

By email: [Financial Promotions DP 2021@fca.org.uk](mailto:Financial_Promotions_DP_2021@fca.org.uk)

5 July 2021

Dear Sir or Madam

**FCA Discussion Paper (DP21/1): Strengthening our financial promotion rules for high-risk investments and firms approving financial promotions**

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.

The CLLS Regulatory Law sub-Committee welcomes the opportunity to respond to the FCA's Discussion Paper: Strengthening our Financial Promotion Rules for High-risk Investments and Firms Approving Financial Promotions (the "**DP**") which follows the FCA's Call for Input on the Consumer Investment Market (the "**CFI**") to which we responded. We note that the FCA will publish a full response to the CFI later this year with next steps. We have not sought to respond to all the questions raised in the DP.

**High-risk investments**

The Committee supports the FCA's desire to afford consumers an appropriate degree of protection with reference to high-risk investments. However, we would make the following general observations in response to the DP:

- We are concerned that as the restrictive regime for high-risk financial promotions has developed incrementally over recent years it now represents a complex patchwork. We would question whether the FCA has exhausted a more principles-based approach to the challenge of high-risk investments in favour of a reliance on detailed technical rules which can be difficult for the firms to understand.

- There is an increasing, and arguably anomalous, disconnect between the COBS4 rules and the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 ("FPO") regime (applying to unauthorised persons).

In our view, the financial promotions regime would benefit from a wider review less focussed on prescriptive rules which can result in a whack-a-mole approach seeking to identify regulatory arbitrage. We are concerned that any such review would:

- protect the breadth of the FPO exemptions which are important in facilitating financial services in the UK; and
- not unduly restrict choice for retail customers in the UK by adopting a highest common denominator of regulation to suit the notional vulnerable consumer, which might have the effect of limiting investment choice for investors generally. Further, we believe that the FCA should take account of the fact that individuals can source restricted investments from outside the regulatory perimeter. For instance, further increasing the regulatory burden (and hence cost) for section 21 approvers of financial promotions and restricting the definition of readily realisable investments, would likely limit investment choice for UK investors and could drive investors to less well-regulated overseas providers.

### **Financial promotions' perimeter**

It appears to us that the main mischief in terms of protecting consumers from harmful advertisements is abuse of the financial promotions' perimeter. As noted by Mark Steward in his 18 May speech, new initiatives should mitigate the risk from scam investment advertisements, including:

- a new dragnet approach enabling the FCA to capture suspicious ads on the same day or within 24 hours after they first appear; and
- developing Online Safety legislation which is likely to result in a more activist approach from social media companies.

Making the financial promotions regime more onerous for regulated firms won't address the perimeter risk. Indeed, as mentioned above, to the extent that regulation limits the retail investment market, it could have a perverse outcome in driving more individuals to the unregulated sector.

### **Segmenting the high-risk investments market**

In the context of the discussion of further segmenting the high-risk investments market, we note that the DP revisits themes from the CFI, stating that the FCA:

- does not believe that the current approach to client categorisation, which relies on self-certification, is the "right outcome" and proposes that further diligence should be undertaken by firms; and
- that the FCA will begin testing possible additional frictions in the customer journey such as 'just in time' education videos (it remains unclear what the FCA envisages in terms of 'just in time' education) and online tests.

We are concerned that such measures may deflect from investors taking responsibility for their own decisions and could add significantly to the cost of firms' compliance. We hope that any proposals would be justified by a comprehensive cost-benefit analysis.

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 comma.

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

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**THE CITY OF LONDON LAW SOCIETY  
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