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Regulatory Law Committee response to the FSA Guidance Consultation on Simplified Advice

The City of London Law Society ("**CLLS**") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world.

This response to the Financial Services Authority ("**FSA**") Guidance Consultation on Simplified Advice has been prepared by the CLLS Regulatory Law Committee (the "**Committee**"). Members of the Committee advise a wide range of firms in the financial markets including banks, brokers, investment advisers, investment managers, custodians, private equity and other specialist fund managers as well as market infrastructure providers such as the operators of trading, clearing and settlement systems.

Thank you for agreeing to receive the Committee's response after the formal deadline. The Committee's response is limited to the section of guidance headed "Professional Standards" and in particular, firms' employees whose role it is to support the firm's clients through its simplified advice process, but who it is not intended should make personal recommendations. For ease of reference, we have referred to such persons as "**facilitators**" throughout this response. The Committee's specific concern relates to the second sentence of the description of Option 3 (Individuals who do not give personal recommendations) at paragraph 4.50, which states:

"Even if the support of the individual would be viewed as generic advice when considered in isolation, the combination of the generic advice and the recommendation of a particular financial instrument by the simplified advice process may well mean that the individual is viewed as giving regulated advice."

As presently phrased, the guidance would appear to suggest that there is a significant risk that, if a firm opts for the Option 3 approach, the relevant facilitators would be performing the controlled function of giving regulated advice for which approval (and appropriate qualification) would be required.

There are of course concerns about the possibility that such a person might stray from providing information about the system, and thus in effect subvert its outcome. Should the facilitator stray into the giving of advice, then he could be dealt with under the provisions that allow the regulator to sanction a person performing controlled functions without approval, and the firm would also be liable for allowing that to happen. The firm will in any event take responsibility for the advice given by the process, and for the training of facilitators, and systems to monitor facilitators

performing this role and ensure that they only give generic advice, information, support and reassurance.

We can understand why the FSA might favour the "cleaner" approaches in Options 1 and 2 over Option 3. However, the Committee is of the view that Option 3 should provide a workable alternative for firms, although they take some risk in doing so - specifically in relation to the human factor of the unqualified adviser making judgments on the suitability of one or more particular products, straying from his role in providing support, information and reassurance about the system into the realms of regulated advice.

The guidance in relation to Option 3 should also be read in light of the FSA's perimeter guidance in PERG 8.26.2 and 8.26.3. On that basis, provided the facilitator does not make any personal recommendation, and makes it clear that he is not doing so, then, as with the case of the decision tree, it is the firm (and the simplified advice process) that would be making the personal recommendation in cases where a facilitator only provides generic advice (e.g. "pay off your debts", "hold enough for an emergency", "consider retirement planning").

It does not seem appropriate or proportionate to seek to make the facilitator personally responsible for the outcome delivered by the firm's process. That process is after all designed by a qualified adviser who will, along with the firm, take personal responsibility for any unsuitable outcomes delivered by the process itself. It is also not entirely clear what policy imperative drives this piece of the guidance, nor what particular scenario might be driving the FSA's concern.

If the guidance remains in its current form, without further explanation or examples, then for all practical purposes it rules out option 3, rather than merely highlighting the risks firms would take on in adopting it.

We would be delighted to discuss any of the above observations and suggestions with you. In the first instance, please contact Margaret Chamberlain (Chair of the Committee) on +44 (0) 20 7295 3233 or by email at margaret.chamberlain@traverssmith.com.

18 November 2011

THE CITY OF LONDON LAW SOCIETY
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