



BRITISH BANKERS' ASSOCIATION

Eve Engledow
FSMA secondary legislation consultation responses
Room 4/23, HM Treasury
1 Horse Guards Road
London, SW1A 2HQ

Pinnars Hall
105-108 Old Broad Street
London EC2N 1EX

Tel: +44 (0) 20 7216 8800
Fax: +44 (0) 20 7216 8811

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Dear Eve

**BBA response to HM Treasury Financial Services and Markets Act two year review:
Changes to secondary legislation.**

Thank you for the opportunity to provide comment on your proposed changes to secondary legislation. Your consultation paper sets out a broad, yet complicated mix of policy and technical issues and will necessarily impact on our members at a number of different levels. Our understanding of the consultation paper is that it can be divided into two parts covering both retail and wholesale aspects and we have responded to the consultation on this basis.

In respect of the main retail elements only, our assessment of the paper reveals two key issues for our members: at policy level, whether publically funded advice centres and/or employers should be allowed to provide financial advice on pensions and mortgages; whereas at technical level, how should the Financial Promotions Order operate in respect of its exemptions.

Although we consider the first issue to be rather peripheral to our members interests, we do nonetheless feel strongly that where an advice centre or 'employer' gives financial advice, particularly on investments, then they should be competent to do so. In addition, you will be aware that the present regulatory regime for giving financial advice is highly regulated and it is being debated whether a simplified sales process could be introduced which in turn would 'lighten the regulatory load'. BBA is supportive of a simplified sales process and should there be a 'tiered' regulatory regime for investments, there should also be consistency of approach for all advisers depending on the 'tier' within which they operate.

On the Financial Promotions Order, broadly speaking we consider that this is an area which requires further clarification/guidance. Application of the exemptions, for example, pose particular problems for large firms that operate as a group or with overseas offices.

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

No comment

2. Do you think that there should be a specific financial promotion exemption for advice centres

No comment

3. Is there a case for further legislation in relation to the ‘in the course of business’ test

No comment

4. Do you think that there should be additional legislation to confirm that advice centres are not carrying out regulated activities

No comment

5. Do you agree with the proposed conditions for exemptions relating to advice centres

No comment

6. Do you think there should be other conditions (eg. Minimum competence criteria and specific PII thresholds)

We consider that where advice centre personnel and employers are giving financial advice then they should be competent to do so. Competency should be aligned against those required for regulated firms to ensure there is consistency of approach.

7. Do you agree with limiting the exemptions to mortgages, endowments, pensions and shares

No comment

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

No comment

9. Do you think that exemptions for advice centres could have regulatory consequences for other bodies beside advice centres

We request clarification on whether customers who have received financial advice from a publically funded advice centre or employer, will gain have to receive fully regulated advice before a bank is then able to sell investment and packaged products (where this is being sold through the advice route).

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

No comment

11. Do you agree that any exemption should be subject to conditions and not be unrestricted

No comment

12. Do you agree with the conditions outlined in paragraph 4.31

No comment

13. Do you think that there should be other conditions

No comment

14. Do you think that the exemption should contain an additional condition restricting the ability of employers to provide additional advice to employees

No comment

15. 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 a person's individual circumstances is an appropriate condition

No comment

16. 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

No comment

17. 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

No comment

18. Do you agree that there should be no restriction on which employer's representatives can promote the employer's pension schemes

We consider that where employer personnel are giving financial advice then they should be competent to do so. Competency should be aligned against those required for regulated firms to ensure there is consistency of approach.

There is a distinction to be drawn between the employers role to establish a pension scheme, and then promoting this to their employees. Generic promotion of schemes to raise employee awareness of the scheme and the desirability of making adequate pension provision should be permissible where this does not then fall over into regulated financial advice.

19. Do you agree with the proposed changes to the Financial Promotions Order

We are concerned that the proposed changes are too restrictive.

Follow up non-real time communication and solicited real time communication

We understand, for example, that

- Where a customer approaches a bank branch following an unsolicited communication that is exempt from the FPO (because contains ‘certain indications’) the firm would not be able to ‘follow’ this up via telephone or a personal visit unless this was expressly requested by the customer.
- Where a first communication is solicited, follow up communication is thus restricted to emails and letters. **See Para 15 (2) (a)**
- Where a first communication is unsolicited and does not fall within the FPO exemptions, are we to assume that no follow up communication is permitted?

Certified High Net Worth Individuals

We are concerned that a high net worth individual must be certified by their accountant or by their employer as a high net worth individual and question the merit of introducing this requirement on practical grounds. **See Para 54 (3) (d)**

20. Are there any further changes to the Financial Promotions Order which you think should be considered

Given our concerns above, we would urge that further consideration be given to the intention behind these provisions.

21. Do you agree that the current article 69 of the Financial Promotion Order is too complex and should be simplified

No comment

22. Do you agree with the narrowing the scope of the exemption but widening the circumstances

No comment

23. Do you agree with the proposed specific conditions for the exemptions to apply

No comment

24. 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?

Yes.

25. 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?

Yes

26. 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?

Option (i) or (iii) are preferable to (ii)

27. 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?

Yes

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

Yes

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

Yes

30. Which of the three options above do you prefer and why?

Option (iii) is preferable because we consider the Takeover Code regime to be one which operates well.

31. 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?

We would prefer to have the exemptions for takeovers retained.

32. 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?

No comment

33. 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?

No comment

34. 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?

No comment

35. 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?

No comment

36. Do you agree with the rationale for our proposals for deregulating trustees' investment activities?

No comment

37. 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?

No comment

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

We support the proposals relating to "Absence of holding out" and trustees. We have no comment on the proposals relating to theatrical debentures.

39. We welcome views on this proposed change to the Service of Notice regulations

No comment

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

Yes

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

No preferences

42. 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?

No comment

43. 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 comment

44. 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 comment

45. 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 comment

46. Do you feel that there is a need for the Electricity Industry advice exemption?

No comment

47. Are there any BSC Parties who currently take advantage or might take advantage of this exemption?

No comment

48. 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 comment

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

No comment

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

No comment

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

Yes

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

Yes

53. 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

54. 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?

Threshold should be lower

55. Should an ordinary resolution be sufficient to revoke the elective resolution?

Yes

56. 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?

No comment

57. Do you have any comments on our proposed amendment for Regulation 36 outlined in paragraph 10.19?

No comment

58. 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?

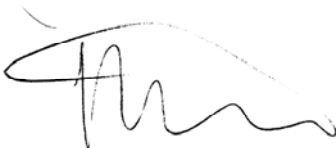
No comment

59. 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?

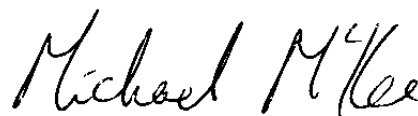
No comment

We would be happy to meet with you to discuss any of the points we have raised further.

Yours sincerely



Samantha Mitchell
Director, Retail



Michael McKee
Executive Director, Wholesale