



HM Treasury Open consultation

Amending the definition of financial advice: consultation

ICAEW welcomes the opportunity to comment on the Open consultation *Amending the definition of financial advice* published by HM Treasury on 20 September 2016, a copy of which is available from this [link](#).

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GENERAL POINTS

1. More needs to be done to encourage consumers to make informed decisions on how to best manage their personal finances. Consumers from all walks of life need access to reliable information, affordable advice, and competitively priced products that are designed to meet relatively straightforward needs. However, to make any substantial progress in closing the savings gap consumers must be both sufficiently motivated to seek-out information and take reliable advice and able to afford to make adequate long-term financial provision for themselves and their families.
2. Complexity and lack of clarity tends to reduce levels of consumer engagement and increases costs across the supply chain. Creating a more straightforward regulatory landscape that makes it clear where regulatory boundaries fall should help achieve some of the broad objectives as set-out in the Financial Advice Markets Review (FAMR). The publication of this consultation paper therefore represents a positive development in that regard and ICAEW welcomes the opportunity to comment.
3. In general terms we support the proposal that the definition of regulated financial advice should be amended as described in the consultation, as creating a single definition would seem to make better sense. The MiFD definition is tighter in its scope than the definition under Article 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO53) and the findings from FAMR appear to suggest that the amended definition is clearer for firms and consumers. We have no reason to believe this is not the case.
4. Although we understand the general reasoning behind using the term guidance, we are not convinced that use of the term in this context will in reality lead to less ambiguity or less confusion. The term guidance is generally taken to mean delivering some sort of general advice that has the purpose of steering someone in one direction in preference to an alternative direction. In other words, guidance is regarded by most people as a form of advice. Using the term guidance to mean general financial advice that falls outside the scope of regulated financial advice could therefore serve to generate more greyness and ambiguity, and greater not less confusion. With this in mind, perhaps it would be better to put the focus on information and advice that falls within the orbit of regulation, and information and advice that does not fall within regulatory scope, with guidance falling into the latter category.
5. Adopting the MiFD definition for regulated financial advice may help to address one issue but at the same time will tend to create problems in other areas. The narrowing of scope of the regulated advice boundary could make it easier for firms to provide information and unregulated financial advice to a broader population. Provided that information is accurate and the unregulated advice provided is soundly based, it should help consumers to make informed decisions on how to manage their personal finances and encourage more people to take regulated financial advice. However, whether it is commercially viable for firms to deliver information and unregulated advice is another matter.
6. If the proposed change to the definition of regulated financial advice does lead to an increase in the supply of unregulated financial advice services, then risk of bad advice and/or rogue activity will also increase. This means that developments in this area will need to be closely monitored and more thought given to finding the most practical way to manage risks in the unregulated advice sector. One solution could be to limit activities in this area to the provision of services that deliver information and explanation of information, although such an approach still presents definitional challenges of its own and presents issues for generic advice.
7. Generic financial planning advice has the potential to play an increasingly useful role in helping meet some of the objectives of this consultation. Amending the definition of regulated financial advice as above could help encourage the growth of this type of service, which can be delivered face-to-face; online; on the telephone; or on a mixed basis. However, it is important to bear in mind that losses retail customers often incur relates to deciding to invest in the wrong type of

financial solution (equities rather than fixed return assets) as opposed to deciding to invest in a particular product. This begs the question of whether more broadly based professional standards in the area of generic financial planning are needed, for example in the areas of qualifications, continuing professional development and professional standards ?

8. To establish the required degree of clarity case studies are needed to clearly illustrate where in practical terms the lines between regulated advice and unregulated guidance and advice fall. The regulator needs to work with firms and other stakeholders to create a series of realistic case study examples, which we note in general terms has been referred to in the consultation. These case studies should greatly help both advisers and consumers better understand exactly where boundaries of responsibility and liability fall in particular circumstances. The ICAEW Financial Services Faculty would be pleased to draw on the experience of its Financial Planning & Retail Distribution Committee to help HM Treasury and the Financial Conduct Authority develop this case study material.

ANSWERS TO SPECIFIC QUESTIONS

Q1: Is the proposed wording a suitable and effective way to achieve the stated policy objective ? Is there anything else needed in the drafting in order to achieve the policy objective set out above ?

9. The wording in the Annex defines what is meant by regulated financial advice. However of itself that does not improve the level of clarity required to define the difference between regulated and unregulated advice in terms of where in practical terms that boundary falls. If anything the consultation serves to highlight just how difficult it is to show a clear difference between the two. This makes it unlikely that businesses will be more willing to risk entering the guidance and unregulated market to close the advice gap. If more firms are to be encouraged to deliver guidance and generic advice at a lower price than regulated advice, they must be certain that this area of activity will not fall within the scope of the Financial Ombudsman Scheme and FSCS levies, Firms must also feel certain that they will not be judged by the retrospective application of a standards of the day test as regards to what was and was not considered a regulated or unregulated activity.
10. Delivering financial advice of any type is time consuming, and given the general public is generally disinclined to pay an economic rate for this type of advice it is unlikely that amending the definition for regulated financial advice will have any material impact on increasing the supply of this type of service to the mass market segment. That means successive governments need to commit to supporting public programmes that deliver information, education and guidance services to the mass of the population. In consultation with HM Treasury further consideration should also be given to the tax breaks that can be offered to consumers for personal financial advice, so that these are not limited to specific areas such as pensions. This would encourage the use of financial advice and serve to undermine the importance that government attaches to it. These issues need to be addressed in context of high priority, long-term public policy initiative.
11. To help improve clarity it may be better to limit unregulated advice to the provision of information and its explanation. That explanation can be quite detailed, particularly concerning the regulated products, so as to be sufficient for the recipient to make an informed decision themselves or to take regulated advice. This approach seems better aligned to the objectives of the Retail Distribution Review. However, consumers must be educated so that they fully understand the importance of making self-provision and importance of accessing information, guidance and taking professional regulated advice.
12. It would be helpful if the wording of RAO53 could clarify the position around retaining an investment to improve consistency with the guidance included in PERG 8.29.7G.

Q2: Do you agree that these are the main costs and benefits that firms and consumers will face? Q3: Can you provide further details of the costs and benefits associated with the change, including quantifying them where possible?

13. The regulatory and compliance costs will to a large extent depend on the degree of clarity of on where the boundaries fall in practical terms. At this stage without detailed case study examples to define where the boundaries fall in different circumstances, it is not really possible to provide any detailed clarification as regards costs and benefits. If regulated firms were to provide both regulated and unregulated advice services compliance costs would not necessarily reduce as firms would then need to have additional systems and controls in place to ensure that boundaries between regulated and unregulated advice services are policed. It is therefore possible that in some circumstances compliance costs could actually increase.
14. However, adopting the MiFID definition could make it easier for other professionals, such as accountants, to make comments to clients on investment proposals. For instance, if a client wishes to discuss the report of a regulated financial advisor under current legislation a professional accountant would not be able to comment on the merits of the report unless they are authorised to do so under the Designated Professional Body Scheme (DPB). Under the new proposals, it appears that the professional accountant without a DPB licence will be able to point out the advantages and disadvantages of the adviser's report in general terms (but not to make a recommendation). This may be of benefit to accountancy firms which are not currently DPB licensed as it extends the services they could offer to clients. However a change in the definition would not remove the need to be DPB licensed as the DPB scheme enables firms to do more than comment on third party advice.

Q4: Do you agree that the regulatory requirements set out above are enough to limit the commercial benefit of unregulated firms providing guidance on regulated products?

15. We generally agree that the current financial promotions regime should be effective to prevent promotions by unauthorised firms and there are a number of other protections in place as listed in the consultation. However it is not clear how the unregulated market will develop and this area will therefore need to be kept under review. The FCA needs appropriate powers to pursue unregulated firms that deliberately step-over the boundary.

Q5: Do you agree with the government's view on the risk of unregulated firms offering guidance on unregulated products?

16. Unregulated firms are more likely to enter the unregulated advice area if regulated businesses hold back because of the risks associated with lack of clarity around the boundaries of regulation. Risk to consumers is likely to rise as the proportion of unregulated firms in the market increases.

Q6: Are there additional risks that are not covered above ?

17. More thought needs to be given to the description of services that firms (both regulated and unregulated) offer so that all parties understand exactly where boundaries of responsibility fall and where responsibilities and liabilities sit. To achieve this straightforward language is key, and perhaps a simple diagrams or flow-chart needs to be included. Lengthy legalistic documentation does not necessarily generate clarity.
18. The workplace should be a good place to communicate simple key messages around the difference between regulated advice and guidance. Anyone that is involved in delivering guidance needs to be properly trained.
19. Greater emphasis on mystery 'shopping' in the area of unregulated firms is needed.

Q7: Should the government take further steps to mitigate potential risk ?

20. It is not clear how the unregulated advice market will develop. All stakeholders need to behave responsibly and to put the interest of their customers to the fore. The market for these services

will need to be carefully monitored at the coal face. Any steps to introduce additional measures will need to be evidentially based and properly evaluated to ensure they are cost effective and likely to generate better outcomes that are in the public interest.

Q8: Are people with protected characteristics under the Equalities Act 2010, or any consumers in vulnerable circumstances, impacted by the policy proposed ?

21. We are not aware of any issues in this area.

Q9: Is there anything else that we should consider in the context of this change to deliver affordable and accessible advice to consumers?

22. The consultation paper primarily concentrates on business model where firms primarily offer advice on, and intermediate in, the distribution of specific investment products and securities. The paper does not adequately consider the implications and risks associated with the provision of generic advice that could steer the consumer to the wrong type of investment; for example, equities rather than fixed return securities. It is not clear that what is generally referred to in terms of 'guidance' meets this test adequately and this point is not considered in sufficient depth in the consultation. It also raises the important question of whether some more broadly based professional standards for the generic advice market need to be considered. The Global Accounting Alliance (GAA) has a personal financial planning expert working party (WP) and this is an area that the WP has been considering. The WP recently met the Ontarian Regulator to help formulate regulatory policy in this important area. The ICAEW Financial Services Faculty and its ICAEW GAA WP representative would be pleased to help the Treasury and FCA develop thinking in this area.
23. As referred to above, to generate clarity on where regulatory boundaries fall a series of case study examples is required. The case study examples need to be generated by working with firms so that they are realistic, and the examples need to be road tested and revisited to make sure that they are up-to-date and fit for purpose.
24. Careful consideration should also be given to where this sort of guidance on regulatory boundaries sits. PERG would be a sensible place, although this is an area that is only really used and understood by regulated firms. Unregulated firms may need to be considered separately, perhaps with a dedicated and well publicised area on the FCA website. Thought will also needed to how this information is made available to consumers and other stakeholders and how to raise awareness more generally. The area of DB transfers will also probably need to be revisited.