



HM TREASURY

FSMA BULLETIN No 52

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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 51

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 have ceased 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.

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

Amendments were made to FSMA on 13 December 2007 to extend FSA regulation to the selling of travel insurance alongside a holiday. An interim authorisation regime will be in place from 20 June 2008 until 31 December 2009.

Proposals for a UK Unclaimed Assets Scheme

Following Royal Assent of the Dormant Bank and Building Societies Act 2008 ('the Act') on 26 November 2008, the Government is proposing to introduce secondary legislation to enable the FSA to regulate a reclaim fund; and establish reporting requirements for building societies taking advantage of the option available to small and locally based institutions identical to the requirements for smaller banks. Minor technical changes to rules on transferral of banking and insurance business legislation will also be made.

One of the statutory instruments will amend The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ('the RAO'). The Act amends Schedule 2 of FSMA in order to add to the list of activities that may be specified as 'regulated activities' for the purposes of FSA regulation, to include the activities of a reclaim fund. The Treasury accordingly proposes to specify particular activities of a reclaim fund by amending the RAO. In particular, the Government will amend the RAO to include the reclaim fund's activities of meeting repayment claims and managing dormant account funds, which is necessary to enable the FSA to authorise and regulate these activities. This instrument will also include a provision applying the provisions in FSMA regulations on notice requirements for business transfers to apply to a reclaim fund business transfer

The other statutory instrument will amend the Building Societies (Accounts and Related Provisions) Regulations 1998 to introduce reporting requirements for building societies taking advantage of the small, locally based option on the same basis as the requirements in the Act relating to smaller banks.

The Government will shortly publish a consultation document on this secondary legislation in order to take forward the implementation of an effective dormant accounts scheme in the UK that protects consumers and is transparent and fair.

SECTION TWO: PROGRESS ON CONSULTATIONS WHICH HAVE CLOSED

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 and closed on 3 October 2008. The summary of responses together with the final Regulations will be published in early 2009.

Acquisitions Directive implementation in the UK – Amendment To The Supervisory Review Process For Cross-Border Mergers And Acquisitions

A joint consultation document with the FSA, including and impact assessment, draft statutory instrument and draft FSA rules amending the controllers regime in FSMA were published in September 2008, with a deadline for response in December. The statutory instrument will be revised following consideration of the (approximately 10) responses, and should then be laid before Parliament in the first quarter of 2009, with a view to coming into force by the EU deadline of 21 March.

Consultation on 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. This consultation sought views on proposals to update the legislation to take account of market developments, in particular the extension of central counterparty clearing activity.

The consultation closed on 16 October and a Summary of Responses was published on 19 December. The Treasury has allowed until the end of January for final comment on the proposed revisions to the draft Regulations, in particular any practical issues arising from the need to amend the default rules of Recognised Investment Exchanges and Recognised Clearing Houses.

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.

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

Deregulating freight forwarding

HMT sought 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. The consultation closed on 12 September 2008. Nine responses were received. A summary and Government response will be published shortly.

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 closed on 12 December 2008 and a response will be published in due course.

SECTION THREE: NEW CONSULTATIONS AND THOSE STILL OPEN

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.

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.

UK negotiating approach to the revising the Electronic Money Directive and the UK implementation of the revised Regulation 2560 on cross border payments in euro

The Electronic Money Directive (EMD) aims to create a Single Market in electronic payments. The EMD was adopted by the European Council and Parliament in 2000, and implemented in the UK in 2002. The EMD introduced a prudential regime for the e-money issuers, known in the Directive as 'E-money Institutions' (ELMI).

In accordance to Article 11 of the EMD, the Commission conducted a review of the implementation of the Directive. Since the adoption of the Payment Services Directive (PSD), it has been thought that an uneven playing field has been created between Payment Institutions (non-bank payment service providers) and ELMIs. In October 2008, the Commission published a proposal to revise the EMD.

Regulation 2560/2001 on cross border payments in euro aims to ensure the price of cross-border Euro payments is no higher than the price of identical national payments in Euro within a Member State (MS). Political agreement between the European Council and Parliament on the Regulation was reached in November 2001 and came into force in December 2001.

In accordance with the review clause in Article 8 of the Regulation, in February 2008 the Commission reported on its review of the Regulations application. The overall impact of the Regulation was broadly positive, as it had achieved its intended objectives. However, to address current gaps resulting from recent market developments, and to align the Regulation with changes that will be introduced by the Payment Services Directive (PSD), the Commission concluded that the Regulation would need to be amended. In October 2008, the Commission published a proposal to revise the Regulation.

On 20 January 2009, HM Treasury published its consultation on both proposals with a view to informing the Government approach towards EU level negotiations on revising the EMD, and the implementation of a revised Regulation 2560 into UK law. Stakeholder reactions to the consultation are invited by 14 April 2009

Regulating the sale and rent back market

The sale and rent back market offers homeowners the option of selling their properties at discounted rates in exchange for tenancy arrangements. A range of stakeholders, including the mortgage industry and consumer groups, has expressed concerns regarding this market. In light of these concerns, at Budget 2008, the Government asked the Office of Fair Trading (OFT) and the Financial Services Authority (FSA) to investigate the sale and rent back market, focusing on consumers' experience of these arrangements, and consider options where appropriate to strengthen consumer protections. On 14 May the OFT announced that it would conduct a formal market study, working to an expedited timetable in light of stakeholder concerns.

The OFT published its report on 15 October. The report made three recommendations to Government, that:

- the sale and rent back sector should be regulated by the Financial Services Authority (FSA) and the regulations should cover transparency, advice and reducing the risks to consumers;
- in the short term, Government programmes targeted at people experiencing financial difficulty over housing should include efforts to raise awareness of sale and rent back, with the key message being that it is a risky product and that those considering it should seek independent advice; and
- the Department for Work and Pensions (DWP) should provide greater clarity on the eligibility of sale and rent back tenants for Housing Benefit.

The Government accepted these recommendations, and at Pre-Budget Report 2008 confirmed the intention to consult on strengthening consumer protections in the sale and rent back market, including extending the scope of FSA regulation to include the sale and rent back market. On 6 February 2009, the Treasury published this consultation. The purpose of the consultation is to help ensure appropriate consumer protections in the sale and rent back market.

The closing date for responses to consultation is 1 May 2009.

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 joint Treasury and FSA consultation will be consulting on clarifying the regulatory treatment of sukuk. The document was published in December 2008 and the consultation period is open until 8 March 2009. This is likely to entail changes to both the CIS (Exemption Order) and the RAO.

SECTION FOUR: CONSULTATIONS PLANNED IN THE NEXT THREE MONTHS

None.