

# Financial Services and Markets Legislation City Liaison Group\*

London Investment Banking Association  
British Bankers' Association  
International Swaps & Derivatives Association  
Futures and Options Association  
Investment Management Association  
International Primary Market Association  
Association of British Insurers  
Linklaters  
Clifford Chance  
Freshfields Bruckhaus Deringer

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Dear Marcello,

## **Financial Services and Markets Act two year review**

I am writing to follow up our conversation of last month about the work which City Liaison Group members are undertaking on the FSMA two year review consultation.

As I outlined then, our intention at this stage is to comment jointly on a number of the proposals in the consultation document, and we have also been considering how we should proceed on points which we raised with the Treasury last year<sup>1</sup> but which have not been included in the consultation.

On the latter, we have in mind three sets of issues, two of which were not covered in the Changes to Secondary Legislation consultation document.

### Two year Review – outstanding issues

First, and as the consultation document recognises, there have been a number of problems which have arisen from the current FSMA provisions on controllers, including the requirements

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<sup>1</sup> For ease of reference, I attach\* the relevant parts of the paper that was submitted last June.

imposed when there is a change in control and the range of shareholders who fall within the current definition of controller. Firms have stressed to us that the current requirements are burdensome and costly to comply with, and we would urge the Treasury to consider again the need to include amendments to Part XII within the Review in the cases where the legislative requirements are *additional* to the Directives' provisions and have the effect of curtailing FSA's ability to introduce more flexible Handbook rules.

Second, there are overlapping concerns about the operation of sections 148 and 157 of the Act, in particular as regards the extent to which the FSMA can limit FSA's capacity to issue waiver or modification directions or to provide individual guidance. For example, we believe that the regulator should be able to waive or modify a rule when the purpose for which the rule has been made can be achieved by a firm in another way: currently section 148 would only permit a direction in such a case where compliance with the rules, or with the rules as unmodified, would be "unduly burdensome or would not achieve the purpose for which the rules were made". There should also be mechanisms by which FSA can clarify *formally* that it believes that a rule made under Part X would not be contravened in the case where a firm complied with guidance on the meaning of the rule that had been provided by another body: we are not clear whether section 157 would enable the regulator to provide individual guidance in such a case or that the fact that such guidance had been given could be publicised by FSA. (We think it unlikely that the FSA would wish to give general guidance in these circumstances and, in any case, the need to consult would entail a lengthier process.)

Additional flexibility of this kind is needed if the regulator is to achieve a shorter Rulebook because alternatives to detailed rules will have to be found if firms are to have the certainty that they need that a given course of action will not contravene regulatory requirements.

There is also an overlap with the provisions of section 150 because, currently, a firm in compliance with a direction given under section 148 is not liable to an action for damages under section 150 *but* compliance with FSA *guidance* to a rule would not protect a firm.

The third matter concerns the provisions in the Financial Services and Markets Tribunal Rules which specify the circumstances in which the Tribunal can hear a case in private. There was considerable debate about these provisions in the run-up to N2 and the City Liaison Group and many other bodies argued that the shift from private to public hearings that rule 17 introduced would deter firms from taking cases to the Tribunal and, in consequence, would undermine the carefully crafted checks and balances arrangements which Parliament had sought to achieve in the light of the Burns Committee's recommendations.

We suggest that the validity of these concerns has been demonstrated by events. At the same time, however, the Council on Tribunals has reconsidered its Model Rules of Procedure in this area and amendments have been made to clarify the circumstances in which tribunals should permit private hearings (a copy of the relevant section from the new Guide to Drafting Tribunal Rules is attached\*, for convenience). Since Treasury Ministers stressed that the Financial Services and Markets Tribunal's rules would reflect the Council on Tribunals' model rules, it seems clear that it is time to revisit this issue.

### Next steps

We suggest that the best way to take these matters forward would be to hold a meeting with you and your colleagues – possibly involving the FSA as well – to discuss the issues, and I would be grateful if you would contact me about this once you have had time to consider this letter. A particular point that we would need to cover is whether a Regulatory Reform Order could be

used to make the amendments that may be needed in the FSMA so that new primary legislation could be avoided.

#### Other matters

Whilst writing, I should also confirm the point that we discussed as regards the possibility of amendments being made to the Financial Promotion/Regulated Activities/Business Orders for the purpose of clarifying the position of Citizens Advice Bureaux and other advice centres. As I explained, there are indeed concerns that amendments could cast unnecessary doubt on whether other organisations currently relying on the business test can continue to do so safely in the absence of further specific exemptions – but we hope that a Ministerial statement in Parliament when the amendment Order is laid confirming that this is not the Treasury's intention should address this problem.

There is also the issue which has been raised with us about the way the services specified in the Annex to the Consolidated Banking Directive are referred to in other legislation, which I mentioned to you, but I suggest that we deal with that separately.

Yours sincerely,

**Peter Beales**

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