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Assets, Savings and Consumers
HM Treasury
1 Horse Guards Road
London
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15 November 2016

Dear Sir, Madam,

HM Treasury's consultation on amending the definition of financial advice

This is the response of the Financial Services Consumer Panel (the Panel) to HM Treasury's consultation on amending the definition of financial advice.

The proposal for having one MiFID-aligned definition of regulated financial advice is, in theory, sensible. However, we question whether the stated benefits really outweigh the risks.

The consultation document focuses heavily on the desire for regulated firms to have more clarity on where the regulatory boundary lies, and thus to be able to provide more help or information to their customers without straying into regulated financial advice.

Regulated product providers should not still be asking for clarity after so many years of conducting business in a regulated environment. Intermediary firms who provide regulated financial advice and independent financial advisers don't have this problem. Any firm that can't figure out where the regulatory boundary is shouldn't be in business. More to the point, narrowing the definition of financial advice under the RAO will not help. Product providers will just say they need more clarity on what constitutes a 'personal recommendation', as they have done in the past.

The FCA's 2015 guidance, "*Retail investment advice: Clarifying the boundaries and exploring the barriers to market development*"¹ explored all of these issues in some depth and provided clarification and examples on where the boundaries of the various different types of advice lie. It focused heavily on the issue of whether or not a personal recommendation was being made, as this was where product providers were seeking clarity. We are surprised this guidance has been largely ignored both in the FAMR and in this current consultation and would urge HM Treasury to determine exactly why firms don't understand it.

Amending the RAO will not provide any obvious benefits to consumers but will increase risk. It will make it easier for unregulated firms to provide 'advice' on regulated products, exposing consumers to high-risk and unsuitable products. This could undermine the pensions freedoms, where scams and poor products are already an issue.

¹ FCA Finalised Guidance – FG15/1: Retail Investment Advice: Clarifying the boundaries and exploring the barriers to market development, January 2015: <https://www.fca.org.uk/publication/finalised-guidance/fg15-01.pdf>

Another serious concern is that the consultation implies any service that does not fall into regulated financial advice within the MiFID definition, will fall into 'guidance' and that this guidance may or may not be charged for.

Guidance is currently offered by Pension Wise, the Pensions Advisory Service and the Money Advice Service (soon to be one single guidance body) as well as other regulated organisations providing debt advice. Guidance offered by Pension Wise is subject to FCA standards² and we hope and anticipate that these standards will be extended to guidance provided by the new body.

These bodies do not promote or recommend specific products or providers. Hence their impartial guidance does not fall within the current definition of either regulated advice or a personal recommendation. Calling a service 'guidance' when it leads to – or has the intention of leading to – a product sale would be completely unacceptable. It would undermine the unbiased guidance service offered by government sponsored bodies and further confuse consumers.

It was our understanding that FAMR wanted consider ways in which consumers could access regulated (and therefore protected) financial advice more readily. If product providers are allowed to facilitate product sales as 'guidance' regulated financial advice through intermediaries will be seriously undermined. Consumers currently struggle to understand the value of regulated financial advice and are very likely to choose free or cheaper 'guidance' services going forward where they will have either no protection, or reduced protection, from purchasing unsuitable products. We feel sure this was not the intention of HM Treasury or of FAMR.

We strongly believe that the government has not made the case for this change and we urge it to re-consider and take further advice.

Yours sincerely

Sue Lewis
Chair
Financial Services Consumer Panel

² FCA standards refer to standards for the provision of pensions guidance by designated guidance providers. This is different to the standards for regulated advice. There is a specific exemption under article 54B of the RAO for providers of Pension Wise.

Q1: Is the proposed wording a suitable and effective way to achieve the stated policy objective? Is there anything else needed in drafting terms in order to achieve the policy objective set out above?

The policy objective of this regulatory change is: *“to provide firms with clarity so they can be confident in developing guidance services which can be applicable to a range of consumer needs”*.

The Panel believes the proposed regulatory change will not achieve the stated policy objective. It will not provide firms with the clarity they seem to desire. Firms will still have to determine whether or not they are providing a personal recommendation and therefore whether they are providing advice under the MiFID definition.

The consultation document provides examples of instances where firms say they will be more confident in providing information to support customer decision-making, if the change is made. However, firms are already able to provide much of this information under the current regime.

For example, the consultation says that firms will be able to contact customers to advise them that they have not used their ISA allowance for a given year. Firms can currently do this without straying into regulated advice as this is factual information. However, if they progress to making suggestions as to how the ISA allowance should be invested this could constitute a personal recommendation and therefore regulated advice under MiFID.

The FCA guidance referred to above³ provides examples of what information it is acceptable for firms to provide without straying into regulated financial advice or a personal recommendation.

We struggle to see what new services of benefit to consumers firms believe they will be able to provide under the new regime that they cannot provide now and would welcome clarity on this.

We also have concerns that the intention is to substitute the word ‘guidance’ for what is commonly known within the industry as ‘non-advised sales.’ We think this latter term is more accurate and clearer for consumers.

Is clarity really needed?

Firms that have been conducting business in the regulated environment for many years should not need clarity on where the regulatory boundary lies. Indeed, not all firms are demanding clarity. Many, particularly those in the intermediary market, are perfectly clear.

Firms who do not understand the rules appear to be mainly product providers and banks. These firms had no issues with where the regulatory boundaries lay prior to the Retail Distribution Review (RDR). Banks, in particular, were regularly and proactively selling regulated products to their customers. They were clear they were providing regulated financial advice.

However, post-RDR, banks and other large providers withdrew from the advice market. Anecdotally this was due to the move to fee-based advice and the requirement to train advisers to a higher professional level. It was not because of lack of clarity on the regulatory boundary. That boundary has not changed as a result of the RDR. We believe product providers want to get back into selling regulated products to their customers, but without the

³ FC15/1: Retail investment advice: Clarifying the boundaries and exploring the barriers to market development

liability associated with the regulatory regime. This is why it is so important the word 'guidance' is not used to describe this activity.

Initially the Panel believed that changing the definition of financial advice to the MiFID definition was a relatively benign regulatory change that would help to bring clarity to both consumers and firms. However, after undertaking further research our view has changed, and we strongly believe that:

- the change itself will not solve the debate about clarity on regulatory boundaries (for the reasons given above); and
- will introduce risks for consumers that outweigh any potential benefits

Advice v guidance

The current UK regulatory regime provides for four types of service relating to retail investments:

- **Regulated financial advice, but with no personal recommendation.** The firm must comply with certain high level obligations such as ensuring that:
 - (a) it acts honestly, fairly and professionally in accordance with the best interests of the client
 - (b) its communications are fair, clear and not misleading; and
 - (c) it complies with the FCA Principles (which include a firm paying due regard to the interests of its consumers and treat them fairly).

This is not providing a personal recommendation and therefore does not have to comply with the FCA suitability requirements.

- **Regulated financial advice, which includes a personal recommendation.** This advice must comply with the FCA rules on suitability. The advice firm carries the responsibility and liability for the advice and therefore the customer has access to redress through the Financial Ombudsman Service or the Financial Services Compensation Scheme. This can be holistic advice or advice focused on just one area of need
- **Non-advised sales.** Firms provide information and interactive tools to aid choice and allow the customer to transact. Responsibility for the purchase lies primarily with the customer but the firm may be liable for any information or tools provided to the customer, and, where relevant, for ensuring that the customer understands the risks involved in the transaction (testing "appropriateness"). A consumer may have access to the FOS about the firm's services prior to the consumer executing the transaction e.g. a consumer could complain about misleading information provided by the firm which encouraged the consumer to execute a transaction with the firm. A consumer may also have recourse to the FSCS about a firm's protected business (very broadly, a firm's regulated activities). However, a consumer would not be able to complain if the product proved to be unsuitable.
- **Guidance**, which provides information and help on options but does not provide solutions and does not normally conclude with a transaction as the service is currently provided by organisations that do not sell products.

All of these services are currently available to consumers. We cannot see what new services would be available with this regulatory change.

Guidance is a specialised activity which helps consumers understand their options and negotiate difficult decisions. It does not, and should not, provide solutions, but helps consumers reach the best solution themselves. However, to be effective, guidance must be provided by guides who have the requisite specialist knowledge and who are unbiased and independent; otherwise it will not be trusted.

Whilst true guidance on non-pension retail investments is not widely available, once the new single guidance organisation is in place guidance on non-pension retail investments could be provided in the same way as the Pensions Advisory Service and Pension Wise currently provide guidance on pensions.

In conclusion, we do not believe that removing the current definition of financial advice contained in the Regulated Activities Order will allow product providers to provide services to consumers that will fill the 'advice gap'. They will either be providing non-advised sales or regulated advice without a personal recommendation, or regulated advice with a personal recommendation, all of which they can do now.

Q2: Do you agree that these are the main costs and benefits that firms and consumers will face?

The consultation focuses heavily on how this change will benefit firms, stating it will lead to savings from less rigorous compliance monitoring and will give firms an opportunity to serve more customers and increase their revenue. The benefits to consumers are less clear, and unconvincing.

The government said during FAMR that one of the reasons it believed there was an advice gap was because consumers were not willing to pay for the cost of advice. Yet this consultation says changing the definition of advice will allow firms to better support their customers by providing more advanced guidance, which they may begin to charge for. If consumers are not willing to pay for regulated advice why would they be willing to pay for guidance that offers them a less personalised service with limited protection should things go wrong?

Consumers can currently access independent guidance on pension and retirement options through the Pensions Advisory Service and Pension Wise free of charge. It is therefore unlikely consumers would be prepared to pay for a similar service with product providers.

Furthermore, if product providers are allowed to charge for guidance, this will completely undermine paid for financial advice that carries full protection for consumers.

Q4: Do you agree that the regulatory requirements set out above are enough to limit the commercial benefit of unregulated firms providing guidance on regulated products?

No. The consultation focuses on firms that are currently regulated being able to provide wider services to consumers without liability, but barely covers the real risk that more unregulated firms will enter the market and will be able to push or advise customers to buy high risk products, with limited recourse for consumers and limited regulatory oversight.

The consultation says consumers receiving guidance from regulated firms *may* have access to the Financial Ombudsman Service and Financial Services Compensation scheme, but does not set out in what circumstances a consumer will and will not have access. More detail is required before we can comment on whether this is adequate.

We do not agree that the stated regulatory requirements are enough to limit this risk, but we are not regulation experts.

Q5: Do you agree with the government's view on the risk of unregulated firms offering guidance on unregulated products?

No. The level of fraud in financial services since pension freedoms were introduced has increased and many consumers are losing their life savings. Statistics from City of London police shows that in the six months following the introduction of the pension freedoms the amount of money reported stolen through pension scams almost doubled to £10.6m when compared to the same period the year before⁴. This regulatory change opens another door for fraudsters and therefore increases that risk.

Q7: Should the government take further steps to mitigate potential risks?

Yes. We do not believe the government has made the case for the change and we urge it to reconsider. The change will not meet the stated policy objective but will introduce unnecessary risk to consumers. If a change introduces sufficient risk to require further mitigation, then the change is undesirable.

The Panel has previously argued⁵ for a duty of care in financial services because even firms authorised and regulated by the FCA do not always act in the interests of consumers. The current FCA principle of "Treating Customers Fairly" does not protect consumers consistently. If the advice definition is changed in the way the government proposes it would make the Consumer Panel's case for a duty of care in financial services stronger.

Q8: Are people with protected characteristics under the Equalities Act 2010, or any consumers in vulnerable circumstances, impacted by the policy proposed?

Yes. All consumers will be exposed to further unacceptable risk. Examples of particularly vulnerable consumers this change will impact are those who have cashed in all or part of their pension savings, and others who have suddenly acquired what is for them a large amount of money through, for example, redundancy or inheritance.

Q9: Is there anything else that we should consider in the context of this change to deliver affordable and accessible advice to consumers?

This consultation paper was published before the government announced it would develop a single public financial guidance body responsible for delivering debt advice, money and pensions guidance to the public rather than two separate bodies. Given this significant change, access to free and impartial financial guidance – which is subject to FCA standards – should be considerably increased, therefore the government should reconsider whether there is a need to allow commercial firms to deliver guidance, and whether product sales should be permitted to be included within guidance.

Further, we would urge the government to consider the effect on the paid for, regulated, advice market. Many small firms are trying to develop new business models which are cost effective, but still provide protected, fully regulated financial advice. We do not believe this market has been given sufficient time to grow since the introduction of the RDR and fear that if product providers are allowed to disguise product sales as 'guidance' they will swamp the market and regulated advice models which offer full protection for consumers, will fail.

⁴ FTAdviser article: Pension freedoms fraud revised higher, October 2016:

<https://www.ftadviser.com/pensions/2016/10/25/pension-freedoms-fraud-revised-higher/>

⁵ Consumer Panel Position Paper: Incorporating a Duty of Care into the Financial Services and Markets Act June 2015: https://www.fs-cp.org.uk/sites/default/files/fscp_position_paper_on_duty_of_care_2015.pdf

