

Regulatory Reform Order:

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

December 2005



HM TREASURY



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

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INTRODUCTION

SUMMARY OF PROPOSALS

1.1 This consultation sets out the Government's proposals to amend various provisions in the Financial Services and Markets Act 2000 (FSMA). The proposals will be implemented by a Regulatory Reform Order (RRO) made under the Regulatory Reform Act 2000 (RRA).

1.2 As with all other RROs, these proposals remove or reduce regulatory burdens, including restrictions, requirements and conditions, and remove inconsistencies and anomalies. They provide for better-targeted Financial Services Authority (FSA) regulation which is more risk-based. The Government's 2005 Pre-Budget Report (PBR) sets out a programme of reforms which aim to deliver better regulation against the five key principles of proportionality, accountability, consistency, transparency and targeting. The proposals set out in this consultation paper fully reflect these principles.

1.3 This RRO forms part of a ten point action plan of reforms to wholesale and retail financial markets set out in PBR 2005, which reflect the greatest concerns which industry has raised with the Government about financial services regulation. These include concerns about unnecessary or disproportionate consultation burdens placed by the FSA on industry, and concerns about restrictions on the FSA's ability to deregulate by issuing waivers and modifications to rules. By addressing these issues and others, the proposals in this consultation document should enable the FSA to develop a more risk-based approach to regulation.

1.4 The most significant proposals will, in specified circumstances, loosen the requirement for the FSA to consult before issuing rules, guidance or other instruments. These proposals are discussed in Chapters 2, 3 and 4. In addition, we propose several 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 (Chapter 5);
- permitting the FSA Board to delegate the issuing of guidance (Chapter 6);
- extending the FSA's powers to waive or modify all of its rules in respect of authorised and unauthorised persons (Chapter 7);
- 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 (Chapters 8 and 9);
- widening the range of persons for whose benefit the FSA may apply penalty income for market abuse, so that persons other than authorised persons (for example, listed and non-listed issuers) may benefit, where this is appropriate (Chapter 10).

1.5 The proposals stem from the Treasury's Two-Year Review of FSMA, which concluded on 2 December 2004. In the context of this review the financial services industry and the FSA drew attention to 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.

REGULATORY REFORM ORDERS

1.6 Each proposal for a Regulatory Reform Order (RRO) must satisfy a number of legal tests. This document is designed to elicit the information that the Minister will need in order to satisfy the Parliamentary Committees that, among other things, the proposed changes satisfy these tests. For this reason, we would particularly welcome your views on how each aspect of the proposed changes in this consultation document meets the following tests.

- **Necessary protection** – the Minister making a RRO must be of the opinion that it does not remove any necessary protection. This means that no RRO can be made unless the Minister is of the opinion that it would maintain any protections that the Minister considers to be necessary. Such protection relates to the checks and balances associated with a particular regulatory regime. The protection does not have to be statutory in nature and does not have to be for the purposes originally intended by Parliament. If the Minister considers a particular protection to be no longer necessary, he or she must provide the Parliamentary Committees with evidence to support this view.
- **Rights and freedoms** – an RRO cannot be made unless the Minister is satisfied that it does not prevent any person from continuing to exercise any right or freedom which they might reasonably expect to enjoy. This test recognises that there are certain rights that it would not be fair to take away from people via the RRA procedures.

1.7 In order to provide for the effective reform of regulatory regimes, RROs can retain existing burdens and create new burdens. But where that is the case stringent additional safeguards apply:

- **Proportionality** – if a new legal burden is being imposed, or an existing burden retained or increased, then the Minister must ensure that it is proportionate to the benefit it brings. This means, for example, that imposing a burden of several thousand pounds for a negligible benefit would not pass the test.
- **Fair balance** – before proposing any RRO that has the effect of imposing legal burdens, the Minister must be of the opinion that a fair balance is being struck between the interests of the person affected by the Order and the interests of the wider public. In this context, fairness does not mean that everyone must benefit. It means that the benefit to society as a whole must be such as to justify the additional burden on a small group or the individual.

- **Desirability** – the Minister making the RRO must be of the opinion that the extent to which it removes burdens or brings other benefits makes the Order as a whole desirable.

CONSULTATION

1.8 Comments on this document should be sent by 5 March 2005 February 2006 at the latest to:

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1.9 Representative groups are asked to provide a summary of the people and organisations they represent when they respond.

1.10 The RRA requires Departments to consult widely on regulatory reform proposals. It requires us to collect evidence on a number of issues from a wide range of consultees.

1.11 This paper is available on the Internet at www.hm-treasury.gov.uk/

1.12 Comments are invited from all interested parties, and not just from those to whom the document has been sent.

1.13 The Parliamentary Committees who will deal with orders under the RRA have requested that a note explaining the RRA Parliamentary process for Orders be annexed to all consultation papers so that consultees understand when and to whom they are able to put their views, should they wish to do so. This is set out in Annex B.

1.14 This consultation document follows the format recommended by the Cabinet Office for such proposals. The criteria applicable to all UK public consultations under the Cabinet Office Code of Practice on Consultation are set out in Annex C.

DISCLOSURE

1.15 Normal practice will be for details of representations received in response to this consultation document to be disclosed, or for respondents to be identified. While the RRA provides for non-disclosure of representations, the Minister is required to include the names of all respondents in the list submitted to Parliament alongside the draft Order.

1.16 If you request that your representation is not disclosed, the Minister will not be able to disclose the contents of your representation without your express consent and, if the representation concerns a third party, their consent too. Alternatively, the Minister may disclose the content of your representation but only in such a way as to anonymise it.

1.17 In all cases where your representation concerns information that may be damaging to the interests of a third party, the Minister is not obliged to pass it on to Parliament if he does not believe it to be true or if he is unable to obtain the consent of the third party.

1.18 Please identify any information which you or any other person involved do not wish to be disclosed.

1.19 Please be aware that any e-mail response sent from a corporate system may carry an automatically generated notice stating that the content of the message should be treated as confidential. Where you do not wish your views to be treated as confidential, please make it clear that such an automatically generated message does not apply.

1.20 Finally, consultees should be aware that the Parliamentary Committees will be able to request sight of their representation as originally submitted. This is a safeguard against attempts to bring improper influence to bear on the Minister. We envisage that, in the normal course of events, this provision will only be used rarely and on an exceptional basis.

CONFIDENTIALITY AND FREEDOM OF INFORMATION

1.21 It is possible that requests for information contained in consultation responses may be made in accordance with access to information regimes (these are primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environment Information Regulations 2004). If you do not want your response to be disclosed in response to such requests for information, you should identify the information you wish to be withheld and explain why confidentiality is necessary. Your request will only be acceded to if it is appropriate in all the circumstances. An automatic confidentiality disclaimer generated by your IT system will not of itself be regarded as binding on the Department.

2

RELAXING THE FSA'S REQUIREMENT TO CONSULT ON RULES

BACKGROUND

2.1 Section 155 of FSMA requires the FSA to consult publicly before issuing virtually all new rules. The proposed rules must normally be accompanied by a cost-benefit analysis, an explanation of the purpose of the rules, and a statement of their compatibility with the FSA's statutory duties under s.2 of FSMA.

2.2 While s.155(7) enables the FSA to dispense with consultation (and the requirements to provide a cost benefit analysis, an explanation of the purpose of the rules and a statement of compatibility) if it considers that the ensuing delay would prejudice the interests of consumers, there are no further exemptions. This causes two problems, namely:

1. Prejudicial delay to others: the FSA must consult even when it considers that the delay caused by consultation would prejudice the interests of firms and others subject to the rules; and
2. Consultation for no useful purpose: the FSA must consult where this serves no useful purpose, e.g. to correct a clerical or drafting error, or where the change has only a minimal effect on the regulatory regime.

Prejudicial delay **2.3** To mitigate the first problem the FSA has adopted a policy of offering waivers of FSA rules in circumstances where it would be burdensome for firms to have to wait for the outcome of consultation before rules are changed. Waivers and modifications offered as at September 2005 include;

- a modification of a requirement for insurers to provide a QC's opinion confirming the effect of innovative tier 1 instruments pending;
- a modification of reporting requirements relating to total number of pension opt-out and pension transfer transactions, which firms have arranged during the previous six months;
- a modification to permit certain better capitalised credit unions to pay different dividends on different accounts if they comply with the relevant capital requirements;
- a short term waiver of requirements for firms doing insurance mediation to treat an individual customer who takes out a mixed use policy (i.e. where the policy covers the individual in both a business and a private capacity) as a retail customer instead of as a commercial customer;
- a waiver relaxing restrictions on the types of products mortgage firms may draw comparisons between in their financial promotions;
- a waiver of a requirement to include details of insurance taken out by a customer in mortgage offer documents pending a proposed rule change;
- a modification to rules requiring the appointment of auditors by mortgage and general insurance firms to reflect changes to Companies Act requirements;

- a modification to requirements for long-term insurers to submit a full directors' certificate, together with their half-yearly reports to the FSA.

2.4 However, under this policy of granting waivers, firms must notify the FSA to confirm that they wish to take advantage of a waiver. This procedure is awkward and costly for both the FSA and for the firms concerned. Moreover, those firms which fail to notify the FSA that they wish to take advantage of the waiver are burdened with complying fully with the rule until the entire consultation process has been conducted and the rule changed.

No useful purpose

2.5 To mitigate the second problem, of consulting for no useful purpose, the FSA publishes regular quarterly consultation papers (known as "Miscellaneous CPs") which gather together minor proposals for changes to its Handbook of rules and guidance. For example, CP05/9 (July 2005) proposed these changes which have minimal effect;

- to make changes to definitions and conduct of business rules to reflect new terminology and concepts introduced by Finance Act 2004 in relation to pensions tax simplification;
- to make changes to the definition of a network to rectify unintended consequences arising out of implementation of the EC Insurance Mediation Directive (2002/92/EC);
- to make clarifications and corrections to rules introduced as part of the new prudential regime for insurers.

2.6 In the course of the Treasury's Two-Year Review of FSMA, industry participants, consumer groups, the FSA and others all raised concerns about the complexity of the FSA's Handbook of rules and guidance and the volume of consultation by the FSA.

2.7 Unnecessary consultation places burdens not just on the FSA but also on the public, firms and other stakeholders, since these parties may still allocate resources to consider the contents of such consultations, if only to double check that nothing important has been included.

THE PROPOSAL

2.8 We therefore propose to extend the circumstances at s.155(7) in which the FSA is not required to consult on rules (or to comply with the obligations in section 155(1) to (6)) to include the following;

- where the FSA considers delay in making the rules is prejudicial to the interests of anyone affected by the rule (rather than just prejudicial to consumers);
- where the FSA considers the changes have a minor effect. One option would be to provide the FSA with discretion to decide what constitutes a 'minor effect', and perhaps to support this with an FSA statement of policy which might clarify that these changes would only involve for example updating references generally and making changes merely to the form or arrangement of a document but not to its content. Another option, which might be preferable, could be to state in the Order what such changes having a 'minor effect' might be, in particular a minor clarification of existing rules, minor changes consequential upon provisions in domestic or EU legislation, or the correction of a clerical or drafting error.

2.9 As a new safeguard, the FSA would only be able to use one of the new exemptions if it considered that the proposal did not significantly prejudice the interests of consumers and in the case of the minor effect exemption, other persons subject to or affected by the proposal.

ANALYSIS

Necessary Protections

2.10 FSMA currently allows firms and consumers to comment on draft rules which affect them. The new and tightly prescribed exemptions will either benefit firms affected or will relate to narrow circumstances where consultation would be of limited use. As regards firms, no necessary protection will be removed.

2.11 In relation to consumers, the existing exemption to the requirement to consult already provides a protection, notably that the FSA may only dispense with consultation where delay in making the rules would be prejudicial to the interest of consumers. The insertion of additional exemptions will be balanced by the insertion of an overarching requirement that the FSA may only make use of those exemptions where it considers that its actions will not significantly prejudice the interests of consumers and in the case of the minor effect exemption, other persons subject to or affected by the proposal. We believe that this proposal provides an acceptable alternative form of necessary protection. The new exemptions will either benefit those affected or will relate to narrow circumstances where consultation would be of limited use. Any reduction in the protection afforded by consultation will be mitigated by the overarching requirement, and will be balanced by the benefits associated with these proposals, i.e. with the FSA's improved responsiveness and effectiveness. In addition, where the FSA decides not to launch a formal consultation exercise the FSA will consider whether to consult informally where this is likely to be beneficial. This might not be so, for example, in relation to correcting clerical errors.

Rights and Freedoms

2.12 Those subject to or affected by the rules and consumers will still be able to exercise the rights and freedoms they might reasonably expect to be able to exercise. In addition, the FSA will continue to be bound by its general duties under s.2 FSMA, including maintaining market confidence and protecting consumers.

Costs and Savings

2.13 The FSA will benefit from the reduction in the requirement to consult on rules where there is an urgent need for such 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 about proposals that do not justify or require external input. 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.

New Burdens

2.14 The FSA will be subject to new requirements that it may not use one of the new exemptions if the FSA proposal in question significantly prejudices the interests of consumers and in the case of the minor effect exemption, other persons subject to or affected by the rules. This is a proportionate response because, in the absence of consultation, it imposes the minimum burden necessary to protect the general interests of consumers and others.

2.15 The new burden will uphold the public interest in consumer protection whilst also allowing the FSA to respond more effectively and so benefit those affected by the rules. Thus, the fair balance test is satisfied.

2.16 The new exceptions will either benefit those affected or will relate to circumstances where consultation would be of limited use. Any reduction in the protection offered by consultation will be balanced by the new requirement and the proposal will bring benefits to the FSA and those affected by the rules, in terms of the FSA's greater responsiveness and effectiveness. The desirability test will therefore also be met.

3

RELAXING THE FSA'S REQUIREMENT TO CONSULT ON GUIDANCE

BACKGROUND

3.1 Section 157(3) of FSMA requires the FSA to consult publicly before issuing any guidance on its rules. The requirement applies even to temporary or unwritten guidance and must, in accordance with s.155, normally be accompanied by a cost-benefit analysis, an explanation of the guidance and a statement of its compatibility with the FSA's statutory duties.

3.2 While the FSA is excused under s.155(7), as with rules, from consulting on proposed guidance where the ensuing delay in issuing guidance would prejudice the interests of consumers, there are no further exemptions. This causes two problems, namely:

1. Prejudicial delay to others: as with rules, the FSA must consult even when the ensuing delay in issuing guidance would prejudice the interests of firms and others subject to the guidance; and
2. Consultation for no useful purpose: as with rules, the FSA must consult even where this serves no useful purpose, e.g. when the guidance is to correct a clerical or drafting error, or has minimal effect.

3.3 These often unnecessary requirements regarding consultation on guidance place burdens not just on the FSA but also on the public, firms and other stakeholders, since all may allocate resources to considering proposals which are unlikely to be improved or changed by consultation. The scope of the requirement, applying as it does to unwritten and temporary guidance, as well as the obligation to produce a cost benefit analysis, an explanation of the guidance and a compatibility statement further burdens the FSA with administrative tasks which are not proportionate to the nature of the guidance produced. This burden is likely to increase as the FSA seeks to simplify its Handbook in a number of places and make it more accessible.

3.4 When the Financial Services and Markets Bill was introduced to Parliament, it contained no requirement to consult on guidance. The requirement was introduced by means of a Government amendment during the Commons Committee Stage. The move may have been influenced by the fact that guidance formerly issued by the Bank of England when it was responsible for banking supervision was binding on the authorised institutions. Thus failure to comply with guidance could lead to the Bank of England examining whether an institution should continue to engage in regulated activities. By contrast, the FSA's guidance has a different status. Although a person acting in accordance with general guidance will be treated as if they have complied with the relevant rule, guidance need not be followed in order to achieve compliance with the relevant rule. Instead, guidance is intended to help persons to whom rules apply to understand and comply with them.

3.5 In the course of the Treasury's Two-Year Review of FSMA, industry participants, consumer groups, the FSA and others all raised concerns about the complexity of the FSA's Handbook of rules and guidance and the volume of consultation by the FSA. The FSA will be better placed to respond more efficiently to these concerns if it is able to act in a wider range of circumstances without needing to consult publicly beforehand.

THE PROPOSAL

Narrow Option

3.6 Our basic proposal is to widen the range of scenarios in which the FSA has the discretion not to consult (or comply with the requirements of section 155(1) to (6)), namely;

- where the FSA considers delay in making the guidance is prejudicial to the interests of anyone affected by it (rather than just prejudicial to consumers); and
- where the FSA considers the changes have a minor effect. One option would be to provide the FSA with discretion to decide what constitutes a 'minor effect', and perhaps to support this with an FSA statement of policy which might clarify that these changes would only involve for example updating references generally and making changes merely to the form or arrangement of a document but not to its content. Another option, which might be preferable, could be to state in the Order what such changes having a 'minor effect' might be, in particular a minor clarification of existing guidance, minor changes consequential upon provisions in domestic or EU legislation, or the correction of a clerical or drafting error.

3.7 As with our proposals on rules, the FSA would only be able to use each new exemption if it considered that the proposal did not significantly prejudice the interest of consumers and in the case of the minor effect exemption, other persons subject to or affected by the guidance. Where the FSA does not consult then the additional requirements in FSMA relating to consultation on guidance would not apply, i.e. the requirements set out in paragraph 3.9 of this document.

3.8 We also propose to remove the requirement to consult on guidance which is not intended to have continuing effect and unwritten guidance. The FSA will still have to consult on all guidance given to regulated persons generally or to a class of regulated person, in writing and intended to have more than a temporary effect.

Broad Option

3.9 Depending on feedback to this consultation, we may enact an additional proposal. This would remove the requirement on the FSA, when consulting on guidance, to produce a cost benefit analysis (s.155(2)(a)), a statement of compatibility with the FSA's statutory duties (s.155(2)(c)), an account of representations made to it in the course of the consultation (s.155(5)) and a note detailing how the final guidance differs from the draft circulated for consultation (s.155(6)).

3.10 If this proposal is adopted the FSA would issue a policy statement so that firms and consumers would be able to see how they intended to handle the consultation procedures under a "lighter touch" regime.

ANALYSIS

Necessary Protections

3.11 FSMA currently allows firms and consumers to comment on draft guidance. In relation to consumers, the existing exemption to the requirement to consult provides a protection because the FSA may only dispense with consultation where delay in issuing guidance would be prejudicial to the interest of consumers.

3.12 The insertion of additional exemptions will be balanced by the insertion of a new overarching requirement that the FSA may only make use of the new exemptions where it considers that its proposals will not significantly prejudice the interests of consumers and in the case of the minor effect exemption, other persons subject to or affected by the guidance. We believe that this proposal provides an acceptable alternative form of necessary protection. The new exemptions will either benefit those affected or will relate to circumstances where consultation would be of limited use. Any reduction in the protection offered to firms and consumers by consultation will be balanced by the overarching requirement and will bring benefits to the FSA and those affected by the guidance, in terms of the FSA's greater responsiveness and effectiveness.

3.13 We do not consider that exempting unwritten guidance and guidance not intended to have continuing effect from the requirement to consult will remove any necessary protection.

3.14 Further, we do not consider that providing the FSA with a power to dispense with the requirements in section 155(2)(a) and (c), (5) and (6) will remove any necessary protections in relation to the issue of guidance. We consider that the requirement to consult, to bring the proposed guidance to the attention of the public and to take account of any representations received will continue to provide the necessary and appropriate level of safeguard.

Rights and freedoms

3.15 Our proposed order will not remove or reduce any rights or freedoms that anybody could reasonably expect to be able to continue to exercise. If the Narrow Option is adopted, firms and consumers will continue to be consulted on general guidance.

3.16 If the Broad Option is adopted and we decide in addition to make the ancillary obligations imposed on the FSA permissive, we consider that the requirement to consult, to bring the proposed guidance to the attention of the public and to take account of any representations received will, in themselves, continue to provide a necessary safeguard.

Costs and Savings

3.17 The FSA will benefit from the reduction in the requirement to consult on guidance where there is an urgent need for such guidance, or where consultation would serve no useful purpose. Where the FSA still has to consult, the FSA will benefit from the reduction in the formal statutory provisions applying to the consultation process, allowing the FSA to tailor consultation exercises appropriately, according to the nature and significance of the proposed guidance.

3.18 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; 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.

New Burdens

3.19 We will impose a new requirement that the FSA may only use one of the new exemptions to dispense with consultation if the FSA's proposals do not significantly prejudice the interests of consumers, and in the case of the minor effect exemption, other persons subject to or affected by the guidance. This is a proportionate response because, in the absence of consultation, it imposes the minimum requirement necessary to protect the general interests of consumers.

3.20 We believe that this new measure meets the "fair balance" test. This additional requirement imposed on the FSA only slightly offsets the benefit it will gain from having to consult less widely on guidance.

3.21 The new exemptions to the requirement to consult will either benefit those affected or will relate to narrow circumstances where consultation would be of limited use. Any reduction in the protection offered by consultation will be balanced by the new requirement and by the benefits brought to the FSA and those affected by the guidance, in terms of the FSA's greater responsiveness and effectiveness. Thus, the desirability test is also satisfied.

4

RELAXING THE FSA'S REQUIREMENT TO CONSULT ON OTHER MATTERS

BACKGROUND

4.1 FSMA requires the FSA to consult on a variety of matters other than rules and guidance, including codes of practice, policy statements on the imposition of penalties, statements of the FSA's decision-making procedure and arrangements for investigating complaints.

4.2 On some of these matters, as with rules and guidance, the FSA is exempted from the need to consult if it considers that the delay would be prejudicial to consumers. But, as with rules and guidance, the FSA enjoys no such exemption if the delay is prejudicial to persons other than consumers. On all of these issues, moreover, the FSA must still consult even where consultation would serve no useful purpose. In other words the FSA encounters the same two problems seen in the last two chapters:

3. Prejudicial delay to others: the FSA must consult even when it considers that the delay caused by consultation would prejudice the interests of firms and others subject to the rules; and
4. Consultation for no useful purpose: the FSA must consult for no useful purpose, e.g. to change a clerical or drafting error.

4.3 In addition, in the case of the codes of practice and statements of policy considered in this chapter, the FSA does not have the power to offer waivers and modifications as can sometimes be done in relation to rules.

4.4 Unnecessary consultation places burdens on not just the FSA but also on the public, firms and other stakeholders, since all may allocate resources to considering and reviewing proposals which are unlikely to be improved by consultation. In the course of the Treasury's Two-Year Review of FSMA, industry participants, consumer groups, the FSA and others all raised concerns about the volume of consultation by the FSA. Our proposal would help the FSA respond to these concerns.

THE PROPOSAL

4.5 We propose, as with rules and guidance, to loosen the consultation requirements which apply to these policy statements, codes, and directions. When the FSA does not consult then the FSA would not need to produce a cost-benefit analysis, statement of compatibility with the FSA's statutory duties, account of representations made to the FSA in the course of the consultation, or note detailing how the final proposals differ from those circulated for consultation.

4.6 On the matters listed at paragraph 4.7 of this document, FSMA already grants the FSA the option not to consult if delay would be prejudicial to the interests of consumers. We propose to widen that discretion to allow the FSA – subject to the safeguard described in paragraph 4.12¹ of this document – not to consult where;

- The FSA considers that delay in making the changes is prejudicial to the interests of those subject to or affected by the proposal; or

¹ The FSA will still have to consult where it considers that not doing so would significantly prejudice consumers' or other persons' interests.

- the FSA considers the changes have a minor effect. One option would be to provide the FSA with discretion to decide what constitutes a 'minor effect', and perhaps to support this with an FSA statement of policy which might clarify that these changes would only involve for example updating references generally and making changes merely to the form or arrangement of a document but not to its content. Another option, which might be preferable, could be to state in the Order what such changes having a 'minor effect' might be, in particular a minor clarification of the existing document, minor changes consequential upon provisions in domestic or EU legislation, or the correction of a clerical or drafting error.

4.7 The matters are:

- Statements of principle in relation to the conduct expected of approved persons (Section 65)

Section 64 of FSMA enables the FSA to issue statements of principle with respect to the conduct expected of approved persons. A failure to comply with a statement of principle amounts to misconduct under section 66 and if the FSA takes action against the person, it may impose a penalty or publish a statement of the person's misconduct. Codes of practice may specify descriptions of the type of conduct, which, in the opinion of the FSA, comply with the statement of principle. At present, before issuing statements or codes of practice the FSA must allow representations to be made and must have regard to the representations (Section 65).

- 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)

Sections 316 and 318 broadly provide that the general prohibition (i.e. no person may carry on a regulated activity without authorisation) shall not apply, or that core provisions shall apply, to Lloyd's underwriters unless a direction has been made by the FSA. Section 319 sets out the procedures to be followed.

- Directions in relation to the general prohibition under Part XX of FSMA – provision of financial services by members of the professions (Section 330)

The general prohibition does not apply to members of a profession provided certain requirements are complied with and that a direction under section 328 has not been made (section 327). Section 328 provides that the FSA may direct that the general prohibition shall apply to specified classes of person or specified classes of activity. Section 330 sets out the procedure which must be followed before a direction is made.

4.8 On the matters listed at paragraph 4.10 of this document the FSA must consult in all cases and we do not propose to introduce the exemption regarding prejudicial delay to consumers or others affected by the changes.

4.9 However we wish to grant the FSA the discretion not to consult where the FSA considers the changes comprise a minor clarification of the existing document, minor changes consequential upon provisions in legislative instruments (this includes domestic and EU legislation), or the correction of a clerical or drafting error.

4.10 The matters are:

- Statements of policy on the imposition on approved persons of warnings and decision notices, penalties and their amount (Section 70)

Section 69 FSMA requires that the FSA must issue a statement of its policy with respect to the imposition of penalties for the misconduct of approved persons and the amount of penalty under that section. Section 70 sets out the procedure that must be applied before the statement is issued.

- Statements of policy on the imposition of penalties on issuers of listed securities or applicants for listing and issuers of financial instruments and certain persons connected to them (Section 94)

If the FSA considers that an issuer of securities, an applicant for listing, an issuer who has requested or approved the admission of the instrument to trading on a regulated market, a person discharging managerial responsibilities within such an issuer, or a person connected to such a person discharging managerial responsibilities, has contravened any provision of the Part VI rules, it may impose on him a penalty of such amount as it considers appropriate. The FSA must also issue a statement of its policy with respect to the imposition and amount of such penalties and sets out the procedure that must be applied before the policy is issued (section 94).

- The scheme for distributing income from fines levied under Part VI of FSMA (Section 100)

The FSA may impose penalties relating to the listing of securities under Part VI of FSMA. Section 100 provides that the FSA must operate a scheme to ensure that the amounts paid to the FSA are applied for the benefit of issuers of securities admitted to the official list, and issuers who have requested or approved the admission of financial instruments to trading on a regulated market. It also sets out the procedure that must be applied before the scheme is made.

- The Code giving guidance as to what behaviour constitutes market abuse (Section 121)

Section 118 sets out the definition of market abuse. Under section 119 the FSA must issue a code, which gives guidance to those determining whether or not behaviour amounts to market abuse and whether or not behaviour is or is not accepted market practice. Section 121 requires that the FSA must consult upon the code before it is issued.

- Statements of policy on the imposition of penalties in relation to market abuse (Section 125)

The FSA must issue a statement of its policy with respect to the imposition of penalties for market abuse and the amount of such penalties under that section. Section 125 sets out the procedure that must be applied before the policy is issued.

- Statements of policy on the imposition of disciplinary measures on an authorised firm (Section 211)

The FSA must issue a statement of its policy with respect to the imposition of penalties and the amount imposed under Part XIV FSMA. Section 211 sets out the procedure that must be applied before the policy is issued.

- Statements of procedure regarding supervisory, warning or decision notices (Section 396)

Section 395 requires that the FSA must determine the procedure that it shall follow in relation to the giving of warning notices and decision notices (e.g. for penalties) and supervisory notices. Section 396 sets out the procedure, which must be followed before such statement of procedure are issued.

- Schemes for investigating complaints against the FSA (Schedule 1 para 7)

The above paragraph provides that the FSA must establish a complaints scheme for the investigation of complaints arising in connection with the exercise or failure to exercise its functions. It contains procedures to be followed before the scheme is issued and these include consultation.

- Details of a scheme in relation to the amount of penalties imposed under the Act (Schedule 1 para 16)

Various provisions within FSMA provide that the FSA may impose penalties. The above paragraph provides that the FSA must operate a scheme to ensure that the amounts paid to the FSA are applied for the benefit of authorised persons. It also sets out the procedure that must be applied before the scheme is made. (Chapter 10 of this document proposes that others may also benefit from this scheme).

ANALYSIS

Necessary Protections

4.11 FSMA currently allows firms and consumers to comment on draft policy statements, codes, and directions to which they are subject or which will affect them.

4.12 The insertion of additional exemptions will relax that protection, but this will be balanced by the insertion of an overarching requirement that the FSA may only rely on the new exemptions where it considers that its proposals will not significantly prejudice the interests of consumers and in the case of the minor effect exemption other persons subject to or affected by the proposals. We believe that this requirement provides an acceptable alternative form of necessary protection.

4.13 The new exemptions will either benefit those affected or will relate to narrow circumstances where consultation would be of limited use. Any reduction in the protection offered by consultation will be balanced by the overarching requirement will bring benefits to the FSA and those affected by the rules, in terms of the FSA's greater responsiveness and effectiveness.

Rights and Freedoms

4.14 Firms and consumers will still be able to exercise rights and freedoms they might reasonably expect to be able to continue to exercise.

Costs and Savings

4.15 The FSA will benefit from the reduction in the requirement to consult on rules where there is an urgent need for such 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 may avoid allocating resources to consultations on proposals that are unlikely to be improved as a result. 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.

New Burdens

4.16 For the matters listed at paragraphs 4.7 and 4.10 of this document we will impose a new requirement that the FSA may not use one of the new exemptions if the FSA's proposals significantly prejudice the interests of consumers and in the case of the minor effect exemption other persons subject to or affected by the proposals. This is a proportionate response because, in the absence of consultation, it imposes the minimum requirement necessary to protect the general interests of consumers and others.

4.17 This new requirement will uphold the public interest in protecting the rights of consumers and firms whilst also allowing the FSA to respond more effectively and so to benefit those affected by the changes. Thus, the fair balance test is satisfied. The new exemptions will either benefit those affected or will relate to narrow circumstances where consultation would be of limited use. Any reduction in the protection offered by consultation will be balanced by the new requirement and the proposal will bring benefits to the FSA and those affected by the changes, in terms of the FSA's greater responsiveness and effectiveness. The desirability test will therefore also be met

4.18 Section 1(4) of the Regulatory Reform Act provides that a Regulatory Reform Order cannot apply to provisions which have been amended (other than for consequential or incidental purposes) within the preceding two years. Section 100 of FSMA was amended by the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2005 (SI 2005/381) in order to implement the EC Market Abuse Directive (Commission Regulation (EC) 2273/2003 implementing EC Directive 2003/6/EC). However, the amendments can be described as consequential or incidental, because the effect was to expand the list of persons to whom penalties obtained under Part VI of FSMA may be applied, rather than to amend the consultation requirements contained in section 100 of FSMA. Therefore, the test at section 1(4) of the Regulatory Reform Act is met.

5

RELAXING THE FSA'S REQUIREMENT TO CONSULT OTHER EEA REGULATORS

BACKGROUND

5.1 Sub-section 49(2) of FSMA requires the FSA to consult a European Economic Area (EEA) firm's home state regulator before granting permission² to carry out a regulated activity to a person who is connected with that firm; or cancelling or varying such a permission.

5.2 The sub-section implements parts of various EC Directives.³ However, while the EC Directive provisions were designed to ensure that other European regulators were consulted before authorisation was granted or expanded, s.49(2) over-implements the requirements by compelling the FSA to consult other regulators when cancelling or narrowing a permission.

5.3 The s.49(2) provisions are burdensome in cases where major financial groups such as insurers and banks apply to cancel or vary permissions since such groups will have authorised entities in many of the other 24 EU Member States. Using the example of a single financial services group, which is made up of 26 UK authorised persons, the FSA had to consult 13 other EEA regulators in 2001, resulting in at least 91 "consultation events". Many of these consultations were not required by EC Directives. Many UK and overseas financial institutions operate through regulated entities in a number of EEA states so that, for example, if one such UK authorised entity applied to cancel or narrow a permission the current legislation would require consultations with home state regulators of all group companies elsewhere in the EEA. This is costly for the firms, the FSA and other European regulators who have to deal with such consultations.

5.4 Exceeding the minimum requirements of EC Directives in this way has resulted in a certain degree of reputational damage to the FSA as EEA regulators have complained about such consultation not covered by EC Directives. Various regulatory authorities across the EEA have confirmed that they are not required to consult home state regulators when varying or cancelling the authorisation of a connected person.

THE PROPOSAL

5.5 We intend to amend s.49(2) to require the FSA to consult with EEA regulators only as required by the relevant EC Directives. This means that we shall;

- remove the requirement to consult European regulators prior to cancelling a permission;
- remove the requirement to consult where a variation narrows the scope of a permission.

5.6 The FSA will still be required to consult prior to the grant of a permission and prior to a variation which extends the scope of a firm's permission.

² Permission to carry on a regulated activity is obtained under Part IV FSMA.

³ Article 12 of the Banking Consolidation Directive (2000/12/EC); Article 6 of the Investment Services Directive (93/22/EC); Article 5b(3) UCITS Directive (85/611/EC) (which were all amended by the Conglomerates Directive (2002/87); and Article 39 of the Consolidated Life Assurance Directive (85/611/EC).

5.7 To achieve our aim, we shall remove the requirement to consult on variations to a permission and impose a new burden requiring consultation only in relation to variations of permission where the variation involves an increase in the scope of a firm's permission.

ANALYSIS

Necessary Protections

5.8 The requirements of s.49(2) act as protections. However, insofar as those requirements are super-equivalent to the Directive requirements, we do not regard them as 'necessary protections'. Therefore no necessary protections will be removed.

Rights and Freedoms

5.9 Our proposed order will not remove or reduce any rights or freedoms that somebody could reasonably expect to be able to continue to exercise.

Costs and Savings

5.10 The FSA will only be required to consult to the extent required by the Directives. This will save the FSA and EEA regulators time and resources. Firms to whom s.49(2) applies will be saved from having to provide more information than is required by the EC Directives which should make the variation of permission process less time consuming. 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.

New Burdens

5.11 In order to comply with the relevant EC Directives a new requirement will be imposed on the FSA (see paragraph 5.7 above) but this will only require consultation where a variation could be regarded as extending the scope of a firm's permission. The Order will do no more than is necessary to comply with EC Directive obligations with the result that the proportionality test is met and a fair balance is struck between the public interest and a firm's need for the speedy resolution of their application. Finally, as our proposals will substantially reduce the need to consult prior to the cancellation or variation of a permission except in the one area explained above, the desirability test is met.

Additional note on RRA compliance

5.12 Section 1(4) of the RRA provides that an RRO cannot apply to provisions which have been amended (other than for consequential or incidental purposes) within the preceding two years. This sub-section of FSMA was amended by SI 1610/2004 in order to implement the EC Insurance Mediation Directive (2002/92/EC). However, the amendments can be described as consequential or incidental, because the effect was to disapply the sub-section for the purposes of (or in connection with) the newly specified activities of insurance mediation rather than to amend the application of s.49(2) to existing activities covered by the legislation. Therefore the test at section 1(4) of the RRA is met.

6

PERMITTING THE FSA BOARD TO DELEGATE THE ISSUING OF GUIDANCE

BACKGROUND

6.1 FSMA requires the FSA Board formally to approve all general guidance⁴ issued by the FSA, regardless of its importance. The requirement stems from Schedule 1, paragraph 1(2), which stipulates that issuing general guidance is one of the FSA's legislative functions; and from Schedule 1, paragraph 5(2) which provides that, in exercising its legislative functions, the FSA must act through its governing body.

6.2 The issuing of guidance as a legislative function was a late addition to the Financial Services and Markets Bill prior to its introduction into Parliament. The reasoning at that point may have reflected the different weight attached to guidance issued by the various predecessor organisations to the FSA. In particular, guidance issued by the Banking Supervision Department of the Bank of England had a force almost equal to that of a rule: failure to abide by guidance could result in the Bank of England reconsidering whether an authorised institution should continue to carry on banking business.

6.3 However, much FSA guidance is routine or technical in nature. More importantly it has a different status. Although a person that acts in accordance with general guidance will be treated as if they have complied with the relevant rule, guidance need not be followed in order to achieve compliance with the relevant rule or other requirement. In such circumstances it looks disproportionate to insist that the Board itself examine each piece of guidance issued by the FSA. Consideration by the Board may add little value and distracts it from more important core functions.

6.4 Guidance issued by comparable regulatory organisations, such as the Office of Fair Trading is not required to be considered by the Board and nor is guidance issued by the Financial Ombudsman Service.

THE PROPOSAL

6.5 We propose include an exception in Schedule 1, paragraph 5(2) allowing the Board of the FSA to delegate the task of issuing general guidance to a committee, sub-committee, officer or member of staff⁵.

⁴ General guidance is defined in section 158(5) of FSMA as guidance which is given to persons generally, to regulated persons generally or to a class of regulated person; intended to have continuing effect; and given in writing or other legible form.

⁵ Paragraph 5(1) FSMA provides that the FSA may make arrangements for any of its functions to be discharged by a committee, sub-committee officer or member of staff of the Authority.

ANALYSIS

Necessary Protections

6.6 Given the status and nature of FSA guidance (see above) we do not consider that Board approval of guidance constitutes a necessary protection. The delegation of approval to a committee or appropriate individual would ensure that guidance was still subject to internal checks and balances, but it would not be subject to the cumbersome and lengthy procedures attendant upon obtaining approval from the Board. Therefore, the balance of advantage, for both the FSA and those to whom the guidance applies, lies in giving the Board greater flexibility to delegate the issuing of guidance.

Rights and Freedoms

6.7 Our proposed order will not remove or reduce any rights or freedoms that somebody could reasonably expect to be able to continue to exercise.

Costs and Savings

6.8 The Board of the FSA would be free to delegate the issuing of guidance to a sub-committee or appropriate individual. This will 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 analyse whether the guidance is "general guidance" under 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.

6.9 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.

6.10 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.

Burdens

6.11 No new burdens will be imposed.

7

REMOVING RESTRICTIONS ON WAIVERS AND MODIFICATIONS

BACKGROUND

7.1 Section 148 of FSMA confers on the FSA a power to waive or modify its rules if it believes the rule concerned is unduly burdensome or does not achieve its purpose. However this Section, as currently drafted, does not allow the FSA to waive or modify rules which relate to unauthorised persons. Additionally, the FSA may only waive or modify rules falling within the list of categories contained at s.148(1).

7.2 It seems anomalous that the FSA is unable to grant waivers to all those subject to its rules. For example, exempt professional firms and applicants subject to application fees are not authorised persons but they are subject to FSA rules. Furthermore, some of the rules which are currently specified in s.148 cannot be waived as they apply to unauthorised persons, for example appointed auditors and actuaries – on whom duties may be imposed in rules under s.340 and unauthorised persons who have applied for authorisation, or granted permission from a future date.

7.3 Meanwhile the list at section 148 is restrictively small: it does not specify, for example, the funding rules applicable to the Financial Services Compensation Scheme and to the Financial Ombudsman Service, nor the FSA's procedural rules for complaints handling by firms – thus preventing the FSA from waiving or modifying such rules where appropriate. Similarly, approved persons rules are not specified with the result that, for example, the FSA would be unable to consider waiving its controlled function rules which require a firm to apply for approved person status for each of its directors even though the regulated business formed only a small proportion of its total activities.

THE PROPOSAL

7.4 We propose to amend s.148(1) to allow the FSA to waive or modify all of its rules and in respect of both authorised and unauthorised persons.

ANALYSIS

Necessary Protections

7.5 Section 148 contains various requirements which must be fulfilled before the FSA waives or modifies a rule. There is no suggestion that these requirements will be revoked or reduced as they apply to the existing provisions and they will be applied to any new provision. Accordingly, no necessary protection will be removed.

Rights and Freedoms

7.6 Our proposed order will not remove or reduce any rights or freedoms that somebody could reasonably expect to be able to continue to exercise.

Costs and Savings

7.7 The FSA will be able to waive or modify all of its rules as long as it is satisfied that;

- compliance by the person 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; and
- the waiver or modification would not result in undue risk to persons whose interests the rules are intended to protect.

7.8 Certain categories of firms and persons would benefit from the greater flexibility that the amendment will bring. Currently around 1150 waivers are granted per year, spread evenly in all areas where waivers can be granted.

Burdens

7.9 No new burdens will be imposed.

BACKGROUND

8.1 FSMA requires the FSA to follow certain procedures prior to discontinuing or suspending the listing of a security. In particular, the FSA must notify the issuer of the details of the discontinuance or suspension (s.78(3)(a)), the reasons for the FSA's decision (s.78(3)(b)), the right to make representations (s.78(3)(c)), the date on which the discontinuance or suspension took, or will take, effect (s.78(3)(d) and the right to refer the matter to the Tribunal (s.78(3)(e)) as provided for by s.77(5)). These provisions implement, in part, Articles 18 and 19 of the EC Admissions Directive (2001/34/EC).

8.2 Clearly, these procedures are appropriate where the discontinuation or suspension has been initiated by the FSA and such action is being resisted by the issuer. However, where the cancellation or suspension is initiated at the request of the issuer, the procedural requirements appear to serve no useful purpose. The company necessarily knows and has no need to make representations or refer the matter to the Financial Services and Markets Tribunal. The market is informed by market announcements published in accordance with the Listing Rules.

THE PROPOSAL

8.3 Where the issuer seeks to discontinue or suspend the listing of a security, we propose to remove the obligation on the FSA to fulfil the following procedural requirements; the reasons for the FSA's decision (s.78(3)(b)); the right to make representations (s.78(3)(c)); and the right to refer the matter to the Tribunal (s.78(3)(e)). We propose in addition as a consequential amendment to remove the anomaly in section 77(5) of FSMA which allows an issuer to petition the Tribunal about a discontinuation or suspension when that discontinuation or suspension was requested by that issuer. However, in order to protect the rights of the issuer we have inserted provision allowing him to make representations and refer the matter to the Tribunal if the FSA refuses his request to discontinue or suspend the listing of the securities.

ANALYSIS

Necessary Protections

8.4 We propose to retain the requirements on the FSA to give details of the discontinuance or suspension and to inform the issuer of the date on which the discontinuance or suspension took place or will take place. In addition, we will allow an issuer to refer the matter to the Tribunal if the FSA refuses their request. Given that the issuer will himself be applying for the discontinuance or suspension, we do not regard the remaining requirements in section 78 as necessary protections.

Rights and Freedoms

8.5 Our proposed order will deny access to the Tribunal (for the purpose of making representations on the discontinuance or suspension) only to those whose securities were discontinued or suspended from listing on the application of their issuer. However, given that the discontinuance or suspension will occur by consent we do not consider that this proposal will remove or reduce any rights or freedoms that somebody could reasonably expect to be able to continue to exercise.

Costs and Savings

8.6 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. Under our proposal the quantity of unnecessary paperwork would be reduced, benefiting both the FSA and the issuer. Around 1 FSA person day was involved in total processing all of these requests.

Burdens

8.7 We will insert provisions regarding the giving of notice and warning notice if the FSA decide not to grant the request to de-list or suspend listing. The FSA will have to consider any representations received and the issuer may apply to the Tribunal if the FSA reject their application. This is a proportionate and fair response because it protects the interests of the issuer in an area which directly affects the way in which they can carry on business, whilst also leaving the FSA room to make the right supervisory decisions. Accordingly, the desirability test is met.

EC Compliance

8.8 Articles 18 and 19 of the EC Admissions Directive (2001/34/EC) provide as follows:

- 18(1): The competent authorities may decide to suspend the listing of a security where the smooth operation of the market is, or may be, temporarily jeopardised or where protection of investors so requires.
- 18(2): The competent authorities may decide that the listing of the security be discontinued where they are satisfied that, owing to special circumstances, normal regular dealings in a security are no longer possible.
- 19: Member States shall ensure decisions of the competent authorities refusing the admission of a security to official listing or discontinuing such a listing shall be subject to the right to apply to the courts.

8.9 Article 19 is parasitic upon Article 18. Article 18 sets out the circumstances in which the competent authority can unilaterally decide to suspend or discontinue listing, but it does not limit the authority's right to suspend or discontinue with the consent of the issuer. This can be dealt with in national provisions, provided that the objectives of the Directive are not compromised. Our proposal removes the issuer's right to apply to the Tribunal to challenge such a decision, where the suspension or discontinuance is carried out at the request of the issuer. That said, we have retained the right to refer the matter to the Tribunal where the FSA refuse to grant the issuer's request to discontinue or suspend the listing of the security. The proposal is a modest one and will not jeopardise the purpose of the Directive since it does not reduce protection for investors. The right removed from issuers in the UK would be irrational for them to use, since it would involve challenging a decision which they had themselves requested.

9

SIMPLIFYING THE PROCEDURE RELATING TO THE CANCELLATION OF SPONSOR APPROVAL

BACKGROUND

9.1 FSMA requires the FSA to issue a warning notice before cancelling a sponsor's⁶ permission – even when cancellation is at the request of the sponsor. Persons in receipt of such a warning notice may appeal to the Financial Services and Markets Tribunal.

9.2 The requirement to issue a warning notice is contained at sub-section 88(4). Sub-sections 88(5) and 88(6) proscribe the way the FSA must treat representations made in response to the warning notice; while sub-section 88(7) provides for the right of appeal to the Tribunal.

9.3 The notice arrangements presume a contentious background to cancellation. Clearly the arrangements are appropriate where the cancellation has been initiated by the FSA and such action is being resisted by the sponsor. However, where the cancellation is initiated at the request of the sponsor, the requirement serves no useful purpose. The market is informed by announcements published on the FSA website. The sponsor necessarily knows and has no need to be given a warning notice or make representations to the Tribunal.

9.4 Requiring the FSA and the sponsor in question to follow the s.88 procedure appears to have resulted from an oversight when FSMA was being drafted. There are procedures similar to s.88 for the cancellation of a firm's Part IV permission (see s.54) or the de-recognition of a Recognised Investment Exchange or Recognised Clearing House (see s.298). However, these other procedures (in s.54 and s.298) are not required if the cancellation of permission or de-recognition is at the request of the person concerned. The procedure in s.88, on the other hand, must be followed even if cancellation is requested by the sponsor. This appears to be disproportionate.

THE PROPOSAL

9.5 We propose to amend s.88(4) so that the FSA is exempt from issuing a warning notice in cases where the cancellation is at the request of the sponsor. Sub-sections 88(5) to (7) reference the issue of a warning notice and so by removing the need to issue a notice, we shall remove the requirement upon the FSA to follow the procedure set out therein. This means that the sponsor will not have access to the Tribunal.

ANALYSIS

Necessary Protections

9.6 Given that the person will himself be applying for the cancellation, we do not consider that our proposal will remove any necessary protections.

⁶ A sponsor is a person approved by the FSA to perform services on behalf of others, as required by the listing rules.

Rights and Freedoms

9.7 Our proposed order will deny access to the Tribunal to those who themselves make an application to cancel their permission to act as a sponsor. However, given that the cancellation will be by consent we do not consider that the proposal will remove or reduce any rights or freedoms that somebody could reasonably expect to be able to continue to exercise.

Costs and Savings

9.8 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. Under our proposal this superfluous paperwork, which burdens both the FSA and firms, would be eliminated. Around 1 FSA person day in total was involved in processing all of these requests.

Burdens

9.9 No new burdens will be imposed.

BACKGROUND

10.1 Under Schedule 1, paragraph 16(2) FSMA, the FSA must apply market abuse penalty income for the benefit of authorised persons. This means that recognised exchanges and listed and non-listed issuers cannot benefit from the application of penalties. The principal purpose of financial penalties is to promote high standards of regulatory conduct by deterring those firms which may contemplate failing to meet appropriate regulatory standards, and by rewarding firms with good compliance systems. In fairness to the majority of firms and their employees who comply with their regulatory obligations, often at a significant cost, it is equitable that those who breach those obligations should generally pay a penalty which will go towards the overall costs of regulating the financial services industry. This rationale applies equally to listed and non-listed issuers and recognised investment exchanges which cannot currently benefit from the application of penalty income.

THE PROPOSAL

10.2 We intend to amend Schedule 1, paragraph 16(2) to enable the FSA to apply the income from penalties levied in connection with market abuse under Section 123 of FSMA to listed and non-listed issuers and recognised exchanges as well as to authorised persons.

ANALYSIS

Necessary Protections

10.3 The proposal does not involve the removal of any necessary protections.

Rights and Freedoms

10.4 Our proposal will not remove or reduce any rights or freedoms that somebody could reasonably expect to be able to continue to exercise.

Costs and Savings

10.5 The FSA will be able to apply the income that it receives from market abuse penalties imposed under s.123 of FSMA for the benefit of a wider range of institutions as it considers appropriate. 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.

10.6 It is difficult to speculate as to exactly how fine proceeds would have been allocated differently in past cases had our proposed reforms been implemented. However, it is likely that the proposed reforms would impact where, for example, a listed or non-listed issuer is fined for market abuse.

10.7 The reforms proposed here would open the possibility of dividing the proceeds of such large fines between authorised persons, listed persons and recognised exchanges.

Burdens

10.8 No new burdens will be imposed. The only change will be an expansion of the FSA's discretion regarding the class to which it applies a penalty.

A

PARTIAL REGULATORY IMPACT ASSESSMENT

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 principle 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 requirements⁷ 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.

⁷ 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.

B

REGULATORY REFORM PROPOSALS AND ORDERS - CONSULTATION AND PARLIAMENTARY CONSIDERATION

B.1 These reform proposals will require changes to primary legislation in order to give effect to them. The Minister could achieve these changes by introducing an Order under the Regulatory Reform Act (RRA). RROs are subject to preliminary consultation and to extended Parliamentary scrutiny (by Committees in each House of Parliament) of any subsequently proposed Order. On that basis, the Minister invites comments on this reform proposal that might be carried forward by a Regulatory Reform Order.

REGULATORY REFORM PROPOSALS

B.2 This consultation document has been produced because the starting point for regulatory reform proposals is thorough and effective consultation with interested parties. In undertaking this preliminary consultation, the Minister is expected to seek out actively the views of those concerned, including those who may be adversely affected, and then to demonstrate to the Scrutiny Committees that he or she has addressed those concerns.

B.3 Following the consultation exercise, when the Minister lays proposals before Parliament under the RRA, he or she must also lay a report for consideration by the Scrutiny Committees setting out a summary of;

- the burden imposed by the existing law;
- whether any of those burdens are proposed to be removed or reduced;
- how the proposals otherwise further the other objects of the RRA (re-enacting proportionate burdens, introducing new but proportionate burdens, removing inconsistencies and anomalies);
- whether there is “necessary protection” and how it is to be continued;
- how any reasonable expectation of the exercise of rights or freedoms is affected (if at all) and how the exercise can be continued;
- how new burdens (if any) are both proportionate and, taking the proposals as a whole, strike a fair balance between the public interest and the interests of persons affected by the new burdens;
- whether an Order that imposes burdens is desirable in terms either of the burdens it removes or the other benefits it brings;
- whether any parts of the proposed Order are being designated as “subordinate provisions”, allowing them to be changed by less elaborate Parliamentary procedures in the future;
- what cost savings or increases are expected any why;
- what other benefits there will be from the proposals;
- details of the consultation process;
- any representations received as a result of that consultation; and
- the changes made to the proposals as a result of that consultation.

B.4 On the day the Minister lays the proposals and report, the period for Parliamentary consideration begins. It lasts for 60 days, excluding Parliamentary recesses of more than four days. If you want a copy of the proposals and the Minister's report, you will be able to obtain them either from HM Treasury or by visiting the Cabinet Office's website at:

<http://www.cabinet-office.gov.uk/regulation/act/index.htm>.

PARLIAMENTARY SCRUTINY

B.5 Both Houses of Parliament scrutinise regulatory reform proposals and draft orders. This is done by the Scrutiny Committees.

B.6 Standing Orders in the Commons stipulate that the Regulatory Reform Committee in the Commons considers whether proposals;

- appear to make an inappropriate use of delegated legislation;
- remove or reduce a burden or the authorisation or requirement of a burden;
- continue any necessary protection;
- have been the subject of, and take appropriate account of, adequate consultation;
- impose a charge on the public revenues or contain provisions requiring payments to be made to the Exchequer or any government department or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribe the amount of any such charge or payment;
- purport to have retrospective effect;
- give rise to doubts whether they are *intra vires*;
- require elucidation, are not written in plain English, or appear to be defectively drafted;
- appear to be incompatible with any obligation resulting from membership of the European Union;
- prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise;
- satisfy the conditions of proportionality between burdens and benefits set out in sections 1 and 3 of the RRA;
- satisfy the test of desirability set out in section 3(2)(b) of the RRA;
- have been the subject of, and take appropriate account of, estimates of increases or reductions in costs or other benefits which may result from their implementation; or
- include provisions to be designated in the draft order as subordinate provisions, and in the case of the latter consideration the committee shall report its opinion whether such a designation should be made, and to what parliamentary proceedings any subordinate provisions orders should be subject.

B.7 The Committee in the House of Lords will consider each proposal in terms of similar criteria, although these are not laid down in Standing Orders.

B.8 Each Committee might take oral or written evidence to help it decide these matters, and each Committee could then be expected to report;

- whether the Minister should proceed to lay a draft order in the same terms as the original proposal;
- whether amendment is necessary; or
- whether the order-making power should not be used (for example, because of the significance or sensitivity of the proposal).

B.9 Copies of Committee Reports, as Parliamentary papers, can be obtained through HMSO. They are also available on the Parliamentary website at:

http://www.parliament.uk/parliamentary_committees/regulatory_reform_committee.cfm for the Regulatory Reform Committee in the Commons; and

http://www.parliament.uk/parliamentary_committees/dpr.cfm for the Delegated Powers and Regulatory Reform Committee in the Lords.

B.10 After the 60 days for Parliamentary consideration, the Minister can lay a draft order before both Houses, this time for the approval of Parliament.

B.11 Each of the Scrutiny Committees examines the draft order to see how far its views have been taken into account. They report, within 15 sitting days, whether the draft order should be approved or not, and it would then be for the relevant House itself to take its final decision.

B.12 The final draft order then has to be approved by both Houses of Parliament before becoming law.

HOW TO MAKE YOUR VIEWS KNOWN

B.13 Responding to this consultation is your first and main opportunity to make your views known to the relevant department as part of the consultation process. You should send your views to:

Ms. Eve Engledow
HM Treasury
Financial Stability and Regulatory Policy, Room 4/24
1 Horse Guards Road
London, SW1A 2HQ
Telephone: 020 7270 4381
Fax: 020 7451 7657
E-mail: eve.engledow@hm-treasury.gov.uk

B.14 When the Ministers lays proposals before Parliament you are welcome to put your views before either or both of the Scrutiny Committees. In the first instance, this should be in writing. The Committees will normally decide on the basis of written submissions whether to take oral evidence.

B.15 Your submission should be as concise as possible, and should focus on one or more of the criteria listed in para 6 above.

B.16 The Scrutiny Committees appointed to scrutinise Regulatory Reform Act Orders can be contact at:

Delegated Powers and Regulatory Reform Committee	Regulatory Reform Committee
House of Lords London SW1A 0PW	House of Commons 7 Millbank London SW1P 3JA
Tel: 020 7219 3103	Tel: 020 7219 2833/2837
Fax: 020 7219 2571	Fax: 020 7219 2509
Email: DPDC@parliament.uk	Email: regrefcom@parliament.uk

NON-DISCLOSURE OF RESPONSES

B.17 Section 7 of the RRA provides what should happen when someone responding to the consultation exercise on a proposed order requests that his or her response should not be disclosed.

B.18 The name of the person who has made representations will always be disclosed to Parliament. If you ask for your representation not to be disclosed, the Minister should not disclose the content of that representation without your express consent and, if the representation relates to a third party, their consent too. Alternatively, the Minister may disclose the content of the representation in such a way as to preserve your anonymity and that of any third party involved.

INFORMATION ABOUT THIRD PARTIES

B.19 If you give information about a third party which the Minister believes may be damaging to the interests of that third party, the Minister does not have to pass on such information to Parliament if he does not believe it is true or he is unable to obtain the consent of the third party to disclosure. This applies whether or not you ask for your representation not to be disclosed.

B.20 The Scrutiny Committees may, however, be given access on request to all representations as originally submitted, as a safeguard against improper influence being brought to bear on Ministers in their formulation of RRA orders.

C

CABINET OFFICE CONSULTATION CRITERIA

- C.1** Cabinet Office guidelines require Departments, when issuing proposals, to;
- consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy;
 - be clear about what the proposals are, who may be affected, what questions are being asked and the timescale for responses;
 - ensure that the consultation is clear, concise and widely accessible;
 - give feedback regarding the responses received and how the consultation process influenced the policy;
 - monitor their departmental effectiveness at consultation, including through the use of a designated consultation co-ordinator;

ensure the consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

D

LIST OF CONSULTEES

D.1 This consultation document has been made available to the general public via the Treasury public website and has in addition been sent to a large number of consultees, including the following bodies:

SJ Berwin	British Bankers Association
ABN AMRO	The Mortgage Group
Institute of Directors	Travers Smith
Clifford Chance	LIBA
PWC	Linklaters
DentonWildeSapte	Natwest
London Stock Exchange	AXA
Allen and Overy	Nationwide
Institute of Chartered Accountants	Association of British Insurers
Norton Rose	Swiss Life
Slaughter and May	Abbey
Law Society	Scottish Widows
Amicus	Virgin Money
Lehman Brothers	Simmons and Simmons
RBS	Norwich Union
Credit Unions Swansea	Alliance and Leicester
Woolwich	Aberdeen Property Investors
London Clearing House	Nomura
APCIMS	Zurich
Morgan Stanley	Clyde
JP Morgan	Dundee
HBOS	Lovells
Lloyds	The Advertising Association
Association of Friendly Societies	Association of Business Recovery Professionals
Association of Chartered Certified Accountants	Business Angels International

Countrywide Independent Advisers	Fidelity Investments
Finance and Leasing Association	Freshfields
Futures and Options Association	Goldman Sachs
International Primary Market Association	International Swaps and Derivatives Association
Lloyds of London	National Consumer Council
National Federation of Consumer Groups	Scottish Provident
Scottish Widows	Society of Pension Consultants



DRAFT REGULATORY REFORM ORDER

Draft Order laid before Parliament under section 4(2) of the Regulatory Reform Act 2001, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2006 No.

REGULATORY REFORM

The Regulatory Reform (Financial Services and Markets Act 2000) Order 2006

Made - - - - *******
Coming into force - - *******

- a. The Treasury have consulted –
 - (i) such organisations as appeared to them to be representative of interests substantially affected by their proposals for this Order;
 - (ii) the statutory bodies to whose functions their proposals relate;
 - (iii) the National Assembly for Wales; and
 - (iv) such other persons as they considered appropriate.
- b. [As a result of that consultation it appeared to the Treasury that it was appropriate to vary part of their proposals].
- c. Following that consultation the Treasury considered it appropriate to proceed to make this Order.
- d. A document containing the Treasury’s proposals has been laid before Parliament as required by section 6 of the Regulatory Reform Act 2001⁽⁸⁾ and the period for Parliamentary consideration under section 8 of that Act has expired.

⁽⁸⁾ 2001 c.6.

- e. The Treasury has had regard to the representations made during that period and in particular to the [] Report, Session [], of the Delegated Powers and Regulatory Reform Committee of the House of Lords⁽⁹⁾ and the [] Report, Session [], of the Regulatory Reform Committee of the House of Commons⁽¹⁰⁾ [and to [x resolution]].
- f. A draft of this Order has been laid before Parliament with a statement giving details of those representations [and the changes to the Treasury's proposals in the light of them].
- g. The draft has been approved by resolution of each House of Parliament.
- h. The Treasury are of the opinion that this Order does not remove any necessary protection or prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise.
- (i) This Order creates burdens affecting persons in the carrying on of certain activities, and the Treasury are of the opinion that—
 - (i) the provisions of this Order, taken as a whole, strike a fair balance between the public interest and the interests of the persons affected by the burdens created, and
 - (ii) the extent to which this Order removes or reduces one or more burdens, or has other beneficial effects for persons affected by the burdens imposed by the existing law, makes it desirable for this Order to be made.

The Treasury, in exercise of the powers conferred upon them by section 1 of the Regulatory Reform Act 2001, make the following Order:

Citation and commencement

1. This Order may be cited as the Regulatory Reform (Financial Services and Markets Act 2000) Order 2006 and comes into force on the [seventh] day after the day on which it is made.

Amendments to the Financial Services and Markets Act 2000

2. The Financial Services and Markets Act 2000⁽¹¹⁾ is amended as follows.
3. In section 49 (persons connected with an applicant), for subsection (2)(b) substitute—

“(b) varying any permission given by the Authority to such a person where the effect of the variation is to extend the activities for which it gives permission.”.

⁽⁹⁾ [Insert Reference e.g. Second Report on 25 February 2006, HL180, ISBN]

⁽¹⁰⁾ [Insert Reference e.g. Third Report on 26 February 2006, HC181, ISBN]

⁽¹¹⁾ 2000 c.8.

4. In section 65 (statements and codes: procedure), for subsection (7) substitute—

“(7) Subsections (1) to (6) do not apply if the Authority considers that—

- (a) the delay involved in complying with them would prejudice the interests of consumers;
 - (b) the delay involved in complying with them would prejudice the interests of persons affected by the proposed statement or code and the Authority is satisfied that the proposed statement or code will not significantly prejudice the interests of consumers; or
 - (c) in the case of a proposal to alter or replace a statement or code,—
 - (i) the proposed changes comprise a minor clarification of that statement or code, minor amendments consequential upon an enactment or Community instrument, or the correction of a clerical or drafting error; and
 - (ii) the Authority is satisfied that the proposed changes will not significantly prejudice the interests of consumers and the interests of persons affected by them.”.
5. In section 70 (statements of policy: procedure), in subsection (7) at the end insert—

“except where the Authority—

- (a) considers that the proposed changes comprise a minor clarification of that statement, minor amendments consequential upon an enactment or Community instrument, or the correction of a clerical or drafting error; and
 - (b) the Authority is satisfied that the proposed changes will not significantly prejudice the interests of consumers or persons affected by them.”.
6. In section 77 (discontinuance and suspension of listing), after subsection (5) insert—

“(6) Subsection (5) does not apply to a discontinuance or suspension of the listing of any securities at the request of the issuer.”.

7. In section 78 (discontinuance or suspension: procedure), after subsection (12) insert—

“(12A) Subsections (1) to (9) of this section do not apply to a discontinuance or suspension of listed securities at the request of the issuer of the securities.”.

8. After section 78 insert—
- “78A Discontinuance or suspension at the request of the issuer: procedure**
- (1) A discontinuance or suspension of the listing of any securities by the competent authority at the request of the issuer of the securities takes effect—
 - (a) immediately, if the notice under subsection (2) states that this is the case;
 - (b) in any other case, on such date as may be specified in that notice.
 - (2) If the competent authority discontinues or suspends the listing of securities at the request of the issuer it must give him written notice.
 - (3) The notice must—
 - (a) give details of the discontinuance or suspension;
 - (b) state the date on which the discontinuance or suspension took effect or will take effect; and
 - (c) inform the issuer of his right to apply for the cancellation of the suspension.
 - (4) If the competent authority proposes not to suspend or discontinue the listing of the securities, it must give the issuer a warning notice.
 - (5) The competent authority must, having considered any representations made in response to the warning notice—
 - (a) if it decides to refuse the application, give the issuer a decision notice;
 - (b) if it grants the application, give him written notice of its decision.
 - (6) If the competent authority decides not to discontinue or suspend the listing of the securities, the issuer may refer the matter to the Tribunal.
 - (7) The issuer may, at any time, apply to the competent authority for the cancellation of the suspension.
 - (8) “Discontinuance” means a discontinuance of listing under section 77(1).
 - (9) “Suspension” means a suspension of listing under section 77(2).”
9. In subsection (4)(b) of section 88 (sponsors), after the words “as a sponsor” insert the words “otherwise than at his request”.
10. In section 94 (statements of policy: procedure), in subsection (7) at the end insert—
- “except where the Authority—
- (a) considers that the proposed changes comprise a minor clarification of that statement, minor amendments consequential upon an enactment or a Community instrument, or the correction of a clerical or drafting error; and

- (b) the Authority is satisfied that the proposed changes will not significantly prejudice the interests of consumers or persons affected by them.”.
11. In section 100 (penalties), in subsection (13) at the end insert—
- “ except where the Authority—
- (a) considers that the proposed changes comprise a minor clarification of the scheme, minor amendments consequential upon an enactment or Community instrument, or the correction of a clerical or drafting error; and
- (b) the Authority is satisfied that the proposed changes will not significantly prejudice the interests of consumers or persons affected by them.”.
12. In section 121 (codes: procedure), in subsection (9) at the end insert—
- “except where the Authority—
- (a) considers that the proposed changes comprise a minor clarification of that code, minor amendments consequential upon an enactment or Community instrument, or the correction of a clerical or drafting error; and
- (b) the Authority is satisfied that the proposed changes will not significantly prejudice the interests of consumers or persons affected by them.”.
13. In section 125 (statement of policy: procedure) in subsection (7) at the end insert—
- “except where the Authority—
- (a) considers that the proposed changes comprise a minor clarification of that statement, minor amendments consequential upon an enactment or Community instrument, or the correction of a clerical or drafting error; and
- (b) the Authority is satisfied that the proposed changes will not significantly prejudice the interests of consumers or persons affected by them.”.
14. (1) Section 148 (modification or waiver of rules) is amended as follows.
- (2) Omit subsection (1).
- (3) For subsection (2), substitute—
- “(2) The Authority may, on the application or with the consent of a person who is subject to rules, direct that all or any those rules—
- (a) are not to apply to that person; or
- (b) are to apply to him with such modifications as may be specified in the direction.”.
- (4) Omit the word “authorised” wherever it appears.

- (5) In subsection (11), for the word “an” substitute the word “a”.
15. In section 155 (consultation), for subsection (7) substitute—
- “(7) Subsections (1) to (6) do not apply if the Authority considers that—
- (a) the delay involved in complying with them would prejudice the interests of consumers;
 - (b) the delay involved in complying with them would prejudice the interests of persons subject to or affected by the proposed rules and the Authority is satisfied that the proposed rules will not significantly prejudice the interests of consumers; or
 - (c) in the case of a proposal to alter or replace a rule,—
 - (i) the proposed changes comprise a minor clarification of that rule, minor amendments consequential upon an enactment or Community instrument, or the correction of a clerical or drafting error; and
 - (ii) the Authority is satisfied that the proposed changes will not significantly prejudice the interests of consumers and the interests of persons affected by them.”.
16. In section 157 (guidance), for subsection (3) substitute—
- “(3) If the Authority proposes to give guidance which is—
- (a) to be given to regulated persons generally, or to a class of regulated person, in relation to rules to which those persons are subject;
 - (b) intended to have continuing effect; and
 - (c) to be given in writing or other legible form,
- subsections (1), (2)(b) and (d), (4) and (7) of section 155 apply to the proposed guidance as they apply to proposed rules.”.
17. In section 211 (statements of policy: procedure), in subsection (7) at the end insert—
- “except where the Authority—
- (a) considers that the proposed changes comprise a minor clarification of an existing statement, minor amendments consequential upon an enactment or Community instrument, or the correction of a clerical or drafting error; and
 - (b) the Authority is satisfied that the proposed changes will not significantly prejudice the interests of consumers or persons affected by them.”.
18. In both sections 319 (consultation on directions under sections 316 and 318) and 330 (consultation on directions under section 328(1)), for subsection (6) substitute—
- “(6) Subsections (1) to (5) do not apply if the Authority considers that—

- (a) the delay involved in complying with them would prejudice the interests of consumers;
 - (b) the delay involved in complying with them would prejudice the interests of persons subject to or affected by the proposed direction and the Authority is satisfied that the proposed direction will not significantly prejudice the interests of consumers; or
 - (c) in the case of a proposed direction which alters or replaces an existing direction,—
 - (i) the proposed changes comprise a minor clarification of the existing direction, minor amendments consequential upon an enactment or Community instrument, or the correction of a clerical or drafting error; and
 - (ii) the Authority is satisfied that the proposed changes will not significantly prejudice the interests of consumers and the interests of persons affected by them.”.
19. In section 396 (statements under section 395: consultation), in subsection (7) at the end insert—
- “except where the Authority—
- (a) considers that the proposed revision comprises a minor clarification of that statement, minor amendments consequential upon an enactment or Community instrument, or the correction of a clerical or drafting error; and
 - (b) the Authority is satisfied that the proposed revision will not significantly prejudice the interests of consumers or persons affected by it.”.
20. (1) Schedule 1 (the Financial Services Authority) is amended as follows.
- (2) In sub-paragraph (2) of paragraph 5 (arrangements for discharging functions), for the words “its legislative functions” substitute the words “the legislative functions mentioned in paragraph 1(2)(a) to (d)”.
 - (3) In paragraph (7) (arrangements for the investigation of complaints), in sub-paragraph (14) at the end insert—
- “ except where the Authority—
- (a) considers that the proposed changes comprise a minor clarification of the scheme, minor amendments consequential upon an enactment or Community instrument, or the correction of a clerical or drafting error; and
 - (b) the Authority is satisfied that the proposed changes will not significantly prejudice the interests of consumers or persons affected by them.”.

- (4) In paragraph 16 (penalties)-
- (a) in sub-paragraph (2), for “The Authority” substitute “Subject to sub-paragraph (3A), the Authority”;
- (b) after sub-paragraph (3) insert—
- “(3A)The scheme must provide for the amounts paid to the Authority by way of penalties imposed under section 123 to be applied for the benefit of authorised persons, recognised investment exchanges, issuers of securities admitted to the official list or issuers who have requested or approved the admission of financial instruments to trading on a regulated market.”;
- (c) in sub-paragraph (13), for “the complaints scheme” substitute—
- “the scheme except where the Authority—
- (a) considers that the proposed changes comprise a minor clarification of the scheme, minor amendments consequential upon an enactment or Community instrument, or the correction of a clerical or drafting error; and
- (b) the Authority is satisfied that the proposed changes will not significantly prejudice the interests of consumers or persons affected by them.”.

[Name]

[Name]

[Date] Two of the Lords Commissioners of Her Majesty’s Treasury

EXPLANATORY NOTE

(This note does not form part of the Order)

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