HM TREASURY

Memorandum to the Treasury Committee

Post-legislative assessment of the Investment Exchanges and Clearing Houses Act 2006

Cm 8142

July 2011

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Presented to Parliament by
the Financial Secretary to the Treasury
by Command of Her Majesty

July 2011

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MEMORANDUM TO THE TREASURY COMMITTEE

Post-legislative assessment of the Investment Exchanges and Clearing Houses Act 2006

Introduction

1. This memorandum has been prepared by the Treasury for submission to the Treasury Committee and will be published as part of the post-legislative scrutiny process set out in Cm 7320.

2. The Investment Exchanges and Clearing Houses Act 2006 ("the Act") received Royal Assent on 19 December 2006 and came into force on 20 December 2006. The Bill was introduced on 16 November 2006. No amendments were made to the Bill during its passage through Parliament.

Detail

3. The Act inserted sections 290A, 300A, 300B, 300C, 300D and 300E into Part 18 of the Financial Services and Markets Act 2000 (FSMA).

4. These sections make arrangements allowing the Financial Services Authority (FSA) to vet new regulatory provisions (such as rules and guidance) proposed by UK recognised investment exchanges (RIEs) and UK recognised clearing houses (RCHs) to ensure that such provisions do not impose excessive requirements on persons affected by them.[1] A requirement is excessive if it is not required by UK or EU law and is not justified as pursuing a reasonable regulatory objective or is disproportionate to the end to be achieved (section 300A(3)).

5. Section 300A sets out the circumstances to which the FSA must have regard in considering whether a proposed requirement is excessive and enables the FSA to direct that a proposed provision must not be made.

6. Section 300B imposes a duty on RIEs and RCHs to notify the FSA of proposed regulatory provision. It also extends the FSA's power to make notification rules to include making notification rules which specify proposed regulatory provision that does not need to be submitted to the FSA for approval or to specify the form and content of the notification of any proposal to make regulatory provision. The FSA has made notification rules using these powers (see section 3.26 of the Recognised Investment Exchanges and Recognised Clearing Houses (REC) sourcebook in the FSA Handbook).[2]

7. Section 300C specifies that regulatory provision must not be made before a notification has been given under section 300B, and before the initial period for consideration of the notification has expired or following the consideration of the provision once it has been "called in" in accordance with section 300D. Section 300D provides that the FSA must publish a notice, giving details of the proposal that it has called in and setting a period for making representations; it sets a period within which the FSA must take a decision about a

[1] The arrangements do not apply to overseas RIEs and RCHs operating in the UK.
[2] Available on the FSA website at www.fsa.gov.uk.

proposal it has called in; and it provides that the proposed change to a body's regulatory provision cannot be made while any legal proceedings are pending.

8. Section 290A requires the FSA to refuse an application for recognition of an investment exchange or clearing house if the applicant's existing or proposed regulatory provision imposes or would impose requirements that are excessive. The Act also included transitional provision (which expired on 19 December 2007) to ensure that the FSA could grant waivers from the new requirements to RIEs and RCHs during the period in which it would be formulating and consulting on the notification rules.

9. The Government has not included any substantive amendments to the FSMA provisions made by the Act in the draft Financial Services Bill published on 16 June 2011.

Assessment of effect

Benefits

10. The intended effect of the Act was to give certainty about the UK regulatory regime applying to users of UK RIEs and RCHs. In particular, the Act was intended to provide reassurance to users as to proportionality of any obligations to which they may be subject when using the services of recognised bodies.

11. A number of UK RIEs and RCHs are subsidiaries of non-UK companies. While foreign ownership can help to bring in investment and innovative ideas to the UK, there were concerns when the Act was passed about the interaction of UK and foreign regulation - in particular, that a foreign parent company of a UK RIE or RCH could seek to impose obligations, on issuers of securities or other users of the RIE's or RCH's facilities, in response to a legal or regulatory obligation in its own jurisdiction. Recent proposals for further consolidation in the industry globally means that these concerns remain relevant today. More generally, the Act provides the FSA with the means to address unnecessary regulation by RIEs and RCHs – the existing provision in FSMA enabled it only to deal with inadequate regulation by these bodies.

12. The Government considers that the Act has had the intended effect.

Costs

13. There was concern about the likely costs on RIEs and RCHs and the FSA. The regulatory impact assessment[3] prepared when the Bill was introduced stated that the UK RIEs and RCHs believed that there could be over 1,000 changes a year to regulatory provision which would need to be considered for notification. The FSA anticipated that on average there would be about 25 notifications a year of which they would call in, on average, only 1 notification a year for further examination. The number of notifications would depend on the notification rules made by the FSA (and, in 2007, on the waivers made under the transitional provision in the Act).

14. In fact, there was: 1 valid notification in 2007; 3 valid notifications in 2008; 2 valid notifications in 2009; none in 2010; and none until mid-April 2011 (and, primarily in the earlier years, a small number of notifications initially made but subsequently withdrawn when it was concluded that the changes were not notifiable). None of these notifications

[3] http://webarchive.nationalarchives.gov.uk/20100407010852/http://www.hm-treasury.gov.uk/d/ria_investmentexchanges161106.pdf

resulted in the proposed regulatory provision being called in for detailed review by the FSA and no proposed regulatory provision has therefore been disallowed under section 300A of FSMA.

15. The low level of notifications suggests that the costs have not been large. FSA has confirmed that the operating the arrangements has not increased its ongoing operating costs.

Conclusion

16. The benefits of a measure of this kind are not found in the numbers of proposed rule changes notified, called in for review or disallowed by the FSA. Rather effectiveness depends on discouraging RIEs and RCHs from introducing excessive regulation and maintaining confidence among users of their facilities that the UK regulatory regime would continue to apply.

17. The Government therefore considers that the reforms made by the Act have been effective without imposing significant costs. Therefore, the Government intends that the provisions should continue to operate in the new regulatory system being put in place through the Financial Services Bill. A draft of that Bill was published on 16 June 2011.

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