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FSMA secondary legislation consultation responses
Financial Stability and Regulatory Policy Team
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Date
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Our reference
DJC

Your reference

Dear Madam

Financial Services and Markets Act two year review

We attach responses in relation to those questions to which we wished to express a view.

Yours faithfully

Taylor Wessing

Enc

Financial Services and Markets Act Two Year Review: Changes to secondary legislation

Taylor Wessing responses

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

We agree with the proposed changes and believe that they will clarify the boundary of the financial promotion regime by making the scope of individual exemptions more consistent.

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

In general, we endorse the comments raised by the Law Society Company Law Committee in its submission to HM Treasury following the announcement of the two-year review of FSMA. In particular, we would like the following further changes to the Financial Promotion Order to be considered:

- increased flexibility in combining exemptions in Part V with the exemptions in Part VI;
- it would provide greater consistency if article 49 mirrored the category of “intermediate customers” in FSA rules more closely;
- amendment to article 12 to enable it to be combined with exemptions in addition to those in articles 19 and 49.

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

We agree that there is scope to simplify article 69 simplify the exemption appropriately with no apparent consumer detriment.

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?

Our understanding based on the draft article 72 in volume 2 of the consultation paper is that, contrary to paragraph 5.17 of volume 1 of the consultation paper, the investments to which the exemption will apply will remain the same. We believe that the scope should remain unaltered as it already matches that of current article 43 (communications to shareholders).

However, we are unsure why the references to investments “dealt in” on a relevant market have been removed. Is this intended to narrow the scope of the exemption or is “dealt in” being regarded as equivalent to “traded on”?

We agree that it is appropriate to widen the circumstances in which article 69 can be used (in particular the extension to relevant investments to be issued) and to apply fewer conditions and see little scope for consumer detriment in the proposals.

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

We agree with the conditions proposed.

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?

We agree with narrowing the scope of the "may reasonably be regarded" test in the way proposed as the scope of the current exemption can be interpreted in an unexpectedly wide way, and there is therefore uncertainty as to how the exemption is to operate. Restricting the test would therefore provide greater certainty.

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?

We agree.

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?

If the 'subjective' limb is to be restricted to small companies, we would prefer the definition in option 2.

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?

We agree that the sale of body corporate exemption in the FPO should be the same as in the RAO.

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?

We agree that there should be some level of regulation of unauthorised persons who carry out telephone campaigns.

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

We agree that the level of regulation should be based on the exemption available under the previous regime.

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

Although option 1 is most consistent with the financial promotion framework, we do not believe that it is workable since FSA guidance (Auth App 1.10.4G) makes it clear that even scripted calls will be interactive dialogues. An authorised person would therefore be unable to approve a script under current FSA rules. A variant on option 1 would be for the exemption to apply to communications based on a script which has been approved by an authorised person, although this would still require FSA rules to be developed on the requirements applying to such scripts. On balance, we therefore favour option 3 as this follows the previous legislation which proved to be a workable exemption.

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?

We agree that the sale of body corporate exemption should apply in the situations exempted under articles 63 to 66 and that they can therefore be removed.

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.

We agree with the proposed changes in respect of articles 15 and 40.

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

We agree with the proposed change.

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

We agree.

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

We agree.

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?

We agree, as any shareholder would be able to require an AGM to be held and, as the consultation paper notes, certain changes to OEIC schemes already require shareholder approval/notification.

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?

Given the additional existing safeguards described in the consultation paper, a lower threshold would be appropriate without causing detriment to shareholders.

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?

We agree.

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

We agree.

Controllers of authorised persons

We agree with the comments submitted to HM Treasury by the Law Society Company Law Committee following the announcement of the 2-year review of FSMA. The comments describe a number of situations where the current provisions result in the definition of a

controller being much wider than might be expected. The current wording, in particular section 422(4), is so complex that working out who is or is not a controller has become a specialised task. This results in many people potentially committing a criminal offence as they are unaware of their status as a controller.

Investment Services Directive

The general provision in article 4(4) of the RAO creates a trap due to the lack of cross-references in the relevant exclusions which are disapplied. As implementation of the replacement for the ISD is not due until 2006 we believe that it would be appropriate to provide cross-references prior to implementation of the new directive.

Promotions to overseas recipients

There is no clear rationale for the inability to combine the exemption in article 12 with exemptions other than articles 19 and 49. We believe that the exemption should also be capable of being applied when the communication is directed at other people to whom it may lawfully be communicated and that this amendment could be incorporated in the next version of the FPO. We also endorse the comments of the Law Society Company Law Committee in relation to article 12.

Financial promotion structure

We agree that the financial promotion regime would, ideally, be based on the risks to the various types of recipient of promotions, rather than on the sector involved. However, we are doubtful that the cost involved in making the significant changes that such a reworking of the regime would be likely to bring would be justified by the benefits given the balance struck by the existing regime.

Public Offer of Securities Regulations

Although not strictly secondary legislation under the FSMA, an FSMA-related issue arises from amendments made at N2 to the Regulations.

The definition of “shares” which existed pre-FSMA and referred to the Financial Services Act 1986 definition, has been removed. This leaves the term undefined other than for the purposes of regulation 7 where the term is defined by reference to the FSMA definition. This has created uncertainty as to the scope of the regulations since the logical conclusion to be drawn from the apparently deliberate removal of the general definition is that “share” is now intended to mean something different from the FSMA definition. One reading might be to give share its natural meaning which could include shares in partnerships and LLPs, as well as units in collective investment schemes. We would ask that the pre-FSMA position be reinstated by making the regulation 7 definition applicable to the rest of the Regulations.