

**Request for your views on
proposals to amend
the
Financial Services Act 2008
and
Collective Investment Schemes Act 2008**

This document is particularly relevant to all current licenceholders,
exempt persons and prospective licenceholders

Issue date 4th March 2011

Closing date 15th April 2011



Financial Supervision Commission Barrantee Oaseirys

INTRODUCTION

Background

The Financial Services Act 2008¹ (“FSA08”) and the Collective Investment Schemes Act 2008² (“CISA08”), collectively referred to as “the Acts”, replaced several supervisory Acts relating to specific finance industry sectors, including the Banking Act 1998, Investment Business Act 1991 and Corporate Service Providers Act 2000³.

Whilst the Financial Supervision Commission (“the Commission”) has not instigated any changes to the Acts since enactment in June 2008, some changes are now proposed as a result of recommendations made by the International Monetary Fund (“IMF”) in 2009⁴, as well as a few other changes to assist industry, to improve clarity and to correct anomalies. It is therefore proposed to make amendments to the Acts in 2012 to address these matters.

Please note that this document seeks views on the high level proposals. After obtaining industry views, a consultation will be issued on a draft Amendment Bill. That consultation document will provide information on the anticipated impact of any proposals being taken forward.

Rationale

The Commission’s regulatory objectives are set out in section 2 of the FSA08. These are:

- (a) securing an appropriate degree of protection for the customers of persons carrying on a regulated activity;*
- (b) the reduction of financial crime; and*
- (c) supporting the Island’s economy and its development as an international finance centre.*

The proposals in this paper support objectives (a) and (c).

In addition, these proposals also aim to⁵:

- Implement external recommendations of bodies such as the IMF⁶ and to safeguard the Island’s reputation⁷; and
- Enable the application of proportionate and relevant sanctions.

The Commission believes it is important to address the IMF’s recommendations in the next two years as far as possible.

¹ <http://www.fsc.gov.im/lib/docs/fsc/CAROL/financialservicesact2008c8ra.pdf>

² <http://www.fsc.gov.im/lib/docs/fsc/CAROL/collectiveinvestmentschemesact201.pdf>

³ http://www.fsc.gov.im/beingregulated/pre_1808/

⁴ <http://www.gov.im/lib/docs/fsc/financialsystemstabilityassessmen.pdf>

⁵ Functions that the Commission is required to have regard to per paragraph 3 of Schedule I to the FSA08 ie:

⁶ The desirability of implementing and applying recognised international standards;

⁷ The need to safeguard the reputation of the Island

Consideration of views

The Commission views open dialogue with industry and other stakeholders as an essential element in developing an optimal regulatory framework. We therefore appreciate the time you spend reading and commenting upon the proposals set out in this document. Please send your responses to the specific questions, as well as any general comments and observations in the next six weeks.

The closing date for comments is 15th April 2011. Please let us have your views in writing and preferably by e-mail, sent to:

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The purpose of this document is to obtain views and gather evidence from which to take an informed decision on the content of proposed legislation. We welcome suggestions on other matters that you believe should be amended in the Acts. However, please note that your comments will not necessarily result in a change to the proposals.

A summary of the comments received, along with the Commission's responses, will be published on our website after all comments have been considered. We wish to encourage submission of views and so **no respondents will be publicly identified**. However, please do not submit comments anonymously, as they will not be considered or included in the summary of comments.

PROPOSALS

Proposed changes

The information set out below provides a summary of each of the proposals. As a result of comments received in response to this document and other matters that may be identified by the Commission in the interim, the draft Bill may contain additional proposals or variations to the matters listed in this document. The draft Bill will be consulted on in due course.

1. **IMF recommendation to protect the use of sensitive terms (FSA08)**

The IMF recommended that the Isle of Man should “*Make explicit that only licensed deposit takers can use the term “bank” and derivatives thereof in relevant names*”. It is suggested that there may also be other sensitive terms (eg investment management) that could be protected. In order to facilitate protection of other terms as appropriate, in an evolving financial services industry, it is suggested that the Commission should be empowered to make Regulations to specify any such restricted terms.

2. **International expectations on scope and perimeter of regulation (FSA08)**

The Commission will be judged by the IMF on its adherence to IOSCO⁸ principles as part of future inspections. The new IOSCO principle 7 states, “*The Regulator should have or contribute to a process to review the perimeter of regulation regularly*” and so it is suggested that a power to obtain information from non-licenceholders should be introduced. Such a power will reflect, an HM Treasury paper⁹ issued in response to the Turner Review¹⁰ which said that the UK Government will introduce a Bill to enhance the power of the FSA (or presumably its successor in this role), “*to keep the scope of regulation under constant review, gathering the information it needs from unregulated institutions ... to determine whether they pose a threat to stability and whether they should be brought under formal FSA supervision*”.

3. **Remove requirement for ‘F Register’ companies to be licensed if they are not conducting licensable activity (FSA08)**

Companies incorporated outside the Island, that are licensed to conduct regulated activities in other countries and which also have a place of business (as defined in the Companies Act 1931) in the Isle of Man, are required to register here under Part X1 of the Companies Act 1931¹¹. This is commonly known as the ‘F Register’. The FSA08 currently contains a provision that requires companies on the F Register to be licensed by the Commission for the type of licensable activity that they conduct elsewhere, irrespective of whether they undertake that activity in or from the Island¹². It is suggested that this could be amended to require licences from the Commission only if the companies undertake the regulated activity in or from the Island. The need

⁸ IOSCO = International Organisation of Securities Commissions

⁹ http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/reforming_financial_markets080709.pdf

¹⁰ http://www.fsa.gov.uk/pubs/other/turner_review.pdf

¹¹ Companies Act 1931 s.312: <http://www.gov.im/lib/docs/ded/companies/acts/companiesact1931.pdf>

¹² FSA08 s4(2): “...a person is treated as carrying on a regulated activity... (b) from the Island if that person is... (ii) a company incorporated outside the Island that is registered under Part XI of the Companies Act 1931...and carries on a regulated activity outside the Island.

for them to remain on the F register for the purposes of company law would not change.

4. **Remove requirement for legislation to specify content of forms (FSA08)**

Currently the Acts require that the content of many forms (eg banking returns) must be specified in legislation. This hinders the Commission's flexibility in adapting to new situations as well as increasing costs unnecessarily in terms of officer and legislative time. Therefore, it is planned instead to have a power to allow the Commission to require information to be submitted in a form *published by the Commission* from time to time.

5. **Update the requirements for Authorised Schemes to allow regulations to specify functionary requirements including place of business (CISA08)**

In line with International Schemes, it is proposed that the requirements for functionaries of Authorised Schemes should be able to be amended through Regulations, thus allowing the potential for increased flexibility where this is appropriate.

6. **Consistency in indemnity provisions (FSA08)**

Statutory indemnity provisions are currently linked to the exercise of functions "*conferred by or under a specified enactment*". It is proposed to align the indemnity provisions more closely with the specific functions conferred on the Commission, or exercised by it, other than under an enactment, eg via delegation of powers from Treasury, as the indemnity position is currently unclear in such situations.

7. **Consultation requirement for Treasury (FSA08)**

The FSA08 requires the Commission to consult before making any Order, Regulations or the Rule Book under that Act, but it only requires Treasury to consult before making any *Order*. To address this inconsistency, it is proposed that Treasury might also consult when making *Regulations* under the FSA08. The only legislation which this impacts upon at present is the Compensation of Depositors Regulations. All other secondary legislation under the FSA08 and CISA08 already has a statutory requirement to be consulted upon.

8. **IMF recommendation on stability of the financial system (FSA08)**

The IMF's comment that the Commission does not have "*an explicit mandate to promote the stability of the financial system*" reflects the wording of IOSCO principle 6 – ie *the Regulator should have or contribute to a process to monitor, mitigate and manage systemic risk, appropriate to its mandate so as to ensure that its remit is only in relation to what it is able to promote as a small jurisdiction*. As this is an international expectation, it is proposed to consider adding a suitably worded objective concerned with mitigating systemic risk to the Commission's regulatory objectives in the FSA08.

9. **Anomaly in powers to issue warning notices (FSA08 & CISA08)**

At present the power to issue warning notices (under section 11 FSA08) is only applicable in respect of *current* directors, controllers and key persons. As

discrepancies sometimes come to light in the winding up of the business of a former licenceholder, it is suggested that the Commission's powers to issue warning notices should be widened to cover *former* directors, controllers or key persons of an entity that has surrendered its licence.

It is also proposed to clarify that the Commission can notify a company if an existing or prospective director of that company is subject to a warning notice.

Additionally, the power to issue warning notices does not currently extend to individuals who are members of a collective investment scheme's governing body. Whilst it is considered inappropriate to allow warning notices against *all* members of a governing body, it would seem appropriate to be able to sanction those who must be vetted by the Commission as to their fitness and propriety, therefore it is proposed to address this anomaly by extending the section 11 power accordingly.

10. Anomaly in powers to issue civil penalties (CISA08)

The FSA08 enables the Commission to impose civil penalties upon permitted persons¹³ for failings under that Act, but there is no similar power in the CISA08. To achieve consistency in the treatment of licenceholders that conduct several regulated activities including fund management, it is suggested that the Commission should also be able to impose penalties for failings relating to administering or managing collective investment schemes, by adding this power to the CISA08.

11. Remove restriction on Authorised Schemes' functionaries' place of business (CISA08)

To provide greater flexibility and facilitate business it is proposed to amend current CISA08 requirements that the manager, trustee or fiduciary custodian of an Authorised Scheme must have a place(s) of business in the Island.

12. Enhance transparency of gateway arrangements (FSA08)

The formal gateways that allow transfers of information between the Commission and other bodies are found in both the FSA08 and some gateway Orders. Additionally, the Commission's gateways currently need to be made by Treasury. For greater effectiveness and to assist external reviewers it is proposed that the powers to make gateways should be held by the Commission and that all current gateways should be shown in the FSA08.

13. Ability to permit the transfer of deposit-taking business (FSA08)

Industry representatives have requested that consideration is given to allowing the transfer of banking business between licensed deposit-takers without the need for the dedicated Acts of Tynwald that are currently required. Such a change would save time and cost, both for the industry and for Tynwald. The proposal would be subject to suitable safeguards to protect depositors' interests. A similar power already exists in the Isle of Man's insurance legislation, as well as in Jersey's banking legislation.

¹³ Permitted persons = Former and current licenceholders and classes of exempt persons.

14. Amendment to ability to issue not “fit and proper” notices (FSA08)

Section 10 of the FSA08 allows the Commission to issue directions that individuals are not “fit and proper”, but only in respect of directors, controllers and key persons of permitted persons. It is suggested that the public could be better protected if this provision was amended to include any individual that has acted in a manner that is not fit and proper in relation to any regulated activity (for example to a member of staff that is not a key person but who may have committed theft or fraud in relation to regulated activities). This change would assist the Commission to protect the customers of persons carrying on a regulated activity.

The Commission welcomes suggestions on other matters that licenceholders, businesses, other professionals and the general public believe should be amended in the Acts. It would be helpful if any suggestions could be accompanied by supporting evidence or reasons.

The Commission is very aware of the cost of regulation and would like to recognise the costs and benefits of its proposals in the formal consultation document that will accompany the draft Bill. Therefore, your assistance in quantifying the financial and other costs and benefits of proposals will be of great importance in preparing the Bill. Information on the impact of these proposals, and of any other changes that you suggest, is requested - including financial, commercial, reputational and any other relevant matters.

Questions

Any general or specific comments on a draft Bill to amend the Financial Services Act 2008 or the Collective Investment Schemes Act 2008 are welcome, particularly those that are supported by relevant evidence. In particular, the Commission would welcome your responses to the following questions:

- A. Which proposals outlined in this paper do you strongly support or oppose? Please tell us the reasons for your views.**

- B. What do you consider will be the impact on individuals and businesses of the proposals outlined in this paper? Please include in your comments any views on:**
 - **specific financial or other costs; or**
 - **specific savings or other benefits****for individuals, businesses or the Island as a whole due to the proposals.** For example, will any proposals affect your decisions about what business to conduct in/from the Isle of Man?

- C. Are there any other matters that you think should be the subject of changes to either of the Acts? Please tell us the reasons for your views and include your opinions on costs and benefits.**
