

Eve Engledow
FSMA secondary legislation consultation responses
Financial Stability and Regulatory Policy Team
Room 4/23
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

24 May 2004

Dear Ms Engledow,

Financial Services and Markets Act two year review: Changes to secondary legislation. Volume 1: Proposals for change

ILAG is a professional representative body concerned with the future of the investment, life and health insurance and pensions industry. It is led by practitioners, and aims to identify and develop industry best practice.

The Group currently has a growing membership of around 50 practitioner companies and associate members. In addition, a number of individual members are affiliated to the Group.

This consultation is the first in a series and does not cover many of the topics of particular interest to regulated firms: the Financial Ombudsman Service for example. We look forward to the issue of such Consultation Papers. In the meantime our responses to the relevant questions in this Paper are overleaf.

General Comments

Citizen's Advice Bureaux

We do not feel that CABs should provide advice on specific products. It is important that consumers have access to guidance by appropriately qualified and trained personnel within CABs. However, any guidance should not stray into regulated activities.

We recognise that the CAB is a largely voluntary service, which relies on the good will of individuals to run it. Creating onerous qualification and training requirements may deter volunteers.



Investment & Life Assurance Group
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Nonetheless it is important that customers are assured of a basic competency to provide generic guidance. CABs should refer customers to local IFAs, where appropriate, for specific advice and we suggest that all CABs forge links with their local IFA community.

CAB customers are often vulnerable members of society and should be afforded the highest level of protection.

We would be happy to discuss our Response in more detail.

Yours sincerely

Sue Rice
Group Director

Response to Specific Questions

Q1: Do you think that the current scope of the financial promotion restriction creates uncertainty or is unduly restrictive of the work of advice centres?

We think that there is some uncertainty as to the exact scope of the advice centres and that practices may differ from centre to centre. However, we do not consider that the current scope is unduly restrictive. It would be helpful, however, if FSA could publish more definitive guidance on implementation.

Q2: Do you think that there should be a specific financial promotion exemption for advice centres?

No. We do not think that there should be any specific exemption for advice centres.

Our main concern is that, at present, individuals working for CABs may be giving advice and unintentionally committing criminal offences.

Q3: Is there a case for further legislation in relation to the business test?

In preference to legislation we feel that it would be helpful if Treasury were to clarify the current position by means of a circular.

Q4: Do you think that there should be additional legislation to confirm that advice centres are not carrying on regulated activities?

No. It should be clear whether advice centres are giving advice or not. If it is decided to allow centres to make financial promotions, which we do not recommend, this will cause client confusion.

By making recommendations, which the client is free to take or ignore, they will, in effect, be giving investment advice. As stated earlier we feel strongly that anyone giving investment advice should be qualified and regulated.

Q5: Do you agree with the proposed conditions for exemptions relating to advice centres?

We do not feel that consumers would be adequately protected by the proposed conditions. We could envisage disputes between advice centres and their PII insurers. Customers would be unprotected if insurers decided to repudiate liability.

Q6: Do you think that there should be other conditions (e.g. minimum competence criteria and specific PII thresholds)?

Yes. For customer protection we think that anyone giving advice on specific topics should:

- be assessed as competent
- pass relevant examinations
- gain approval as a CF21 under the FSA Approved Persons Rules
- be subject to performance and competence monitoring

Q7: Do you agree with limiting the exemptions to mortgages, endowments, pension products and shares?

As stated above, we do not agree with such exemptions.

Q8: Do you think that an exemption limited only to members of certain established networks of advice centres provides a better alternative?

No. The conditions we suggest in Q5 and Q6 would apply even if a network system were to be introduced.

Q9: Do you think that exemptions for advice centres could have regulatory consequences for other bodies besides advice centres?

We think that there is a very real possibility that any exemptions for advice centres would have consequences for other bodies.

There is the need to avoid the situation where there is two-tier advice and two-tier protection or where an individual adviser can operate out of CAB and on his own account and then fall under separate legislation.

Q10: Do you agree that there should be an exemption for both real time and non real time promotions made by employers (option 1(c))? If not, which of options 1(a) and (b) do you prefer?

We would not favour exemptions for both real time and non-real time promotions. We do not think that it is part of an employer's duty to persuade his employees to join a pension scheme. In fact, an employer who did so by means of a real time promotion could be in an invidious position, should the benefits prove to be disappointing, and might face legal action by the employees.

We feel that a suitably worded non-real time promotion containing appropriate caveats, could avoid that danger, and be of help to employees, and would support option 1 (b). However, we doubt whether in practice many employers in the current climate will wish to go that far.

Q11: Do you agree that any exemption should be subject to conditions and not be unrestricted?

We feel that employers should not go further than pointing out the advantages of their pensions scheme.

Q12: Do you agree with the conditions outlined in paragraph 4.31?

Yes.

Q13: Do you think that there should be other conditions?

No.

Q14: Do you think that the exemption should contain an additional condition restricting the ability of employers to provide individual advice to employees?

Yes.

Q15: If so do you think that limiting the ability of employers to make promotions by a requirement that they do not provide pensions advice in relation to an employee's individual circumstances is an appropriate condition?

Yes.

Q16: *Do you think that limiting the ability of employers to make promotions by reference to the definition of the activity of advising in article 53 RAO is an appropriate condition above?*

Yes.

Q17: *Do you think that limiting the ability of employers to make promotions by prohibiting reference to unfavourable comparisons with other pensions is a viable alternative condition above?*

Yes.

Q18: *Do you agree that there should be no restriction on which employer's representatives can promote the employer's pension schemes?*

No. The authority should be limited to named individuals within the firm's senior management.

Q19: *Do you agree with the proposed changes to the Financial Promotion Order?*

Yes.

Q20: *Are there any further changes to the Financial Promotion Order which you think should be considered?*

No.

Q21: *Do you agree that the current article 69 of the Financial Promotion Order is too complex and should if possible be simplified?*

Yes.

Q22: *Do you agree with narrowing the scope of the exemption but widening the circumstances in which it can be used and with applying fewer conditions to its use?*

Yes.

Q23: *Do you agree with the proposed specific conditions for the exemption to apply?*

Yes.

Q24: Do you agree that the exclusion in the Regulated Activities Order should be narrowed so that the "may reasonably be regarded" test will apply only in relation to a party who is acquiring or disposing of the day to day control of that body corporate and hence not to advice given to a party whose object is not acquisition or disposal of day to day control?

No comments.

Q25: Do you agree that the exclusion in the Regulated Activities Order should be narrowed so that the "may reasonably be regarded" test will apply only in relation to takeovers of small companies?

No comments.

Q26: Which option do you prefer as the definition of "small" company in respect of which the 'may reasonably be regarded' test should apply? Do you have any other suggestions?

No comments.

Q27: Do you agree that the exemption for promotions in respect of takeovers should be subject to the same conditions as those which apply under the revised RAO?

No comments.

Q28: Do you agree that it is desirable to have some form of regulation or conditions on unauthorised persons who are carrying out telephone campaigns?

No comments.

Q29: Do you agree that broadly speaking we should regulate to the same extent as under previous legislation?

No comments.

Q30: Which of the three options above do you prefer and why?

No comments.

Q31: Do you agree that under the proposed regulatory framework the provisions in the Financial Promotion Order providing exemptions for takeovers of relevant unlisted companies (i.e. Articles 63-66) are no longer necessary?

No comments.

Q32: Do you agree that the expression "routine or day to day decisions" should be replaced with "day to day decisions" so as to increase the scope of decisions which unauthorised trustees are permitted to take?

We have no objection in principle to increasing the scope of decisions which Trustees are allowed to make, but there would need to be care that they did not use that freedom to go beyond the purely routine to activities which they were not competent to undertake.

Q33: Do you agree that the scope of products in which unauthorised trustees are permitted to invest should include pooled investment vehicles and contracts of insurance?

Yes.

Q34: Do you agree that the condition under which unauthorised trustees can invest in certain products should be relaxed so that they only have to obtain and consider independent advice rather than act in accordance with it?

We doubt that this would be an appropriate relaxation. Independent advice is given by persons who have achieved competence, and are responsible for the advice which they give. There seems no reason to suppose that unauthorised Trustees could successfully second guess professional advisers.

Moreover, there could be a question as to where redress would lie should Trustees decline to accept professional advice or ignore advice, and that decision turned out badly.

Q35: Do you agree that the condition under which unauthorised trustees can invest in certain products should be relaxed so that advice can also be given by professional firms operating under Part XX of FSMA?

Yes.

Q36: Do you agree with the rationale for our proposals for deregulating trustees' investment activities?

We support the idea of eliminating inconsistencies between FISMA and the Pensions Act, 1995, but we have doubts about extending Trustees' powers too far.

Q37: Do you agree that the scope of exempt products should be limited to pooled investment vehicles or contracts of insurance and not include individual quoted securities or derivatives?

Yes.

Q38: What are your views on the three changes proposed to the Regulated Activities Order in chapter 8? We seek, in particular, views on the question of theatrical debentures.

No comments

Q39: We welcome views on this proposed change to the Service of Notice

Yes.

Q40: Do you agree that there should be provisions in FSMA applying to trustees similar to those of the Financial Services Act?

Yes.

Q41: We welcome views on the appropriate means of legislating for trustees in bankruptcy.

We agree with the proposal set out in 9.10.

Q42: We welcome views on this proposed change to the Disclosure Regulations. Do you think that independent actuaries should be able to disclose information to others in either of the situations outlined in (a) or (b) above, or both, or not at all?

We would support giving independent actuaries the right to make disclosures in both the circumstances outlined in 9.18. However, we feel that whether to disclose or not should be left to his judgment.

Q43: In relation to the proposals above should the existing exemptions be removed or limited? If so to what degree? Please provide reasons for your responses.

No comments.

Q44: Do you agree that there has been no evidence of investor detriment from unregulated advice being given to investors (a) in the electricity forward markets or (b) in the course of either the Balancing and Settlement Arrangements or the provision of balancing services to NGC?

No comments.

Q45: Do you agree that only those investors who have knowledge of the electricity markets i.e. professionals are likely to consider investing in the electricity forward markets?

No comments.

Q46: Do you feel that there is a need for the Electricity Industry advice exemption?

No comments.

Q47: Are there any BSC Parties who currently take advantage or might take advantage of this exemption?

No comments.

Q48: Could a BSC Party take advantage of the exemption to provide investment advice (e.g. advice about financial engineering in the electricity markets) that should properly be regulated by the FSA?

No comments.

Q49: Do you agree that the Electricity Industry advice exemption should be retained? Please explain your views.

No comments.

Q50: Do you agree that such a change to Regulation 22(5) should be made?

Yes.

Q51: Do you agree that the costs of requiring OEICs to have an AGM outweigh the benefits?

Yes.

Q52: Do you agree that OEICs should be able to elect to dispense with the holding of AGMs?

Yes.

Q53: Do you agree that there will be adequate safeguards to protect shareholders if the requirement for OEICs to have an AGM is changed to an elective requirement?

Yes. It is particularly important that shareholders retain the right to require an AGM.

Q54: Is the requirement that all shareholders agree to an elective resolution too onerous a requirement for OEICs to meet? Should the threshold be lower e.g. 95 per cent of shareholders?

This requirement is too onerous. Rather than set a hurdle for agreement the OEIC could ask if any shareholders disagree with the proposal.

Q55: Should an ordinary resolution be sufficient to revoke the elective resolution?

Yes.

Q56: Regarding the proposed amendments to regulation 34 outlined in paragraph 10.18, do you agree that appointments should not have effect for longer than twelve months starting on the date of the appointment?

Yes. This should also be the longest period that any vacancy can be filled without an election at an AGM and no more than 1 director should be appointed in this way. In other words, a 'co-opted' director cannot be replaced by another 'co-opted' director.

Q57: Do you have any comments on our proposed amendment for regulation 36 outlined in paragraph 10.19?

Sending all documents to all shareholders who would have been entitled to attend the AGM could be very expensive.

These documents should be made available to those shareholders who wish to see them. For example, shareholders should be invited to request (using a Freepost reply service) any documents, including a summary, they wish to see.

Documents should also be published electronically and details of this provided with the invitation to request documents. This will reduce costs and potentially be of more use to shareholders.

Q58: If it is possible to do so, should any amendments be made to the requirement in regulation 78 regarding the information that is made public?

No.

Q59: If it is possible to do so, should any amendments be made to the requirement in regulation 78 regarding the manner in which information is made public? Is publication in the London or Edinburgh Gazettes appropriate or would publication elsewhere be more useful?

Electronic publication would be more suitable. This would increase availability and reduce costs. We are not convinced that the disclosures need to go beyond shareholders.

Ends