



HM TREASURY

FSMA BULLETIN No 51

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This FSMA Bulletin provides an update on:

1. legislation adopted after the previous Bulletin;
2. progress on consultations which have closed;
3. new consultations and those still open;
4. consultations planned in the next three months.

Do you have any ideas or thoughts on any aspects of FSMA or FSA regulation which would benefit from simplification or deregulation, or which might merit further examination or review? If so please e-mail fsma.bulletin@hm-treasury.x.gsi.gov.uk

SECTION ONE: LEGISLATION ADOPTED AFTER FSMA BULLETIN NO 50

FSMA Market Abuse Regime: A review of the sunset clauses

The Financial Services and Markets Act 2000 (Market Abuse) Regulations 2008 came into force on 30 June 2008. These Regulations extend the sunset clauses in the Financial Services and Markets Act 2000 ("FSMA"), which would otherwise cease on 30 June 2008 so that subsections (4) and (8) of section 118 of the Act and related ancillary provisions will remain in force until 31 December 2009.

UK Regulated Covered Bonds Regulations

Legislation making provision concerning covered bonds was made in the Regulated Covered Bonds Regulations 2008 which came into force on 6 March 2008.

Amendments to Part 7 FSMA (Control of Business Transfers)

Amendments have been made to Part 7 FSMA, which deals with schemes for the transfer of insurance and banking business. The amendments were the subject of consultation in early 2007 and have been pursued largely in the context of insurance business transfers. The amendments were made in four statutory instruments:

- The Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) (Amendment) Regulations 2008 (SI 2008 No 1467)
- The Financial Services and Markets Act 2000 (Amendments to Part 7) Regulations 2008 (SI 2008 No 1468)
- The Financial Services and Markets Act 2000 (Amendment of Section 323) Regulations 2008 (SI 2008 No 1469)
- The Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) (Amendment) Order 2008 (SI 2008 No 1725)

The first three above came into force on 30 June 2008. The fourth followed on 23 July 2008.

The amendments in SI 2008 No 1468 clarify the powers of the court under Part 7, to put beyond doubt the ability of the court to transfer property and override contractual provisions that might otherwise have the effect of voiding or altering any contract subject to the transfer. SI 2008 No 1467 provides that all affected reinsurers should be notified of a proposed transfer.

The amendments in the other two orders (SI 2008 No 1469 and SI 2008 No 1725) extend the scope of section 323 FSMA and related secondary legislation to include former underwriting members of Lloyd's who resigned before 24 December 1996. The effect is to allow the transfer provisions of Part 7 to apply to all insurance business at Lloyd's, whenever written.

The Insurance Accounts Directive (Lloyd's Syndicate and Aggregate Accounts) Regulations 2008

These regulations (SI 2008 No 1950) came into force on 15 August 2008 following consultation earlier in the year. They revoke and replace the Insurance Accounts Directive (Lloyd's Syndicate and Aggregate Accounts) Regulations 2004. In doing so, they include amendments to implement Directives 2006/43/EC on statutory audit ("the Audit Directive") and 2006/46/EC on company reporting with respect to Lloyd's and market participants at Lloyd's. The regulations also reflect some other EU-related changes in reporting that have been incorporated into company law since the 2004 Lloyd's accounting regulations were made.

Many provisions have been carried forward from the 2004 regulations. The main changes provide for more independence in the appointment of auditors for syndicate and aggregate accounts, amend notification arrangements where an auditor ceases to hold office before the period of office has elapsed, and provide a new right to apply to the High Court for remedy where an auditor is dismissed on improper grounds. They also include extended disclosure requirements for the accounts with respect to off-balance sheet arrangements and related party transactions.

Regulation of Modified Credit Agreements: a consultation

In November 2007 HM Treasury and the Department for Business, Enterprise and Regulatory Reform (BERR) published a joint consultation document, "Regulation of Modified Credit Agreements: a

consultation", proposing secondary legislation to ensure that the regulatory regimes of the Financial Services Authority (FSA) and Office of Fair Trading (OFT) for credit agreements remain mutually exclusive. The consultation lasted 12 weeks, in accordance with the Code of Practice for written consultations, and closed on 14 February 2008. A summary of responses to the consultation is available on HM Treasury website. Following consultation, the Government laid secondary legislation on 14 March 2008. This legislation came into force on 6 April 2008.

Sex Discrimination (Amendment of Legislation) Regulations 2008

The Gender Directive (Council Directive 2004/113/EC) specifies the circumstances in which insurance companies will be able to charge different premiums or offer different benefits to men and women. The Government consultation on implementing this provision closed on 3 September 2007 and a response was published in November 2007.

Implementing regulations, the Sex Discrimination (Amendment of Legislation) Regulations 2008, entered into force on 6 April 2008 to give effect to the Directive in Great Britain and Northern Ireland.

The Regulations amend the Sex Discrimination Act 1975 (and the corresponding provisions of the Sex Discrimination (Northern Ireland) Order 1976) to permit discrimination by insurance companies, provided that data relevant to the use of sex as an actuarial factor is compiled, published and regularly updated in accordance with guidance issued by the Treasury, differences of treatment are proportionate and not related to costs related to pregnancy or that insurance and related financial services are provided only to one sex and only affect one sex. The Treasury has published guidance setting out how insurance companies should meet their obligations. The guidance also entered into effect on 6 April 2008 and is available at [/www.hm-treasury.gov.uk](http://www.hm-treasury.gov.uk).

Review of the Regulation of Travel Insurance Sold along with a holiday

The Treasury previously committed to review the way in which travel insurance sold along with a holiday and other related travel is regulated by early 2007 (travel insurance sold in this way is not currently subject to statutory regulation). The legislation was made

on 13 December 2007. An interim authorisation regime will be in place from 20 June 2008 until 31 December 2009.

SECTION TWO: PROGRESS ON CONSULTATIONS WHICH HAVE CLOSED

Consultation on better regulation measures for the asset management sector

This consultation seeks views on a package of better regulation proposals for the asset management sector. The proposals are to:

- allow paperless settlement trades in of units in Authorised Unit Trusts and shares in Open-Ended Investment Companies,
- introduce a protected cell regime for Open-Ended Investment Companies and
- speed up the process by which foreign UCITS funds passport into the UK.

The consultation closed on 1 August 2007 and an announcement will be made in due course.

Myners Principles

The Myners Principles make use of comply-or-explain principles to improve pension fund trustee investment decision-making.

The Government has now published its response to consultation on proposals to update the Myners principles. This consultation, which closed in June 2008, was based on a study commissioned by the Government and carried out by the National Association of Pensions Funds (NAPF) in 2007.

The key themes which came out of the consultation process are: there will be a smaller number of simplified, higher-level principles; these principles will be linked to a body of higher quality guidance; there will be greater industry ownership through the establishment of a joint Government-industry Investment Governance Group; and, there will be a more robust approach to disclosure and industry debate, within a voluntary 'comply or explain' approach.

The Investment Governance Group is an industry led body with a mandate to tackle the issues identified in the NAPF's proposals and endorsed by the consultation.

Consultation on amendments to the Collective Investment Schemes border for property transactions

HMT consulted in January 2007 on the definition of a collective investment scheme (CIS) set out in FSMA S235(1). This prohibits establishing, operating or winding up a CIS without FSA authorization.

The Schedule to the FSMA Collective Investment Schemes Order 2001 lists certain cases in which arrangements which would otherwise be considered CISs are exempt. There was uncertainty over whether certain types of property transaction fell within the definition of a CIS, particularly how exemptions applied to special purpose vehicles or multiple transactions.

The consultation closed on 29 March 2007. Responses to the consultation highlighted difficulties the proposed clarifications would cause for schemes set up deliberately to qualify as CISs in order to benefit from tax relief. The Treasury is developing revised proposals which were put out for further consultation in July. An announcement will be made in due course.

Proposals for a UK Unclaimed Assets Scheme

Following the consultations on the proposed scheme, on November 7 the Dormant Bank and Building Society Accounts Bill was introduced in Parliament to facilitate the scheme.

The proposed legislation will allow participating banks and building societies to extinguish their liability to a dormant account holder upon transfer of the balance of the account to a reclaim fund. After transfer, account holders will have the right of repayment from a reclaim fund which will need to be authorised by the Financial Services Authority. Account holders will be able to continue their usual relationship with their bank or building society, which will act as agent of a reclaim fund.

Money not needed to fund reclaim applications will be passed to the Big Lottery Fund for onward distribution according to the distribution priorities in England, Scotland, Wales and Northern Ireland. In addition, smaller locally-based financial institutions may transfer money not needed for reclaim to charities that benefit their local communities.

Legislative Reform Order (LRO) to amend Lloyd's Act 1982

In March 2008, the Treasury published a consultation paper on proposals to modernise the governance arrangements at Lloyd's by way of a Legislative Reform Order, amending Lloyd's Act 1982.

Following consultation, the draft Order has now been laid before Parliament where it will be subject to scrutiny by the Regulatory Reform Committees in both Houses of Parliament.

The Government's response to the consultation, and the Explanatory Document provided to Parliament are available on the Treasury website at

http://www.hm-treasury.gov.uk/consultations_and_legislation/consult_fullindex.cfm

SECTION THREE: NEW CONSULTATIONS AND THOSE STILL OPEN

Proposals to reform Part 7 of the Companies Act 1989

Part 7 modifies general insolvency law to provide systemic protection for certain financial markets in the event that one of their participants defaults. The Government has proposed a number of amendments to ensure the legislation is up to date and reflects market developments, in particular the extension of central counterparty clearing activity.

A consultation document was published in July 2008. The closing date for responses is 16 October.

Financial Promotions in the Workplace

This consultation closed on 16th June 2006. The proposals would enable company pensions administrators to provide written material and make oral promotions about company pensions to employees without needing to be regulated by the FSA. Employers would also be able to communicate to employees about work-related insurance cover without needing to be regulated by the FSA. A further consultation covering certain changes proposed in the previous consultation was published on 22 September. The consultation closes 12 December 2008.

Financial stability and depositor protection

The Authorities (HM Treasury, Bank of England and Financial Services Authority) published two consultation documents in July, *Financial stability and depositor protection: further consultation* on 1 July 2008 and a detailed document on the proposals for a Special Resolution Regime on 22 July. These documents follow on from a discussion paper in late 2007 and a January consultation document, which sought views on a number of questions around the ways in which the current framework for dealing with banks in distress, and in particular depositor protection, might be improved to respond better to the challenges of recent events which have demonstrated the importance of depositor confidence if institutions are to weather periods of financial instability. The reforms - mainly being taken forward in legislation later this year - include a special resolution regime with a range of tools for resolving troubled banks, an enhanced financial stability remit for the Bank of England, a

supervisory enhancement programme to strengthen the FSA's existing regulatory approach and changes to the operation of the UK's deposit compensation scheme to ensure that consumers understand, and have confidence in, the arrangements that will ensure they are swiftly and adequately compensated in the unlikely event of a bank failure.

The closing date for responses for both consultation documents was 15 September 2008.

UK implementation of the Payment Services Directive (PSD)

The PSD aims to harmonise conduct of business rules for all providers of electronic payment services across the EU, and creates a tiered prudential authorisation regime for non-bank payment service providers – known as “Payment Institutions”.

The Council and European Parliament reached political agreement on the PSD on 24 April 2007. The Directive was formally adopted on 13 November 2007, and was published in the Official Journal on 5 December 2007.

The Directive must be transposed into the national law of all EU Member States by 1 November 2009. On 22 July 2008, HM Treasury published its final consultation on implementing the PSD. This document is the final phase in a three-stage consultation process and requests responses to the draft HM Treasury Payment Services Regulations, which will implement the majority of the PSD in the UK on 1 November 2009. The consultation period, which began with the publication of the document, ran for 12 weeks. Responses were requested by 3 October 2008.

Deregulating freight forwarding

This consultation seeks views on removing retail ‘open cover’ insurance policies offered by freight forwarding and storage firms from the scope of FSA regulation. The practice of freight forwarders and storage firms extending ‘open cover’ insurance to commercial customers was deregulated in 2007. Retail ‘open cover’ was not deregulated because of the risk of consumer detriment. Since then the relevant trade associations have amended their codes of practice to ensure that their members join the Voluntary Jurisdiction of the Financial Ombudsman Service. Deregulation will bring UK regulation

in line with the rest of the EU, reduce costs and, via the FOS and FSCS, provide greater protection than the insurance alternatives currently offered. The consultation closed on 12 September 2008 and a response will be published in due course.

Extension of the Statutory Regime for Issuer Liability

Section 90A of the Financial Services and Markets Act 2000 established a statutory civil liability regime for issuer misstatements to the markets in publications that are required for the purposes of the Transparency Obligations Directive (2004/109). Professor Paul Davies of LSE was asked to advise whether any further extension of this liability regime was needed. His report of June 2007 concluded that the current regime was soundly based, however he also recommended extending the limited scope of the statutory regime to a wider range of markets, transactions and issuer disclosures. HMT consulted in July 2008 on proposed regulations based on Professor Davies' recommendations. Responses were due by 9 October 2008.

SECTION FOUR: CONSULTATIONS PLANNED IN THE NEXT THREE MONTHS

Clarification of the regulatory treatment of sukuk (Islamic bonds)

It is presently unclear whether sukuk, which are essentially Sharia'a compliant bonds, should be regulated as a Collective Investment Scheme (CIS), which they represent in legal form, or as a debt security, which they represent in economic substance. As the regulatory treatment for CIS is more onerous than that for debt securities, to regulate *sukuk* as CIS would potentially place UK sukuk issuers at a commercial disadvantage.

The Treasury and the FSA will be consulting on clarifying the regulatory treatment of sukuk in the autumn. This is likely to entail changes to both the CIS (Exemption Order) and the RAO.

Amendment To The Supervisory Review Process For Cross-Border Mergers And Acquisitions

A consultation document, impact assessment, and draft statutory instrument amending the controllers regime in FSMA will be published this September.