

Regulated activities

Financial Services Consumer Panel response to:
'Regulated activities – a consultation document', a HM Treasury document

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Summary

- a. We are disappointed by the nature of the Treasury's consultation on this important topic. The regulations are virtually incomprehensible to non-lawyers and the consultation paper does not provide sufficient information to assess whether continuation of the present scope of regulation or the removal of certain activities provides sufficient consumer protection. In view of this our response takes the form of questions and does not provide an exhaustive list of potential problem areas for consumers (*paragraphs 3-4*).
- b. We raise questions in relation to the following aspects of the draft order:
 - the definition of investment advice subject to regulation (*paragraph 5*);
 - the exclusion for newspapers and other publications (*paragraph 7*);

- the exclusion for TV, sound and teletext services (*paragraph 8*);
- the exclusion of certain activities carried out in course of profession or other business (*paragraph 9*);
- the definition of consumer (*paragraph 10*).

c. We recommend that:

- guidance is issued by the FSA or Treasury on the boundary between generic and specific advice (*paragraph 5*);
- compliance with any guidance issued by the FSA or Treasury should provide a defence against prosecution (*paragraph 5*);
- action is taken to help consumers understand the distinction between generic advice and specific investment advice (*paragraph 5*).

Introduction

1. This response is submitted by the Financial Services Consumer Panel ('the Panel') to the Treasury consultation on '*Regulated Activities*'. The Financial Services Authority (FSA) established the Consumer Panel to advise the FSA Board on the interests and concerns of consumers and to report on the FSA's effectiveness in meeting its consumer protection and public awareness statutory objectives. There are eleven members of the Panel representing a broad range of consumer interests. The Panel is independent of the FSA - it can raise its own concerns, initiate its own research and publish its own reports. We are responding on the Regulated Activities Order (RAO). We do not wish to comment on the Exemption Order or the Collective Investment Schemes Order.
2. We note that the RAO does not include mortgages, long-term care insurance or pre-paid funeral plans and that the Treasury is still considering how these activities should be treated. We wish to draw the Treasury's attention to our response to the Joint Committee calling for

mortgages and long-term care insurance to be included in the FSA's remit from the outset. Our separate response to the Treasury's consultation on the regulation of pre-paid funeral plans welcomes the proposal that the investment involved in pre-paid funeral plans should be regulated by the FSA.

Overall comments

3. We are disappointed by the nature of the Treasury's consultation on this important topic. The overview and explanatory notes accompanying the draft orders are lacking in detail and the orders themselves are virtually incomprehensible to non-lawyers. In some instances the explanatory text appears at odds with the drafting of the Order itself (e.g. the exclusion for activities carried out in the course of profession or business at Schedule 3, paragraph 77 appears to differ from the explanatory text – see paragraph 9 of our response). The result is a lack of transparency making it difficult for those without legal expertise to fully assess the implications of the Treasury's proposals. The work of the Tax Law Rewrite Project demonstrates that it is possible to make complex legislation accessible. This example of good practice should be replicated for consultations on other legislation.

4. Our response is in the form of questions and queries on selected aspects of the draft Order which raise issues for consumers. Given the nature of the Treasury's consultation it is not possible for the Panel to provide an exhaustive list of potential issues for consumers raised by the RAO. The consultation document does not provide sufficient information to assess whether the Government's overall approach to continue with the current scope of regulation or in some cases to remove certain activities from regulation will provide appropriate consumer protection. For example, as we note in paragraph 7 of our response, there is a lack of information in the consultation paper on the impact for consumers of the exemption for newspapers and other publications providing investment advice (eg an assessment of whether the nature of advice given in newspapers has

changed and the extent to which consumers make investment decisions based on advice in newspapers).

Definition of investment advice subject to regulation (Article 19)

5. The explanation of Article 19 is that investment advice is only regulated where it relates to the merits of dealing in a particular investment ('specific advice'). Advice about the merits of different categories of product would not require authorisation ('generic advice'). We understand this reflects the current situation and that the definition of investment advice in the RAO has clarified existing legislation by specifying that advice is only regulated where it relates to a "particular" investment. We raise two issues in connection with this.

- The clarification is welcome insofar as uncertainty about regulating generic advice may restrict its availability to consumers. This clarification should be helpful to the FSA in the context of its proposed public awareness objective which may involve the FSA providing generic advice. It should also be helpful to the non-commercial advice agency sector, which hitherto has been inhibited in some instances from providing financial advice because of a fear that agencies might breach financial services regulation. This can be a problem with non-commercial housing agencies, for example, which feel inhibited (rightly or wrongly) from giving generic advice e.g. on equity release schemes. **The Panel recommends that the FSA or Treasury issues further guidance on the boundary between generic advice and regulated advice and that compliance with FSA/Treasury guidance should provide a defence against prosecution. It is also important that action is taken to help consumers understand the distinction between generic and specific advice and to ensure consumers are made aware of what advice is and what advice is not regulated by the FSA in their dealings with providers of financial services and intermediaries.**

- However, we are concerned that the exclusion of generic advice from FSA regulation in certain circumstances will be detrimental to consumers. Those who provide generic advice will not be required to apply the test of suitability and consumers receiving generic advice will not have access to redress or other protections afforded by regulation. We question what safeguards would protect against detriment in the following circumstances:
 - Generic advice given in the context of execution only business. For example, giving generic advice on bonds versus equities will be permissible without authorisation and could lead to abuse if a firm which only sells bonds gives generic advice that bonds are best, and then arranges the sale of bonds on an execution-only basis.
 - The producer of a computer software package providing generic advice would not require authorisation and the package could lead to consumers purchasing particular types of investment on an execution only basis which are not suitable.
6. We welcome the clarification provided in Article 19 by including advice to a person in his capacity as an agent of an investor (compared with the corresponding provision in the Financial Services Act, 1986).

Exclusion for newspapers and other publications providing investment advice from authorisation (Schedule 3, paragraph 78)

7. We understand that this exemption is based on current regulation. Newspapers, journals, magazines and other periodicals play an important role in educating and informing consumers about financial products and services. We appreciate that this could be constrained if changes were made to this exemption. We also acknowledge that the proposed regime for financial promotions by journalists will go some way to protecting consumers. Nevertheless, the Government should not automatically continue with this exemption without first assessing whether there are any

significant risks to consumers given any changes in the nature of financial journalism. There is no evidence in the Treasury's consultation paper to enable such an assessment and to justify the continuation of the present regime. Our final point is that this exemption seems to be largely based on paper media; we question how it will apply to electronic media.

Exclusion for TV, sound and teletext services from authorisation (Schedule 3, paragraph 79)

8. The exemption for advice provided through TV, sound broadcasting or through teletext services may be quickly outdated and inappropriate because of rapid changes in technology (eg as TV becomes more interactive and capable of providing specific advice, we query whether it will be appropriate for it to benefit from this exemption). We would welcome more discussion of this issue.

Exclusion of certain activities carried out in the course of professional or business (e.g. Schedule 3, paragraph 77)

9. We welcome the demise of the existing regime whereby the Recognised Professional Bodies (RPBs), covering accountants and lawyers, regulate the investment activities of their members as this led to differing standards of consumer protection. The change must not, however, lead to a loophole which could expose consumers to inaccurate or inappropriate advice. We consider it essential that any exemption to avoid unnecessary precautionary authorisation should at the same time provide appropriate consumer protection. The Treasury's consultation paper suggests that the proposed exemption would be more liberal than the exemption under the Financial Services Act, 1986. It is not clear from the drafting of the Order the nature of this concession in order to assess its impact on consumers. We therefore question whether this exemption is likely to pose any risks to consumers. A particular area of concern is professional firms or

businesses that do not give investment advice regularly and who as a result could become out of date in a rapidly changing market.

Definition of 'customer'

10. The RAO uses an unusual definition of 'customer' to mean someone who is not an individual. We question why the Treasury has chosen this new definition which is contrary to the usual meaning and could be misleading.