

Financial Services and Markets

The Financial Services Bill

On 19 November 2009, the government issued the new Financial Services Bill. The Bill includes some of the legislative proposals outlined in the Treasury White Paper issued in July 2009 (see our summary note [[HERE](#)]) in response to the Turner Review.

A significant number of the provisions confer additional powers on the FSA or the Treasury to make rules or regulations. It will therefore be difficult to assess the full impact of the provisions until these new regulations and rules have been published.

We set out below a summary of some of the key provisions of the Bill as initially drafted.

Power to obtain information

In some of the most widely-drawn provisions in the new Bill, the FSA will have the power to require certain persons (irrespective of their regulatory status) to provide information or documents which the regulator considers are, or might be, relevant to the stability of the UK financial system (Clause 30 – new Section 165A FSMA). The power will be exercisable against direct or indirect investors in investment funds, managers of investment funds, providers of services and/or facilities to authorised firms and their respective connected persons.

The definition of 'investment fund' is widely drawn and would include single investor vehicles. While the provision is not confined to hedge funds, they are a clear target.

On the face of it there is no territorial limit to these powers, so the FSA could seek information from managers, investors and service providers based outside the UK.

The Treasury may widen the scope of the Section 165A power even further by prescribing by order additional persons against whom the FSA may exercise the power.

The FSA will also have a corresponding power to require information from the persons outlined above in support of an overseas regulator where the FSA considers the information and documents are, or might be, relevant to the stability of the financial system of the relevant overseas jurisdiction.

Short selling

The FSA will have the following powers:

- to institute an outright ban on selling certain financial instruments short (there were doubts as to whether the FSA had the legal power to issue the short-selling ban in relation to banking shares in October 2008)(Clause 13 – new Section 131B);
- to make short-term emergency short selling rules without pre-consultation where it feels that it is necessary to do so to maintain confidence in, or protect the stability of, the UK financial system (Clause 13 – new Section 131D FSMA);
- to require disclosure of short positions held by any person (whether authorised or not) (Clause 13 – new Section 131B(1) and (2));
- to extend the territorial scope of its rules to short selling which takes place overseas where an instrument which is admitted to trading on a UK market is sold short (Clause 13 – new Section 131B(6));

The FSA will be able to make the necessary rules outside the context of the market abuse regime.

Remuneration

The key elements of the Bill in relation to remuneration are:

- The Treasury will have the power to make regulations requiring the preparation by authorised firms of a remuneration report – this will have to disclose the remuneration paid to the firm's officers and employees and those with a 'specified connection' with the firm (Clause 9). Any individuals who provide services to a firm but are not employees – e.g. consultants and others employed under contracts for services, rather than a contract of service, will have a 'specified connection' – the regulations may prescribe others (Clause 9(3) and (4));
- The Treasury will be able to require that executive remuneration reports are filed with the FSA or Registrar of Companies (Clause 10(3)) – it may require that the FSA publishes remuneration reports filed with it;
- The FSA will have a new duty under FSMA to make rules requiring all (or some) authorised firms to have and implement a remuneration policy (Clause 11 - new section 139A(1) FSMA). Remuneration policies will have to be consistent with the effective management of risks and with the FSB Principles for Sound Compensation Practices – Implementation Standards as issued by the Financial Stability Board on 25 September 2009 (http://www.financialstabilityboard.org/publications/r_090925c.pdf) (Clause 11 - new section 139A(3) FSMA);
- In making its remuneration rules, the FSA must have regard to other relevant international standards about remuneration which are in force (Clause 11 - new section 139A(4) FSMA) – these are not specified, but would include things such as the European Commission Recommendation of 30 April 2009 on executive remuneration);
- The FSA will have the power to force firms to make amendments to their remuneration policies where the regulator considers that they do not meet its requirements (Clause 11 - new section 139A(7) FSMA);
- Most controversially, the FSA will have the power to make rules prohibiting the way in which employees may be remunerated (here the regulator is likely to prohibit multi-year guaranteed bonuses and large bonuses paid out as a cash lump sum at the end of a year) and to provide that any provision which breaches the rules will be void and unenforceable – the FSA will be able to claw back any bonuses which are in breach (Clause 11 – new Section 139A FSMA).

Sir David Walker has written in support of statutory backing (as opposed to relying on self-regulation) in relation to remuneration reports.

'Living wills'

- The FSA will have a duty to make rules requiring certain authorised firms to prepare 'living wills' (or, as the Bill rather less morbidly describes them, 'Recovery and Resolution plans') to deal with 'specified circumstances' of financial difficulty and with circumstances in which it is likely that the firm will fail or has failed (Clause 12 – new Section 139B and 139C FSMA);
- The Bill requires the FSA to apply the rules to banks in respect of which the special resolution regime under Part I the Banking Act 2009 may be exercisable (Clause 12 - new Section 139B(1)) – subject to that, the FSA has the flexibility to extend the requirements to other specified groups of authorised firms or to all authorised firms;

FSA's disciplinary and enforcement powers against individuals

- The FSA will have the power to impose a financial penalty on a person if he has performed a controlled function without being approved as an approved person – currently the FSA only has the power to sanction the relevant authorised firm (and not the individual) if it allows someone to carry on a controlled function without approval (Clause 16 – new section 63A FSMA);
- In addition to its existing enforcement powers against approved persons for misconduct (i.e. to impose a financial penalty or issue a public statement) the FSA will be able to suspend an approved person from carrying on certain functions and/or impose restrictions on his performance of controlled functions for up to 2 years (Clause 17 – section 66 FSMA (as amended));

FSA's disciplinary and enforcement powers against firms

- The FSA will have additional powers to suspend, limit or otherwise restrict a firm's Part IV permission for up to 12 months in the event that it finds that the firm has breached FSMA or a provision of the MiFID Regulation (Commission Regulation (EC) No. 1287/2006) (Clause 14 – new Section 206A FSMA);
- The FSA will in future be able to **ban and fine** firms – i.e. to impose a penalty on an authorised firm where it has decided to cancel the firm's Part IV permission under section 33 FSMA – it is currently prohibited from doing this by section 206(2) FSMA;
- the FSA's current power to order authorised firms and payment service providers to conduct a review of past business will be reinforced by a power to make rules requiring firms to establish and conduct a **consumer redress scheme** where the firm has breached regulatory requirements and consumers have suffered loss (Clause 26 – section 404 FSMA (as substituted));
- the FSA's powers to issue penalties and other disciplinary measures under Part IV FSMA (and to require firms to establish and operate consumer redress schemes) will be exercisable against any firm which is not or is no longer authorised.

Class actions

- In a move towards US-style class actions, courts will be able to allow **collective proceedings** against authorised firms, appointed representatives, payment service providers and consumer credit providers where a number of claims share the same, similar or related issues of fact or law – these claims may be brought by consumer groups or other representative bodies (Clauses 18 to 25);

Financial stability

- As proposed in the White Paper, a new **Council for Financial Stability** will be established, chaired by the Chancellor and including the chairman of the FSA and the Governor of the Bank of England – the Council will focus on managing systemic risk and protecting financial stability, both domestically and internationally (Clause 1).
- The FSA will have a new statutory **financial stability objective** (Clause 5 – new Section 3A FSMA) and its **rule-making powers** will be enhanced so that it will be make rules in furtherance of *any* of its statutory objectives (including the new financial stability objective), not just in the interests of consumer protection .

The new Bill is available on the Parliament website [\[HERE\]](#) together with explanatory notes [\[HERE\]](#).

If you would like further information or advice on these matters, please contact Margaret Chamberlain, Jane Tuckley, Mark Evans or Tim Lewis in the Financial Services and Markets Department or your usual contact at Travers Smith.

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