

1 September 2011

Sent by email to: FCAApproach@fsa.gov.uk

Dear Sirs,

The Financial Conduct Authority: Approach to Regulation

Thank you for publishing the FCA Approach to Regulation paper in June 2011.

The IMA represents the asset management industry operating in the UK. Our Members include independent fund managers, the investment arms of retail banks, life insurers and investment banks, and the managers of occupational pension schemes.

They are responsible for the management of around £3.9 trillion of assets, which are invested on behalf of clients globally. These include authorised investment funds, institutional funds (e.g. pensions and life funds), private client accounts and a wide range of pooled investment vehicles.

Scope

In responding, a significant issue for firms presently is uncertainty as to which of FCA and PRA will be their lead or only regulator. It is critical that this is made clear as soon as practicable and ahead of the Bill's consideration. We are informed that messages from FSA and HMT are not consistent. Firms should know where they might stand. We have asked that the draft order on splitting responsibilities should be published.

Many IMA members are within insurance-owned groups, some in bank-groups, but most are in neither. Of those not in insurance groups, many will have insurance subsidiaries for the sole purpose of writing unit-linked reinsurance contracts. We had asked for these to stay with FCA. We think the order should make provision to allow these connected companies to be FCA-regulated where they only write these unit-linked contracts.

We understand that each firm will be looked at separately and therefore no BIPRU 125K asset managers will be regulated by PRA even if a parent or sister company is a bank or insurer. This will mean that many FCA-regulated firms will have a single and subservient PRA-regulated subsidiary for legal/contractual purposes. We consider the approach of the Bill and the draft documents on approach by the PRA and FCA presume that PRA's involvement will be where the group is by its nature PRA-regulated. It is important to note that the listing of numbers of firms said to be conduct and prudentially regulated by FCA may not tell the whole story for asset managers. Unless exempted, this use of reinsurance will permit PRA to have involvement in groups which in policy terms were probably meant for FCA alone. That alone will add to the complexity of running an asset manager in the UK and we would question the policy benefit in so doing.

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In addition PRA will have a power to designate other types of firm. It is not clear whether the PRA's statements about this proposed power and those of HMT are consistent.

Our submissions to HM Treasury

We shall presume that you are considering the points we make in our submissions to HMT on their papers to date on regulatory reform, including the current paper. They include comment upon the use of the consumer term.

Market intelligence

We note at 3.8 that you do not expect to learn lessons from FSCS experience (as opposed to FOS). We thought and have previously said that the FSA was wrong not to learn from what the FSCS and insolvency practitioners could teach them about failures; it is no surprise to us that an insolvency practitioner first proposed living wills. FCA should be open to learning from all experiences of the regulatory system.

Under this heading are proposals on gathering market intelligence. We think FCA should ensure it does not duplicate the work of the market intelligence unit at the Bank of England, but rather draws upon that work and focuses its own efforts on areas not covered by the Bank.

Co-ordination

In addition to the co-ordination point above, FCA will need to consider co-ordination with the Bank of England (including the Stock Lending and Repo Committee) and Debt Management Office. This may be why 3.19 refers to *some* of the non-organised OTC markets. There should be clarity as to roles in these different areas.

Preventative action and FCA process

We are concerned that the amending legislation is so light on process protections.

The FSA's Enforcement Review and changes to the RDC and internal processes occurred without any legislative change. We would have expected to see a more detailed explanation as to how administrative law duties will be met by the FCA in its internal processes. For example at 4.15 there is reference to the fact that there may be a requirement to consult and that "*This should ensure that account will be taken of, for example, any reputational damage which could occur as a result of publication of the information.*" That may be partly correct but we would hope FCA would also commit to concepts such as "maxwellisation" and to make only fair and balanced comments when reporting on the issuance of a warning notice.

We note on the other hand the last bullet point of 4.17 (our underlining): "*For example, the obligation to publish a report, and the desirability of transparency, should not impede or prejudice the FCA's ability to pursue enforcement investigations. In such circumstances, publication would be delayed until enforcement action is completed.*" We would suggest that the interests of transparency (that is, accountability) should not be so readily overcome and that your policies should better state that "publication may have to be delayed until a later stage or even completion of any enforcement action".

Accountability

We have made proposals to HMT about accountability, including on the role of your NEDs.

We also think the reference to PPI mis-selling in 5.16 is instructive in this area if, as we are lead to believe, there were real differences in viewpoints within the FSA. By what mechanism will these be better considered in FCA?

We look forward to seeing how FCA will have internal (independent) processes to identify the need to report on its own failure.

Supervisory design

We are very interested in the thoughts in this area, especially the possible role of PRA. We recognise the difficulty in keeping a cap on costs, let alone implementing what is a necessary reversal in the current climate. FCA cannot afford to be seen as a regulator which cannot be approached. We have said above that FCA should not seek to duplicate the Bank of England's market intelligence unit but at the same time it should have that ability to ask and engage widely. An example we use is when certain products were being reviewed by FSA; we asked if firms which did not produce such products were being spoken to. It is an obvious source of information in a competing market; discovering why some choose not to offer some products when they plainly could offer them, can be very informative.

In the current proposals for the supervisory framework in 5.12, many firms will have a very different experience of FCA than FSA. At a moment of enormous legislative change in Europe there may be many less directly supervised firms, without any direct supervisory contact. FCA will need to consider how it will communicate expected changes given this change.

The framework at 5.12 is silent about s.166 reports and their role in the new regime. It is unclear whether the need to use resources in the most economic and efficient manner (new section 3B(1)(a)), will allow FCA to use more s.166 reports. These are very expensive mechanisms for supervision from the point of view of firms but probably relatively cheap from the point of view of FSA and their use appears to be on the increase. We are concerned that this may lead to many costs associated with FCA supervision not being apparent on the balance sheet of the FCA.

Market supervision

In relation to market supervision you may note that we would want it to be clear that the PRA veto cannot prevent prosecution powers or market abuse powers being exercised by FCA.

Client asset supervision

In our response to HMT we note how client assets need to be considered even with recovery and resolution plans and therefore should be an explicit part of co-ordination.

Policy/rule-making

We would welcome far greater clarity from the FCA on the use of its powers compared to the FSA. We have used your heading from 5.33 even though it conflates FCA's own policies and FCA rules which are enforceable against regulated firms.

The publication for years of documents which most viewed as guidance, but which were not subjected to the protections provided in FSMA should not be seen as acceptable in the new regulator. Although the FSA is now taking steps to correct these errors by issuing a large number of consultation guidances, it is doing so on very short notice no doubt to preserve the status of a variety of recommendations upon transition to the FCA. We would welcome a much clearer commitment from the FCA as to how it will identify guidance and other

recommendations whether to be found in documents or speeches. There may now be a need to use new approaches, for example as where the SEC makes clear that individual staff members cannot make policy in speeches. The website needs to better reflect the legal status of different communications; it must also be operated recognising this constraint, as the revision of documents without notice (or new titles) and the retention of previous versions must be organised as befits a statutory body (an example easily to mind was the revision of FAQs for short-selling).

Moreover FCA will, in the areas in which our member firms operate, be constrained in its approach by MiFID and CRD, as well as many other directives and regulations. It is vital that FCA recognises in its planning that it will be a supervisor of firms, where the rules to which they are subject derive from the EU and will be increasingly harmonised under ESMA and the other ESAs.

The Register

We are telling HMT that we think the time has come to reform the Regulated Activities Order, the Permission regime and the Register. It generates a bureaucracy whose worth is very doubtful.

We look forward to continuing our dialogue with FCA, and welcome comments or questions on the above,

Yours faithfully



Guy Sears
Director, Wholesale