regulatory conduct by deterring those firms which may contemplate failing to meet appropriate regulatory standards, and by rewarding firms with good compliance systems.

THE ORIGINAL PROPOSAL

10.2 We proposed to amend Schedule 1, paragraph 16(2) to enable the FSA to apply the income from penalties levied in connection with market abuse under Section 123 of FSMA to listed and non-listed issuers and recognised exchanges as well as to authorised persons. This was largely on the grounds that those who breach regulatory obligations should pay a penalty which goes towards the costs of regulating the activities in which they engage - and fees paid to the FSA by both recognised exchanges and issuers more than proportionately cover the costs incurred by the FSA in relation to the FSA's market monitoring and market abuse work.

CONSULTATION RESPONSES

10.3 Three consultation respondents agreed with the original proposal, four agreed subject to various conditions (that the penalty income should go to the compliance shortfall area giving rise to the penalty; that the FSA should consult on any proposed amendments to penalty income distribution; that the impact of this change should be minimal, and; that penalty income should be used to support financial education projects). Four respondents disagreed with the original proposal, and one sought clarification that this proposal falls under the requirements of a Regulatory Reform Order.

THE REVISED PROPOSAL

10.4 We have reviewed the original proposal in light of consultation responses and have further considered the legal position. Some types of market abuse by issuers would also constitute breaches of FSA listing or disclosure rules, and hence those issuers could be subject to fines which would be redistributed to other issuers. This does not apply to all forms of market abuse however. On these grounds we considered that the FSA should be able to distribute market abuse fines to issuers in appropriate cases, such as where there has been no finding of breach of the listing or disclosure rules. However, after further consideration of the legal position we do not consider that this proposal can properly be characterised as a reduction of a burden within the meaning of the Regulatory Reform Act 2001. Although the absence of a power in the relevant legislation may, in principle, amount to a burden, this will only be the case if, taken as a whole, the relevant legislation can be regarded as imposing a burden on an activity. The complete absence of legislative provision for an activity cannot be said to constitute a burden on that activity. In this case, the legislation requires the FSA to distribute penalty income to authorised persons. The activity of distributing to issuers,

or for that matter investment exchanges, is not covered by the legislation and so cannot be characterised as a burden.

10.5 Further, we no longer consider that the FSA should be able to distribute market abuse fines to investment exchanges. The primary purpose of distributing penalty income is to reward those who have not committed the relevant offence. Unlike issuers and authorised persons, investment exchanges are not in so much of a position to commit market abuse. Furthermore, as a matter of principle, bodies holding regulatory and quasi-regulatory functions should not benefit from the levying of fines, and under FSMA investment exchanges hold quasi-regulatory functions. We therefore no longer propose to amend FSMA.

ANALYSIS

Necessary Protections

10.6 FSMA will not be amended hence no necessary protections will be removed by the Order.

Rights and Freedoms

10.7 FSMA will not be amended hence the Order will not prevent any person continuing to exercise any rights or freedoms that he might reasonably expect to be able to continue to exercise.

Costs and Savings

10.8 FSMA will not be amended hence the Order will not generate any costs or savings.

New Burdens

10.9 FSMA will not be amended hence the Order will not generate any new burdens or re-enact any existing burdens.



PARTNERSHIPS

BACKGROUND

11.1 Section 32(2) of FSMA provides that if a partnership or unincorporated association is dissolved, its FSA authorisation continues to have effect in relation to any firm which succeeds to the business of the dissolved firm. Section 32(3)(a) of FSMA states that this is so only if, amongst other requirements, ‘the members of the resulting firm are substantially the same as the former firm’.

11.2 Section 32(3)(a) causes particular difficulties in relation to a partnership that has two partners and one of the partners leaves the partnership. The remaining partner would temporarily need to cease trading and apply for authorisation if they wished to carry on the former partnership business. This is disruptive and costly. Similar considerations apply where the business of the partnership remains largely unchanged but the members of the partnership change substantially, including if the partnership expands.

11.3 Prior to FSMA it was possible for the remaining partner to continue trading, either by acting as a sole trader or by appointing new partner(s), without needing to be reauthorised. In particular, section 27(6) of the Financial Services Act 1986 did not require reauthorisation in cases where members of the partnership were no longer ‘substantially the same’, and specifically allowed the surviving member of a two person partnership to continue acting as a sole trader, again without needing to be reauthorised.

THE PROPOSAL

11.4 We propose that FSMA should be amended to revert to the situation which existed beforehand.

11.5 First, we propose to removing section 32(3)(a) of FSMA containing the ‘substantially the same’ condition.

11.6 Secondly, we propose to insert a new provision clarifying that the authorisation of the former partnership would continue in relation to a sole practitioner which carries on the business of the former partnership.

ANALYSIS

Necessary protections

11.7 No necessary protections will be removed. The current requirement to secure reauthorisation provides the FSA with a trigger to consider afresh the threshold conditions (legal status, location, close links, suitability, adequate resources). But authorised persons must satisfy all of these conditions on a continuing basis, and the FSA’s rules contain provisions which also act as trigger events alerting the FSA that it may be appropriate to consider the threshold conditions. For example, where a firm makes an application for a new partner to become an approved person, the resulting assessment by the FSA could trigger a consideration of the threshold conditions regarding the suitability of the firm. Similarly, FSA rules require that firms disclose to the FSA anything in relation to the firm which the FSA would reasonably require notice.

Notice of a change of partners could trigger renewed consideration of the threshold conditions. The application process does not provide the FSA with information gathering powers any greater than those that are available in connection with ongoing monitoring by the FSA. The requirement to secure reauthorisation therefore does not present the FSA with any particular regulatory benefits.

Rights and freedoms

11.8 Our proposed Order will not prevent anybody from exercising any rights or freedoms that he could reasonably expect to be able to continue to exercise.

Costs and savings

11.9 The unnecessary costs of securing reauthorisation from the FSA would be avoided, as would the costs associated with disruption to the business in question.

New Burdens

11.10 No new burdens will be imposed and no existing burdens will be re-enacted.

Q3: What sort of detriment are the current arrangements generating? Do you have any views on the number of partnerships affected, and on the types and extent of detriment suffered?

Q4: Do you consider that section 32(3)(a) of FSMA should be removed, containing the 'substantially the same' condition?

Q5: Do you consider that a new provision should be inserted clarifying that the authorisation of the former partnership would continue in relation to 'any person who succeeds to that business having previously carried it on in partnership'?

A

PARTIAL REGULATORY IMPACT ASSESSMENT

Purpose and Intended Effect

Introduction A.1 This partial Regulatory Impact Assessment considers the costs and benefits of relaxing a number of restrictions imposed on the Financial Services Authority (FSA) by the Financial Services and Markets Act 2000 (FSMA).

A.2 The changes brought about by this Order would;

- enable the FSA not to consult on temporary or unwritten guidance, and when consulting on all guidance, provide the FSA with discretion to decide when to produce a cost-benefit analysis and accompanying statements and accounts;
- remove unnecessary consultation between the FSA and regulators in other countries in the European Economic Area;
- permit the FSA board to delegate the issuing of guidance to a committee or sub-committee of the FSA board;
- extend the FSA's powers to waive or modify all of its rules in respect of authorised and unauthorised persons,;
- allow the FSA to discontinue or suspend the listing of securities or to cancel the approval of sponsors with fewer procedural requirements where the request for discontinuation, suspension or cancellation comes from the issuer or sponsor himself ;
- lighten authorisation requirements in relation to partnerships whose membership changes.

Reasoning A.3 The need for these changes was identified primarily during the Two Year Review of FSMA, an exercise conducted in 2003/4 by the Treasury, the FSA and others in order to take stock of the new regulatory system after two years of its operation. These proposals will affect the FSA and those subject to FSMA, including authorised firms. The proposals will be implemented by means of a Regulatory Reform Order (RRO) made under the terms of the Regulatory Reform Act 2001 (RRA).

Costs and Benefits

Measure 1: Facilitating the FSA's production of guidance

A.4 The FSA is required by FSMA to consult on all forms of guidance, except where the delay in doing so would prejudice the interests of consumers. We propose to restrict consultation to written guidance (or guidance given in another legible form) which is intended to have continuing effect. We also propose to remove the FSA's obligation to produce the various ancillary documents required by section 155, in particular a cost-benefit analysis, statement of compatibility with the FSA's statutory duties, account of representations made to the FSA, and note detailing how the final guidance differs from the draft circulated for consultation.

Benefits A.5 The FSA will be able to issue guidance more flexibly and more quickly than at

present, and at lower cost. The FSA will have more of an incentive to use guidance when communicating with industry rather than using other forms of communication.

Costs A.6 We do not envisage any costs arising from this proposal.

Measure 2: Removing the FSA's requirement to consult other EEA regulators on changes in permissions

A.7 We propose to reduce the circumstances in which the FSA, under section 49 of FSMA, must consult other European regulators before cancelling or varying a firm's permission. Section 49 was designed to implement parts of various European Directives but, as currently drafted, it is stricter than those Directives require it to be. The Directives in question were designed chiefly to ensure that other European regulators were consulted before authorisation was granted under those Directives, but section 49 requires the FSA to consult other regulators when cancelling or varying a permission. Under our proposal the FSA would no longer have to consult other EEA regulators when cancelling or varying permissions.

A.8 The super-equivalence of section 49 has resulted in a certain degree of reputational damage to the FSA as European regulators have complained that such consultation about matters not covered by the Directives is costly, inconvenient and confusing. Various regulatory authorities across the EEA, including those of France, Germany, the Netherlands, Luxembourg, Latvia and Norway, have confirmed that they are not required to consult home state regulators when varying or cancelling the authorisation of a connected person.

Benefits A.9 The proposal would spare the FSA from the need to consult other EEA regulators unnecessarily. In cases where major cross-border groups apply to change permission, this would represent a substantial resource saving. This current consultation is costly for the firms, the FSA and other European regulators who have to deal with such consultations. Indeed some EEA regulators have complained about the cost and inconvenience of having to respond to FSA consultation on matters not covered by the Directives. The FSA issues around 15 variations of permission per year which involve cancellations or narrowing of the permission, and many more involving an extension of permission. Many involve notifying more than one other EC regulator, some involve notifying all. Without these notification requirements each permission could be processed between 10-20 days quicker.

Costs A.10 We do not envisage any costs arising from this proposal.

Measure 3: Permitting the FSA board to delegate the issuing of Guidance

A.11 We propose to allow the FSA board to delegate the task of issuing general guidance – a practice not currently permitted under FSMA. Much guidance is routine or technical in nature: consideration by the board adds little value and distracts it from more important core functions.

Benefits A.12 The board of the FSA would be free to delegate the issuing of guidance to a committee or sub-committee. This would allow the board to focus on more important issues and increase the efficiency of the FSA in approving and issuing guidance, to the benefit of firms and consumers, who rely on such guidance to interpret the FSA's rules. In addition, the FSA will no longer have to spend time analysing whether guidance is "general guidance" under FSMA s.158(5), and in need of board consideration.

Additionally, less time and resources will be consumed preparing the “board pack”. This involves preparing detailed paperwork which is scrutinised by FSA legal advisers. The FSA Handbook of Rules is structured with rules and guidance alongside each other. Most significant changes involve amending both rules and guidance and would continue to be considered by the FSA board in the same way as now. The one significant exception to this is guidance relating to FSA rules on collective investment schemes. These proposed changes will enable the FSA to issue material with the status of guidance in a more timely and responsive manner than at present, which should lead to reduced compliance costs.

Costs A.13 We do not envisage any costs arising from this proposal. The delegation of approval to a committee would ensure that guidance was still subject to internal checks and balances.

Measure 4: Removing restrictions on waivers and modifications

A.14 We propose to amend FSMA to allow the FSA to waive or modify all of its rules in respect of both authorised and unauthorised persons. FSMA currently prevents the FSA from waiving or modifying rules which relate to unauthorised persons; or persons that are not specified in section 148 of FSMA. It was always intended that the FSA should be able to waive or modify all of its rules and the limitations in the Act seems to have been incorporated into FSMA unintentionally.

Benefits A.15 The FSA would be able to waive or modify all rules made under FSMA, such as fees rules, approved persons rules. It would also be able to waive or modify rules which apply to unauthorised persons who are subject to FSA rules, such as auditors and actuaries. Firms and other parties would benefit from the FSA’s ability to change unsuitable or burdensome rules to which they are subject. Currently around 1150 waivers are granted per year, spread evenly in all areas where waivers can be granted.

Costs A.16 We do not envisage any costs arising from this proposal. When waiving or modifying rules the FSA would still have to be satisfied that;

- compliance by the person with the rules as unmodified would be unduly burdensome, or would not achieve the purpose for which the rules were made; and
- the waiver or modification would not result in undue risk to persons whose interests the rules are intended to protect.

Measure 5: Simplifying procedures relating to the discontinuation, suspension or cancellation of securities listings

A.17 We propose to remove the obligation of the FSA to fulfil certain procedural requirements⁵ when delisting a security at the request of that security’s issuer. We propose in addition to remove an anomaly in FSMA which allows an issuer to petition the Tribunal about a delisting even when the delisting was requested by that issuer.

A.18 The requirements and right of petition above were designed as safeguards in cases where a delisting was initiated by the FSA against the wishes of the issuer. In

⁵ The FSA is required to inform the issuer of: the reasons for the FSA’s decision; the right to make representations; and the right to refer the matter to the Tribunal.

cases where the delisting comes at the request of the issuer, however, they seem to serve no useful purpose.

Benefits A.19 The FSA would no longer have to follow prescriptive delisting procedures for no useful purpose. In a typical two-week period in July 2005, the FSA had to deal with 18 cancellation requests and 7 suspension requests under the s.78 procedure. Around 1 FSA person day was involved in processing these requests. Under our proposal much unnecessary paperwork would be avoided. Additionally, an anomaly – the right to petition the Tribunal as described above – would be removed from FSMA.

Costs A.20 We do not envisage any costs arising from this proposal.

Measure 6: Simplifying the procedure relating to the cancellation of sponsor approval

A.21 We propose to remove the FSA’s obligation formally to warn a sponsor prior to cancelling his approval, where the sponsor himself has applied for cancellation. We propose in addition to remove an anomaly in FSMA which allows a sponsor to petition the Tribunal about the cancellation of his approval even when the cancellation was requested by that sponsor. A formal warning is clearly appropriate where the cancellation has been initiated by the FSA and such action would be resisted by the sponsor. But in cases where the cancellation is initiated at the request of the sponsor, the process in s.88 seems to serve no useful purpose. The market is informed by announcements published on the FSA website. The sponsor, by definition, knows and has no need to be given a warning notice or make representations.

Benefits A.22 The FSA would no longer have to issue a formal warning prior to cancelling an approval that had been requested by the relevant sponsor. In the nine months to July 2005, for example, the FSA dealt with nine voluntary applications for cancellation of sponsor status, necessitating the issuance of a warning notice, final notice, and decision notice in each instance – a process that often spans several weeks. Around 1 FSA person day was involved in processing these requests.

Costs A.23 We do not envisage any costs arising from this proposal.

Measure 7: Reauthorising partnerships

A.24 We propose to amend FSMA so that when the members of a partnership are no longer substantially the same, the partnership is no longer required to secure reauthorisation from the FSA, and any outstanding partner carrying out the partnership’s business may continue to do so as a sole trader without needing to be reauthorised.

Benefits A.25 The costs of applying for reauthorisation would be avoided, as would the costs of having to cease trading whilst the FSA processes the reauthorisation application. The FSA aims to process such applications within six months. The costs of disrupting business over this period may be significant, and once the remaining partner has secured their reauthorisation they might in effect incur a number of start-up costs.

Costs A.26 We do not envisage any costs from this proposal.

Options

A.27 There is an option of doing nothing for all these measures. If we were to choose this option the benefits described in this RIA would not materialise and the costs, where appropriate, would not be incurred.

A.28 In some places there might hypothetically be non-legislative options, in particular that the FSA might not apply some of these FSMA requirements thoroughly. A deliberate decision by the FSA not to comply with various FSMA requirements would, however, undermine the credibility of FSMA and the FSA, and might encourage authorised persons to adopt a pick and mix attitude towards FSMA provisions which apply to them. Furthermore, the corporate governance arrangements which apply to the FSA do not really provide for the FSA to decide not to comply with their with their statutory duties and responsibilities. For these reasons this option is not viable.

Consultation

A.29 The following were consulted:

Competition Assessment

A.30 We do not envisage any detrimental effects on competition arising from these measures.

Small Firms Impact Test

A.31 We do not envisage any material negative impact on small firms arising from these measures.

Enforcement, Sanctions and Monitoring

A.32 Most of these are proposals are permissive and will not require monitoring, sanctions or enforcement.

A.33 Some of the proposals on consultation require the FSA to show that, if it chooses to dispense with consultation, it must show that doing so will not unduly prejudice the interest of consumers. The FSA would publish a policy statement setting out the criteria that would inform such consideration.

B

REGULATORY REFORM PROPOSALS AND ORDERS - CONSULTATION AND PARLIAMENTARY CONSIDERATION

B.1 These reform proposals will require changes to primary legislation in order to give effect to them. The Minister could achieve these changes by introducing an Order under the Regulatory Reform Act (RRA). RROs are subject to preliminary consultation and to extended Parliamentary scrutiny (by Committees in each House of Parliament) of any subsequently proposed Order. On that basis, the Minister invites comments on this reform proposal that might be carried forward by a Regulatory Reform Order.

REGULATORY REFORM PROPOSALS

B.2 This consultation document has been produced because the starting point for regulatory reform proposals is thorough and effective consultation with interested parties. In undertaking this preliminary consultation, the Minister is expected to seek out actively the views of those concerned, including those who may be adversely affected, and then to demonstrate to the Scrutiny Committees that he or she has addressed those concerns.

B.3 Following the consultation exercise, when the Minister lays proposals before Parliament under the RRA, he or she must also lay a report for consideration by the Scrutiny Committees setting out a summary of;

- the burden imposed by the existing law;
- whether any of those burdens are proposed to be removed or reduced;
- how the proposals otherwise further the other objects of the RRA (re-enacting proportionate burdens, introducing new but proportionate burdens, removing inconsistencies and anomalies);
- whether there is “necessary protection” and how it is to be continued;
- how any reasonable expectation of the exercise of rights or freedoms is affected (if at all) and how the exercise can be continued;
- how new burdens (if any) are both proportionate and, taking the proposals as a whole, strike a fair balance between the public interest and the interests of persons affected by the new burdens;
- whether an Order that imposes burdens is desirable in terms either of the burdens it removes or the other benefits it brings;
- whether any parts of the proposed Order are being designated as “subordinate provisions”, allowing them to be changed by less elaborate Parliamentary procedures in the future;
- what cost savings or increases are expected any why;
- what other benefits there will be from the proposals;
- details of the consultation process;
- any representations received as a result of that consultation; and
- the changes made to the proposals as a result of that consultation.

B.4 On the day the Minister lays the proposals and report, the period for Parliamentary consideration begins. It lasts for 60 days, excluding Parliamentary recesses of more than four days. If you want a copy of the proposals and the Minister's report, you will be able to obtain them either from HM Treasury or by visiting the Cabinet Office's website at

<http://www.cabinet-office.gov.uk/regulation/act/index.htm>.

PARLIAMENTARY SCRUTINY

B.5 Both Houses of Parliament scrutinise regulatory reform proposals and draft orders. This is done by the Scrutiny Committees.

B.6 Standing Orders in the Commons stipulate that the Regulatory Reform Committee in the Commons considers whether proposals;

- appear to make an inappropriate use of delegated legislation;
- remove or reduce a burden or the authorisation or requirement of a burden;
- continue any necessary protection;
- have been the subject of, and take appropriate account of, adequate consultation;
- impose a charge on the public revenues or contain provisions requiring payments to be made to the Exchequer or any government department or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribe the amount of any such charge or payment;
- purport to have retrospective effect;
- give rise to doubts whether they are *intra vires*;
- require elucidation, are not written in plain English, or appear to be defectively drafted;
- appear to be incompatible with any obligation resulting from membership of the European Union;
- prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise;
- satisfy the conditions of proportionality between burdens and benefits set out in sections 1 and 3 of the RRA;
- satisfy the test of desirability set out in section 3(2)(b) of the RRA;
- have been the subject of, and take appropriate account of, estimates of increases or reductions in costs or other benefits which may result from their implementation; or
- include provisions to be designated in the draft order as subordinate provisions, and in the case of the latter consideration the committee shall report its opinion whether such a designation should be made, and to what parliamentary proceedings any subordinate provisions orders should be subject.

B.7 The Committee in the House of Lords will consider each proposal in terms of similar criteria, although these are not laid down in Standing Orders.

B.8 Each Committee might take oral or written evidence to help it decide these matters, and each Committee could then be expected to report;

- whether the Minister should proceed to lay a draft order in the same terms as the original proposal;
- whether amendment is necessary; or
- whether the order-making power should not be used (for example, because of the significance or sensitivity of the proposal).

B.9 Copies of Committee Reports, as Parliamentary papers, can be obtained through HMSO. They are also available on the Parliamentary website at:

http://www.parliament.uk/parliamentary_committees/regulatory_reform_committee.cfm for the Regulatory Reform Committee in the Commons; and

http://www.parliament.uk/parliamentary_committees/dpr.cfm for the Delegated Powers and Regulatory Reform Committee in the Lords.

B.10 After the 60 days for Parliamentary consideration, the Minister can lay a draft order before both Houses, this time for the approval of Parliament.

B.11 Each of the Scrutiny Committees examines the draft order to see how far its views have been taken into account. They report, within 15 sitting days, whether the draft order should be approved or not, and it would then be for the relevant House itself to take its final decision.

B.12 The final draft order then has to be approved by both Houses of Parliament before becoming law.

HOW TO MAKE YOUR VIEWS KNOWN

B.13 Responding to this consultation is your first and main opportunity to make your views known to the relevant department as part of the consultation process. You should send your views to:

Barbara Smith
HM Treasury
Financial Services Strategy team
Room 4/18
1 Horse Guards Road
London
SW1A 2HQ
Telephone: 020 7270 5172
E-mail: barbara.smith@hm-treasury.gov.uk

B.14 When the Ministers lays proposals before Parliament you are welcome to put your views before either or both of the Scrutiny Committees. In the first instance, this

should be in writing. The Committees will normally decide on the basis of written submissions whether to take oral evidence.

B.15 Your submission should be as concise as possible, and should focus on one or more of the criteria listed in para 6 above.

B.16 The Scrutiny Committees appointed to scrutinise Regulatory Reform Act Orders can be contact at:

Delegated Powers and Regulatory Reform Committee	Regulatory Reform Committee
	House of Commons
House of Lords	7 Millbank
London	London
SW1A 0PW	SW1P 3JA
Tel: 020 7219 3103	Tel: 020 7219 2833/2837
Fax: 020 7219 2571	Fax: 020 7219 2509
DPDC@parliament.uk	regrefcom@parliament.uk

NON-DISCLOSURE OF RESPONSES

B.17 Section 7 of the RRA provides what should happen when someone responding to the consultation exercise on a proposed order requests that his or her response should not be disclosed.

B.18 The name of the person who has made representations will always be disclosed to Parliament. If you ask for your representation not to be disclosed, the Minister should not disclose the content of that representation without your express consent and, if the representation relates to a third party, their consent too. Alternatively, the Minister may disclose the content of the representation in such a way as to preserve your anonymity and that of any third party involved.

INFORMATION ABOUT THIRD PARTIES

B.19 If you give information about a third party which the Minister believes may be damaging to the interests of that third party, the Minister does not have to pass on such information to Parliament if he does not believe it is true or he is unable to obtain the consent of the third party to disclosure. This applies whether or not you ask for your representation not to be disclosed.

B.20 The Scrutiny Committees may, however, be given access on request to all representations as originally submitted, as a safeguard against improper influence being brought to bear on Ministers in their formulation of RRA orders.



CABINET OFFICE CODE OF PRACTICE ON WRITTEN CONSULTATIONS

C.1 The Cabinet Office has published a Code of Practice for Written Consultations to guide Departments' activities in this area. This sets down the following criteria:

- consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy;
- be clear about what the proposals are, who may be affected, what questions are being asked, and the timescale for responses;
- ensure the consultation is clear, concise and widely accessible;
- give feedback regarding the responses received and how the consultation process influenced the policy;
- monitor the Department's effectiveness at consultation, including through the use of a designated consultation coordinator;
- ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

C.2 If you feel that this consultation does not fulfil these criteria, please contact:

Julie Humphreys

HM Treasury

1 Horse Guards Road

London

SW1A 2HQ

Telephone: (+44) (0) 207 270 5543

Email: Julie.Humphreys@hm-treasury.x.gsi.gov.uk

D

LIST OF CONSULTEES

D.1 This consultation document has been made available to the general public via the Treasury public website and has in addition been sent to a large number of consultees, including the following bodies:

Alexander Forbes Risk Services Ltd	APCIMS
Association of British Banks	Association of British Insurers
Association of Independent Financial Advisers	Association of Investment Trust Companies
Aviva PLC	AXA
Britannia Building Society	British Bankers' Association
Building Societies Association	City of London Law Society
Commonwealth Bank in Europe	Depositary & Trustees Association
Financial Ombudsman Service	Financial Services & Markets Legislation City Liaison Group
Financial Services Authority	Financial Services Consumer Panel
Freshfields Bruckhaus Deringer	Friends Provident
Institute of Insurance Brokers	International Financial Data Services
International Underwriting Association	Investment & Life Assurance Group
Investment Management Association	Law Society
Legal & General Group PLC	Liverpool Victoria Friendly Society
Lloyds TSB	London Stock Exchange PLC
Nationwide Building Society	Prudential Assurance Company Ltd
Royal Bank of Scotland	Standard Life Bank



DRAFT REGULATORY REFORM ORDER

Draft Order laid before Parliament under section 4(2) of the Regulatory Reform Act 2001, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2006 No.

REGULATORY REFORM

The Regulatory Reform (Financial Services and Markets Act 2000) Order 2006

Made - - - - *******
Coming into force - - *******

- (a) The Treasury have consulted –
- (i) such organisations as appeared to them to be representative of interests substantially affected by their proposals for this Order;
 - (ii) the statutory bodies to whose functions their proposals relate;
 - (iii) the National Assembly for Wales; and
 - (iv) such other persons as they considered appropriate.
- (b) As a result of that consultation it appeared to the Treasury that it was appropriate to vary part of their proposals.
- (c) Following that consultation the Treasury considered it appropriate to proceed to make this Order.
- (d) A document containing the Treasury’s proposals has been laid before Parliament as required by section 6 of the Regulatory Reform Act 2001⁽⁶⁾ and the period for Parliamentary consideration under section 8 of that Act has expired.
- (e) The Treasury has had regard to the representations made during that period and in particular to the [] Report, Session [], of the Delegated Powers and Regulatory Reform Committee of the House of Lords⁽⁷⁾ and the [] Report, Session [], of the Regulatory Reform Committee of the House of Commons⁽⁸⁾ [and to [x resolution]].
- (f) A draft of this Order has been laid before Parliament with a statement giving details of those representations [and the changes to the Treasury’s proposals in the light of them].
- (g) The draft has been approved by resolution of each House of Parliament.

⁽⁶⁾ 2001 c.6.

⁽⁷⁾ [Insert Reference e.g. Second Report on 25 February 2006, HL180, ISBN]

⁽⁸⁾ [Insert Reference e.g. Third Report on 26 February 2006, HC181, ISBN]

- (h) The Treasury are of the opinion that this Order does not remove any necessary protection or prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise.
- (i) This Order creates burdens affecting persons in the carrying on of certain activities, and the Treasury are of the opinion that—
 - (i) the provisions of this Order, taken as a whole, strike a fair balance between the public interest and the interests of the persons affected by the burdens created, and
 - (ii) the extent to which this Order removes or reduces one or more burdens, or has other beneficial effects for persons affected by the burdens imposed by the existing law, makes it desirable for this Order to be made.

The Treasury, in exercise of the powers conferred upon them by section 1 of the Regulatory Reform Act 2001, make the following Order:

Citation and commencement

1. This Order may be cited as the Regulatory Reform (Financial Services and Markets Act 2000) Order 2006 and comes into force on the [seventh] day after the day on which it is made.

Amendments to the Financial Services and Markets Act 2000

2. The Financial Services and Markets Act 2000⁽⁹⁾ is amended as follows.

Partnerships and unincorporated associations

3. In section 32 (partnerships and unincorporated associations)—

- (a) in subsection (2), after “any firm” add “or sole practitioner”;
- (b) for subsection (3), substitute—

“(3) For the purposes of this section, a firm or sole practitioner is to be regarded as succeeding to the business of the dissolved firm only if succession is to the whole or substantially the whole of the business of the dissolved firm.”.

Persons connected with an applicant

4. In section 49 (persons connected with an applicant), for subsection (2)(b) substitute—

“(b) varying any permission given by the Authority to such a person where the effect of the variation is to grant permission for the purposes of a different single market directive to the directive for the purposes of which the existing permission was granted,”.

Discontinuance and suspension of listing on the application of an issuer

5. In section 77 (discontinuance and suspension of listing)—

- (a) after subsection (2) insert—

“(2A) The competent authority may discontinue under subsection (1) or suspend under subsection (2) the listing of any securities on its own initiative or on the application of the issuer of those securities.”;

- (b) in subsection (5) after “any securities,” insert “on its own initiative,”.

6. In section 78 (discontinuance or suspension: procedure), after subsection (12) insert—

“(12A) This section does not apply to a discontinuance or suspension on the application of the issuer of the securities.”.

7. After section 78 insert—

⁽⁹⁾ 2000 c.8.

“Discontinuance or suspension at the request of the issuer: procedure

78A.—(1) A discontinuance or suspension by the competent authority on the application of the issuer of the securities takes effect—

- (a) immediately, if the notice under subsection (2) states that this is the case;
- (b) in any other case, on such date as may be specified in that notice.

(2) If the competent authority discontinues or suspends the listing of securities on the application of the issuer of the securities it must give him written notice.

(3) The notice must—

- (a) give details of the discontinuance or suspension;
- (b) inform the issuer of the securities of the date on which the discontinuance or suspension took effect or will take effect; and
- (c) inform the issuer of his right to apply for the cancellation of the suspension.

(4) If the competent authority proposes to refuse an application by the issuer of the securities for the discontinuance or suspension of the listing of the securities, it must give him a warning notice.

(5) The competent authority must, having considered any representations made in response to the warning notice, if it decides to refuse the application, give the issuer of the securities a decision notice.

(6) If the competent authority decides not to discontinue or suspend the listing of the securities, the issuer of the securities may refer the matter to the Tribunal.

(7) If the competent authority has suspended the listing of securities and proposes to refuse an application by the issuer of the securities for the cancellation of the suspension, it must give him a warning notice.

(8) The competent authority must, having considered any representations made in response to the warning notice—

- (a) if it decides to refuse the application for the cancellation of the suspension, give the issuer of the securities a decision notice;
- (b) if it grants the application, give him written notice of its decision.

(12) If the competent authority decides to refuse an application for the cancellation of the suspension of listed securities, the applicant may refer the matter to the Tribunal.

(13) “Discontinuance” means a discontinuance of listing under section 77(1).

(14) “Suspension” means a suspension of listing under section 77(2).”.

Cancellation of approval at the request of a sponsor

8. In subsection (4)(b) of section 88 (sponsors), after “as a sponsor” insert “otherwise than at his request”.

Modification or waiver of rules

9. In section 148 (modification or waiver of rules)—

- (a) omit subsection (1);
- (b) for subsection (2), substitute—

“(2) The Authority may, on the application or with the consent of a person who is subject to rules made by the Authority, direct that all or any of those rules—

- (a) are not to apply to that person; or
- (b) are to apply to him with such modifications as may be specified in the direction.”;
- (c) in subsections (4)(a), (7)(b), (8) and (9)(b) omit “authorised”;
- (d) in subsection (11), for “an authorised person” substitute “a person”.

Guidance

10. In section 157 (guidance), for subsection (3) substitute—

“(3) If the Authority proposes to give guidance in writing or other legible form—

- (a) to regulated persons generally, or to a class of regulated person, in relation to rules to which those persons are subject; and
- (b) which is intended to have continuing effect,

subsections (1), (2)(d), (4) and (7) of section 155 apply to the proposed guidance as they apply to proposed rules.”.

The Authority’s procedures

11. In subsection (13) of section 395 (the Authority’s procedures) after paragraph (b) insert—

“(bza) 78A(2) or (8)(b);”.

Arrangements for discharging functions

12. In paragraph 5 (arrangements for discharging functions) of Schedule 1, for sub-paragraph (2) substitute—

“(2) But—

- (a) in exercising the legislative functions mentioned in paragraph 1(2)(a) to (d), the Authority must act through its governing body; and
- (b) in exercising the legislative function mentioned in paragraph 1(2)(e), the Authority may not make arrangements for that function to be discharged by an officer or member of staff of the Authority.”.

[Name]

[Name]

[Date]

Two of the Lords Commissioners of Her Majesty’s Treasury

EXPLANATORY NOTE

(This note does not form part of the Order)

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