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FSMA Secondary Legislation Consultation Responses
Financial Stability and Regulatory Policy Team
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HM Treasury
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Via email: twoyearreview@hm-treasury.x.gsi.gov.uk

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CONSULTATION DOCUMENT – Proposed changes to the Secondary legislation under the Financial Services and Markets Act 2000 (FSMA)

We are pleased to be able to comment on your consultation document on the proposed changes to the financial promotion order.

Kingston Smith has a broadly based clientele largely comprised of smaller organisations and consequently we are obliged to offer them a full range of services. We have three separately regulated entities providing stockbroking, financial and corporate finance advice. Our response is based on their practical experience with the FSMA.

We are particularly concerned that advice centres who provide free confidential and independent financial advice are strictly regulated to ensure that the quality of advice given to the public, whether free or paid for, is sufficiently high.

Many areas of the financial advice given from these advice centres is complex and it is essential that this be given by trained competent qualified individuals. This training is expensive in the private sector and it is a concern as to where adequate levels of training can be sourced. Citizens Advice Bureaux cover a very wide range of areas and financial advice is a very specific complex area in its own right. We believe it is questionable whether one centre can provide a whole range of services and also provide financial advice of the quality required.

Our response to your detailed questions is contained in the attached appendix.

MICHAEL J SNYDER
Senior Partner

CONSULTATION QUESTIONS SUMMARY

1. We do not think that the current scope of the financial promotion restriction creates uncertainty or is restrictive of the work of financial advice centres. We believe that there should be some restriction and in relation to complex issues a complete prohibition. There is a strong danger that advice given could be inappropriate in this instance.
2. We do not believe there should be a financial promotion exemption for advice centres.
3. We do not believe there is a case for further legislation although we do consider it advantageous that advice centres are clearly designated as only being able to offer a restricted range of financial guidance.
4. We do believe that additional legislation would be necessary. We are concerned that full consideration is given to any exemptions for advice centres specifically if they are able to provide independent advice, which is free at the point of access. This may attract those individuals seeking free advice specifically rather than seeking the best quality of advice from whatever source. Free advice should be restricted to those areas of business where an individual is unable to meet the cost of paying for quality advice for example debt counselling or mortgage restructuring as a result of hardship.
5. Broadly we do agree with the proposed conditions for exemptions. Our main concern is that financial advice is a very complex area and Citizens Advice Bureaux will not be geared up to provide a full range of services. Accordingly the services that they give must be restricted to those areas which cannot be adequately provided in the private sector or can be provided simply and cheaply at the lower end of the market.
6. We believe strongly that there must be an adequate test of competence for any individual being authorised to give any financial advice irrespective of whether this is free or paid for. We do think consideration should be given that if the advice is free from the advice centres then the recipients should have no right of redress should that advice subsequently be shown to be inappropriate. This should in turn reduce the need for higher levels of professional indemnity insurance.
7. We broadly agree with limiting the exemptions to the areas stated in the report. Again we reiterate the point that we believe the complex issues must be dealt with by full time professionals and therefore paid for at the point of access.
8. No.
9. We do not think the exemptions will have any significant regulatory consequences for other business bodies.

10. Our preference would be that any exemption is limited to non-real time communications. Our reasoning is that it allows greater protection of employees which we consider more of a priority than active promotion of pensions in the work place. We are acutely concerned that if there is an incentive to employers to promote pensions in the work place this will be done regardless of the technical ability or knowledge to do so. By limiting any exemption to non-real time communication, employees will not be put at risk by any misleading oral promotions from employers.
11. In order to maximise the protection of the employees any exemptions should be subject to conditions. Any financial promotion must be within very carefully considered constraints.
12. We broadly agree with the conditions outlined in paragraph 4.3.1.
13. We do not consider there should be any other conditions.
14. We do not think employers should be able to provide individual advice to employees. Any information provided to employees should fall short of advice and should be strictly pre-checked information only.
15. It should not be an employer's task to give any pensions advice in relation to an employee's individual circumstances. This is clearly beyond an employer's remit as regards what services or information he should be providing his employees. We also consider it is essential that pensions advice is given to individuals which is in line with their individual circumstances. Therefore it is our view that anything that the employer gives the employees is limited strictly to information only. It is inappropriate that they give advice as this must be based on the employees' personal circumstances and we also consider it inappropriate that an employer should seek to establish these circumstances.
16. No comment.
17. We do not consider that an employer should be drawn into inappropriate comparisons with other pension providers.
18. Any promotion of an employer's pension scheme must be done by someone who is adequately versed in the detail of that scheme. We therefore consider that there must be restrictions on which employers' representatives are able to promote an employers pension scheme. There must also be checks as to the competence of any designated individual.
19. Yes.
20. We do not have specific suggestions for further amendments to the Financial Promotion Order other than by reference to our answers to other questions below.
21. We agree that the current Article 69 is too complex and should be simplified.

22. We agree to the narrowing of the scope of the exemption. However, the borderline between an inducement and an invitation may be difficult to draw in all cases. It should be clear what an “invitation” means and we suggest consideration should be given to a definition.
23. We agree with the specific conditions for the exemption although we are not clear as to why the expression “traded” is used instead of “traded or dealt in” as in the current Article 69 and in the current Article 67 (new Article 70) and the current Article 68 (new Article 71).
24. We agree that the exclusion should be narrowed.
25. We agree that the exclusion should only relate to “small companies”
26. Our preference is **Option 2**: a company which is owned by no more than 50 persons or is a “unlisted company” (within the meaning of Article 3 of the FPO).
27. Yes
28. Yes
29. Yes
30. We prefer option (iii) because the Takeover Code is open to revision by the Takeover Panel in the light of experience and it does not seem to us that we need any further protection for private companies than exist in relation to public companies.
31. We agree that takeovers of “small companies” can be dealt with solely under the new proposed Regulation 69 (similar to the existing Article 62) as, in particular, the exemption for making offers for “small companies” complying with Schedule 4 of the existing Financial Promotion Order are rarely made and are cumbersome, time consuming and expensive. Also the Schedule 4 information is somewhat arbitrary: it would have been easier to have made such provisions subject to similar rules to the Takeover Code as these are a familiar format.
32. We do agree with that the expression ‘routine’ or ‘day to day’ decisions should be replaced with ‘day to day’ decisions. It should therefore become the responsibility of the authorised trustee to ensure that any decisions taken by any unauthorised trustees are done so appropriately.
33. We do agree that the scope of products in which unauthorised trustees are permitted to invest should be extended to include pooled investment vehicles and contracts of insurance. These individual contracts should themselves be regulated and authorised and we consider this provides sufficient and best protection for the occupational pension scheme membership.
34. We agree that this condition should be relaxed in order to allow greater flexibility for the unauthorised trustees. Again we consider there is sufficient protection available to cover adequate protection for occupational pension scheme members.

35. We agree.
36. We agree.
37. We certainly agree that the scope of exempt products should be limited to pooled investment vehicles or contracts of insurance. We consider individual quoted securities or derivatives carry unacceptable risk and should only be used following specific expert independent financial advice.