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Dear Sir or Madam

Consultation on 14th Programme of Law Reform: UK Statute Book

The City of London Law Society ("**CLLS**") represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

This letter has been prepared by the CLLS Regulatory Law Committee (the "**Committee**"). The Committee not only responds to consultations but also proactively raises concerns where it becomes aware of issues which it considers to be of importance in a regulatory context.

We are grateful for the opportunity to comment on the Law Commission's 14th Programme of law reform and wish in particular to write in support of the theme of enhancing clarity and coherence of the UK statute book.

Our brief comments centre on Financial Services legislation which is the primary focus of this Committee's work.

As one of the world's leading centres for investment management, the financial services sector delivers vital exports, jobs, and tax receipts to the UK. Yet even prior to the UK's exit from the EU, the complexity created by the interweaving of UK and EU requirements governing the financial services sector was well-known.

The process of leaving the EU has required the onshoring of a vast quantity of EU law, which has now been brought into the UK legal system. The size of the EU Exit legislative project involved, and the uncertainties and time constraints within which the various government departments, make

its overall success all the more remarkable, and a tribute to the hard work of those involved. However, the same factors also meant that the teams working on the legislative project in the financial services sector were expressly directed not to make policy changes, other than to reflect the UK's new position outside the EU, and to smooth the transition to that position.

Prior to exit day, HM Treasury had made over 50 EU Exit instruments under the European Union (Withdrawal) Act 2018. The majority of these instruments were originally due to take effect on exit day. This included introducing a range of temporary permissions and transitional regimes to minimise any disruption to firms and consumers as the UK left the EU. The European Union (Withdrawal Agreement) Act 2020 delayed those parts of these EU Exit instruments that would have come into force by reference to exit day so they instead come into force by reference to "IP completion day". However, a number of the financial services temporary permissions and transitional regimes commenced prior to exit day in order for the UK regulators and affected firms to begin to prepare for exit day.

In short, the UK had a functioning legislative and regulatory framework on IP completion day, although we are aware of an isolated onshoring issue in the financial services sector (relating to the Financial Promotions Order), in relation to which a legislative solution is likely to be implemented in October 2021, which could potentially give rise to the unenforceability of a large number of agreements.

Overall, however, following IP completion day, the legislation is now even more complex, and the way in which the various requirements are interwoven demands a high level of specialist knowledge and familiarity.

Practitioners must navigate the multiple pieces of UK primary financial services legislation, other relevant primary legislation, a proliferation of UK statutory instruments made under the primary financial services legislation, other relevant secondary legislation, legislation for exiting the EU, EU retained legislation (both primary and secondary) and EU binding technical standards. We note that although updated versions of the EU legislation as at IP completion day were published where available, in some cases only the original versions were available and accordingly there remains a need to identify and consider any relevant updated versions.

We believe there is a strong case for removing the unnecessary structural complexity in the newly combined provisions, which impacts the accessibility and transparency of the law, and creates a risk of business uncertainty and litigation.

We would commend to the Commission a brief perusal of the two (extremely large) volumes of the 22nd edition of the Butterworths Securities & Financial Services Law Handbook (2021) – the invaluable companion of every financial services regulatory lawyer in the UK as it provides consolidated versions of the legislation. In particular, the Preface prepared by its consultant editor highlights a wide range of issues which the EU Exit legislative project has given rise to (or exacerbated).

The Butterworths publication does not of course contain the many thousands of additional pages which comprise the FCA and PRA Rulebooks (the FCA Handbook when printed is estimated to stand at around 11 feet in height) but the regulators do accept that a complicated rulebook with duplications or outdated rules contributes to the perception that the UK regime is burdensome and complex, and affects the regime's openness and accessibility.

We recognise that the UK's approach to regulation of financial services is currently under review by policymakers with a view to reflecting the UK's new position outside the EU and ensuring the regulatory framework is fit for the future, and in particular to reflect the UK's new position outside of the EU, and with a key aim of achieving an agile and coherent approach to financial services regulation in the UK, to support a stable, innovative and world leading financial services sector. This should in principle offer the opportunity for consolidation of disparate legislation.

HM Treasury's proposals are currently in the second phase of consultation, and in our response to HM Treasury's most recent consultation paper, we made a number of comments on the existing regime and the proposals for change. Broadly speaking we believe the Financial Services & Markets Act 2000 (FSMA) model has worked well. The structure has accommodated some major amendments including the creation of new regulators and introduction of new regulatory regimes, alongside an ongoing list of smaller amendments. It is much easier to read and understand the legislation when it is published in consolidated form at various junctures and although it would be helpful to incorporate amendments that have not been made as part of FSMA, the underlying structure is sound.

There are some aspects of the FSMA structure that we think make it very practical:

- It ensures that the source of most financial services requirements is in one place, which makes it easier to find the underlying legislative power.

- FSMA generally indicates where a provision might be further developed in secondary legislation or regulatory rules.

- Non-legal practitioners can focus on the regulators' rules but the rules usually point to the law as appropriate.

On the first point, there are different views on whether regimes that are contained in other pieces of legislation, such as the payment services regulation, should be merged into FSMA, and there may still be reasons to maintain separate legislation for specialist regimes whose participants have little need to consult other parts of FSMA.

In addition, FSMA has become very broad in scope and without rationalisation and a continuing determination to reserve detailed provisions for secondary legislation, it could get unwieldy. Adapting the legislation to the post-EU era will not be straightforward and will likely require significant amendment anyway, even with the work already undertaken during the onshoring process, so if there were a desire to do something more radical, now would seem like a good opportunity.

We have also highlighted (in our responses to a number of recent consultations) that various regulatory policy initiatives currently appear to be being developed in isolation without adequate consideration of the potential read-across to other similar initiatives. In general terms the Committee has concerns about what seems to be a rather piecemeal and siloed approach to, for example, reforms relating to the selling of financial products - a strategic and thoughtful review of an issue of more general application identified as being in need of reform would appear to be warranted. Examples of separate initiatives include HM Treasury's consultation on non-transferable debt securities, the FCA's discussion paper on Strengthening financial promotion rules for high-risk investments and firms approving financial promotions, and HM Treasury's Cryptoassets financial promotions consultation, all of which are taking place against a background of ongoing wider-ranging reviews covering the same kinds of issue – for example the "Wholesale Markets Review" consideration of the appropriate balance between consumer protection and retail investment (see paragraphs 9.8-9.11 of that Review document), and of course HM Treasury's work on the Future Regulatory Framework review.

In summary, from the perspective of financial services law, we believe that there is a strong case for an overarching project to investigate areas of the UK Statute Book where legislative repair has the potential to bring the greatest benefits, and that the financial services sector is one example of such an area.

If you would find it helpful to discuss any of these comments then we would be happy to do so. Please contact Karen Anderson by telephone on +44 (0) 20 7466 2404 or by email at Karen.Anderson@hsf.com in the first instance.

Yours faithfully

Karen Anderson
Chair, CLLS Regulatory Law Committee

THE CITY OF LONDON LAW SOCIETY
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Individuals and firms represented on this Committee are as follows:

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