HM Treasury

Financial Services Future Regulatory Framework Review

Phase II Consultation

JOINT RESPONSE FROM:

UK Shareholders' Association

&

UK Individual Shareholders Society

UK Shareholders' Association

UKSA, 1 Bromley Lane, Chislehurst, BR7 6LH
Phone: 01689 856691
Email: officeatuksa@gmail.com
Web: www.uksa.org.uk

ShareSoc

UK Individual Shareholders

Suite 34, 5 Liberty Square, Kings Hill, West Malling, ME19 4AU
Phone: 0333-200-1595 Email: info@sharesoc.org
Web: www.sharesoc.org

HM Treasury Financial Services Future Regulatory Framework Review Phase II

To: Future Regulatory Framework Review, Financial Services Strategy, HM Treasury, 1 Horse Guards Road, SW1A 2HQ

Email address: FRF.Review@hmtreasury.gov.uk

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1. Introduction

1. As you will see from our responses to your specific questions, we are broadly supportive of the overall framework of:

    1.1. primary legislation which is intended to endure for an extended period

    1.2. regulation making power in the Treasury

    1.3. operational implementation and the issue of detailed rules by the regulators.

2. We are not satisfied with the quality of financial services regulation over the last 20 years, which have been marked by many regulatory failures.

3. We consider that these failures arise from the following main sources:

    3.1. Failure to prioritise the right strategic objectives.

    3.2. Regulatory bodies that have been too close to the industry that they are responsible for regulating.

    3.3. Excessively detailed rules instead of a principles-based approach.

    3.4. Regulators failing to exercise the powers that they have.

4. Our detailed responses make some suggestions for how these problems can be avoided in the future.

2. About UKSA

5. UKSA (UK Shareholders' Association) is the oldest shareholder campaigning organisation in the UK. We are a not-for-profit company that represents and supports shareholders who invest in the stock market.

6. There are many agents and intermediaries active in financial markets. Unlike them, we are an organisation solely representing people who are investing their own money.

7. UKSA was formed to provide private shareholders with a voice, influence and an opportunity to meet like-minded fellow investors. It is structured as a non-profit making company with annual subscriptions. An elected Chairman and Board of Directors (all volunteers and individuals with a wide range of backgrounds and experience) monitor a regional organisation. Each region benefits from oversight by an elected regional Chairman and Committee.

8. We build relations with regulators, politicians and the media to ensure that the voice of individual shareholders is reflected in the development of law, regulation, and other forms of public policy. See www.uksa.org.uk

3. About ShareSoc

9. UK Individual Shareholders Society (ShareSoc) is the UK's largest retail shareholder organisation acting in all areas of the UK stock market with over 7,000 members, a 40% increase in the past year. As a not for profit, ShareSoc is dedicated to the support of individual investors (as opposed to institutional investors). We aim to make and keep investors better informed, to improve their investment skills and to represent their best interests. We don't shirk from tackling companies, the Government or other institutions if we think individual shareholders are not being treated fairly. See www.sharesoc.org .

10. ShareSoc current campaigns include Shareholder Rights, Regulation of LSE AIM, Woodford and SVS/ITI. ShareSoc Patron Lord Lee is personally campaigning about disclosure in relation to takeovers, which may have led to false markets, and ShareSoc is supporting Lord Lee's actions.

11. Like UKSA, we build relations with regulators, politicians and the media to ensure that the voice of individual shareholders is reflected in the development of law, regulation, and other forms of public policy.

12. ShareSoc have collaborated with UKSA in preparing this joint response, as we do on most of our consultation responses.

4. Answers to your numbered questions

Q1 How do you view the operation of the FSMA model over the last 20 years? Do you agree that the model works well and provides a reliable approach which can be adapted to the UK's position outside of the EU?

13. We do not agree that the FSMA model has worked well over the last 20 years. It failed its most important test, the global financial crisis, where UK banks performed considerably worse than banks in certain other major jurisdictions such as Canada and Australia.

14. The model has also failed consumers, with a long line of regulatory failures. To name just three which have been the subject of recent reviews:

    14.1. The Connaught Income Fund Series 1

    14.2. London Capital and Finance

    14.3. The Interest Rate Hedging Product redress scheme

15. In our opinion consumers have been failed because the FSMA did not prioritise them when creating the basic legal framework.

16. Reproduced below is the relevant part of FSMA 2000 after amendment by FSA 2012:

    1B The FCA's general duties

    (1) In discharging its general functions the FCA must, so far as is reasonably possible, act in a way which—

    (a) is compatible with its strategic objective, and

    (b) advances one or more of its operational objectives.

    (2) The FCA's strategic objective is: ensuring that the relevant markets (see section 1F) function well.

    (3) The FCA's operational objectives are—

    (a) the consumer protection objective (see section 1C);

    (b) the integrity objective (see section 1D);

    (c) the competition objective (see section 1E).

(4) The FCA must, so far as is compatible with acting in a way which advances the consumer protection objective or the integrity objective, discharge its general functions in a way which promotes effective competition in the interests of consumers.

17. How does the FCA interpret its strategic objective of "ensuring that the relevant markets function well"? Our concern is that the FCA has not seen that as identical to getting the best outcome for consumers.

18. Looking at the items in your paragraph 24.3, we regard it as essential to prioritise them explicitly as follows:

    18.1. financial stability,

    18.2. the integrity of financial markets

    18.3. consumer protection[1], and

    18.4. competition.

19. However the first two should not be interpreted as requiring policies that lead to consumers being overcharged to maintain the profitability of financial services providers on the grounds that such profits are required for financial stability.

Q2 What is your view of the proposed post-EU framework blueprint for adapting the FSMA model? In particular:

20. We concur with a broad framework which involves:

    20.1. primary legislation that can then be left unchanged for an extended period of time

    20.2. secondary legislation created by the Treasury, and

    20.3. financial services regulators who have the power to issue detailed rules that financial services providers are required to follow.

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[1] We would also question whether consumer protection is the right term. Some would say that the FCA have interpreted this item as favouring over-protection of the nanny-state type of approach. A broader debate about whether financial services providers should have a duty of care to consumers and whether the needs of consumers should be given a higher priority may be helpful. See also our answer to Question 6.

21. For convenience, we have given the numbers (a), (b) and (c) to your three bullet points in Q2.

Q2(a) What are your views on the proposed division of responsibilities between Parliament, HM Treasury and the financial services regulators?

22. We consider the division of responsibilities to be reasonable. In particular we regard it as desirable that HM Treasury proceeds by making formal regulations since these can be subject to Parliamentary scrutiny, albeit that Parliament is often insufficiently rigorous when undertaking it.

Q2(b) What is your view of the proposal for high-level policy framework legislation for government and Parliament to set the overall policy approach in key areas of regulation?

23. We have no objection to the overall framework.

24. However we are concerned when there are too many priorities, with insufficient prioritisation. For example your paragraph 2.46 canvasses the idea that “activity-specific regulatory principles could bring about enhanced regulator focus on a broader range of public policy issues, including competitiveness,”. That could easily lead to a lack of focus on the priorities as listed in our earlier paragraph 18.

Q2(c) Do you have views on how the regulators should be obliged to explain how they have had regard to activity-specific regulatory principles when making policy or rule proposals?

25. As explained above, we are sceptical about the merits of “activity specific regulatory principles.”

Q3 Do you have views on whether and how the existing general regulatory principles in FSMA should be updated?

26. We refer to our earlier comments.

Q4 Do you have views on whether the existing statutory objectives for the regulators should be changed or added to? What do you see as the benefits and risks of changing the existing objectives? How would changing the objectives compare with the proposal for new activity-specific regulatory principles?

27. We believe that the key objectives should be as listed earlier, and are sceptical about activity-specific regulatory principles.

Q5 Do you think there are alternative models that the government should consider? Are there international examples of alternative models that should be examined?

28. The key issue is the relationship between the regulator and the industry. As explained below, we consider that the relationship is insufficiently robust and challenging. As an alternative model, we point towards the USA with the Securities and Exchange Commission, which we consider has historically been taken far more seriously by the USA's financial services industry than have UK regulators by the UK industry.

Q6 Do you think the focus for review and adaptation of key accountability, scrutiny and public engagement mechanisms for the regulators, as set out in the consultation, is the right one? Are there other issues that should be reviewed?

29. We were struck by the list of panels in paragraph 3.43 of your consultation document.

30. Of the five panels listed, four represent providers of financial services. While it is no surprise that such firms want their voices to be heard, this composition illustrates how easy it is to bring about a situation where most of the voices the Government hears are from providers, and not from consumers.

31. Although about 20% of the public hold shares[2], the Financial Services Consumer Panel has not historically prioritised representing the interests of consumers as individual investors. Instead, it has tended to focus on the interests of those consumers using services such as consumer credit. This has meant that, in practice, there has been a significant gap in representation of the interests of individual investors via the statutory panels. We welcome the Consumer Panel's recent higher focus on savings and investments but feel that this needs to go further. As part of this, we feel that the membership of the Consumer Panel should reflect more clearly experience in and understanding of the needs of the shareholding public, i.e. individual investors.

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[2] UK Stock Market Statistics - Sharesoc

32. Clearly, Government and regulators should also listen directly to consumers of financial services, including individual investors.

33. Page 89 of The Rt. Hon. Dame Elizabeth Gloster DBE's "Report of the Independent Investigation into the Financial Conduct Authority's Regulation of London Capital & Finance plc" [3] states that in the years 2014-2019 annual calls to the FCA's contact centre varied between 99,000 and 126,500. This level of calls indicates that consumers wish to engage with the FCA and pass on signs and evidence of poor behaviour by financial services providers, both legitimate players and fraudsters. Consumers should be the 'eyes and ears' of the FCA, and they are obviously keen to play their part in this respect.

34. However, we are concerned that the FCA seems to take very little advantage of such information. We are not aware of it having a system for classifying and red-flagging concerns raised by consumers who get in touch with the contact centre. If that is correct, it does not reflect well on the FCA's attitude towards consumers.

35. The Financial Times Jonathan Ford recently wrote "In 2018, the FCA disclosed it received almost 7,000 fraud complaints. Yet it opened just 40 investigations in the last two years and none resulted in a prosecution, let alone a conviction." [4]

Q7 How do you think the role of Parliament in scrutinising financial services policy and regulation might be adapted?

36. At present we consider that Parliament does not scrutinise financial services policy and regulation as well as it could.

37. The key scrutiny role is played by Parliamentary committees, since this subject is not suitable for the floor of the House of Commons or the House of Lords.

38. The current process of scrutiny involves members asking questions of expertly briefed functionaries under tight time constraints and MPs generally do not have the relevant technical expertise to question them effectively. Our experience is that MPs are often unable to penetrate to identify if regulations or the laws have been broken under the current Committee hearings format, and

[3] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/945247/Gloster_Report_FINAL.pdf

[4] https://www.ft.com/content/369ea89d-5871-4e58-b008-820e85d4428f

even when they suspect they are being deceived, they lack the resources to investigate further.

39. The secretariats to Parliamentary committees often do excellent work (the reviews of the HBOS failure (April 2013), and the collapse of Carillion (May 2018) spring to mind), but in our experience they are woefully under-resourced.

40. Neither the Parliamentary committees nor the regulators make much use of whistleblowers. Indeed, whistleblowers are often shabbily treated – we have been told of cases where the regulator has told the firm of a whistleblower in a way that could lead to them being identified.

    40.1. Section 348 of the Financial Services and Markets Act 2000, which penalises disclosure of 'confidential information' is a further and unduly restrictive impediment to whistleblowers. In one case, a whistleblower had to appeal to the Solicitor General in order to disclose information to a regulator.

41. Freedom of information requests are another way in which members of the public can engage with regulatory interests. However, our experience is that such requests are easily evaded. We were told on one occasion that information could not be released because it would damage public trust in the regulator! E.g. the FCA and the LSE refusal in relation to the disclosure of information to Burford re spoofing and whether orders in their shares were placed and then apparently cancelled was a rare opportunity to discover whether market manipulation is endemic on the LSE[5].

42. Nor is it ever clear from the outside whether a complaint to the regulator has been resolved. A consumer making a complaint wants at least to know that it has been received, is being dealt with, and eventually resolved. The time it takes to reach any sort of conclusion is also ridiculous. This secretive and laborious process is based on the pretext of having to be very careful about saying anything that might be prejudicial to the other party (the Financial Services provider). This sends a message to the miscreants within the industry that they can get away with anything. It is up to the industry and the firms to look after their own reputations, not the FCA.

43. We would suggest that the scrutiny process can be improved as follows:

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[5] See https://www.sharesoc.org/blog/regulations-and-law/slave-to-the-algorithm-burford-and-the-importance-of-maintaining-confidence-in-a-broken-system/

43.1. greater research and technical support for MPs: academic experts or independent industry experts might work (possibly on temporary contracts) to play an active part in hearings, e.g., by setting out information requests, scrutinising material submitted or even questioning senior functionaries at hearings;

43.2. greater encouragement of, and support for, whistleblowers to come forward and offer evidence under personal immunity; and

43.3. enhanced expectations of candid disclosure by witnesses to be achieved by a more vigorous prosecution and punishment of witnesses who show contempt of Parliament by misleading MPs.

43.4. Relax section (or remove) 348 of FSMA so that public interest trumps confidentiality.

43.5. Revise the Public Interest Disclosure Act so that whistleblowing is less of a difficult and dangerous legal process.

Q8 What are your views on how the policy work of HM Treasury and the regulators should be coordinated, particularly in the early stages of policy making?

44. We have no comment on the internal coordination between HM Treasury and the regulators. However we consider that the quality of policy making would be improved if HM Treasury were to consult the public at an earlier stage of the policy making process, ensuring that consumers had the opportunity to input their views.

Q9 Do you think there are ways of further improving the regulators' policy-making processes, and in particular, ensuring that stakeholders are sufficiently involved in those processes?

45. We have a fundamental concern that regulators as currently constituted are too close to the industry they 'regulate'. They are often fearful of judicial review. Working for a regulator is perceived by some as a stepping-stone to highly paid employment in the industry, in compliance or senior management roles.

46. Regulatory staff tend to consist of a mix of

46.1. Ex-industry employees, often approaching retirement, with generic skills to operate at the supervisory level. These are equipped with deep knowledge of the industry that they must now regulate, but often they

arrive with the culture and prejudices of the poacher, rather than the gamekeeper. Salaries are competitive (to an extent) with industry pay scales.

46.2. Specialist ex-industry employees. In making use of specialists, the regulator faces the problem of any organisation trying to use specialist skills. If the specialism is no longer required, the specialists are no longer useful. Conversely, when new products are developed by the industry, regulators and firms will compete for specialist skills: regulators are unlikely to complete successfully in the employment market. A classic case was in the lead-up to the GFC when regulators did not understand products like CDO, CDO squared and so on.

46.3. 'Career' regulators. These are employed from the graduate pool and typically spend their career climbing the management ranks of the regulator (with some exceptions), building experience as they move from department to department. They accept that they will in most cases earn less than their ex-industry counterparts; their ‘reward’ is the status accorded by their position in the management hierarchy. The benefit of career regulators is their independence from the industry, the disadvantage is the layers of management that must be created in order for the promotional ‘reward’.

46.4. Temporary management consultants. A large number of regulatory staff are employed on temporary contracts from the large accounting and management consulting firms at cost. The benefit to the regulator is high quality staff at a competitive rate, the benefit to the consultant is regulatory knowledge that can be used to their profit when the staff return. The costs are obvious: close personal ties to regulatory staff mean unconscious capture of the regulator. Further damaging is the emerging ‘regulatory business model’, namely the creation of rules which have no clear public benefit, but which consultants can use as a product to sell to firms.

47. There is also the ‘revolving door’ problem by which individuals switch roles so poachers become gamekeepers and vice versa, especially at the senior level. This is exacerbated by politicians (often failed politicians who have lost their seats) being rewarded with jobs in the financial services industry for their previous loyalty to powerful industry lobbying groups during their Parliamentary career (‘look after us and we will look after you’). The net result is the emergence of an insider elite (aka ‘the Swamp’) who control the system and

have more in common with each other than they do with ‘outsiders’ who lack effective voice.

48. We also have significant concerns about staff moving from regulators to financial services firms, and to consulting firms which advise the financial services industry. Strong processes are needed to guard against the risk of “bad behaviour”:

    48.1. For junior regulatory staff, processes are needed to prevent them becoming employed for a defined period of time by firms for which they have had direct responsibility while working at the regulator. Otherwise, the risk exists that they may misbehave while at the regulator in exchange for the prospect of employment; possibly even in the form of an explicit private agreement to that effect.

    48.2. For senior regulatory staff, the risk is that they will “go easy” on the financial services industry generally, because that increases the likelihood of obtaining a very highly paid, and very senior role, after leaving the regulator. For staff above a specified grade, we consider that formal approval at Ministerial level should be required before they can take any job in the financial services industry (including firms consulting to the industry) for a defined period, after they leave the regulator.

49. In our experience, regulators are always reactive, never proactive, and can rarely or never have a deep enough understanding of financial matters to actively prevent an emerging problem. In a recent example – the collapse of London Capital & Finance (LCF) – it was revealed that only when the risks previously identified in relation to mini-bonds had materialised did the FCA take action.[6],[7]

50. We are also concerned that there is simply too much overcomplicated and redundant regulation. Examples include:

    50.1. (Prudential) The CAD (Capital Adequacy Directive) regime whose purpose was to protect banks by an internal model to calculate market

[6] “Report of the Independent Investigation into the Financial Conduct Authority’s Regulation of London Capital & Finance plc”, para 4.1.

[7] Wellesley may be another example of a mini-bond problem.

risk and hence a capital requirement. The regime came into effect in 1998, and was spectacularly unsuccessful in preventing the GFC. Reasons included:

i. lack of specialist knowledge of the products which led to the crisis,
ii. the 'regulatory perimeter' problem – firms which could not get CAD permission simply put the products into the banking book.

50.2. (Prudential) The Basel II (credit) regime whose purpose was to protect banks credit books using a capital model (the 'Basel Advanced Internal Ratings Based' (AIRB) model) calibrated to 1 in 1,000-year probability of collapse. Famously, HBOS implemented this model in early 2008, and collapsed 9 months later. The problem was that the firm failed to incorporate details of a 'bad book' into the model, with the inevitable result.

50.3. (Prudential) The Solvency II regime for life insurers, which seems almost designed by the industry to mislead shareholders (and policyholders) on the true value of the firms' balance sheets.

50.4. (Conduct of business) One of the (good) intentions of Mifid was to make costs to the consumer explicit. However, this also made the costs explicit to the financial officers of fund managers, who naturally wanted to reduce these costs to zero, particularly as they had their own in-house analysts. At the same time, the large sell-side investment banks decided they could give their product away for very low cost because they made so much everywhere else, thus contravening the unbundling intention of Mifid. As a result, it is now very difficult for a private investor to get to see the reports that brokers write about companies.

50.5. In the case of Mifid II some of the content seems to have been badly thought through from the start. John Kay writing in the Financial Times in January 2018 commented at some length on the weaknesses of the KID.[8] As he points out, the prospective returns required by the KID are little more than a projection of historic returns over the last five years. He notes that: 'In the past, regulators have rightly emphasised to investors that past performance should not be used as a guide to what they can expect in future. Yet it seems that they have not succeeded in persuading themselves of this important truth'. He goes on to mention

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[8] Risk, the retail investor and disastrous new rules – John Kay; Financial Times, 19th January 2018.

specifically the example of the Bitcoin XBT Tracker Fund for which the KID told you that over one year a moderate performance would net you a cool 150% return.

50.6. Discussions with a number of financial services firms indicate that Mifid II has damaged investor protection in other areas. Most firms have now withdrawn advisory broking services because it is simply too costly and onerous to comply with the requirements for documenting all discussions with private clients which involve any element of advice. Private clients are therefore either 'on their own' with an execution-only service or else they can take the broker's / advisor's discretionary service. For many retail investors this is an expensive option and one which also forces them to cede all control of their portfolio to the broker / advisor.

50.7. It is easy to argue that the weaknesses of Mifid II are a prime example of the very regulation that the UK will seek to avoid having left the EU. However, the UK has form with this type of argument. The FCA amongst others had plenty of input to the development and drafting of Mifid II. Despite this, it seems to have done little or nothing to point out and resist some fairly obvious inconsistencies and flaws which quickly became apparent when Mifid II was revealed to investors. Elsewhere, the UK has consistently 'gold-plated' EU directives when transposing them into UK law. When the constraints caused by this 'over-enthusiastic' interpretation become clear, the UK government has resorted to conveniently but disingenuously blaming the EU for imposing complex, restrictive and unnecessary legislation.

50.8. (Conduct of business) Another unintended consequence of over-regulation is the explosion of compliance jobs (we heard of one wealth manager who now employs 100 compliance staff). This naturally drives smaller firms out of business, inhibiting competition. Furthermore, the experience of at least one of our members in dealing with firms' compliance departments suggests that they seem to be batting for the very member of the firm's advisory staff who are trying to bend or break the rules. He spent over a year pursuing a pensions complaint in which the compliance staff seemed to see it as their role to confuse and obfuscate endlessly in the hope that the customer would give up and go away. In the end, the case went to the Financial Ombudsman Service who found in the customer's favour and ordered the firm to compensate him to the tune of many tens of thousands of pounds to make good the losses to his pension pot. Far from investigating the

case impartially, the compliance team seemed to see their primary duty from the outset as being one of 'damage-limitation' for the firm.

51. We suggest that, rather than trying to balance 'light touch' with prudence, future legislation aims at protecting underlying principles through the legal process, including more liability of key decision makers and stringent punishment of those who transgress basic principles. Placing reliance on regulatory imposed models inevitably leads to management escaping blame.

52. Excessive regulation often leads to the rules crowding out those principles and even the law itself. Firms and regulators can then claim that they have ticked the boxes to comply with the rules, and then falsely claim that they are compliant with the law. But regulatory rules are not necessarily compliant with, e.g., the legal requirements of the Companies Act. Excessive regulation can then give lawbreakers the fig leaf of a plausible defence and none of the main parties concerned has any incentive to investigate further. And so poor / illegal practices (e.g., false accounting) become de facto legalised. This is a huge problem.

53. As another example, consider insurance. The rules governing insurance are overwhelming, opaque and highly onerous. But they are also unnecessary, because the law itself says that insurance contracts should satisfy the principle of utmost good faith. That single principle alone suffices, but all the regulations obscure that principle and effectively subvert it.

54. The culture of regulation also needs to be addressed, so that regulators actually use the powers that they are trusted with. Note that a recent article[9] reported that "As for the watchdog's own record of throwing the legal book at offenders, a recent Freedom of Information request summarises its lacklustre record. In 2018, the FCA disclosed[10] it received almost 7,000 fraud complaints. Yet it opened just 40 investigations in the last two years, and none resulted in a prosecution, let alone a conviction".

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[9] "Boom time for investment fraud in Britain", Jonathan Ford, Financial Times, 7 February 2021, https://www.ft.com/content/369ea89d-5871-4e58-b008-820e85d4428f

[10] https://www.fca.org.uk/news/press-releases/fca-warns-public-investment-scams-over-197-million-reported-losses-2018