

By email: FinProms@hmtreasury.gov.uk

23 October 2020

Dear Sir or Madam

HMT consultation on the Regulatory Framework for the Approval of Financial Promotions (the "Consultation")

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 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.

While the Committee acknowledges the concerns identified in the Consultation in respect of the current financial promotions regime, this response advises a more conservative path and notes some additional comments for HM Treasury to consider as part of the ongoing Consultation.

Adequacy of existing regulatory tools

The Committee considers that the changes described in the Consultation Paper under Options 1 or 2 will be potentially disruptive and unduly onerous for firms approving promotions for unauthorised persons, which could consequently impact consumers' ability to make fully informed decisions on financial products and services.

The application for, and maintenance of, new or varied permissions will occupy firms' time and incur expense. Additionally, where permission to approve promotions is required at short notice or on an ad hoc basis, these new provisions may pose a significant obstacle to efficient transactional proceedings. Members of the Committee note that it is common for regulated firms to be asked to approve a financial promotion in the course of completing a financial transaction, where there is concern about the ability of an unregulated party to communicate the financial promotion. The urgent timing of many transactions means that the regulated firm could only support the transaction by

approving the financial promotion if it had the foresight to meet the new permission requirement proposed in the Consultation.

With this in mind, the Committee suggests that HM Treasury reconsider the adequacy of the existing regulatory regime under the Financial Services and Markets Act 2000 (the "**Act**") and further evaluates the advantages of utilising the powers already available to the FCA under the Act to achieve the government's aims. For example, using a similar approach to other issues (for example, in the areas of market abuse and outsourcing) the FCA can proactively assess the role of approval of financial promotions and how firms perform this role, update COBS 4.10, publish examples of good and bad practice guidance, and pursue enforcement in respect of material breaches of existing obligations relating to financial promotion approval (for example, where a firm cannot show that it has the necessary expertise to be able to approve the financial promotion). In terms of being able to identify those firms which are most in need of increased supervision, the FCA could add a notification obligation in SUP 15 (for example, production of an annual report on use of the power to approve financial promotions).

The Committee does not agree that the FCA can only be reactive in tackling poor compliance in this area. The FCA has the means to give clear guidance in order to raise compliance standards. It also has the means to target firms and their senior managers in respect of compliance issues, as well as having the usual range of sanctions available in respect of breaches.

The Committee welcomes the indication in paragraph 6.2 of the Consultation that neither of the Options would extend to the approval by firms of communications to be issued by their group companies.

The overseas persons exclusion

The applicability of the overseas persons exclusion under Article 72 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the "**RAO**") is dependent in part upon there being a 'legitimate approach'. Article 72(7) of the RAO requires a legitimate approach to have been made in such a way that it does not contravene the general restriction under section 21(1) of the Act.

The Committee notes that any changes concerning the exceptions to the general restriction, such as those proposed to section 21(2)(b) of the Act under Options 1 and 2, will therefore alter the usefulness of the overseas persons exclusion and consequently potentially affect the activities of international actors in the UK, in that only those firms which have passed the proposed gateway would be able to approve promotions by the overseas person.

Criminal penalties

As is acknowledged in the Consultation Paper, both of the Options proposed would require amendments to the defence under section 25(2)(a) of the Act to reflect that not all authorised persons will be able to approve the financial promotions of unauthorised persons.

Revised scope

If it is decided to proceed with one of the Options, the Committee's view is that Option 1 is preferable. The Committee agrees with HM Treasury's comments at paragraph 6.12 of the Consultation that Option 2 may not be a proportionate response to the relevant policy concerns.

Further, should HM Treasury decide to proceed with one of the Options, the Committee urges it to consider limiting the application of the new requirement to financial promotions communicated to retail clients.

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 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

CITY OF LONDON LAW SOCIETY 2020

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Its contents should not be taken as legal advice in relation to a particular situation or transaction.

**THE CITY OF LONDON LAW SOCIETY
REGULATORY LAW COMMITTEE**

Individuals and firms represented on this Committee are as follows:

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