

HIGHLIGHTS FROM THE FINANCIAL SERVICES BILL 2009

3 December, 2009

To Our Clients and Friends:

The Financial Services Bill 2009 (“FSB 2009”), unveiled in the Queen’s Speech on 18 November 2009, proposes far-reaching changes. One such change is the establishment of a Council for Financial Stability which would consist of the Chancellor of the Exchequer (as Chairman), the chair of the FSA and the Governor of the Bank of England. The FSB 2009 also proposes a number of amendments to the Financial Services and Markets Act 2000 (“FSMA”). The majority of the amendments, including the proposed new rules on remuneration, apply to all FSA “authorised persons,” not just banks. The FSB 2009 extends to the whole of the UK, *i.e.* England, Wales, Scotland and Northern Ireland. Consequently, if enacted, it would not apply to the Channel Islands.

THE FSA’S REGULATORY OBJECTIVES

The FSB 2009 adds “financial stability” to the FSA’s existing regulatory objectives of “market confidence,” “the protection of consumers,” “the reduction of financial crime” and replaces one of the current regulatory objectives of “public awareness” with “enhancing public understanding of financial matters” (which involves the establishment of a consumer financial education body). Under the proposals, the FSA must determine and review its strategy relating to the financial stability objective in consultation with the Treasury. The FSB 2009 places the FSA under a duty to promote international regulation and supervision.

REMUNERATION OF THE EXECUTIVES OF “AUTHORISED PERSONS” (NOT JUST BANKS)

Duty on the FSA to make rules about remuneration

The FSB 2009 amends FSMA by imposing a duty on the FSA to make general rules requiring each authorised person to have and act in accordance with a remuneration policy.

“Remuneration policy”

A “remuneration policy” is defined as a policy about the remuneration by the authorised person of:

- officers;
- employees; and
- other persons

of a specified description.

When making rules about remuneration policy, the FSA would be required to have regard to international standards about the remuneration of individuals working in the financial sector.

The FSB 2009 provides that if the FSA considers that a remuneration policy fails to make provision which complies with the requirements mentioned above, it must take such steps as it considers appropriate to deal with the failure.

Proposed power of the FSA to rewrite contracts and prohibit persons from being remunerated in a certain way

One of the steps that the FSA may take includes requiring the remuneration policy to be revised. Clause 11 of the FSB 2009 provides that the FSA's general rules may:

- (a) prohibit persons (or persons of a specified description) from being remunerated in a specified way;
- (b) provide that any provision of an agreement that contravenes such a prohibition is void; and
- (c) provide for the recovery of any payment made, or other property transferred, in pursuance of a provision that is void by virtue of paragraph (b).

A prohibition of remuneration in a specified manner may be imposed only for the purpose of ensuring that the provision of remuneration is consistent with:

- the effective management of risks; or
- the *Implementation Standards for Principles for Sound Compensation Practices* issued by the Financial Stability Board on 25 September 2009.

The Treasury's power to make provision for relevant executives' remuneration reports

The FSB 2009 enables the Treasury to make provision by regulations about the preparation, approval and disclosure of the authorised person's executives' remuneration reports.

"Executives of an authorised person"

The following are defined as the executives of an authorised person:

- officers of the authorised person;

- other individuals who have a prescribed connection with the authorised person. Such other individuals may include individuals who provide services, or whose services are provided (directly or indirectly) to the authorised person or individuals who are officers or employees of a member of the same group as the authorised person.

“Remuneration report”

An executives’ remuneration report is defined as a report containing information about:

- the remuneration of relevant executives of an authorised person (plainly, this captures a very wide spectrum of persons); or
- anything connected with the remuneration of relevant executives of an authorised person.

PROPOSED EXTENSION OF THE FSA’S INFORMATION GATHERING POWERS

The FSB 2009 endows the FSA with wide powers to require information and documents from persons, (including service providers and persons who have a legal or beneficial interest in any of the assets of a relevant investment fund, including any persons connected with such persons) that the FSA considers are or might be relevant to one or more aspects of the U.K. financial system.

APPROVED PERSONS - PROPOSED EXTENSION OF THE FSA’S DISCIPLINARY POWERS

The FSB 2009 proposes to insert a new section 63A into FSMA which would provide that where the FSA is satisfied that a person has at any time performed a controlled function without the FSA’s approval, it may impose such a penalty on the person concerned as it considers appropriate. However, the FSA may not impose a penalty where, having considered any representations made to it in response to a warning notice, there are reasonable grounds for it to be satisfied that the person:

- did not know; and
- could not reasonably be expected to have known that he was “at that time performing a controlled function without approval.”¹

¹ *Clause 16 of the FSB 2009.*

The FSB 2009 places the FSA under a duty to prepare and publish (in a way which appears to the FSA to be “best calculated to bring it to the attention of the public”) a policy statement on the penalties under section 63A of FSMA, including the amount of such penalties. In determining the amount of the penalty, the FSA’s policy must, amongst other things, have regard to:

- the conduct of the person on whom the penalty is to be imposed;
- the length of the period during which the person performed a controlled function without approval; and
- whether the person on whom the penalty is to be imposed is an individual.

Limitation period for the imposition of a financial penalty on approved persons

The FSB 2009 provides for a limitation period of four years, beginning with the day on which the FSA knew that the person concerned was performing or had performed a controlled function without approval, for the imposition of a financial penalty. Under the proposals, the FSA would be deemed to know that a person is performing or had performed a controlled function without approval if it had information from which that could be reasonably inferred.

**RECOVERY AND RESOLUTION PLAN (RRP) –
“LIVING WILL”**

The FSB 2009 requires the FSA to make rules obliging authorised persons to produce and maintain a resolution and recovery plan, a so-called “living will.”

A recovery plan aims to reduce the likelihood of a firm failing by setting out what the authorised person would do in (or prior to it becoming subject to) stressed circumstances that would affect its ability to carry on all or a specified part of its business. Whether this requirement applies to all authorised persons or only specified firms is at the FSA’s discretion. Action described in the plan may include the restructuring, scaling back or sale of certain business lines or assets of the authorised person in question.

A resolution plan should cover action to be taken in the event of the failure of all or part of the business.

Where the FSA considers that a recovery and resolution plan fails to make satisfactory provision in relation to the matters that the plan is required to cover, it may take such steps as it considers appropriate to deal with the failure. This could include requiring the revision of the plan.

COLLECTIVE PROCEEDINGS

The FSB 2009 envisages court authorised “collective proceedings” (known in the U.S. as class actions) in respect of financial services claims that raise the same, similar or related issues of fact or law. “Financial services claims” are defined by reference to the description of the defendant and the type of activities that give rise to the claim. Under the proposals, the court would have to determine whether collective proceedings should take place on an “opt-in” or “opt-out” basis. The Explanatory Note to the FSB 2009 provides that:

“In opt-in proceedings it is necessary for any person who wishes their claim to be represented in the collective proceedings to identify themselves to the representative by a certain time which will be set by the Court. In opt-out proceedings everyone with a suitable claim will be comprised in the represented group without any need to identify themselves. They will, however, be able to opt out of the group within a certain period of time which will also be set by the Court.”

Collective proceedings would be brought by a Court Order authorised representative on behalf of the Claimants against:

- authorised persons in respect of:
 - a service provided, or to be provided, in connection with the carrying on of a regulated activity or
 - dealing with the authorised person in the course of the authorised person’s carrying on of a regulated activity;
- an authorised firm in respect of a relevant ancillary service;
- a person acting as an appointed representative in respect of a service provided, or to be provided, by the person when so acting;
- a payment service provider relating to a payment service; and/or
- a person carrying on a consumer credit business in respect of that business.

References to “a regulated activity” include an activity that was not a regulated activity when the cause of action first arose but is a regulated activity when the Collective Proceedings Order is made.

Under the proposals, the Treasury may provide that additional claims relating to financial services or ancillary activities can be represented in collective proceedings. It may also provide that claims of a specified description are not financial services claims for these purposes and

therefore cannot be included in collective proceedings. The FSB 2009 provides that financial services claims, including those that may be included or excluded by the Treasury, include claims that arose before the commencement of the relevant provisions in the FSB 2009.

Proposed inroads into limitation provisions in respect of collective and other proceedings

Clause 22 of the FSB 2009 gives the Treasury the power to make regulations which could, amongst other things, disapply or modify the usual limitation provisions in relation to collective proceedings and other financial services proceedings.

CONCLUSION

The majority of the proposals in the FSB 2009 apply to all FSA authorised persons, not just banks. If enacted, the legislation will increase the FSA's already wide information gathering, decision-making and disciplinary powers. Consequently, all FSA authorised persons should keep an eye on the Bill's passage through Parliament and be ready to implement the new rules if and when they become law.

Please feel free to contact any of the undersigned if you have any questions.

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