

Assets, Savings and Consumers  
HM Treasury  
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By email: [dfa@hmtreasury.gsi.gov.uk](mailto:dfa@hmtreasury.gsi.gov.uk)

15 November 2016

Dear Sirs

**HM Treasury – Consultation on amending the definition of financial advice**

The City of London Law Society ("**CLLS**") represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

This letter has been prepared by the CLLS Regulatory Law Committee (the "**Committee**"). The Regulatory Committee not only responds to consultations but also proactively raises concerns where it becomes aware of issues which it considers to be of importance in a regulatory context.

We agree that it is sensible to amend the definition of the regulated activity of advice so that it is limited to personal recommendations. The complex interaction between the regulation of:

- A) financial promotion;
- B) advice as defined under FSMA;
- C) advice as defined under the Markets in Financial Instruments Directive;
- D) personal recommendations as defined under FCA Rules

and their application to different investment and financial products causes considerable confusion. We also agree that the uncertainty these overlapping concepts generates does restrict the types of information and guidance which law abiding firms, both regulated and unregulated, including employers and consumer organisations, are willing to provide. The result is that information and guidance may either be unavailable or only provided by less scrupulous firms.

Making the proposed changes will have the consequence that some types of firm, principally tip sheets and their electronic equivalents, cease to fall within the scope of MiFID regulation except in relation to restrictions on financial promotion. This does involve a degree of risk for consumers, which has to be balanced against the benefits of the broader availability of financial guidance and we do not think the potential number of such firms should be underestimated. However, the U.K. financial promotion regime is very wide ranging. It is already the only governing regime for advice on the choice of investment adviser, manager or other service provider, rather than on specific investments. Moreover, focusing regulated activities on personal recommendations will enable regulatory resources to be focused on the area where consumers reasonably expect protection.

A change of definition would also mean that the FCA would need to review its rules to consider whether amendments are necessary, what impact there is on other requirements (such as those for certification) and how far relevant rules can or should extend to unregulated activities of regulated firms. Generally this is only done in relation to the Principles and systems and controls obligations. Most of the specific FCA Conduct of Business rules relating to advice are already limited to personal recommendations. We note, however, that the recent FCA CP 16/29 flagged that a change to the definition of advice would affect its proposed extension of the inducements/RDR regime.

We generally agree with the proposal that the new definition should be aligned as closely as possible to the MiFID2 definition since that is the most detailed current concept and would assist in maintaining equivalence, which is important in the current political environment and in order to ensure that firms understand where the regulatory boundaries are for advice provided to EU customers.

We suggest that the words "presented as suitable" should be moved in revised paragraph 53(1A)(c) which should read "a recommendation that is presented as:- (i) suitable for the person to whom it is made; or (ii) based on a consideration of the circumstances of that person".

The proposed wording means there will still be uncertainties over the exact scope of the new definition, and where the regulatory perimeter is, for instance on:

- a) what amounts to presentation of suitability or being based on the recipient's circumstances, particularly where it includes a flowchart (or electronic equivalent) which can be applied to an individual's situation. This can shade into "robo-advice".
- b) if the amendment we propose above was not made, there would be both uncertainty over what amounts to advice based on someone's circumstances, and the anomalous situation that if his or her circumstances were not considered the activity would not be regulated, even if the individual concerned was encouraged to believe that the advice was based on those circumstances.
- c) what amounts to a "large number of people" in relation to the definition of distribution channels and information which is or is likely to become publicly available.

We think that some degree of uncertainty over the regulatory perimeter for advice is inevitable and may even have some benefit in enabling the exercise of discretion in complex fact situations. Perimeter guidance from the FCA can be of assistance on questions of the kind outlined above without creating hard distinctions which are too easy to "game". Accordingly we agree that, subject to the amendment mentioned above, the proposed alteration to the boundary, in order to prevent an unduly cautious approach being taken to the provision of information and guidance, is appropriate.

If you would find it helpful to discuss any of these comments then we would be happy to do so. Please contact Karen Anderson by telephone on +44 (0) 20 7466 2404 or by email at [Karen.Anderson@hsf.com](mailto:Karen.Anderson@hsf.com) in the first instance.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Karen Anderson', followed by a period.

**Karen Anderson**  
*Chair, CLLS Regulatory Law Committee*

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**THE CITY OF LONDON LAW SOCIETY  
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