CFA INSTITUTE | Centre for Financial Market Integrity

Sarah Parkinson
Market Abuse consultation
Room 3/W2
HM Treasury
1 Horse Guards Road
London SW1A 2HQ

London, 23rd April 2008

Dear Ms. Parkinson,

Re: Response to HM Treasury consultation paper
"FSMA market abuse regime: a review of the sunset clauses"

The CFA Institute Centre for Financial Market Integrity ("Centre") welcomes the opportunity to comment on the HM Treasury's ("HMT") Consultation Paper, "FSMA market abuse regime: a review of the sunset clauses" (the "Consultation"), with respect to the "Market Abuse Directive" ("MAD").

We support the Treasury's proposal for a temporary extension of the superequivalent provisions of the UK Market Abuse regime, until the EU review of the MAD is complete. This is because we believe that the UK legislation is more likely to capture market abuse than the European Market Abuse Directive.

However, we observe that the legislation has become increasingly complex to comprehend and that the 1993 Criminal Justice Act with respect to Part V 'Insider Dealing' is out of date. We would therefore recommend reconsideration of all the associated UK legislation to fall in line with the forthcoming review of MAD. This is in the hope that the EU review will embrace the UK's broader coverage of market abuse.

I attach our response that addresses the questions of the consultation paper. Please do not hesitate to contact me, should you wish to discuss any of the points raised in our response.

Yours faithfully,

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Our detailed comments are set out in order of your Consultation's questions and are presented below.

Q1. Do you consider that the superequivalences increase the effectiveness of our regime and have an effect on market integrity?

Yes. The identified differences (listed below) from the Financial Services and Markets Act 2000 ("FSMA") more comprehensively address the opportunities for market abuse than the Market Abuse Directive.

Q2. Which of the identified differences do you see as most important and why?

We see benefits from the broader definition of insider information through application of the 'relevant information not generally available' (RINGA) concept as it relates to material non-public information and the lower standard of proof through civil as opposed criminal action. We believe that the individual or group 'behaviour' and 'inaction' features provide greater coverage of market abuse than do the concise action and dealing in securities provisions of MAD. The provision that covers insider behaviour, while not requiring proof of how the information was obtained, but need only to demonstrate that it was RINGA, covers the problem of convicting individuals within an insider ring. Finally, the superequivalent 'catch all' standard covering instruments under the FSMA, section 118A (3) "… whose subject matter is the qualifying investments", keeps the legislation fresh with an ever-evolving market. Whilst we support the superequivalent standards, they are difficult to comprehend. We would recommend that they be redrafted to improve their clarity.

Q3. Do you have any further evidence on the practical operation of the superequivalences since the introduction of MAD?

No.

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[2] CFA Institute is best known for developing and administrating the Chartered Financial Analyst curriculum and examinations and issuing the CFA charter.

Q4. Do you agree that we should extend the sunset clauses for a limited period until the results of the EU review are known?

Yes, because the superequivalent provisions are more likely to capture market abuse.

Q5. Do you agree that an extension until 2010 would allow sufficient time to assess the outcome of the EU review?

Yes. Though there is merit to include a provision that leads to an automatic review of these clauses on the completion of the EU review, if it is sooner than 2010.

Q6. Do you have any initial views on the EU Review and what the UK priorities for change should be?

We believe that the UK's superequivalent provisions bring additional cover to the market abuse regime and should be bought into active consideration in the EU review for the reasons stated in our answer to question 2.

Q7. Do you have any views on the need to update the 1993 Criminal Justice Act?

Based on HMT comment in the consultation and our own research we believe that the 1993 Criminal Justice Act (the "Act") needs to be updated to reflect legislative changes brought on by the FSMA, MAD and indeed an updated version of MAD. Part V of the Act concerning 'Insider Dealing' ought to take on the broader concept of 'Market Abuse'. Part V, Section 55, 'Dealing in securities,' appears outmoded by advances in market activity. Indeed the current superequivalent provisions struggle to concisely define what instruments are covered under market abuse. The Centre suggests using the term 'investments and derivatives of' as a way to more accurately reflect the spirit of the legislation, thereby capturing the thriving alternative investments market. Part V, Section 60 'Other interpretations', defines a 'regulated market' as one described by order of the Treasury. We feel that this prescription carries the risk of inflexibility and to some extent could be criticised as arbitrary. Whilst we do not currently offer a solution, we believe this definition needs review.

Q8. Do you agree with the analysis of the costs and benefits for the different implementation options, including the impact on competition and small firms?

Broadly, yes. However, it would appear that the costs of the 2008 EU review of MAD artificially inflate the costs in the cost benefit analysis of this consultation. The EU review will occur and is exclusive of the consultation's three policy options. Therefore, it would seem appropriate to remove these costs from the cost benefit analysis.

Q9. Are there any alternative options, or combinations of the proposed options, that should be considered?

Please note our answer to question 5.

Q10. Do you agree with our policy proposal? If not, please specify your reasons.

Yes, subject to our answer in question 5.