

# Regulatory Reform Order:

## A consultation on proposed changes to the Financial Services Markets Act 2000

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December 2005



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**Regulatory Reform Order:**  
A consultation on proposed  
changes to the Financial Services  
and Markets Act 2000

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## PARTIAL REGULATORY IMPACT ASSESSMENT

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### Purpose and Intended Effect

**Introduction A.1** This partial Regulatory Impact Assessment considers the costs and benefits of relaxing the consultation requirements imposed on the Financial Services Authority (FSA) by the Financial Services and Markets Act 2000 (FSMA), as well as several other deregulatory measures relating to the Act.

**A.2** The most significant changes will remove the requirement placed on the FSA to consult on rules and guidance in circumstances where consultation would serve no purpose, or where the delay caused by consultation would be prejudicial to those subject to the rules and guidance. Alongside this, we are proposing a number of more minor amendments that will reduce burdens or restrictions on the FSA, by;

- removing unnecessary consultation with regulators in other countries in the European Economic Area;
- allowing the FSA to discontinue or suspend the listing of securities or to cancel the approval of sponsors with fewer procedural requirements where the request for discontinuation, suspension or cancellation comes from the issuer or sponsor himself;
- extending the FSA's power so that it may waive or modify all of its rules in respect of authorised and unauthorised persons;
- permitting the FSA Board to delegate the issuing of guidance;
- widening the range of persons to whom the FSA may apply income it receives from penalties levied for market abuse, so that persons other than authorised persons (for example, listed firms and recognised exchanges) may benefit, where this is appropriate;
- reducing consultation requirements on matters other than rules and guidance.

**Reasoning A.3** The need for these changes was identified during the Two Year Review of FSMA – an exercise conducted in 2003/4 by the Treasury, the FSA and others in order to take stock of the new regulatory system after two years of its operation. During the Review various bodies representing the financial services industry complained about the volume of unnecessary consultation by the FSA and the burden that this placed on business. The reduction in unnecessary consultation requirements, together with the other measures we are proposing, will make it easier for the FSA to issue timely guidance, another key industry concern, and increase the efficiency of the regulatory framework in a number of areas.

**A.4** These proposals will affect the FSA and those subject to FSMA, including authorised firms and – to a lesser extent – consumers.

**A.5** The proposals will be implemented by means of a Regulatory Reform Order (RRO) made under the terms of the Regulatory Reform Act 2001 (RRA).

## Costs and Benefits

### Measure 1: Relaxing the FSA's requirement to consult on rules

**A.6** We propose to exempt the FSA from the obligation to consult on new rules where the delay incurred by consulting would prejudice the interests of those subject to the rules. FSMA already grants the FSA an exemption from consulting when the resulting delay would prejudice the interests of consumers. However, the absence of an exemption to protect firms and others from prejudicial delay has caused difficulties. The FSA has reported several instances where it has had to use less satisfactory procedures to effect urgent measures because FSMA prevents immediate rulemaking.

**A.7** We also propose to remove the FSA's obligation to consult on rule changes where consultation would serve no useful purpose. Such consultation might relate to proposals which correct clerical or drafting errors; or proposals that have minimal effect.

**A.8** To ensure continued protection, we plan to restrict the new exemption so that the FSA will still have to consult on rulemaking where it considers that its proposal would significantly prejudice consumers' or firm's interests (see Chapter 2 for details). The FSA would publish a policy statement setting out the criteria that would inform such consideration.

**Benefits A.9** The FSA will benefit from the reduction in the requirement to consult on rules where there is an urgent need for the rules, or where consultation would serve no useful purpose. Firms and others to whom the rules apply will benefit because the FSA will be able to make rules more rapidly in cases where delay would be prejudicial to their interests; and because they will be subject to fewer consultations on proposals that are unlikely to be improved as a result. Around 10-20 proposals per year are likely to qualify for the new 'minor effect' exemption. Each of these consultations takes up between 1-15 FSA person days depending upon the complexity. Costs are also incurred by all those who examine and assess these consultations. Extra costs are incurred by all those who, in addition, respond to such consultations.

**Costs A.10** We do not envisage any costs arising from this proposal. Any detriment to consumers caused by the relaxation of consultation requirements should be offset by the requirement that the FSA will still have to consult on rulemaking where it considers that not doing so would unduly prejudice consumers' interests.

**Measure 2: Relaxing the FSA's requirement to consult on guidance**

**A.11** The FSA is required by FSMA to consult on guidance in the same way as it is required to consult on rules – see above. As with rules, the FSA need not consult on guidance where the delay in doing so would prejudice the interests of consumers. As with rules, our basic proposal on guidance – **The Narrow Option** – is to extend this exemption to include circumstances where delay caused by consultation would prejudice those persons who are subject to the guidance and enable the FSA not to consult were doing so would serve no useful purpose. Finally, we would also restrict the consultation exercise to written guidance (or guidance given in another legible form) which is intended to have continuing effect. We would restrict the new exemption/s so that the FSA will still have to consult on guidance where it considers that not doing so would unduly prejudice consumers' or firms' interests (see Chapter 3 for details). We also propose – **The Broad Option** – to remove the FSA's obligation to produce the various ancillary documents required by section 155. Instead, the FSA would publish a policy statement setting out the criteria that would inform its decision as to whether or not to publish a compatibility statement, for example.

**Benefits A.12** The FSA will no longer have to consult on guidance where there is an urgent need for such guidance – unless it considers that its proposal would unduly prejudice consumers' or other persons' interests. The FSA will, in addition, no longer consult where consultation would serve no useful purpose. If the Broad Option is chosen the FSA will benefit from the reduction in the formal statutory provisions applying to the consultation process, allowing them to tailor consultation exercises appropriately, according to the nature and significance of the proposed guidance. Firms and others to whom the rules, which the guidance seeks to explain, apply will benefit because the FSA will be able to issue guidance more rapidly in cases where delay would be prejudicial to their interests; because they will be subject to fewer consultations on proposals that are unlikely to be improved as a result and because consultations will in general be more streamlined and contain only necessary and relevant information. Around 10-20 proposals per year are likely to qualify for the new 'minor effect' exemption. Each of these consultations takes up between 1-15 FSA person days depending upon the complexity. Costs are also incurred by all those who examine and assess these consultations. Extra costs are incurred by all those who, in addition, respond to such consultations.

**Costs A.13** We do not envisage any costs arising from this proposal. Any detriment to consumers caused by the relaxation of consultation requirements should be offset by the requirement that the FSA will still have to consult on guidance where it considers that not doing so would significantly harm consumers' interests.

**Measure 3: Relaxing the FSA's requirement to consult on certain other matters**

**A.14** We further propose, in line with the measures above on rules and guidance, to loosen the consultation requirements which apply to certain policy statements, codes, directions etc.

**A.15** On the following matters, we propose to grant the FSA – subject to a safeguard similar to that applicable to rules – the discretion not to consult on changes for no useful purpose;

- statements of policy on the imposition on approved persons of warnings and decision notices, penalties and their amount (Section 70);
- statements of policy on the imposition of penalties on issuers of listed securities or applicants for listing (Section 94);
- the scheme for distributing income from fines levied under Part VI of FSMA (Section 100);
- the Code giving guidance as to what behaviour constitutes market abuse (Section 121);
- statements of policy on the imposition of penalties in relation to market abuse (Section 125);
- statements of policy on the imposition of disciplinary measures on an authorised firm (Section 211);
- statements of procedure regarding supervisory, warning or decision notices (Section 396);
- schemes for investigating complaints against the FSA (Schedule 1 para 7);
- statements of policy in relation to the amount of penalties imposed under the Act (Schedule 1 para 16).

**A.16** On the following matters, which already contain a provision regarding prejudicial delay to consumers, we propose to allow the FSA not to consult, subject to a safeguard similar to that applicable to rules, where delay is prejudicial to those affected by the direction or statement of principle or where consultation serves no useful purpose;

- procedure for giving a direction as to whether the general prohibition does not apply to the carrying on of an insurance market activity by members of Lloyds (Section 319);
- directions in relation to the general prohibition under Part XX of FMSA – provision of financial services by members of the professions (Section 330);
- statements of principles with respect to the conduct expected of approved persons.

**Benefits A.17** Firms and others concerned will be spared the need to reply to consultations on proposals that are unlikely to be improved by consultation. In the case of section 65, 319 and 330 the FSA will be able to pass measures more rapidly in cases where delay would be prejudicial to the interests of firms and others. To date all but one of the matters referred to in paragraph 4.10 have been amended, but these changes have been substantive and would not have benefited from the new ‘minor effect’ exemption if it had been in place. But minor changes might be needed in future, e.g. changes to the statement made under section 395 of FSMA to reflect the change of name of the FSA’s executive committee.

**Costs A.18** We do not envisage any costs arising from this proposal. Any detriment to consumers caused by the relaxation of consultation requirements should be offset by the requirement that the FSA will still have to consult where it considers that not doing so would unduly prejudice consumers' interests.

**Measure 4: Removing the FSA's requirement to consult other EEA regulators on changes in permissions**

**A.19** We propose to reduce the circumstances in which the FSA, under section 49 of FSMA, must consult other European regulators before cancelling or varying a firm's permission. Section 49 was designed to implement parts of various European Directives but, as currently drafted, it is stricter than those Directives require it to be. The Directives in question were designed chiefly to ensure that other European regulators were consulted before authorisation was granted or expanded, but section 49 requires the FSA to consult other regulators even when cancelling or narrowing permission. Under our proposal the FSA would no longer have to consult other EEA regulators when cancelling or narrowing permissions.

**A.20** The super-equivalence of section 49 has resulted in a certain degree of reputational damage to the FSA as European regulators have complained that such consultation about matters not covered by the Directives is costly, inconvenient and confusing. Various regulatory authorities across the EEA, including those of France, Germany, the Netherlands, Luxembourg, Latvia and Norway, have confirmed that they are not required to consult home state regulators when varying or cancelling the authorisation of a connected person.

**Benefits A.21** The proposal would spare the FSA from the need to consult other EEA regulators unnecessarily. In cases where major cross-border groups apply to change permission, this would represent a substantial resource saving. This current consultation is costly for the firms, the FSA and other European regulators who have to deal with such consultations. Indeed some EEA regulators have complained about the cost and inconvenience of having to respond to FSA consultation on matters not covered by the Directives. The FSA issues around 15 variations of permission per year which involve cancellations or narrowing of the permission. Many involve notifying more than one other EC regulator, some involve notifying all. Without these notification requirements each permission could be processed between 10-20 days quicker.

**Costs A.22** We do not envisage any costs arising from this proposal.

**Measure 5: Permitting the FSA Board to delegate the issuing of Guidance**

**A.23** We propose to allow the FSA Board to delegate the task of issuing general guidance – a practice not currently permitted under FSMA. Much guidance is routine or technical in nature: consideration by the Board adds little value and distracts it from more important core functions. Whereas guidance issued by the Bank of England (when it carried out the FSA's supervisory functions) carried virtually as much weight as rules, FSA guidance is non-binding. We consider the Act could usefully be relaxed to reflect this.

**Benefits A.24** The Board of the FSA would be free to delegate the issuing of guidance to a sub-committee, officer or member of staff of the FSA to approve general guidance. This would allow the Board to focus on more important issues and increase the efficiency of the FSA in approving and issuing guidance, to the benefit of firms and consumers, who rely on such guidance to interpret the FSA’s rules. In addition, the FSA will no longer have to spend time analysing whether guidance is “general guidance” under FSMA s.158(5), and in need of Board consideration. Additionally, less time and resources will be consumed preparing the “Board pack”. This involves preparing detailed paperwork which is scrutinised by FSA legal advisers. The FSA Handbook of Rules is structured with rules and guidance alongside each other. Most significant changes involve amending both rules and guidance and would continue to be considered by the FSA board in the same way as now. Two significant exceptions to this are guidance relating to the regulatory perimeter and guidance relating to FSA rules on collective investment schemes. These proposed changes will enable the FSA to issue material with the status of guidance in a more timely and responsive manner than at present, which should lead to reduced compliance costs.

**Costs A.25** We do not envisage any costs arising from this proposal. The delegation of approval to a committee would ensure that guidance was still subject to internal checks and balances.

**Measure 6: Removing restrictions on waivers and modifications**

**A.26** We propose to amend FSMA to allow the FSA to waive or modify all of its rules in respect of both authorised and unauthorised persons. FSMA currently prevents the FSA from waiving or modifying rules which relate to unauthorised persons; or persons that are not specified in section 148 of FSMA. It was always intended that the FSA should be able to waive or modify all of its rules and the limitations in the Act seems to have been incorporated into FSMA unintentionally.

**Benefits A.27** The FSA would be able to waive or modify all rules made under FSMA, such as fees rules, approved persons rules. It would also be able to waive or modify rules which apply to unauthorised persons who are subject to FSA rules, such as auditors and actuaries. Firms and other parties would benefit from the FSA’s ability to change unsuitable or burdensome rules to which they are subject. Currently around 1150 waivers are granted per year, spread evenly in all areas where waivers can be granted.

**Costs A.28** We do not envisage any costs arising from this proposal. When waiving or modifying rules the FSA would still have to be satisfied that;

- compliance by the person with the rules as unmodified would be unduly burdensome, or would not achieve the purpose for which the rules were made; and
- the waiver or modification would not result in undue risk to persons whose interests the rules are intended to protect.

**Measure 7: Simplifying procedures relating to the discontinuation, suspension or cancellation of securities listings**

**A.29** We propose to remove the obligation of the FSA to fulfil certain procedural requirements<sup>7</sup> when delisting a security at the request of that security's issuer. We propose in addition to remove an anomaly in FSMA which allows an issuer to petition the Tribunal about a delisting even when the delisting was requested by that issuer.

**A.30** The requirements and right of petition above were designed as safeguards in cases where a delisting was initiated by the FSA against the wishes of the issuer. In cases where the delisting comes at the request of the issuer, however, they seem to serve no useful purpose.

**Benefits A.31** The FSA would no longer have to follow prescriptive delisting procedures for no useful purpose. In a typical two-week period in July 2005, the FSA had to deal with 18 cancellation requests and 7 suspension requests under the s.78 procedure. Around 1 FSA person day was involved in processing these requests. Under our proposal much unnecessary paperwork would be avoided. Additionally, an anomaly – the right to petition the Tribunal as described above – would be removed from FSMA.

**Costs A.32** We do not envisage any costs arising from this proposal.

**Measure 8: Simplifying the procedure relating to the cancellation of sponsor approval**

**A.33** We propose to remove the FSA's obligation formally to warn a sponsor prior to cancelling his approval, where the sponsor himself has applied for cancellation. We propose in addition to remove an anomaly in FSMA which allows a sponsor to petition the Tribunal about the cancellation of his approval even when the cancellation was requested by that sponsor. A formal warning is clearly appropriate where the cancellation has been initiated by the FSA and such action would be resisted by the sponsor. But in cases where the cancellation is initiated at the request of the sponsor, the process in s.88 seems to serve no useful purpose. The market is informed by announcements published on the FSA website. The sponsor, by definition, knows and has no need to be given a warning notice or make representations.

**Benefits A.34** The FSA would no longer have to issue a formal warning prior to cancelling an approval that had been requested by the relevant sponsor. In the nine months to July 2005, for example, the FSA dealt with nine voluntary applications for cancellation of sponsor status, necessitating the issuance of a warning notice, final notice, and decision notice in each instance – a process that often spans several weeks. Around 1 FSA person day was involved in processing these requests.

**Costs A.35** We do not envisage any costs arising from this proposal.

<sup>7</sup> The FSA is required to inform the issuer of: the reasons for the FSA's decision; the right to make representations; and the right to refer the matter to the Tribunal.

**Measure 9: Easing restrictions relating to the FSA's distribution of penalty income**

**A.36** We propose to grant the FSA more discretion when allocating income received from market abuse penalties. Currently, the FSA may only distribute penalty income from market abuse fines to authorised persons. This means that exchanges and listed and non-listed issuers cannot benefit from the distribution of penalties. We plan to amend FSMA to allow income from market abuse fines to be distributed to authorised persons, listed and unlisted issuers or recognised exchanges.

**Benefits A.37** The reforms proposed here would open the possibility of dividing the proceeds of such large fines between authorised persons, listed and non-listed issuers and recognised exchanges. To date the FSA has issued 11 market abuse fines since FSMA came into effect in December 2001. One fine was for £17m, the others totalled around £11m.

**Costs A.38** It is difficult to speculate as to exactly how fine proceeds may have been allocated differently in past cases had this reform been implemented. However, it is likely that the proposed reforms would be relevant where a listed or non-listed issuer is fined for market abuse.

**A.39** As noted above, it is difficult to speculate as to exactly how fine proceeds may have been allocated differently in past cases had this reform been implemented. However, if penalty income could be distributed to unauthorised firms, there would inevitably be a paper cost to authorised firms in terms of lower “windfalls” in cases such as Shell. There have been no other penalties on this scale: since the enactment of FSMA the cumulative value of all other market abuse penalties is slightly above £1 million.

## Options

**A.40** There is an option of doing nothing for all these measures. If we were to choose this option the benefits described in this RIA would not materialise and the costs, where appropriate, would not be incurred.

**A.41** In some places there might hypothetically be non-legislative options, in particular that the FSA might not apply some of these FSMA requirements thoroughly. A deliberate decision by the FSA not to comply with various FSMA requirements would, however, undermine the credibility of FSMA and the FSA, and might encourage authorised persons to adopt a pick and mix attitude towards FSMA provisions which apply to them. Furthermore, the corporate governance arrangements which apply to the FSA do not really provide for the FSA to decide not to comply with their with their statutory duties and responsibilities. For these reasons this option is not viable.

## Consultation

**A.42** The following responded to the consultation:

## Competition Assessment

**A.43** We do not envisage any detrimental effects on competition arising from these measures.

## Small Firms Impact Test

**A.44** We do not envisage any material negative impact on small firms arising from these measures.

## Enforcement, Sanctions and Monitoring

**A.45** Most of these proposals are permissive and will not require monitoring, sanctions or enforcement.

**A.46** Some of the proposals on consultation require the FSA to show that, if it chooses to dispense with consultation, it must show that doing so will not unduly prejudice the interest of consumers. The FSA would publish a policy statement setting out the criteria that would inform such consideration.